

CHAPTER III

RIGHTS OF CHILD: STATUTORY PROVISIONS IN INDIA

3.1 PRELUDE

The child has been the subject of special laws and legal provisions. Because of its tender tears, weak physique and inadequately developed mind and understanding. It needs protection against moral and physical harm and exploitation by others. In the formative years of its life, the child needs special care service to realize its full potential for growth and development. There are about 300 central and state statutes concerning children. These have been enacted with an intention to protect and help children and achieve the goal of child labour welfare enshrined in our National Charter⁷².

The Constitution-makers were conscious of the need for special care for children and, therefore, provisions to the welfare of children dealing specially with the protection of child labour have been envisaged in our National Charter.⁷³ Accordingly, our National Policy resolution for children, 1974, lays special stress on the responsibility of the Nation for physical, mental, moral and special development of children. All these calls for great deal of legislative activity. Thus laws directly pertaining to the children are mostly found under labour legislations.

Though some legislative measures in India were enacted during the pre-independence era, but they were found limited in their scope and British had a great apathy towards the welfare of the people including children. After independence the State took its responsibility in the matter of welfare of the children as the future well being of the nation depends as to how they should grow and develop. This responsibility of the State is reflected in some of the Constitutional provisions, central laws and in number of enactments dealing

⁷² See Encyclopaedia of Social Work in India, (1987), Vol. I, p. 69

⁷³ See Article 15(3), 14, 39 (e), (f) and 21(A) of the Constitution

with labour legislations passed with object of securing well-being of the children. The labour legislation has been divided into pre independence and post-independence.

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3.2 LABOUR LEGISLATIONS

3.2.1 PRE-INDEPENDENCE LABOUR LEGISLATIONS

During the early years, the country and the public generally showed very little concern for the child. Even the citizens renowned for their public spirit and philanthropy did not realize how the indigent children of the country were neglected and exploited. During the pre-independence period social welfare were sporadic, ad-hoc and for the most part, uncoordinated as they were structured to meet purely local needs. Many National and State wise organizations were established in the first part of the 19th Century, which were mainly concerned with the children such as orphans, destitute, vagrancy and handicap etc.

The common law principles needed radical change in the light of the social conditions following the Industrial Revolution. There was an increase in young offenders and children going wayward who needed to be dealt with institutions distinct and separate from ordinary courts.

3.2.1.1 THE APPRENTICES ACT, 1850

In India the first legislation concerning children came in 1850 when the Apprentices Act was passed. The main object of the Act was to provide for the regulation and control of training of apprentices in trades and for matters connected therewith. Now it is not in existence. In 1876 it was repealed by the Reformatory School Act, 1876. At present for regulating and controlling the training of apprentices in any trade and work connected therewith, we have Apprentices Act 1961.

The Act provided that the father or the Guardian could bind a child between the age of ten and eighteen years and in special cases up to the age of twenty one years. Magistrate was authorized to act as guardians in respects of a destitute child or any child convicted of vagrancy or the commission of any petty offence and bind him as apprentice to learn a trade, craft or employment.⁷⁴ No distinction was made between boy and girl child who was found to be destitutes or if they were guilty of petty offences.

3.2.1.2 THE REFORMATORY SCHOOL ACT, 1876

The Reformatory Schools Act 1876 replaced the above Act, and was modified in 1897. It was an improvement over the former. The Act was found in some of the presidency states of India which were taking custody of only alleged delinquent boys under 16 years of age in Bombay and 15 years elsewhere. It is a landmark legislation in the field Juvenile Delinquency. It is here, we come to know that criminal Law treats punishment more as reformatory or corrective than as deterrent or punitive measure.

This Act provided that young offenders upto 15 years of age found guilty of offences punishable with imprisonment or transportation were not to be sent to ordinary prison but to reformatory schools. The Act provided for **special courts which could order 3-7 years detention and training instead of punishment.**

⁷⁴ Ahmad Siddique, Criminology 129 (1973)

During their detention they were treated humanly and provided with opportunities of any other school. And attempts were also made to reform them to be a civilized nation.

The Act even today holds good in the areas where no children Acts have enacted. Most of the Indian States, realizing the merits of Reformatory School of Thought passed legislation for juvenile courts and other institutions. The first Children Act was passed by Madras in 1920 followed by Bengal and Bombay in 1922 and 1924 respectively.

3.2.1.3 THE FACTORIES ACT, 1881

The origin of statutory protection to child worker in India can be traced back to the Indian Factories Act, 1881. The Act prohibited the employment of children under seven years of age and also in two separate factories on the same day. It limited the working hours of children to nine hours a day and stipulated that at least four holidays be given in a month. However this Act covered only Factories employing 100 persons or more.

The Factories Act has undergone number of amendments, each time making minor changes. The detailed provisions of Factories Act have been discussed under post independence legislation. In 1891 this Act was revised. The Indian factories Act, 1891, increased the minimum age limit to nine years and the hours of work was reduced to seven hours for children between 7 and 14 years. It also prohibited work at night between 8 p.m and 5 a.m .

By the Factories Act, 1922, the scope of factory was extended to cover any premises where 20 or more persons were employed and mechanized power was used. The Local Governments were empowered to extend the provisions to any premises where ten or more persons were employed. This Act defined a child as a person who has not completed the 15 years of age. It reduced the working hours of children six and necessitated the granting of the half-an-hour interval

for the children employed for more than five- and-a -half hours. Children were required to have a medical certificate of re-examination of continuing work.

3.2.1.4 THE MADRAS CHILDREN ACT, 1920

The first move to enact a Children's Act came from the Indian Jails Committee (1919-1920) which recommended special treatment for young offenders to reform and rehabilitate them. The Children's Act in various states in the 20th century was a sequel to the committee's recommendations. These acts were enacted to provide for: Custody, trial, maintenance, welfare, education and punishment of young offenders, for protection of children and young persons who are neglected destitutes or moral danger or in need of protection.

First came to Children's Act of Madras in 1920, then in Bengal in 1922, followed by Bombay in 1924. Legislation was passed in other States to provide for separate procedure and institutions for the trial, custody, correction and rehabilitation of delinquent children. The trend continued and although there were some variations in the legislation enacted by different states, they were basically welfare oriented and recognized the importance of understanding the situation of the child. Each subsequent amendment attempted to provide a more effective set of procedures and institutions to help in the rehabilitation of the child.

Though the Madras legislation was first among all the children's Act, it was only after three years a school called Junior Certified School, was designed for the training of the non offender child, and children's Aid Society was also established. And it was in 1939 that juvenile courts established under the act started functioning in Madras.

3.2.1.5 THE BENGAL CHILDREN'S ACT, 1922

The Bengal children Act was enacted in 1922. It was also based on English children Act 1908. Its operation was proposed to be restricted only to juvenile boys and not to girls. The reason was the prevalence of pardha system and the

absence of separate institution for the treatment and training of the young girls according to the Children's Act. The main provision of Bengal Children's Act was;

No boy under 12 years of age is sentenced to be death or imprisoned for any offence.

Penal measures is to be substituted for all juvenile offenders by educational treatment; and

For these educational treatment two separate institution was proposed to be established; namely industrial school for children under and above 12 years of age.

Bengal law was dead almost for 18 years.

3.2.1.6 THE BOMBAY CHILDREN'S ACT, 1924

During the early years of the century, the country and the public generally showed little concern for the dependent child. Even Mumbai, the first and foremost in the sphere of local self-government had not a single institution charged with duty, armed with legal authority and endowed with financial resources, to reclaim children from slums and streets, and haunts of vice and shame. It was backward in the domain of child welfare.

A conscious move in this direction came when in 1914 the apathy of the public regarding welfare of the juvenile offenders sent to reformatory in Mumbai was deplored in the report of the I.G. Police. Shri R.P. Masani raised larger issues in the columns of Times of India and asked "why not deal with the cause of child dependency and delinquency and reduce the number of children passing through the courts of reformation?" Having read this article on "Child protection" in papers, Sir John Wardla then a prominent figure in public life personally approached him to start immediately reclaiming children from the streets and told him "if you can find worker, I will find money." Thus was established in January 1917, Society for the Protection of Children in Western India. The Society managed to achieve two main objectives:

1. To prevent the wastage of children of the city.
2. To clean society and setting right the grievous wrong of its children.

It was this society which submitted to the government specific provisions for a comprehensive enactment on the subject for having special legislation. After 6 years the Children Aid Society was set up which acted as a non-official auxiliary body for assisting government in implementing the provisions of the Act. Mumbai was especially grateful to Dr. Clifford Manshardt for his pioneering work in establishing institutions for the best of the children. In 1920 a children's organization called *Balkan-ji-Bari* was formed with children as their members.

In 1924 Guild of Service started its child welfare services in Chennai and South India.

In 1945 **Kasturba Gandhi National Memorial Trust** was created for the welfare of women and children. Its main work was in rural areas and gave grants in-aid to the rural organizations or their units for balwadis and crèches. It has always been the non-government organizations and Institutions that have created 'Systems' with their own enterprise and vision to work for and coach the weaker sections and did social work for the poor, needy, handicap and orphans. There have been also movements like *shriniketan* and Gandhiji's Mission **Antodaya systems** and **Nai Talim**, programmes by Ramakrishna, **Arya Samaj Mandals** and **Gurukula** that were created.

3.2.1.7 THE CHILD MARRIAGE RESTRAINT ACT, 1929

This Act is popularly known as the Sharda Act. The Act is applicable to all communities and all persons living in India except the State of Jammu and Kashmir. The Act, only restrains the people from performing child marriage and to make the restraint effective. It imposes some penalties on persons bringing about such marriages as a "Child" as defined in the Sharda Act is a boy below

age 18 and a girl below the age of 15 years. The Sharda Act was drastically amended in March 1978 and the changes came out with force on 2nd October, 1978. Thus the Age of Male was raised to 21 and that of a Female to 18 years.

There is punishment for male adult below 21 years and above 18 years of age marrying with child, of simple imprisonment which may extend to 15 days, or fine which may extend to one thousand rupees or both;

There is also punishment for whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment unless he proves that he had reasons to believe that the marriage was not child marriage

3.2.1.8 THE CHILDREN (PLEDGING OF LABOUR) ACT, 1933

The main object of this Act is to eradicate the evils arising from the pledging of labour of young children by their parents employers in lieu of loans or advances.

Previously, the Act extended to whole of India except Jammu and Kashmir, but after September 1, 1971, it has been extended to the Jammu and Kashmir also⁷⁵.

Child means, under this Act, A person who has not completed the age of 15 years⁷⁶. The Act declares an agreement, oral or written, to pledge the labour of children, whereby the 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, to be void⁷⁷. However, an agreement made without detriment in 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 to be an illegal agreement⁷⁸. A person who knowingly enters in to an agreement with a parent or guardian of a child whereby such parent or guardian pledges the labour of child, or an employer who knowingly employs such a child is liable to a fine up to Rs.200. A

⁷⁵ See, The Children (Pledging of Labour) Act, 1933, Section 1(2)

⁷⁶ Ibid Section 2

⁷⁷ Ibid Section 25

⁷⁸ The Employment of Children Act, 1938, Section 3

parent or a guardian who knowingly pledges the labour of his child is liable to be punished with a fine, which may extend up to Rs 50⁷⁹.

3.2.1.9 THE EMPLOYMENT OF CHILDREN ACT, 1938

It prevents employment of children in hazardous employment and certain categories of unhealthy occupations, the Act prohibits the employment of children below 15 years of age in any occupation connected with the transport of passengers, goods or mail by railway, or a port authority within the limits of a port⁸⁰.

With the exception of children employed as apprentices or trainees, no child between the ages of 15-17 can be employed or permitted to work in these occupations unless he is allowed a rest interval of at least 12 consecutive hours in a day. The period of rest is to include at least seven such consecutive hours between 10 P.M. and 7 A.M. as may be prescribed by the appropriate government⁸¹.

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; dyeing and weaving; manufacture of matches; explosives and fire works; mica cutting and splitting; shellac manufacture tanning and wool cleaning. These provisions, however, do not apply to workshops where the work is done by the occupier with the aid of his family only or to any school established, aided or recognized by any state government. The State governments are empowered to extend the scope of these provisions of the Act to any other employment also.

Study of the statutes in the country would reveal that only a few laws relating to children were enacted before independence. Moreover, Indian Legislation before independence was largely based on the Legislative practices and trends in U.K.

⁷⁹ Ibid Section 3(2)

⁸⁰ Ibid Section 3(3)

⁸¹ Ibid, Section 3-A

Government of India's commitment to welfare, it enacted in the Post-Independence period, many social legislation unprecedented in its long history. These laws derive their legitimacy and strength from the Indian Constitution, the International Labour Organization (ILO) conventions and recommendations, also from the Declaration of the Rights of Child adopted by the General Assembly of United Nations, and the resolution adopted by Government of India on National Policy for Children.

3.2.2 POST INDEPENDENCE LEGISLATIONS

Before independence, the law relating to the employment of children in various sectors had failed to achieve its goal-the elimination of the evils of child labor. A labor investigating committee, instituted to examine the state of Indian labour in depth, in its report in 1946 pointed out that the main cause for this failure was the inadequacy of the inspecting staff to enforce the provisions of law.

After independence, the Factories Act, 1948, Minimum Wages Act and various other laws were passed, pertaining to the minimum age for employment in factories, hours of work and rest, conditions of work place, requirement of health certificate by qualified child worker, minimum wages for adult, adolescent and child and many other issues, which have been discussed one by one in the following paragraphs.

3.2.2.1 THE FACTORY ACT, 1948

The Act extends to the whole of India except the state of Jammu and Kashmir,⁸² it applies to establishments employing 10 or more workers with power or 20 or more workers without power.

The term "child" under this Act has been defined as a person who has not completed his fifteen years of age, and young person is defined as between the age group of 15-18 years. **The Act prohibits the employment of child below 14 years in any factory and also imposes some restrictions on the employment of**

⁸² The Factory Act, 1948, Section 1(2)

young persons to safe-guard their health. Young persons are required to obtain a certificate of fitness from a Certifying Surgeon statutorily. Such certificate should be in the custody of the Manager of the factory and 'the young person should carry while he is at work as a token giving a reference to such certificate of fitness. The certificate of fitness granted remains valid for one year and may be renewed or revoked before the expiry of the said period of one year if in the opinion of the certifying surgeon the holder of certificate is no longer fit to work in the capacity stated therein in factory. An adolescent who is not granted certificate of fitness to work in the factory is considered to be child for all purposes of the Act.

The Act imposes restrictions in the matter of working of the young person. A person who is below the age of 17 years shall not be allowed to work in any factory during night. Night means a period of at least twelve consecutive hours, which shall include interval of at least seven consecutive hours falling between 10 p.m. and 7 a.m. Restrictions are also placed on their employment in certain dangerous occupation. The hours of work of children are limited to 4½ hours in a day: period of work to two shifts and spread over the 5 hours a day. They cannot be employed between 10 pm to 6 am. The manager of a factory has to maintain a register of child workers furnishing the necessary details.

A young person shall not work on any dangerous machine unless he has been fully instructed as to the dangers thereof and the precautions to be observed, has received sufficient training in work at machine, and is under adequate supervision.

There is also prohibition on the employment of a child for pressing cotton in which a cotton-opener is at work. These are broadly the provision in the Act for protection of children employed in the factories to work. Section 98 of this Act provides for penalties on adolescent for using false certificates of fitness or allowing certificate issued to them for being used by others. Similarly, section 99 provides for penalty on a parent or guardian for permitting double employment

of a child. The Act also makes provision for crèches to be provided by the employer in factories employing 30 or more women workers for the use of children less than 6 years of age.

The object of these statutory restrictions over the employment of young person is to prevent exploitation of young labourers and to provide for their safety. The Act also prohibits the employment of children to any part of the factory for pressing cotton in which a cotton opener is at work, except where the feed end of a cotton opener is in a room separated from the delivery end⁸³. The state government is empowered by this Act to make rules prescribing the maximum weights, which may be lifted by adolescents and children⁸⁴. Besides a weekly day of rest, every child workers who has worked for a period of 240 days or more in a factory during a calendar year is entitled during the subsequent year of leave with wages at the rate of one day for every 15 days or work as against every 20 days in the case of an adult worker⁸⁵. Rest Shelters, canteens, etc. are also to be provided to all workers including children⁸⁶.

3.2.2.2 MINIMUM WAGES ACT, 1948

The Minimum Wages Act, 1948 specified that the expression "adult", "adolescent" and child will have the meaning assigned to them. It defined "child" as a person who has not completed his 15th year. However this definition does not have any particular significance since the Act did not contain any important regulatory or prohibitory provision applicable only to child labour, except that it provides that in fixing and revising minimum rates of wages, different minimum rates of wages may be fixed for adults, adolescents, children and apprentices.

The Act provides for fixation by State Government of minimum time rate of wages, minimum piece rate of wages, guaranteed time rates of wages for

⁸³ Ibid, Section 74

⁸⁴ The Factory Act, 1948, Section 68

⁸⁵ Ibid, Section 70

⁸⁶ The Factory Act, 1948, Section 27

different occupation and, localities or class of work and adult, adolescents, children and apprentices⁸⁷. The Act is aimed at occupations which are less well organized and more difficult to regulate and where sweated labour is more prevalent or where there is much scope for the exploitation of labour⁸⁸.

3.2.2.3 PLANTATION LABOUR ACT, 1951

The Act covers in the first instance all tea, coffee, rubber, cinchona, cordamory plantation and areas 10.117 hectares or more. In which 30 or more persons are employed,⁸⁹ or were employed on any day of the preceding 12 months. Further the state government is, however, empowered to extend, all or any of the provisions of this Act to any land used or intended to be used for growing and plantation even if it measures less than 10.117 hectares and the number of persons employed therein is less than thirty, provided that land which measured less than 10.117 hectares or in which less than 30 persons are employed immediately before the commencement of the Act would not be covered.

The employment of children below the age of 12 years is prohibited under the Act⁹⁰ A child worker (a person who has not completed 15 years) can be allowed to work or employed only between 6 a.m and 7 p.m. the total maximum working hours in a week for a child and an adolescent prescribed under the Act are 40. A child who has completed his twelfth year and an adolescent will not be allowed to work in any plantation unless he is certified to be fit by a duly appointed Certifying Surgeon⁹¹. And such child or adolescent is required to carry with him while he is on work, a token giving a reference of such certificate. A certificate granted under Section 27 of this Act remains valid for the period of one year⁹². A use of false certificate of fitness is punishable by imprisonment which may extend to one month, or with fine or both⁹³. The Act prescribes a few welfare

⁸⁷ Ibid, Section 99

⁸⁸ Section 3, The Minimum Wages Act, 1948

⁸⁹ See, The Plantation Labour Act, 1951, Section 4(a)

⁹⁰ Ibid, Section 24

⁹¹ Ibid, Section 26

⁹² Ibid, Section 27(2)

⁹³ Ibid, Section 34

measures in the nature of suitable rooms for the use of children below the age of 6 years and education for the children of workers employed in plantation.

The Act is, however, more comprehensive in the sense that this Act alone makes the provisions for education as a responsibility of the employer and so is for the housing and medical and recreational facilities⁹⁴. Perhaps the legislator were moved to make all these provisions in this Act because of the fact that plantation labour is commonly known as “family labour” as against ‘individual’ child labour.

3.2.2.4 THE MINES ACT, 1952

This Act also extends to the whole of India⁹⁵ and includes all excavations where any operation for the purpose of searching for or obtaining minerals is carried out.⁹⁶ **This Act also defines child as a person who has not completed his fifteen years⁹⁷.**

The Mines Act of 1901 had empowered the Chief Inspector of Mines to prohibit employment of children in mines under 12 years of age. But this Act could not be enforced strictly. In 1921, the children below 12 years constituted 3.5 percent of the total labour force in mines; The Indian Mines Act of 1923 prohibited the employment of children under 13 years of age in any part of a mine which was below ground. But in 1926, children below 12 still constituted about 1.6 percent. In 1935, the minimum age for the employment of children was raised to 15 years; persons between the ages of 15 to 17 could not be employed as adults or allowed to work underground unless they were certified to be medically fit to work as adults.

The provisions with respect to the employment of children under this Act are more stringent than those under the Factories Act, 1948. A child is neither

⁹⁴ Ibid, Section 5, 6,

⁹⁵ The Mines Act, 1952, Section 1(2)

⁹⁶ Ibid, Section 2(j)

⁹⁷ Ibid, Section 2(e)

allowed to work nor can he be present in any part of mine which is below ground or in any open excavation in which any mining operation is carried on⁹⁸. An adolescent (a person between 16 and 18 years of age) is allowed to work in any part below ground if he has a medical certificate from a certifying surgeon declaring him fit to work as an adult⁹⁹. But, an adolescent who does not possess a certificate from the Certifying Surgeon may not be allowed to work in a mine above ground for more than 4 ½ hours on any day and only between 6 am to 6 pm. A certificate is valid for one year¹⁰⁰.

The act also includes:

All bearing, bore holes and oil well; All shafts, in or adjacent to and belonging to mine, whether in the course of being sunk or not; All levels and inclined planes in the course of being driven; All converse or aerial railways provided for the bringing into or removal from mine of minerals or other Articles or for the removal of refuse there from; All audits, levels, planes, machinery, works, railways, tramways and riding; In or adjacent to and belonging to a mine; All workshops situated within the precinct of a mine and under the same management and used solely for purposes connected with that mine or a number of mines under the same management; All power stations for supplying solely for the purpose of working the mines or a number of mines under the same management; Any premise exclusively occupied by the owner of the mines and for the time being used for depositing refuse from a mine or in which any operation in connection with such refuse is being carried on; and

Unless exempted by the central government by notification in the official gazette, any premises or part there of in or adjacent to and belonging to a mine, on which any process ancillary to getting, dressing or preparation for sale of minerals¹⁰¹ or of coke is carried on.

⁹⁸ Ibid, Section 45 (i)

⁹⁹ Ibid, Section 40(i)

¹⁰⁰ Ibid, Section 41(i)

¹⁰¹ see, The Indian Labour Year Book (1974), p. 175

The adolescent for employment in mines under this Act are not required to obtain a certificate of fitness but it is **compulsory for every young person to obtain the certificate of fitness from Certifying Surgeon under the Factories Act, 1948**. This is the drawback and the deficiency in the Mines Act and as such the work in mine above ground is considered more stringent than the work in a factory. The Act also contains the provisions relating to the powers of inspectors and maintenance of records. Section 87 of this Act further lays down "No suit, prosecution or other legal proceeding whatever shall lie against any person for anything which is in good faith done or intended to be done under this Act."

3.2.2.5 THE MERCHANT SHIPPING ACT, 1958

The Act is applicable to sea-going ships and lays down a few provisions regarding the employment of children. **It prohibits the employment of children in a ship below the age of 15 years except in following ships**

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

Similarly, employment of young person under 18 years of age as trimmers and stokers is also prohibited in any ship registered in India. Such persons, if employed, are required to produce a certificate of physical fitness from a prescribed authority, which remains valid for a period of one year. The Act provides for modest penalty of a fine upto Rs. 50 for violation of provisions regarding the employment of children.

3.2.2.6 THE MOTOR TRANSPORT WORKERS ACT, 1961

This Act applies to the whole of India¹⁰². The Act lays down some of the measures for the welfare of the workers employed in motor transport undertaking and regulates the conditions of their work. The Act applies to every motor Transport undertaking employing five or more workers. The State Government has power to apply all or any of the provisions of this Act to any motor transport undertaking employing less than five motor transport workers¹⁰³. **The employment of children in any capacity in any motor transport undertaking is prohibited**¹⁰⁴.

A child under this Act has been defined as a person who has not completed 15 years of age, An adolescent (a person who has completed 15 years of age but not 18 years) is also not allowed to work as a motor transport worker unless a certificate of physical fitness is granted by a Certifying Surgeon¹⁰⁵. Such a Certificate is valid for 12 months¹⁰⁶. An adolescent, however, employed as a motor transport worker is not allowed to work more than six hours a day including rest interval of half-an-hour. He is also not allowed to work between 10 pm to 6 am in any motor transport undertaking. The ordinary working hours prescribed under Section 13 of the Act for an adult worker are 48 hours in a week. Such a motor transport worker can be allowed to work for more than 8 hours in a day or 48 hours in a week with the approval of the authority prescribed under the Act, but the working hours shall in no case be more than 10 hours in a day and fifty-four hours in a week.

The Act contains provisions for offences and penalties on the line adopted under the Factories Act, 1948 and the Mines Act, 1952. The Central Government has power to give directions to the Government of any State as to carrying in to execution the provisions contained in this Act.

¹⁰² The Motor Transport Workers Act, 1961, Section 14

¹⁰³ Ibid, Section 1(4)

¹⁰⁴ Ibid, Section 21

¹⁰⁵ Ibid, Section 22

¹⁰⁶ Ibid, Section 23(2)

3.2.2.7 THE APPRENTICES ACT, 1961

There was no comprehensive law dealing with matters relating to training of apprentices and their Service conditions before this Act was passed. The only statutory provisions regarding apprentices were found in the Model Standing orders framed under the Industrial Employment (Standing Orders) Act, 1946. The Government of India appointed an Expert committee to examine this matter and to recommend for under taking a separate legislation regulating the training of apprentices in the industries. Consequently, the parliament enacted the Apprentices Act, 1961.

The main object of the Act is to provide for the regulation and control of training of apprentices in trades and for matters connected therewith. The Act extends to the whole of India, and provides for the regulation and control of training of apprentices in trade and for matters connected therewith. Under this Act, an apprentice has been defined "as person who is undergoing apprenticeship training in designated trade in pursuance of control of apprenticeship." The Act provides that no person shall be qualified for engaged as an apprentice or to undergo apprenticeship training in any designated trade unless he is at least 14 years of age and satisfies such standards of education and physical fitness as may be prescribed¹⁰⁷. If he is a minor, his guardian is required to enter into a contract of apprenticeship with the employer¹⁰⁸ and it shall be registered with the Apprenticeship Advisor¹⁰⁹.

3.2.2.8 THE ATOMIC ENERGY ACT, 1962

This Act extends to the whole of India. The Act covers all workers in factories and mines producing atomic and other mineral products emitting radiation or all working places where radiation takes place. Children below the age of 18 are provided to work except when they are permitted by the competent authorities.

¹⁰⁷ see, Section 3 of Apprentices Act. 1961

¹⁰⁸ Ibid, Section 4(a)

¹⁰⁹ Ibid, Section 4(b)

3.2.2.9 THE BEEDI & CIGAR WORKS (CONDITIONS OF EMPLOYMENT) ACT, 1966

This Act regulates the conditions of work of beedi and cigar workers. The Act also extends to whole of India. The Act provides that no child should be required or allowed to work in any industrial premises;¹¹⁰ the Act defines the child as a person who has not completed his fourteen years of age¹¹¹. The employment of Women and Young persons under section 25 of this Act, between 7pm and 6am is prohibited¹¹². No difference has been made with regard to maximum weekly hours of work between an adult and a young person except that in case of latter no overtime work will be allowed.

The Administration of Act rests with the State who appoints Chief Inspectors or Inspectors for the purpose. The Act provides the penalties for breach, which may be imprisonment upto three months or a fine upto Rs. 500 or both¹¹³. Further, provisions for canteen,¹¹⁴ first aid,¹¹⁵ cleaning¹¹⁶ and ventilation¹¹⁷ are also made under the Act but there is no provision for medical examinations for young persons.

3.2.2.10 THE SHOPS AND ESTABLISHMENT ACTS

The working condition of employees in shops and commercial establishments are governed largely by the shops and establishment Acts of state governments and rules framed there under. These Acts and rules *inter-alia* regulate the daily and weekly hours of work, rest intervals, opening and closing hours of establishments, payment of wages, overtime pay, holidays with pay, annual leave, employment of children and young person. The minimum age for employment of children in different states varies from 12 years to 14 years. These Acts also prohibits the employment of young persons during night, the

¹¹⁰ See, Bidi & Cigar Works (conditions & Employment) Act, 1966, Section 24(b)

¹¹¹ Ibid, Section 2(b)

¹¹² Ibid, Section 25

¹¹³ Ibid, Section 32

¹¹⁴ Ibid, Section 16

¹¹⁵ Ibid, Section 15

¹¹⁶ Ibid, Section 8

¹¹⁷ Ibid, Section 9

time varying from 7 pm to 6 pm. The hours of work for children are also fixed. These vary from 3 to 7 hours per day in different states, with half an hour to one hour break after 3 to 4 hours. From time to time, amendments have been made in most of the statutes, because of the progressive outlook of the government for improving the conditions of the children which regulate the working conditions of child labourers and to mitigate adverse effect of employment for their health, education and training etc.

These Acts give an impression that the government is doing its best to check the exploitation of children by employer and others, but real picture in the field is otherwise because these enactments have their own limitations as their applicability is generally employment based i.e. on the basis of number of persons employed therefore the protective provisions of these enactments do not cover children employed in smaller establishments.

3.2.2.11 THE CHILD LABOUR (REGULATION & PROHIBITION) ACT, 1986

Since legal framework for the eradication of child labour happens to be patchy, the need for a comprehensive legislation to overcome various anomalies such as minimum age for employment, working hours, medical examination, minimum wages and penalties and offences has been debated thoroughly. Under this background child Labour (Prohibition & Regulation) Act, has been enacted on 23rd December, 1986. According to this Act, the employments of children Act, 1938 is repealed. All rules made in this Act will be in addition to the provisions of the Factories Act, 1948, the Plantations Labour Act, 1951 and Mines Act, 1952.

The Act states right in the beginning that its aim is to 'prohibit the engagement of children in certain employments and regulate the conditions of work of children in certain other employments. The Act brought a conceptual uniformity in definition of 'child' by bridging the gap created under various laws¹¹⁸. To prohibit and regulate the child labour it classifies occupations into 'hazardous'

¹¹⁸ See Section 2(ii) of Child Labour (Regulation & Prohibition) Act, 1986

and 'non-hazardous'¹¹⁹. The Act consists of four parts and schedule. First part deals with preliminary definitions. Second part entails prohibitions of employment of children in certain occupations and processes. Part third regulates child labour in those process listed in the schedule are carried on. Fourth part of the Act deals with miscellaneous items viz. penalties, procedure relating to offences and appointment of inspectors. The schedule enumerates occupation and process where employments of children are prohibited. And the same is mentioned as under:

The 'OCCUPATIONS' listed in Part A are :

- Transport of passengers, goods or mails by railway;
- Cinder picking, clearing of an ash-pit or building operation in the railway premises;
- Work in catering establishment at a railway station, involving the movement of a vendor or any other employee of the establishment from one platform to another or in or out of moving train;
- Work relating to the construction of a railway station or with any work where such work is done in close proximity to or between the rail lines; and
- A port authority within the limits of any port

The 'PROCESS' listed in Part B are:

- Bidi-making
- Carpet-weaving
- Cement manufacture, including bagging of cement.
- Cloth printing, dyeing and weaving.
- Manufacture of matches, explosive and fire-works.
- Mica-cutting and splitting
- Shellac manufacture
- Soap manufacture.

¹¹⁹ Ibid, Section 3

- Tanning
- Wool-cleaning.
- Building and construction industry

In the OCCUPATIONS AND PROCESS listed in the Schedule the Child Labour is totally prohibited.

According to this act "Child" means a person who has not completed his fourteen year of age¹²⁰. Again, family units and training centers are not included in the purview of the Act. The Act provides for the setting up of "child Labour Technical Advisory Committee" for the purpose of addition of occupations and processes to the Schedule A. Section 3 of the Act prohibits the employment of children below 14 years in any of the occupations and processes specified in schedule. The other part of the section provides an exception to the above prohibition¹²¹.

However, it stipulates conditions such as a wage structure, working hour etc, for employment of children in such non-hazardous occupation. Section 7 of the Act specifies that the period of work for a child in any establishment on each day is fixed so as not to exceed 6 hours. This includes interval and the time spent in waiting for work on any day. Section 7(4) prohibits night work between 7 pm to 8 pm, and Section 7(5) prohibits double employment of a child in any establishment. Section 13(1) clearly states that the government can make rules for the health and safety of children who are permitted to work in any establishment. These rules provides for matter such as cleanliness,¹²² ventilation,¹²³ dust and fumes,¹²⁴ lighting,¹²⁵ drinking water¹²⁶ and sanitary facilities, etc. But there is no mention of nutrition or medical facilities.

¹²⁰ See, The Child Labour (Prohibition & Regulation) Act, 1986, Section 2(ii)

¹²¹ Section 14

¹²² Ibid, Section 13(9)

⁸⁵ Ibid, Section 13(c)

¹²⁴ Ibid, Section 13(d)

¹²⁵ Ibid, Section 13(f)

¹²⁶ Ibid, Section 13(g)

Section 14 of the act deals with penalties. The penalty for violation of the Act will range from three months to one year of imprisonment with a fine of Rs. 10,000 to Rs. 20,000 or with both. Further if a person is found guilty he will be liable for punishment under the clauses given in Section 14(1 & 2) and not under any of the previous Acts. According to Section 16 of the Act, any person, police officer or Inspector may file a complaint of the commission of an offence under the Act in any court of competent Jurisdiction. Further, Part "B" of the schedule had added one more process into existing list and that is "Building & Construction industry" & all other provisions are similar to the ones already existing in the Act of 1938.

3.3 THE CONSTITUTION OF INDIA

India is a welfare state. The "State" is defined to be an independent political entity, having control over a defined territory. India emerged on the world map as an independent political entity on 14 August 1947. And the Constitution was adopted by the people of India on 21 January 1951. Preamble of our Constitution sets out various noble aims and objects to be achieved by the nation. The objectives stated in preamble are construed to be the basic structure of our Constitution. It aims at securing to all its citizens, JUSTICE, LIBERTY EQUALITY AND FRATERNITY.

However, unfortunately, due to socio-economic factors the incidence of neglect, abuse and deprivation, particularly in the poverty-afflicted sections of the society, has gradually increased. Such a scenario made it imperative to intervene for providing care and protection to children.

The founding fathers of the Constitution were wise enough to provide that the children should also have their distributive justice in future in free India and keeping in view this noble objective, Indian Constitution has made several provisions for the protection, care and promotion of welfare of India. This constitution of India is the *Grundnorm* for various child related legislation, viz; child labour Prohibition and Regulation Act, 1968, Contract Labour (Regulations

And Abolitions) Act 1970, Juvenile Justice Act, 2000, National Policy for children in India and all other Acts which is mentioned in this chapter. This chapter will brief the reader about almost all the legislative enactments pertaining to child. In these chapters the Researcher has tried to find out the pros and cons in the legislation. She has tried to find out the reason for the non observance of the provisions.

The Indian Constitution has guaranteed to its citizen all fundamental human rights that are essential for overall development of a human personality. All fundamental rights guaranteed under Part III of Constitution are available to a child. Beside this several provision are to be found in Para III and IV of Constitution, which are specifically directed towards attainment of welfare of children. For instance, Articles 15(3), 21A, 24 and 25 in Part III; and Article 39(e), 39 (f), 41 and 45 in Part IV of our Constitution make specific constitutional provision in respect of welfare and protection and promotion of interests of the children.

3.3.1 PROVISIONS RELATING TO CHILDREN UNDER PART III OF THE INDIAN CONSTITUTION

The chapter on fundamental rights in Indian Constitution guarantees some fundamental right only to the citizens of India ¹²⁷ while the others are guaranteed to any persons ¹²⁸ i.e. for both citizen and non-citizen. Within which the fundamental rights to the children are also implicitly included. The children have rights to enjoy all the fundamental right, which are guaranteed to the citizens of India under Articles 15,16,19 and 29 of the Constitution because the children in India are also citizens of India.

3.3.1.1 ARTICLE 15(3): SPECIAL PROVISIONS FOR WOMEN & CHILDREN.

¹²⁷ See, The Constitution of India, Articles 15,16 & 29 which guarantee fundamental rights only for the citizen of India

¹²⁸ See, the Constitution of India, Articles 14,17,18,20 to 28 and 32 which guarantee fundamental rights for both the Indian citizens and non-citizens found in India

Article 15(3) is one of the two exceptions to the general rule laid down in clause (1) and (2) of the Article 15. It says that nothing in Article 15 shall prevent the state from making any special provision for women and children. Though, no ground is mentioned, preferential treatment is permitted on consideration of inherent weakness of children and therefore they require special treatment on account of their very nature. Therefore Articles 15(3) empowers the state to make special provisions in its law for giving favorable treatment to children and women. The reason is the "children and women's" physical structure place them at a disadvantage in the struggle for subsistence and their physical well-being becomes an object of public interest and care in order to preserve the strength and vigor of the race.¹²⁹

Article 15 in general prohibits the discrimination on the ground of religion, race, caste, sex or place of birth. Mr. H. M. Seervai is of the view that since Article 15(1) does not make age any prohibited ground of discrimination the reference to child in Article 15(3) appears to be point less.¹³⁰ Thus Article 15(3) is an exception to the rule against discrimination and therefore provision of maternity relief for women workers (Article 42) or of free nutrition and education for children (Article 45) or measures for prevention of their exploitation (Article 39(F)) will not be contravention of Article 15. Further the word for is used to mean "in favour of". Thus it is clear that the intention was to protect the interests of women and children who according to the framers of Constitution required protection.

However, a question not yet definitely answered is whether Article 15(3) saves any provision, which is made concerning women or children saves only such provisions as in their favour.¹³¹ The better view would appear to be that while the state can make laws containing special provisions for women and children, it could not discriminate against them on the basis of their sex only special

¹²⁹ Muller V/s Oregon 52 L.Ed.551

¹³⁰ See, H.M. Seervai, Constitution of law of India, (1975), P. 293

¹³¹ Mukharji J. in Mahadeb V/s Dr. Sen, AIR 1951 Cal. 563

provision for children means "special provision which is to the advantage of children and merely relating to the children. This approach appears to be the cumulative effect of Articles 15(1) and 15(3)."¹³²

Keeping in view the welfare of the children the Supreme Court has emphasized in *Lakshmikant V/s India* ¹³³ upon the great importance of child welfare in the country, while reading Articles 15(3), 24 and clause (e) and (f) of Article 39. Accordingly, the court has taken opportunity to lay down guidelines for adoption of Indian children by foreign parents, as there is no statutory enactment for the purpose. The court has stated that the primary purpose of giving the child in adoption must be his welfare.¹³⁴

"Thus under Article 15(3) state is free to make special provision for children depending upon its economic and political capacity keeping in mind, the primary object must be welfare of the child."

3.3.1.2 ARTICLE 21A: FREE & COMPULSORY EDUCATION

Universal free and compulsory education should have become a reality in India by 1960. Article 45 of the Indian Constitution said: "The state shall endeavour to provide within a period of 10 years from the commencement of the Constitution, for free and compulsory education for all children until they complete the age of 14 years". Though constitutional obligation was time bound, it kept on extending again and again; first to 1970 and then to 1980, 1990 and 2000.

Before 86th Amendment to Article 21, the state was under a constitutional directive to secure a right to education, which included provision for the free and compulsory education for all children until they complete the age of 14 years, was circumscribed by the limits of economic capacity of the state and its development. The relative impact of the fundamental rights and the directive

¹³² See, M.P. Jain constitutional law of India, (1998) p. 500

¹³³ AIR 1984 S.C. 463

¹³⁴ Also see; in re; Dr. Giovanni Marco Muzzu, AIR 1983 Bom. 242; In re; Rasiklal Chhaganlal Mehta, AIR 1982 Guj. 193

principles had been expounded by the Supreme Court ¹³⁵ by observing that directive principles which are fundamental in the governance of the country could not be isolated from the fundamental rights guaranteed under Part III. These principles had to be read into the fundamental rights. Both are supplementary to each other. The state was held to be under a constitutional mandate to create conditions in which fundamental right guaranteed to the individual under Part III could be enjoyed by all, and this is not possible without making right to education under Article 45 a reality. The fundamental rights under chapter III would remain beyond the reach of all.

Thus the right to free primary education was declared as a Fundamental Right by the Supreme Court. The complementary nature of rights declared in Part III and Part IV, and the harmonious interpretation of these rights; have been the foundation for the realisation of primary education. The two crucial judgments that paved the way for the declaration of the right to education as a fundamental right are *Mohini Jain V State of Karnataka*¹³⁶ and *Unnikrishnan Vs State of Andhra Pradesh*¹³⁷. The Court has tried to give full realisation to the interdependent argument of social and civil/ political rights of those who are deprived in general and the petitioners in particular.

Accordingly the Constitution (86th Amendment) Act 2002 ¹³⁸ inserted a new Article 21-A and Article 51-A and substituted Article 45 of the Constitution. The amendment has made the right to free and compulsory education as fundamental right by providing in Article 21-A that "the state shall provide free and compulsory education to all children of the age of six to fourteen years in such a manner as the state may by law determine." Thus, the constitutional amendment is meant to ensure that the right to education for all those between six and fourteen years of age is legally enforceable and not merely a desirable goal as it was hitherto.

¹³⁵ See supra note 4

¹³⁶ AIR 1992 SC 1858

¹³⁷ AIR 1993 SC 2178

¹³⁸ See supra note 2

It is indeed laudable that the scope of right to life in the Constitution of India has been expanded to incorporate this integral socio-economic right to education, but it remains to be seen how the people exercise it and the duration the Government will take to act upon it.

3.3.1.3 ARTICLE 23(1): PROHIBITION OF “TRAFFIC IN HUMAN BEINGS” AND FORCED LABOUR

Although, this Article does not specially speak of children, yet it is applied to them and is more relevant in this context because children are the most valuable section of the society. Article 23 protects the individual against not only the state but also private citizens. It imposes positive obligations on state to take steps to abolish evils of “traffic in human beings” and beggar and other similar forms of forced labour wherever they are found. Again, Article 23 prohibits the system of ‘bonded labour’ because it is a form of forced labour within the meaning of this Article. Further, it is to be noted that the protection of this Article is available to both citizens as well as non-citizens.’

The worst of worst type of child trafficking is the involvement of the child in the flesh trade. However the problem of child prostitution is not new in India. As per the report published in the Times of India, there are about four lakh child prostitutes in India. Most of the destitute and abducted children are sold to the flesh traders where they are forced to entertain 2-3 clients per day. In Lucknow, about 10 destitute boys were found dead after being sexually assaulted. In many places Nari Niketan for destitute girls have become centres for prostitution. Approximately 20 percent of the prostitutes in the country are girl children. The customary initiation of girls in the practice of Devadasis, Jogins and Venkatasins is prevalent in the state of Karnataka, Andhra Pradesh and Maharashtra respectively. The eldest girl of every family is sacrificed in the name of customs and forced into prostitution. The number of such Devadasis and Jogins is found to be approximately 21,306 and 16,300 respectively.

In *Gaurav Jain V. Union of India*¹³⁹, the Supreme Court showed its concern for the children born to prostitutes. In order to protect them from exploitation the court issued various directions including that these children be separated from their mother and be allowed to mingle with other children so as to become part of the society.

Similarly it is equally important to mention the well known case of sexual exploitation of children *Vishaljeet V. Union of India*¹⁴⁰ wherein the Supreme Court issued direction to state governments and union territories to prevent flesh trade, exploitation of children in view of Articles 23(1) and 39(f) of the Constitution of India.

Further the words contemplated by Article 23(1) 'other similar forms of forced labour' has to be interpreted *ejusdem generis*. The kind of forced labour contemplated by Article 23(1) has to be something in the nature of either traffic in human beings or beggar. However, the word **beggar**, which has not been defined in the Constitution, may be defined as "labour or service exacted by government or a person in power without giving remuneration to it."

Thus the word refers to forced labour for which no pay is given. Thus Article 23(1) prohibits not only beggar but also all other forms of forced labour in whatever form it may manifest itself because it is violative of human dignity and is contrary to basic human values. Further every form of forced labour 'beggar' or otherwise, is within inhibition of Article 23 and it makes no difference whether the person who is forced to give his labour or service to another is remunerated or not. Even remuneration is paid, labour supplied by a person would be hit by this Article if it is forced labour, that is, labour is supplied not, willingly but as result of force or compulsion.

¹³⁹ AIR 1997 SC 3021

¹⁴⁰ AIR 1990 S.C. 1412

The Supreme Court in *people union for Democratic rights V/s Union of India*¹⁴¹ held that the scope of Article 23 is wide and unlimited and strike at "traffic in human beings" and "beggar and other form of forced labour" wherever they are found. Further the court observed that children below 14 years were employed in construction work and directed the government to take necessary steps for punishing the violation of fundamental rights of citizen when they belongs to the weaker section of the society and are unable to wage a legal battle against a strong and powerful opponent, exploiting them.

In *Bandhua Mukti Morcha V Union of India*¹⁴² the Supreme Court has connected Article 23(1) and held that when an action is initiated in the court through public interest litigation alleging the existence of bonded labour the government should welcome it as it may give the government an opportunity to examine whether bonded labour system exist and as well as to take appropriate steps to eradicate that system. Article 23, which prohibits "forced labour", has abolished the system of bonded labour but unfortunately no serious effort was made to give effect to this Article. It was only in 1976 that parliament enacted the bonded labour system (abolition) Act 1976, providing for the abolition of bonded labour system with a view to preventing the economic and physical exploitation of the weaker section of the people.

But the eradication of child trafficking is impossible by making legislation only. If the law of punishment for child trafficking written in the books is not properly implemented then it could not be treated as meaningful legislation. The immoral traffic prevention act, 1950 is the most ineffective legislation in India and therefore effective implementation of the convention on the rights of child should be main aim of government and this can be achieved only through sincere national efforts and international co-operation in order to make legislation regarding child trafficking more fruitful.

¹⁴¹ AIR 1982 S.C. 1473

¹⁴² AIR 1984 S.C. 802

3.3.1.4 ARTICLE 24: PROHIBITS EMPLOYMENT OF CHILDREN IN HAZARDOUS EMPLOYMENTS

Framers of our Constitution were quite aware about the problem of child labour and due to this reason they incorporated a fundamental right in favour of children in Article-24 whereby the employers were totally prohibited from employing children in hazardous activity below the age of 14 years.

Article-24 of the Indian Constitution prohibits employment of children in factory, mine or any hazardous employment. This provision is certainly in the interest of public health and safety of life of children. No other Constitution except of Japan contains an express prohibition against employment of children in factories etc. as under Article 24 of our Constitution. Article 27, Para 3 of the Japanese Constitution speaks "children shall not be exploited." Article 24 of our Constitution is in consonance with clause (e) and (f) of Article 39. That is why Article 39 of the Constitution imposes upon the state an obligation to ensure that the health and strength of workers, men and women and the tender age of the children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

The provision of Article 21 A which has provided for the compulsory education of the children who have not attained the age of 14 years for the upbringing of a child as an asset of nation, and Article 24 requires that no child below the age of 14 years is to be employed in any factory, mines or any other hazardous activity but should be engaged in school during that life period. Thus Article 21A and 24 are complementary to each other.

The Supreme Court has emphasized that a fundamental right which is enforceable against everyone i.e. against the state as well as against the individual and against the whole world(Article 17, 23, 24) if violated, the state is constitutionally obligated to take necessary steps for the purpose of interdicting such violations and ensuring that the fundamental right is observed by the private individual who is transgressing the same.

Thus by the virtue of mandate in Article 24, no one can employ a child below the age of 14 years in hazardous employment like construction work as the supreme court has held in the case of *People Union for Democratic Rights V. Union of India*¹⁴³ that it was a clear breach of Article 24 of the Constitution. The Supreme Court in the said case rejected the contention that the Employment of Children Act, 1938 was not applicable in case of employment of children in the construction work of Asiad projects in Delhi since construction industry was not a process specified in the schedule to the children Act. But it was held that the construction work is hazardous employment and therefore under Article 24 no child below the age of 14 years can be employed in the construction work even if construction industry is not specified in the schedule to the employment of the Children Act, 1938. Expressing concern about the sad and deplorable omission, Bhagwati J., advised the state Government to take immediate steps for inclusion of construction work in the Schedule to the Act and to ensure that the constitutional mandate of Article 24 is not violated in any part of the country.

Similarly the Supreme Court in Labourers working on *Salal Hydro Project V. Jammu & Kashmir*¹⁴⁴ has reiterated the principle that construction work is a hazardous employment and children below 14 cannot be employed in this work.

Further in a land mark Judgment in *M.C. Mehta V. State of Tamil Nadu (Sivakasi case)*¹⁴⁵ the Supreme Court has held that children below the age of 14 years cannot be employed in any hazardous industry, mines or other works and has 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 sectors.

However Article 24 does not prohibit employment of children below the age of 14 years in any innocent or harmless job or work but only bars the employment

¹⁴³ Ibid

¹⁴⁴ AIR 1984 S.C. 177

¹⁴⁵ AIR 1997 S.C. 699

of children in hazardous activity. The problem of child labour is a difficult economic problem and it cannot be solved merely by legislation. So long as there is poverty and destitution in this country, it will be difficult to eradicate child labour. Therefore looking to the prevailing socio-economic conditions, it is not possible to prohibit child labour altogether and such steps if taken would not be socially or economically acceptable to the people at large. And this is the reason why Article 24 put restriction against employment of child labour only to factories, mines or other hazardous employments. Thus employment of children in non-hazardous employment is permitted under certain conditions which is reflected in the case of *M.C. Mehta V. State of Tamil Nadu*¹⁴⁶ (children were allowed in packing process) and various other rules, regulations and Acts pertaining to children.

At the end we can say that Article 24 prohibits employment of children in factories etc and on the other hand lays down a provision which allows employment of children below the age of 14 years, in works other than in any factory or mine or hazardous employment. Thus truly speaking child labour cannot be abolished strictly. When we read Article 24 in the light of Article 39(e) and (f) and Article 21A; in spite of such restrictions; indirectly Article 24 encourages child labour as a necessary evil. There is a need that Article 24 should be restricted and finally prohibited on all sorts of child employment, irrespective of hazardous and non-hazardous occupation. Hence, these statutory provisions ¹⁴⁷ are irrational and double standard provisions, which indirectly encourage child, labour and ultimately hamper the future of the child as well as the future of the nation. Therefore, government should take necessary steps for solving this problem.

3.3.2 PROVISION RELATING TO CHILDREN IN PART IV OF THE CONSTITUTION

¹⁴⁶ AIR 1991 S.C.417

¹⁴⁷ Supra Note; 1

The provisions in Part IV of the India Constitution which enable the judiciary to promote the jurisprudence of child rights are Article 39 (e) & (f), Article 41, Article 45 and Article 47 which are discussed here under in the light of various judgments of Supreme Court.

3.3.2.1 ARTICLE 39 (E) & (F): PREVENTS THE ABUSE AND EXPLOITATION OF CHILDREN

Article 39 requires the state in particular, to direct its policy towards securing:

- (a) Equal right of men and women to adequate means of livelihood.
- (b) Distribution of ownership, and control of the material resources of the community to the common good.
- (c) To ensure that, the economic system should not result in concentration of wealth and means of production to the common detriment.
- (d) Equal pay for equal work for both men and women.
- (e) To protect health and strength of workers and tender age of children and to ensure that they are not forced by economic necessity to enter a vocations unsuited to their age or strength
- (f) That children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Thus, out of the above mentioned policies, policy mentioned in clause (e) and (f) of Article 39 specifically deals with children.

Clause (f) of the Article 39 was modified by the Constitutional (42nd Amendment) Act, 1976 with a view to emphasize the constructive role of the state with regard to children and therefore w.e.f. 3.1.97 in place of that "children" that "childhood" and youth are protected against exploitation and against moral and material abandonment.

Article 39(e) and (f) of the Constitution imposes upon the state an obligation that the tender age of the children are not abused and that they are not forced by economic necessity to enter vocations unsuited to their age or strength. Further the state is directed to provide social and economic conditions and infrastructure for the children for their healthy development for the exercise of freedoms and maintenance of dignity. Thus right to live with human dignity free from exploitations enshrined in Article-21 derives its breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Article 41 & 42.¹⁴⁸

Since Directive Principles are unenforceable Supreme Court plays a very vital role and directs the government to make policy effective to take appropriate steps and implement laws effectively which is reflected from the various Judgments of Supreme Court. In *M.C. Mehta V/s State of Tamil Nadu* ¹⁴⁹ Supreme Court having taken cognizance of the inhuman conditions in which children are placed, issued directions to the factory owners to provide proper facilities for medical care, recreation, proper meals, leisure hours and make provisions for their education also. The court also suggested a scheme for compulsory insurance for the child workers.

In another case of *V.D. Singh Tomar V/s State of Bihar*¹⁵⁰ the Supreme Court pointed out that "the right to live with dignity is the fundamental right of every Indian citizen. And so in discharge of its responsibilities to the people the state recognizes the need for maintaining establishments for the care of those unfortunate children who are cast-away of imperfect social order. Therefore out of necessity, provision must be made for their protection and welfare. To abide by the constitutional standards recognized by will and accepted in principle, it is incumbent upon the state while assigning children to these establishments,

¹⁴⁸ Fances Mullin's Case, AIR 1980 S.C. 849

¹⁴⁹ AIR 1991 S.C.417

¹⁵⁰ AIR 1988 S.C.1782

euphemistically described as 'care homes' to provide at least the minimum conditions ensuring human dignity."

Similarly in *Lakshmikant Pandey V, Union of India*¹⁵¹ a writ petition was filed alleging that in the guise of adoption Indian children of tender age were not only exposed to the long dreadful journey to distant foreign countries at great risk to their lives but in case they survive they were not provided any shelter and relief homes and in course of time they become beggars or prostitutes for want of proper care. Bhagwati, J laid down principles and norms which should be followed in determining whether a child should be allowed to be adopted by foreign parent with the object of ensuring the welfare of the child his lordship directed the Government and various agencies dealing with the matter to follow these principles in such cases as it is constitutional obligation under Article 15(3) and 39 (e) & (f) to ensure the welfare of the child.

Again in one of the landmark case of *Sheela Barse*¹⁵² the Supreme Court struck the right note and chief Justice Bhagwati, ordered and appointed a committee of District Judges in 1986 to survey the condition of Jails where, in spite of statutory provisions the Juveniles were kept. Later in the same case, again it was sought to be impressed upon the state government that they must setup necessary remand homes and observation homes where children accused of an offence can be lodged, pending investigation and trial. In accordance with the observation of Supreme Court, the parliament has come forward by enacting the Juvenile Justice Act 1986.

3.3.2.2 ARTICLE 41: THE STATE SHALL MAKE EFFECTIVE PROVISIONS FOR EDUCATION

The state shall, within the limits of its economic capacity and development to make effective provisions for securing the right to work, to education and to

¹⁵¹ (1984) 2 SCC 244 see also *Laxmi Kant Pandey V/s Union of India* (1987) SCC 667

¹⁵² AIR 1986 S.C. 1773

public assistance in case of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Article 41 deals with the right to work, to educate and to public assistance in certain cases. However, Article 41 does not however obligate the State to render compensation to the workers whose continuous employment suffers as a result of some governmental action. e.g. short supply of electricity.¹⁵³ Further, even though Article 41 does not mention children, the ending words “.....& in other cases of undeserved want,” cover the children as the suffering children deserve least the fate as in and cling to the anachronistic dope of the fatalistic theory of suffering for the sins committed in the past birth. Therefore it is the duty of the state to assist all the children who suffers for want of minimum basic need and thus held to include medical education.¹⁵⁴

3.3.2.3 ARTICLE 45: EARLY CHILDHOOD CARE & EDUCATION

Article 45 directs the state to make provision for early childhood care and education for all children until they complete the age of 6 year.¹⁵⁵

Children are the foundation of human society. The shape of future human society shall be determined by their mental and physical well being. Just as the personality of an adult is built in his or her primitive years, the development of a nation is determined by the priority given to the child. The children are the supreme assets of the nation; hence in national policy child's care should occupy the most prominent place. Specific care needs to be taken that children grow up to become agile citizens, physically fit, mentally sound and alert and socially and morally healthy. Therefore Article-45 talks about “Early childhood care.”

¹⁵³ Radhakrishnan Mills V/s S.I.T. AIR 1954 Mad. 686

¹⁵⁴ Samir Kumar Das V/s State AIR 1982 Pat. 66

¹⁵⁵ Article 45 is substituted by the Constitution 86th Amendment Act, 2002, 5.3. The earlier Article 45 was as follows: Article 45 requires the state to endeavour to provide, with in a period of ten year from the commencement of the Constitution to free and compulsory education for all children until they complete the age of fourteen year.

There are many ways to view the early development needs of an infant and child. A nearly universal view is that grooming children in the best possible coordinational family environment, an atmosphere of happiness love and understanding is mandatory for the development of his or her personality which will allow the infant to feel that the world is a safe place. Thus, beside the development needs of the child, disease prevention and disease intervention are essentially part of the vulnerable years; foremost for all children are adequate nutrition, Sanitation, immunization and education. Thus, it is the fundamental duty of the family unit to maintain and to prevent disease in that child. Preventive care of the child by the family is the cornerstone for all pediatric concerns.

Children ought to get their nurturance from their parents. Failing that, they ought to get it from the local governments. Failing that, it should come from their national governments. Failing that, they ought to get it from the international community. The responsibility hierarchy thus looks like this.

Child
 Family
 Community
 Local Government
 State Government
 National Government
 International Non-Governmental Organizations
 International Government Organizations

We can picture this as a set of nested circles, with the child in the center of the nest. The idea that needs to be added is that in cases of failure, agents more distant from the child should not simply substitute for those closer to the child. Instead, those who are more distant should try to work with the strengthen those who are closer to help them become more capable of fulfilling their responsibilities towards children. The very outermost ring includes international

governmental organizations (IGOS) such as UNICEF, the Food and Agriculture organization, the World Health Organization, and the United Nations Committee on Human Rights. Thus in looking after the well-being of children, the International Community is the last resort where there are large scale failures and where national governments will not or cannot do what need to be done.

3.3.2.4 ARTICLE 47: DUTY TO RAISE THE LEVEL OF NUTRITION AND THE STANDARD OF LIVING AND TO IMPROVE PUBLIC HEALTH

The state shall progressively increase the scope of such services so that, within a reasonable time all children in the country enjoy balanced growth. In particular, the state is to endeavour to bring about prohibition of the consumption, except for medicinal purposes of intoxication drinks and drugs, which are injurious to health. A Statute which does not make adequate provision for allowing use and consumption of intoxicating drinks for medicinal purposes goes beyond the scope of Article 47.¹⁵⁶ Article 47 has helped in the crystallization of the judicial view in favour of imposing stringent conditions on liquor trade with reference to Article 19(6). Article 47 was cited by the Supreme Court in *Nussarwanji* as one of the reasons for holding that Article 19(1)(g) does not protect the liquor trade.¹⁵⁷

Thus the above provisions summarizes the following constitutional duties and responsibilities in connection with the nations children:

- Protect the children from all types of exploitation;
- Maintain children decently where the parents cannot or fail to look after them properly;
- Eliminate child employment;
- Protect the health of the Children; &
- Provide nutritious food ¹⁵⁸

¹⁵⁶ From *Nussarwanji Balsara V/s Bombay*, AIR 1951,Bom. 210

¹⁵⁷ Supra 549

¹⁵⁸ Rao, Supra, P.4

Again, center and state legislators are responsible to properly implement the fundamental rights that are given to the children and the directives that are given to the state.

3.3.2.5 ARTICLE 51-A(K) ; DUTY OF GUARDIANS TO PROVIDE OPPORTUNITY OF EDUCATION

Article 51-A (Chapter 4A, Fundamental Duties) has been added by the 42nd Amendment of the Constitution. Article 51A is confined to citizen only. It imposes a duty upon every citizen of India. Clause k has been added in Article 51A by 86th Amendment to the Constitution in the year 2002. Article 51 A(k) imposes a fundamental duty on citizen that "who is a parent or guardian has to provide opportunities for education to his child or ward as the case may be, between the age of six and fourteen years". This Article was amended at the same time when the Article 21 was amended. This shows that the need of basic education of children was perceived as utmost important. Thus, duty upon guardian and on state (Article 21A) was casted at the same time.

3.3.3 RIGHT OF AN UNBORN CHILD

To become pregnant is a fundamental right of a girl or woman. To keep a child in her womb and ensure the growth of the child in her womb as per her desire is also her right. It is, therefore, a normal rule that there should be continuance of the pregnancy for its full term until safe delivery, except in very exceptional circumstances. The girl cannot be deprived of this right simply because she is a teenage. The Constitution of India does not make a distinction between a major and a minor in the matter of fundamental rights. What we have said is the right of the mother. At the same time the question arises that whether the child in the womb has any right to live? The study will show that child's right to live is conditional upon being considered as living in the womb itself.

During the initial stages of pregnancy, the embryo looks like a tiny speck and gradually grows to a small animal, which looks almost similar to a human being. During the process of growth the shapes that an embryo goes through appear to

be fascinating because they trace the history of our ancestors. An analysis of the changes in the embryo has been very important in the study of the history of evolution. The developing child is called 'embryo' for the first two months and then a 'fetus' until birth.

During the 19th century the judicial opinion recognized the existence of life only when the 'quickening' took place. Quickening is the stage when the pregnant women feel the fetus move. In the later 19th century in America the medical writers were very critical of the widely prevalent belief that there was no life in fetus prior to quickening. They condemned the Act of procuring abortion at every period of gestation except for preserving the life of either mother or child. The medical view was in favour of the protection of the human life of the fetus as far as possible and accordingly in 19th century various state legislatures in the U.S.A. made the anticipated change in the abortion law providing for the protection of fetus from the moment of conception to entire period of gestation. Even at the Common Law some courts in the 19th century refused to deny protection to the unborn child during the period prior to 'quickening' and held that abortion was just as illegal at that time as at a late period.

Thus the English and American Criminal Law, in the beginning, treated 'quickening' as a decisive moment to provide protection to fetus but in the 19th century, protection to fetus was provided throughout its life in the womb. This change came due to the informed medical opinion and it came to protect the life of the fetus and not the life of the mother.

However, different views are expressed as to when 'life' really commences. One view is that life commences from the moment of fertilization. This is the position taken by the Catholic Church. Another view is that life begins with the zygote's implantation into the uterine wall which occurs six or seven days after fertilization. The third view, according to West Germany, is that 'life' in the sense of the historical existence of a human individual exist according to a

definite biological-physiological knowledge in any case from the 14th day after conception.

However, once it is assumed or established that human life begins at or near conception and that fetus is a person during almost the entire first trimester of pregnancy, Article 21¹ of our Constitution may be interpreted to mean, in an appropriate case, that with respect to life, the word 'person' applies to all human beings irrespective of age, health, function or condition of dependency, including their unborn offspring at every stage of their biological development. If the existence of life in an unborn person is recognized by the state, it is endowed with certain inalienable rights including the right to the continuance of life. In view of above, it becomes the obligation of the state not only to protect 'life' from arbitrary and unjust destruction under Article 21 but also not to deny it, equal protections, who are fetuses by offering them less or no protection than other persons.

It may be objected that the state has already discriminated against the unborn child by treating the killing in the womb as "causing miscarriage" under section 312 and 313 of the Indian penal code and as "termination of pregnancy" under the medical termination of pregnancy Act, 1971, rather than "murder" and by providing a lesser penalty for the crime of "causing miscarriage" than for the crime of "murder". Does not such distinction made by criminal Law deny the fetus equal protection?

It may be argued that a pregnant woman should have personal liberty" to destroy any fetus of her own if she finds it intolerable. To force a woman to continue an unwanted pregnancy is to impose a kind of slavery upon her or at least to infringe her sense of self-respect and dignity. The fetus may have a right to life, but not a right to be kept in a woman's body against her will.

The argument no doubt asserts a self-evident legal right of a woman to be free to refuse sexual intercourse or to adopt contraceptive measures. If a woman

adopts either of these alternatives, there is no need for her to subject her body to the burden of pregnancy. But, her further claim that she is free to destroy the fetus she has conceived by voluntary sexual intercourse can be considered as legitimate, only if we consider and treat the fetus in her womb having no separate life.

Perhaps in future the legislature or the judiciary will have to resolve the conflict between the two; a pregnant woman's personal liberty right to destroy fetus in her womb under any circumstances at any time and the claim of the state to protect the right to life of the unborn on the basis of the growth of scientific knowledge and recognition of the fetus as a living person within the womb.

Though the word 'person' in Article 21 does not apparently include an 'unborn person', it is certainly not true that the unborn is not a legal person for other purposes. An unborn person is not treated as non-entity under the other areas of law. It would be strange if a fetus had right enforceable by apparent to recover damages for infliction of injuries while in the womb but could himself be abolished by a parent. It would be unjust and unfair if a fetus had a right to get partition of the coparcenery property or joint family property re-opened and yet has no right to be protected from abortions.

3.4 THE INDIAN CONTRACT ACT, 1872

3.4.1 MINORS' CONTRACT

A person ceases to be child on attainment of age of eighteen years for all civil purposes except when there is guardian appointed by the court, for certain purposes, his age is extended to 21 years.¹⁵⁹ A person below 18 years is not liable for his acts in all civil matters, though for certain torts he may be liable. He is also liable to taxes. The age of majority of a person is to be determined "according to the law to which he is subject."

¹⁵⁹ Indian Majority Act, 1875 Section 3

Under the Indian Contract Act, A minor i.e. a person below the age of 18 years has no capacity to contract, as Section 10 requires that the parties to a contract must be competent and therefore according to Section 11 a minor is not competent. **The minor, though not competent to contract, is found having commercial interactions in number of cases. This event gives rise to the legal complications and therefore requires the law to protect the interest of minor.** The protection available to minor under such cases has been discussed in the following paragraphs.

In *Mohiri Bibi V. Dharmodas Ghose*.¹⁶⁰ Looking to the Section 11 their LORDSHIPS are satisfied that the Act makes it essential that all contracting parties should be competent to contract and expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act. The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act, and cannot arise in the case of an infant and hold that minor's contract being void , cancelled the mortgage.

Ever since this decision it has not been doubted that a minor's agreement is absolutely void. But, however in today's society it does not seem to be possible, much less desirable, for law to adhere to the categorical declaration that a minor's agreement is always "absolutely void". Minors are appearing in public life today more frequently than even before. A minor has to travel, to get his dresses tailored, or cleaned, to visit cinema halls and deposit his cycle at a stand. He has to deal with educational institutions and purchase so many things for the facility of life and education. If, in any one of these cases, the other party to the contract could brush aside the minor on the ground that the engagement is void, the legal protection against contractual liability would be too dear to minors. Therefore to modify it's earlier decisions the Privy Council adopted the trend

¹⁶⁰ (1903) 30 IA 114

which is evidenced in the decision of their Lordships *in Srikakulam Subrahmanyam V. Kurra Subba Rao*¹⁶¹. The fact of this case were as follows:

That in order to pay off the promissory note and the mortgage debt of his father, the minor son and his mother sold a piece of land to the holders of the promissory note in satisfaction of the note and he was also to pay off the mortgage debt. He paid off the mortgage accordingly and the possession of the land was given over to him. Afterwards the minor brought an action to recover back the land.

It was found as a fact that the **transaction was for the benefit of the minor and the guardian had the capacity to contract on his behalf**. Thus it was held by Lord MORTON that Section 11 (Contracts Act) and the Mohiribibi case leave no doubt that a minor cannot contract and that if the guardian and the mother had taken no part in this transaction it would have been void. But since the contract being for the benefit of the minor and within the power of the guardian was held to be binding upon him.

Minor is exempted from tortious liability of a contract if the tort is directly connected with the contract and means of affecting it a parcel of the same transaction¹⁶². It implies that the wrongs of children should not be considered seriously and such wrongful acts of children must be excused as innocent acts.

According to established view the contracts which are obviously, manifestly beneficial or to the advantage of the minor are enforceable by him. Accordingly, a minor is allowed to enforce a mortgage executed in his favour¹⁶³. Similarly a minor can sue on a promissory Note executed in his favour¹⁶⁴. The reason behind such contractual laws is that the policy of law of contract is to protect persons below age from contractual liability in order to avoid to defeat the policy of law.

¹⁶¹ (1949) 75 IA IIS

¹⁶² Dharmodas Ghose V/s Brahmaddutt ILR (1898) 25 Cal. 616

¹⁶³ Raghavachary V/s Srinivasa (1916) 40 Mad. 308

¹⁶⁴ *Rangnazu v/s Madura Basappa* (1913)24

Such contracts are contract of Marriage, Contract of Service, Contract of Apprenticeship.

The Indian law with regard to **Contract of Necessaries** is embodied in Section 68, Contract Act which runs as under:

“If a person, incapable of entering into a contract, or any one to whom he is legally bound to support, is supplied by another person with necessities suited to his condition in life, the person who was furnished such supplies is entitled to be reimbursed from the property of such incapable person.”

The Indian courts have given a wide meaning to the term ‘necessaries’. It is now an established rule that necessities does not merely mean things necessary for the subsistence of the minor. It is not confined to goods, it includes other things such as good teaching and instructions¹⁶⁵; money spent in defending or prosecuting a litigation on behalf of the minor in respect to his estate or in defending him in a criminal prosecution¹⁶⁶; house taken on rent by the minor for the purpose of living and continuing his studies,¹⁶⁷ have been held necessities. In a majority of cases it has been held that the marriage of the minor¹⁶⁸ or any person dependant¹⁶⁹ on the minor is necessary within the meaning of Section 68.

A supplier of necessities or a lender who lent money for the purchase of necessities will be entitled to the decree if he can prove: (i) the necessities were suitable having regard to the social status and conditions of minor’s life, and (ii) they were suitable to his actual requirement, i.e., when necessities were supplied to him he has not already been supplied with the same from some

¹⁶⁵ Sadasheo Balaji V/s Firm Hiralal Ramgopal, AIR 1938 Nag 65

¹⁶⁶ Walkin V/s Dummo, ILR (1881) 7 Cal 140; Branson V/s Appasami, ILR (1894) 17 Mad 257; Venkatta V/s Thimmayya, ILR (1898) 22 Mad 314

¹⁶⁷ Kunwarlal V/s Surajmal, AIR 1963 MP 58

¹⁶⁸ Yadorao V/s Coandradas, AIR 1927 Nag 196; Rahim Bibi V/s Sherifuddin, AIR 1947 Mad 155

¹⁶⁹ Nandan Prasad V/s Audhya Prasad, ILR (1910) 5 IC 413 (FB); Shrinivas Rao V/s Babaram, AIR 1933 Nag 285

other source.¹⁷⁰ A supplier or lender, unlike alliance, cannot be protected merely on the basis that he made proper and bona fide enquiries.

3.4.2 NON-APPLICABILITY OF THE DOCTRINE OF ESTOPPEL

The principle of 'estoppel' under section 115 of Evidence Act is not applicable to a minor in a contract even if a minor by misrepresenting his age induces another to contract with him.¹⁷¹ Here it is quite clear that the other contracting party, a major must be alert and take every necessary care not to do any contract with a minor, since such contract is void under the Act. There can be no estoppel where the truth of the matter is known to both the parties. A false representation made to a person who knows it to be false is not such a fraud as to take away the privilege of infancy¹⁷². It is also quite common belief of the people that an infant may not have firm knowledge of his age etc. because of this reason a minor could not be blamed for misrepresenting his age in a contract.

3.4.3 MINOR'S POSITION UNDER THE DOCTRINE OF RESTITUTION

Doctrine of restitution under section 64 and 65 of Indian Contract Act does not apply to contracts made by minor. As these sections obliges the parties who had obtained certain benefit or advantage from other party and thereafter the contract cannot be performed either because one of the party at whose option the contract is voidable had rescinded the contract or the contract is discovered to be void or becomes void.

In these two situations the existence of the contract is pre-supposed. And the contract can exist only if the parties are competent to contract. Since minor is incompetent to contract **section 64 and 65 does not apply to them.**

English law partly observes the Doctrine of Restitution, where the minor has obtained the benefit by fraudulent misrepresentation. If an infant obtains the property or goods by misrepresenting his age, he can be compelled to restore it,

¹⁷⁰ Sachit V/s Harnandan, AIR 1933 Pat 29; Sadaseo V/s Sankar, AIR 193 Nag 68

¹⁷¹ Jaganth Singh V/s Latta (1908) 3. All 21

¹⁷² *Mohiri Bibi V. Dharmodas Ghose* (1903) 30 IA 114

but only so long as the same is traceable in his possession. This is known as the **equitable doctrine of Restitution**. But where the infant has sold the goods or converted them he cannot be made to repay the value of the goods, because that would amount to enforcing a void contract. Again, the doctrine of restitution is not applied where the infant has obtained cash instead of goods.¹⁷³

The case of *Lesli V. Sheill*¹⁷⁴ explains the doctrine. In this case, the defendant, a minor, falsely misrepresented himself to be a minor and obtained two loans of 200 pounds each from the plaintiffs, who were money lenders. The plaintiffs brought an action to recover 475 pounds, being the amount of loan taken and the interest thereon. It was held in the court of Appeal that the money could not be recovered. If that would allowed that would amount to enforcing an agreement to repay loan, which is void under the Infant's Relief Act, 1874.

Law Commission of India is also of the view that section 65 of Indian Contract covers the case of minors who makes false representation that he is a major and such a minor should be asked to pay compensation. It recommended that such explanation should be added to section 65.

No Amendment of Indian Contract has made so far to give effect to the recommendation of Law Commission.

3.4.4 POSITION OF A MINOR UNDER THE INDIAN PARTNERSHIP ACT, 1932

Under Indian Partnership Act a person below the age of 18 cannot be partner in a firm, but he can be admitted to the benefits of partnership. Section 30 of the Partnership Act lays down that a minor may be admitted to the benefit of a firm, presumption being that it is beneficial to the child. It appears that it in actual working, more often than not, such an arrangement results in a disadvantage to the child.

¹⁷³ Leslie (R) Ltd V/s Sheill

¹⁷⁴ (1914) 3 KB 607

A child is admitted to the benefits at his volition, only with the consent of all partners. he is entitled to such share of property and such profits of the firm as may be agreed upon by the partners. ¹⁷⁵ He may also be given access to the accounts of the firm. He may also be given a copy of accounts. The child admitted to the benefits of a partnership is not personally liable to third persons as are other partners for any of the act of the firm. His liability is limited. It is limited to his share. He is also not liable personally for the debts of the firm. Of course, his share in the firm is liable for the debts of the firm.

But it should be noticed that the child has no hand in the management of affairs of the firm. Nor is he permitted to conduct its business. In view of this, some has taken the view that after all what benefit the admittance of a minor to firm does the minor derive? The real benefit would have been if even his share was not made liable for the losses of the partnership. After all, a firm can incur losses on account of mismanagement of the firm by its adult partners. Once the firm is in loss, minor's share will be liable irrespective of the fact whether minor has or has not derived any benefit. ¹⁷⁶

It is interesting to note that a child can claim a share in the profits of the firm only when he severs his relations. Section 30(4), Partnership Act is explicit on it. It runs: "Such minor may not sue the partners for an account or payment of his share of the property or profits of the firm, save when severing his connection with the firm."

It is true that sub-section (2) of section 30 permits the child to have access to accounts. He is allowed to inspect the accounts and have a copy thereof to enable him to know as to what share of profit has been apportioned to him. He has no power or right to dispute theses accounts as he is allowed to do so only when he severs his link with the partnership. A. M. Matta observes: ¹⁷⁷

¹⁷⁵ Section 30(3), Partnership Act

¹⁷⁶ Rampratap V/s Fooli Bai, ILR (1896) 20 Bom 767

¹⁷⁷ A.M. Matta: Position of child in Business Association, 395, (Child and the Law)

"He has to accept, even if what is being offered to him does not represent even the book version as prepared by the adult partners of the firm in case he is interested in being retained as a so-called beneficiary in the firm. The other course open to him is to claim his share in profit by bringing a suit in the court of law and sever his relation with the firm. This gives rise to an illogical proposition, that the minor can not only dispute the statement of accounts as prepared by the adult partners of the firm but is also prevented from effectively demanding the profits that have been credited to his share except when he is prepared to bear the loss of his relation with the firm. This, it is submitted is not a protection of, but prejudicial to, the interest of the minor."

On attaining majority the child has the option to sever his connection with the firm or apply to become full partner. He is required to exercise his option within a period of six months after his attaining majority. If on attaining majority he is not aware of his admittance to partnership benefits, then within six months of his obtaining the knowledge that he was admitted to the benefits of the partnership, the child has to give a public notice of the exercise of his option. In case minor fails to exercise his option within the stipulated period, he automatically becomes a full partner.¹⁷⁸ He becomes liable to third persons for all acts of the firm thereafter, though prior to that his rights and liabilities are only as the one admitted to the benefits of the partnership.¹⁷⁹ It should be noticed that if the child on attaining majority does not give public notice, he automatically becomes a full partner.

This is based on the doctrine of holding out. The result of such express or implied election or even the imputed election is that the child not only becomes personally liable for the acts of the firm after election but his personal liability extends back to the date when he was admitted to the benefits of partnership. This again results in more harm to the infant than the benefit it ostensibly confers on him.

¹⁷⁸ Section 30(5)

¹⁷⁹ Section 30(7)(1)



More so, when the election may have been imputed to the minor due to his failure to give notice of the same. In such cases the genuine presumption is that the minor did not want to continue in the firm. It is in spite of the absence of infant's desire to become a partner that he may sometimes be made liable for the acts of the firm or liabilities of the firm incurred during his minority. It was pointed out in *Harmohan V/s Sudarshan* ¹⁸⁰ that this sub-section places the creditor of the firm, as regards such minor, in a more favorable position than under the English law. English law differs on this issue. The infant under English law is not made liable for the acts and liabilities of the firm incurred before he elects to become a partner- either expressly or impliedly. ¹⁸¹

At the same time after electing to become a partner, his share in the assets of the partnership and share in the profits remain the same as it was when he was admitted to the benefits of the partnership. ¹⁸² It may be emphasized that if on attaining majority the child elects to become a partner his liability towards third persons is not only in respect to the acts of the firm done after he opted to become a partner but also for the acts of the firm done before he opted to become a partner. In other words, his liability is retrospective.

This position is not to the advantage of the child. If on attaining majority the minor does not opt to become a partner, his rights, and liabilities continue to be the same as they were before he became a major. His share in the firm will not be liable for the acts of the partners done after he elected not to become the partner.

¹⁸³

3.5. POSITION OF CHILD UNDER LAW OF TORT

Under these head discussion is made on the protection available to the children under the law of torts. Wrongful acts make a person liable in tort. The same

¹⁸⁰ A.M. Matta cited above at 395

¹⁸¹ (1920) 25 CWN 847

¹⁸² Section 30(7) (b)

¹⁸³ Section 30(8)

principle is applicable to minors also. The liability of the child in tort is almost at par with adults, except where cause of action arises out of or in connection with, contract.

Thus the law of torts makes no special provision even for minors. A minor can sue for all torts committed against him like any other person except that he has to bring his suit through a next friend. Accordingly it appears that the child can sue for pre-natal caused to him.¹⁸⁴

A father may be liable for his own personal negligence in allowing his child an opportunity of committing a wrong as when he supplies his son with an air gun or allows him the use of the gun and the boy afterward accidentally wounds a person.¹⁸⁵

Similarly, an occupier is liable for want of due care to the children and to all his visitors and to see that visitor will be reasonably safe in using his premises where he is invited. But more care should be exercised by the occupier in case of child visitor since a child will meddle where the adult will not and so what is safe for an adult may not be safe for a child,¹⁸⁶ and this factor must be kept in mind while deciding whether the occupier has been wanting in the duty of care required by the Act.

*Glasgow corporation V. Taylor*¹⁸⁷ is leading case to examine this principle. The facts were that a garden maintained by the corporation was much frequented by children. A child who entered with other children into the garden ate some berries of the poisonous shrubs in the garden and died. In a suit by the father of the deceased child, the corporation was held liable for want of the due care to the children. It has been aptly said that so far as infants are concerned, there is a duty "not merely not to dig pitfalls for them, but not to lead them into

¹⁸⁴ Under English law such liability is recognized statutorily: Injuries to unborn child Act 1974 & cognitional Disabilities (civil liability) Act 1976

¹⁸⁵ Bebee V/s Sales, (1916) 32 TLR 413

¹⁸⁶ Hawkins V/s Couls-dons & Purly V/sD.C. (1964) Q.B. 319

¹⁸⁷ (1922) 1 AC 44

temptation.”¹⁸⁸ The same duty lies on the occupier where a child enters as trespasser into the premises of such occupier.

Children do not form a special class and they are treated as visitors or trespassers as the case may be. But the age and intelligence of an entrant is a relevant factor and the court is to take into consideration in deciding cases of a child visitor or a trespasser.

Also, in the case of contributory negligence of child, in deciding the question of contributory negligence, the age of the child is to be considered as an important factor and the experience and intelligence of ordinary children of that age are to be taken into account along with other relevant circumstances.¹⁸⁹ Thus a child of six years, standing near a footpath when knocked down by a lorry¹⁹⁰ and a child of the same age when knocked by a motor vehicle trying to cross the road¹⁹¹ will not be held guilty of contributory negligence for children of that age does not have adequate road sense. The provisions exempting tortious liability of child are filled with the principles of common humanity

3.6 POSITION OF A CHILD UNDER THE CIVIL PROCEDURE CODE 1908

De jure guardians of the minor's property have power of settling all dispute relating to the property of the minor.¹⁹² They may settle them by private negotiations or by litigation. When a dispute goes to a court of law either at the instance of the other party to the dispute or on the behalf of minor, the question that arises is: has the *de jure* guardian any right to represent the minor in the court? Another important question that arises is: can any other persons as 'next friend' of the minor file a suit on behalf of the minor without any consultation with the *de jure* guardian?

¹⁸⁸ Latham V/s R. Johnson & Nephnew Ltd., (1913) 1 KB 398, p. 415

¹⁸⁹ Gough V/s Thorne (1966) 1 WLR 1387

¹⁹⁰ R. Srinivas V/s K.M. Parsivamurthy, AIR 1976, Karnataka 92

¹⁹¹ Delhi Transport Corporation V/s Kumari Lalitha, AIR 1982, Delhi 558

¹⁹² D.Bhushayya V/s Ramakrishrayya, AIR 1962 SC 1886

The question of guardianship in litigation of the minor is dealt with in Order 32, Civil Procedure Code. The provision is also applicable to execution proceedings.

The person who files the suit on behalf of the minor is known as 'next friend'.¹⁹³ When a suit is filed against the minor, the person appointed by the court to represent the minor is known as '*guardian ad litem*' or 'guardian in the suit'. Their functions are basically the same, though the court constitutes a *guardian ad litem*, while the next friend constitutes himself as such by taking steps in the suit. But simply because some one rushes to the court (i.e., other than the guardian of minor) and files a suit on behalf of the minor, could the *de jure* guardian be deprived of his power to settle the dispute the way he thinks it best? In our submission, it is not merely the question of interfering with the power of the *de jure* guardian; it would also not be ordinarily in the welfare of the child. Rule 4(2) and Rule 3(4) purport to achieve this purpose. But it is submitted that the judicial interpretation has not helped in the furtherance of this purpose of law, rather some decisions have gone contrary to it.

Order 32, Rule 1 lays down that 'every suit by a minor shall be instituted in his name by a person who in such a suit shall be called the next friend of the minor'. Rule 2 provides that 'where a suit is instituted by or on behalf of without a next friend, the defendant may apply to have the plaint taken off the file'. The same qualifications are laid down for both the next friend and the *guardian ad litem*.

According to Rule 4(1) any person who is of sound mind and who has attained majority and whose interest is not adverse to the minor can act as the next friend or the guardian for the suit. **Rule 5(2) provides that every order made in a suit or on an application, in which minor is in any way concerned and affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged.**

¹⁹³ Rule 1, O.32 C.P.C

Rule 4(2) provides that in the presence of a certificated guardian no other person can act as 'next friend' unless the court considers it to be in the welfare of the child that another person should represent the child, Rule 3 (4) lays down that a guardian ad litem cannot be appointed without giving notice to the de jure guardian, and in his absence to the de facto guardian, if any.

It may be noted that the sub-rule (2) of Rule 4 not mention any other legal guardian, natural or testamentary, while sub-rule (4) of Rule 3 includes all de jure guardians. Rule 4(3) lays down that 'no person shall without his consent be appointed guardian for the suit.'¹⁹⁴ There was nothing equivalent to the last three provisions under the old Code.

In *Khaurajmal V. Diams*¹⁹⁵ the Privy Council propounded the doctrine that if a decree was passed against the persons not properly represented, the decree is nullity and 'might be disregarded without any proceedings to set them aside'. In respect of the minor this was elaborated in *Rashidunnissa V. Ad. Ismail*,¹⁹⁶ where the Privy Council said that a decree against the minor would be a nullity if: (i) no guardian ad litem was appointed at all, or (ii) no proper person was appointed. In *Mst. Bibi Waliyam V. Banke Behari*,¹⁹⁷ the Privy Council propounded the doctrine of 'substantial representation': no decree shall be set aside on the ground of any defect or irregularity in any proceedings in the suit, not affecting the merit of the case or the jurisdiction of the court.

The High Courts in interpreting the provisions of Order 32 have taken divergent views and in doing so have invariably relied on one or the other of the above Privy Council decisions.

3.6.1 SUIT AGAINST THE CHILD

¹⁹⁴ Habib Teli V/s Ali Teli, AIR 1968 J and K 9

¹⁹⁵ ILR (1905) 32 Cal 296

¹⁹⁶ ILR (1903) 31 ALL 572

¹⁹⁷ ILR (1903) 30 Cal 1021

Rule 3, 0, 32, C.P.C. lays down that Where the defendant in a suit is minor, the court is to appoint a guardian for the suit for the minor defendant.¹⁹⁸ On the interpretation of sub-rule (4) two questions have mainly arisen;

- (i) will an appointment made by the court without giving any notice to the minor or his guardian or without hearing any objections from the minor or his guardian is a valid order, the sense that the minor cannot impeach an order or decree passed in such proceedings unless he is shown that he has been prejudiced, or, whether such an order or decree is nullity?
- (ii) When in such proceedings minor is not represented by a guardian of the guardian is only a namesake, then whether an order or decree passed such proceedings would be a nullity or whether the minor can avoid it only if he is prejudiced?

On the former question there are divergent views. The cases following *Mst. Bibi Walian's case*¹⁹⁹ take the view that such an order or decree cannot be avoided unless minor shows that some prejudice was caused to him on that account.²⁰⁰ The other cases take the view that the provisions are mandatory and the appointment of any person other than the *de jure guardian* is void in the absence of a specific order of the court that the appointment of another person was necessary in the welfare of the child.²⁰¹

3.6.2 THE POSITION OF GUARDIAN IN THE LITIGATION VIS-A-VIS OF PROPERTY

Rule 6, Order 32, C.P.C. provides that a guardian in litigation cannot receive any money on behalf of the minor and Rule 7 provides that he cannot compromise or enter into an agreement on respect to the subject matter of the suit without the prior permission of the court. The question that arise are;

¹⁹⁸ Diwali Bai V/s Jai Kumar, AIR 1969 Bom 393

¹⁹⁹ ILR (1903) 30 Cal 1021

²⁰⁰ AIR 1957 Pat 260 where all these cases have been reviewed

²⁰¹ Nirmal Chandra V/s Khandu Ghoshe, AIR 1965 Cal 562.

When a person other than the guardian of property is the guardian appointed in litigation, can guardian of property exercise his powers of alienations etc. in respect to that property? Or,

When guardian of property is also the guardian in litigation, can he in his capacity as guardian of property exercise his powers in respect to the property of the minor, including the power of receiving money on behalf of the minor and of entering into compromise in respect to the property without the leave of the court as stipulated under Rules 6 and 7?

It is an established proposition of Hindu law that when a Karta of joint family files a suit or is sued, he represents the minor coparceners²⁰² and a decree passed in the suit is binding on the minor coparceners. Such a decree cannot be impeached even when the karta is grossly negligent.²⁰³ The principle, which permits a minor to challenge a decree passed against him on the ground of gross negligence, applies to a suit, which concerns the property held by the minor in his own right.²⁰⁴ The karta also retains the power of compromise without the leave of the court.²⁰⁵ Even when a guardian is appointed for a minor coparcener in the suit, the karta has power to compromise on a matter, which is not subject matter of the suit.²⁰⁶

However, the position is different when once a guardian in the litigation is appointed for the minor. The court controls the powers of the natural guardian or any other de jure guardian of the property in respect to the subject matter of the suit.

²⁰²Linganagowada V/s Banangowada, AIR 1927 PC 56; Krishnamurthi V/s Chanambaram, AIR 1946 Mad 243.

²⁰³Mahabir pd. V/s Swami Chand, AIR 1958 Raj.107; Kishnathan V/s Chandabaram, AIR 1946 Mad 343.

²⁰⁴Mahabir Pd V/s Swami chandra, AIR 1958 Raj.

²⁰⁵Udatammai Achi V/s Umyal Achi, AIR 1944 Mad 289;

²⁰⁶Somrendra V/s Asutosh Ray AIR 1939 Cal. 588

The Privy Council in the case of *Ganesh V Tulsiram*²⁰⁷ said that the karta of the Hindu joint family can under certain circumstances and subject to certain conditions enter into agreement binding on the minor members, but 'when a minor is a party to a suit and a next friend or guardian has been appointed to look after the rights and interests of the infant in and concerning the suit, the acts of such next friend or guardian are subject to the control of the court.

Their Lordship further said that when the karta is the next friend or guardian in the suit, Order 32 controls his powers and in his capacity as karta he has no power left in respect to the property, which is subject-matter of the suit.

Following this decision, the preponderance of opinion expressed by our High Courts is that when a minor is represented in a suit by a guardian in litigation, the karta retains no powers in respect to the subject-matter of the suit, and even if he is also the guardian in litigation, he cannot do any of those things mentioned in Rule 6 and 7 without the prior permission of the court.²⁰⁸ When some one else is appointed as guardian in litigation, then also karta retains no such power.²⁰⁹ The same is the position of the natural guardian.²¹⁰ Similarly, when a certificated guardian is appointed as a guardian in litigation, his powers relating to the subject matter of the suit are regulated by Order 32, and not by Section 29 of Guardians and Wards Act, 1890.²¹¹

Where the next friend or guardian has not been appointed or declared as such by a court or if he is duly appointed is suffering from some disability, the court may ask him to give security while allowing him to receive money or some other property on behalf of the guardian. But the court may dispense with security if

²⁰⁷ *Ganesh V/s Tulsiram*, ILR 1913, 36 Mad 295; see also *Ramaswaroop V/s Latajat Hussain*, ILR (1902) 29 Cal 735.

²⁰⁸ *Ramnathan V/s Veerappan*, AIR 1956 Mad 89; *Bhikhulal V/s Kisan Lal*, AIR 1959 Bom 260;

²⁰⁹ *Sheo Sagar V/s Sitaram*, AIR 1952 Pat 48;

²¹⁰ *Kastoori V/s Patiram*, AIR 1940 AII 16, *Golmibibi V/s Abdus Samad*, AIR 1937, Cal 211.

²¹¹ *Baboo Gynu V/s Sardar*, AIR 1955 Nag 192.

the person happens to be the karta of the Hindu joint family or parent of the minor.²¹²

Rules 6 and 7 are meant to protect the interest of the minor and they should not be indiscriminately applied to all matters so as to thwart the discretion and initiative of the guardian. Thus, it has been held that Rule 7 does not apply when the compromise or agreement is entered into with a third party who is not a party to suit,²¹³ or to a case where the minor is not a party to suit, though his interest is indirectly affected.²¹⁴

In *Dokku Bhushayya V. Katragadda Ramakrishnayya* ²¹⁵ the Supreme Court said that the crucial words in Rule 7 are, "any agreement or compromise... with reference to the suit," Subba Rao, J., said that the words 'with reference' if taken out of the context are of widest import and would apply to all and every proceedings and steps in the suit, but obviously 'it could not have been the intention of the Legislature that agreements in respect to such procedural steps should conform with the requirement of the Rule' the learned judge added, "it that be not so, the rule instead of protecting the interests of a minor would easily become a major obstacle in disposing of the suit."

According to the majority opinion in this case the Rule does not apply; (a) to mere procedural matters, (b) to agreements and compromise entered into with a person who is not a party to the suit, and (c) the Rule applies only during the pendency of the suit. "So consistent with the purpose of the Rule the words 'with reference to the suit' must limited to the rights put in issue in the suit."

It has been seen earlier that it lies within the **power of the guardian whether to compromise or not to compromise**, but if he decides to compromise,²¹⁶ he cannot do so without the prior permission of the Court under Rule 7, otherwise

²¹² P.B.Kedar V/s Thachamna, AIR 1970 Ker 241.

²¹³ Jitendra Nath V/s Somrendra Nath, AIR 1943 PC 96

²¹⁴ Surendra Nath V/s Sambhunath, AIR 1972 Cal 870

²¹⁵ AIR 1962 SC 1886

²¹⁶ Rule 7 (2)

such a compromise would be voidable at the instance of the minor,²¹⁷ Rule 7(1A) required that an application for leave to compromise should be accompanied by affidavit of the next friend or guardian for the suit or if minor is represented by a lawyer the latter's affidavit is also necessary.

If a guardian in litigation desires to refer any matter relating to the suit to arbitration, provisions of Rule 7 will apply.²¹⁸ If a guardian in litigation refers any dispute without leave of the court to arbitration, the award as well as the decree passed on its basis is voidable at the option of the minor.²¹⁹ Not merely leave should be obtained before any reference to arbitration is made, but the court should also give a finding that such a reference is for the benefit of the minor.²²⁰ The leave must be expressly recorded in the proceedings.²²¹ However, it is not necessary that an application for arbitration on behalf of the minor should be filed simultaneously with the application of other parties to the suit.²²² If the reference and the award are otherwise in accordance with law and the provision of Rule 7 are complied with, a decree passed on the basis of the award would not be invalid merely because it was passed a few days earlier than 30 days, as required by Section 17, Arbitration Act.²²³ If after a reference to arbitration is made with the leave of the court, the parties enter into a compromise and the award is made on the basis, the award is not invalid merely because no sanction of the court was obtained for compromise.²²⁴

3.7 POSITION OF A CHILD UNDER THE INDIAN EVIDENCE ACT, 1872

Under the Indian Evidence Act, the noteworthy children laws affording protection are the provisions regarding presumption of legitimacy of child & 'child witness s'. The philosophy & the nature of those provisions relating to children laws are critically examined here under.

²¹⁷ A.K. Singh V/s Durjan, AIR 1953 Raj 153.

²¹⁸ Deo Narayan V/s Siaban Singh AIR 1952 Pat 461;

²¹⁹ Girdhar Pd. V/s Ambika Pd., AIR 1969 Pat 218.

²²⁰ Mst. Narain V/s Mst. Ambika Pd., AIR 1937 All 65 (FB);

²²¹ Gopal V/s Santilal, AIR 1942 All 85; Kedarnath V/s Basantlal, AIR 1939 Pat 278

²²² Baboo Pd., V/s Mahabir, AIR 1951 Pat 294

²²³ Veeravalli Perayya V/s Sukhavasi Chenchu Subba Rao, AIR 1961 AP 159

²²⁴ Subramanya V/s Biravaperummal, AIR 1935 Mad 1068

3.7.1 PRESUMPTION OF LEGITIMACY

Presumption of legitimacy of child is the other area where legal provisions for children are provided. Under Section 112 of the Evidence Act the conclusive proof of presumption of legitimacy, two conditions are necessary ;

- (a) The child should have been born during the continuance of a valid marriage or if the marriage was dissolved, within 280 days after it's dissolution, the mother remaining unmarried,
- (b) The parties to the marriage should have had access to each other at any time when the child could have been begotten. The presumption of legitimacy is a presumption of law, not a mere inference to be drawn by a process of logical reasoning from the fact of marriage and birth of conception during wedlock.

It is a presumption founded upon public policy which requires that every child during wedlock shall be deemed to be legitimate unless the contrary is proved.

²²⁵ The same principle is applied in several cases. ²²⁶

The judiciary has gone a step forward by extending the status of legitimacy even to a child born to second wife. ²²⁷

A husband tried to show that he had provided separate residence to his second wife and thereafter never visited her. But the husband being not able to prove his allegation that he did not paid visits to his second wife, the child born by her was presumed to be legitimate child and also a child born to a women to her second husband, though the circumstances shows that conception was formed during her marriage with the first husband. ²²⁸ Thus the Section applies to the legitimacy of the children of married persons only on the birth of a child during

²²⁵ Pigot V/s Pigot (1938) 61 CRL 387

²²⁶ BajRangi V/s Deputy Director of Consolidation, AIR 1982, All, 335

²²⁷ Garfat V/s Garfat (1959) SR 362 Australia

²²⁸ Sethu V/s Palani ILR (1925) 49 Mad. 523 The court relied on the fact that the second husband failed to prove that he could not have had access to her even when she was the wife of the first husband

marriage, the presumption of legitimacy is conclusive, no matter how soon the birth occurs after the marriage. Under the Section, a child born in wedlock should be treated as the child of the father who was at the time of its birth, the husband of the mother, unless it is shown that he had no access to the mother at the time of its conception, irrespective of the question whether the mother was married or not at the time of the conception.

The provisions under Section 112 of the Indian Evidence Act, which is a conclusive proof of legitimacy of the child is not a rational law having sound reasoning and the logical basis what is existing under the section is losing its significance in the changing circumstances. The logical basis and the reasoning formed is the logical reasoning when the advancement in the scientific knowledge is limited and it is not so in the twentieth century. Hence, the law should be changed along with the changing phase of the scientific knowledge and technology for the betterment of human life, self-fulfillment and development.

3.7.2 CHILD WITNESS

Section 118 of the Indian Evidence Act 1872, provides the rule for 'who may testify' the child witness fall within the words 'by tender age', and the court has been given discretion to disqualify on grounds of non-understanding the questions put to him for the purpose. The competency of children is now regulated not by their age, but the degree of understanding, which they appear to possess. A child may be competent witness to give evidence in Court if it appears that she can understand the questions put to her and give rational answers thereto.

In practice, it is not unusual to receive the sufficient understanding; and in *Brasier's Case* ²²⁹ an infant, who was certainly under seven years of age, and perhaps only five, all the judges held that she might have been examined upon

²²⁹ *R V Brasier* (1779) 1 *Lea* 199 followed in *Kashi Nath Pandey V Emp.* AIR 1942 Cal 214; *Jalwanti Lodhin V State* AIR 1953 Pat 246:1952 Cri LJ 1344

oath, if, on strict examination by the court, she had been found to comprehend the danger and impiety of falsehood. No fixed rule can be laid down as to the credit that should be assigned to the evidence of a child witness. Obviously the question would depend on a number of circumstances.

Thus from the above discussion it can be said that, the public opinion on children is that they are innocent and truth reflects in their words. Therefore the underlying principle of the object of procedural law is that, in the eyes of law a child is immature to judge any thing because of its tender age and due to these reason children need more legal protection to safeguard their interests in the society and the above provisions of the Act express the same philosophy.

3.8 POSITION OF A CHILD UNDER FAMILY LAWS

3.8.1 MARRIAGE

3.8.1.1 UNDER HINDU LAW

Hindu Marriage Act originally laid down the age of marriage of bride as fifteen yrs and that of bridegroom as eighteen years. These ages were raised to 18 and 21 respectively by the Child Marriage Restraint (Amendment) Act, 1978. Section 5 (iii), Hindu Marriage Act lays down that a marriage may be solemnized between any two Hindus if "bridegroom has completed the age of 21 years and the bride the age of 18 years at the time of marriage."

But such is the policy of law that non-age does not render the marriage void or voidable. The rationale behind this policy is that minor marriages in our country are still so rampant that if we would lay down that non-age renders a marriage void, probably 80 percent of marriage would be rendered void. The objective of the policy is to discourage child marriages: to put a damper on them. In pursuant to the policy of discouraging child marriages, Section 18(a), Hindu Marriage Act attaches some penal consequences to the parties to child marriage. It is provided that an under age bride or bridegroom who procures a marriage

for herself or himself is punishable for a term of simple imprisonment which may extend to fifteen days or a fine upto Rs. 1000 or both.

The Amending Law of 1976 has made another innovation. It lays down that if a girl was married before she attained the age of fifteen years and if she repudiated the marriage before she attained the age of eighteen years irrespective of the fact whether or not marriage was consummated, then on this basis she can sue for divorce.²³⁰

3.8.1.2 UNDER MUSLIM LAW

Marriage under the Mohammedan law is in the nature of civil contract. Therefore a Mohammedan boy or girl who has not attained majority is not competent to enter into a contract of marriage but his or her guardian may enter into contract of marriage on their behalf. The father, father's father and other paternal ascendants have priority over mother and other maternal relations to give a minor in marriage. When any guardian other than the father or father's father has contracted a minor in marriage, the minor has the option to repudiate the marriage on attaining puberty.²³¹ The age of puberty under Muslim Law is attainment of 15 years.²³²

But where the marriage is contracted for the minor by the father or father's father, the minor has no option on attaining puberty unless the contract is to be manifest disadvantage of the minor or has been fraudulently or negligently entered into. The above rule has been now modified in the case of females by the Dissolution of Muslim Marriage Act, 1939, Section 2 (vii) of which provides that a woman married under Muslim Law will be entitled to obtain a decree for the dissolution of her marriage if she proves the following facts, namely:-

²³⁰ Section 13 (2) (iv), Hindu Marriage Act

²³¹ Newad Mulka Jehan V/s Mohamed (1873) 26 W.R. 26

²³² 'Mulla' Mohammedan (17th Edition) p. 269-70

- 1) she, having been given in marriage by her father or other guardian before she attained the age of 15 years, repudiated the marriage before attaining the age of eighteen years, and
- 2) the marriage has not been consummated.

Formerly the right of repudiating the marriage was lost in the case of a female, if after attaining puberty and after being informed of the marriage and of her right to repudiate it, she did not repudiate within a reasonable time. ²³³ The Dissolution of Muslim Marriage Act, 1939, now gives her the right to repudiate the marriage at any time before attaining the age of eighteen years, provided that the marriage had not been consummated. In the case of male, the right continues until he has ratified the marriage either expressly or impliedly as by payment of dower or by cohabitation. ²³⁴

The age of puberty under Mohammedan law is less than age of majority under Indian majority Act. Thus marriage at puberty is surely a child marriage, but surprisingly, the Child Marriage Restraint Act, 1929, does not affected It.

3.8.1.3 UNDER THE SPECIAL MARRIAGE ACT, 1872

Under the Special Marriage Act, 1872, marriage may be celebrated before a Registrar between persons each of whom professes one or other of the following religions, that is to say, the Hindu, Buddhist, Sikh, or Jains religion. One of the conditions upon which marriages under the Act may be celebrated is that each party must, if he or she has not completed the age of twenty-one years, have obtained the consent of his or her father or guardian to the marriage. ²³⁵

3.8.1.4 MARRIAGE UNDER THE PARSİ LAW

Under the Parsis Marriage and Divorce Act, no suit can be brought in any Court to enforce any marriage or any contract connected with or arising out of any marriage, if, at the date of the institution of the suit the husband shall not have

²³³ Bismillah V/Nur Muhammad (1922) 44 All 61

²³⁴ Mulla's Mohammedan Law, S. 210

²³⁵ Act III of 1872, Section 2

completed the age of sixteen years, or the wife shall not have completed the age of fourteen years.²³⁶ The lawful age for marriage under Parsi law is twenty one years for bridegroom and eighteen years for bride.

3.8.1.5 MARRIAGE UNDER CHRISTIAN LAW

The lawful age of marriage under the Christian religion is twenty one years for bridegroom and eighteen years for bride. Whenever a marriage is intended to be solemnized by a licensed minister of Religion notice of the intended marriage must be given to him in writing by one of the persons intending marriage.²³⁷ When one of the persons intending marriage is a minor,²³⁸ the Minister shall send a copy of such notice to the Senior Marriage Registrar of the district,²³⁹ who in turn shall send a copy of it to the other Marriage Registrars in the same district.²⁴⁰

After giving the notice, one of the persons intending marriage has to appear personally before the Minister and make a solemn declaration that there is no lawful hindrance to the marriage and, when either or both of the parties is or are a minor or minors, that the consent required by law has been obtained, or that there is no person resident in India having authority to give such consent.²⁴¹ The right of giving consent to a minor's marriage belongs successively to the father, the guardian of the person of the minor, and the mother and their consent is required for the marriage, unless no person authorized to give consent is resident in India.²⁴²

The Minister, after giving the required notice and on being satisfied regarding the consent shall issue, under his hand a certificate of such notice. Where the Minister is not satisfied that the consent of the person whose consent to such marriage is required as aforesaid has been obtained, the Minister shall not issue

²³⁶ Section 38, *ibid.*

²³⁷ Indian Christian Marriage Act, Section 12

²³⁸ "Minor" defined by Section 3 of the Act

²³⁹ Indian Christian Marriage Act, Section 15

²⁴⁰ Indian Christian Marriage Act, Section 16

²⁴¹ *Ibid*, Section 18

²⁴² *Ibid*, Section 19

such certificate until the expiration of fourteen days after the receipt by him of the notice of marriage.²⁴³

After the issue of the certificate by the Minister, marriage may be solemnized between the persons therein described. ²⁴⁴

3.8.2 RIGHT OF MINOR CHILD TO CLAIM MAINTENANCE

The right of minor child to claim maintenance arises both under the personal as well as the statutory law. The personal law by which the parties are governed while the latter is created by express enactment independent of their personal law gives the former right. Each right is unaffected by the other, and affords a cumulative remedy.

3.8.2.1 UNDER THE HINDU LAW

Ordinarily, the obligation to maintain children extends during the minority of the children, whether legitimate or illegitimate.

The right to maintenance arises from the concept of the joint family. The manager of an HUF is under an obligation to maintain all the members including the children. An unmarried daughter has a right to be maintained till her marriage and to have her marriage expenses paid. An unmarried daughter can sue the manager of the family for her maintenance.

Under the modern Hindu law, the dasiputra has no special status and is entitled to maintenance during his minority, in the status of an illegitimate son. Under the old Hindu law position of dasiputra of a Sudra was made better. According to the Mitakshara, the dasiputra of a Sudra "obtains a share by his father's choice or pleasure. But after the death of the father if there are sons from the wedded wife, let these brothers allow him to participate for half a share, that is let them give him half of as much as of the amount of one brother. The position of a

²⁴³ Ibid, Section 22

²⁴⁴ Ibid, Section 25

dasiputra of Sudra is that if his father dies joint with his own father or collaterals, again the dasiputra has no right to partition or to share on partition. After his father's death, he is entitled to maintenance out of the joint family estate, in case his father has left no separate property.²⁴⁵

Under the old Hindu law, an illegitimate son of Hindu born of a non-Hindu woman was entitled to maintenance if he was brought up as a Hindu but if he was not brought up as a Hindu, his claim was not maintainable.²⁴⁶ The same is the position under the modern law. The son born of an adulterous or casual intercourse was also entitled to maintenance under the Hindu law but only during the minority.²⁴⁷

Sub section (1) & (2) of Section(20) of **Hindu Adoption & Maintenance Act** says that ; Subject to the provisions, of this section a Hindu is bound, during his or her lifetime to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

Thus it abolishes all distinctions between illegitimate or legitimate sons. All illegitimate sons are entitled to maintenance during their minority. No illegitimate son can claim maintenance after he has become a major. But in respect of unmarried major daughters this obligations continues, though the father or mother is required to maintain a major unmarried daughter only so far as she is "unable to maintain herself out of her own earnings or other property."²⁴⁸ Again Section 20 (3) does not speak of the capacity to earn an income but speaks of the existence of a source of income and the ability to maintain oneself with such income.²⁴⁹ The obligation to maintain a daughter includes reasonable expenses of her marriage.²⁵⁰ The adopted daughter has the same right to claim maintenance as a natural born legitimate daughter.

²⁴⁵ Veltaiyappa V/s Natarajan, AIR 1931 PC 294

²⁴⁶ Krishna Kumar V/s Sheo Prasad, AIR 1947 Nag 205

²⁴⁷ Tikaram V/s Narayan Singh, AIR 1958 MP 231

²⁴⁸ Section 23 (2) of the Act, 52

²⁴⁹ Laxmi V/s Krishna, AIR 1968 Mys 288

²⁵⁰ Chandra V/s Nanak, ILR 1975 Del 175

However, the textual law is silent on the putative father's obligation to maintain an illegitimate daughter but under the modern Hindu law the controversy has been set at rest; she is entitled to claim maintenance against both her putative father and natural mother.

3.8.2.2 UNDER THE MUSLIM LAW

Primary obligation of providing maintenance for the children rests on the father. The father is primarily and basically has the obligation of providing maintenance to children, sons and daughters. According to the Hedaya, "The maintenance of minor children rests on their father, and no person can be an associate or partner in furnishing it."²⁵¹

Under Muslim law a person has no obligation to maintain his illegitimate children.²⁵² But if father enters into an agreement to maintain his illegitimate child, the agreement is valid and enforceable.²⁵³

The Muslim authorities have laid down that a father who willfully neglected or deserted his children or refused to maintain them, when he had means to do so, could be punished. The obligation to maintain children is a personal obligation of the father. The father is bound to maintain his children of both sexes or of any creed.²⁵⁴ **The Darr-ul-Muhtar lays down that if the father and his young child are both without means, then the father must earn it, and if he is unable to work for his living then he must get it by asking alms, so that he may provide for the child.**

The father is required to provide maintenance even when the child is in the custody of the mother or any other person entitled to its custody.²⁵⁵ Even when

²⁵¹ The Hedaya 408

²⁵² Pavitri V/s Katheeseemma, AIR 1959 Kat 319

²⁵³ Sukha V/s Ninni, AIR 1960 Raj 163

²⁵⁴ The fatwai Alamgiri I, 750

²⁵⁵ The Hedaya 148; Baillie, I 455-56

the father has divorced the mother of the child, his obligation to maintain his children continues.²⁵⁶ The father has to provide full maintenance.²⁵⁷

Apart from the usual requirement of maintenance, such as for food, shelter, clothing, education and medical care, the Muslim law gives also enjoin upon a father to provide a nurse for his child.²⁵⁸ Under the Ithana Ashari law, if the mother herself nurses child, then she is entitled to receive hire.²⁵⁹ The children's right to maintenance can be made a charge on father's property.²⁶⁰

The mere fact that the father is in strained circumstances is no excuse for not maintaining the children. Any person who provides maintenance for children or incurs debts for maintaining them can recover the amount actually spent on their maintenance.

Although the father's obligation to maintain his children is personal, it is not absolute. If the children have their own property or income the father may maintain them out of that property or income. In case it is necessary, the father has also the power of selling the property of his children. However, if the father has maintained his children, out of his own resources, he cannot recover the same spent on children out of their property.²⁶¹

Ordinarily, father's obligation to maintain children terminates on their attaining majority; exceptionally he has the obligation to maintain major children also.

Where the father is entitled to the custody of his child and if the father offers to child to keep it with him, then the child is entitled to maintenance only if it lives with him, unless the circumstances justify its living away from the father.²⁶²

²⁵⁶ Md. Yusuf V/s Maji Adam, (1911) 37 Bom 71

²⁵⁷ Fyzee (3rd Edition) 329

²⁵⁸ Durr-ul-Muhtar, Chapter on Nafaqa Fasl 5

²⁵⁹ The Hedaya 146

²⁶⁰ Manikyam V/s Venkayamma, 1897 AP 719

²⁶¹ The Fatwai Alamgiri I, 753

²⁶² Bayba V/s Esmail, ILR (1941) Bom 643

Further, Muslim law recognizes that under certain circumstances, mother too has obligation to maintain her minor children. But it is only a secondary obligation. Under Hanafi Law, the rule is that when the father is poor and the mother rich, then the mother is bound to maintain the children, but the mother has the right to recover the amount so spent on the maintenance of children as and when the father is in a position to repay it.²⁶³

Under the Shia Law, mother has no obligation to maintain her children even when she is in "easy circumstances" or even very affluent. Thus under all schools of Muslim law, wherever a mother provides for the maintenance of her children she can recover the amount spent by her on the maintenance of children.

All schools of Muslim law imposes it as an obligation to maintain grand children on the grandfather where both parents are dead or if the grandmother is in easy circumstances, she too has an obligation to provide for the maintenance of her grand children. But whenever, the grandparent's pay for the maintenance of the minor grand children, they can recover the amount from the father of the children as and when the latter is in a position to repay it.²⁶⁴

If the grandparents are not in a position to pay for the maintenance of grand children, the obligation devolves on those collateral relations of the children between whom and them (children) there is a bar of blood relationship (hurmat-e-nasab) in regard to marriage.²⁶⁵ In this category of relations will come uncles and aunts of the children and their parents.

3.8.3 CUSTODY AND GUARDIANSHIP OF A MINOR CHILD

Institution of child care has taken shape of great concern both in Shastric Laws and Textual Laws. Judiciary in this connection accepts the concept of realism. Usually parents do take care but the difficulty arises when the parents are

²⁶³ The Fatwai Alamgiri I, 752

²⁶⁴ Fatwai Alamgiri 375

²⁶⁵ Ibid, Hadaya 147

separated or divorced. Both the parents feel natural affection for the child and want custody of their child. In such a situation as dilemma arises as to the fact of guardianship and custody of the child between the father and the mother even after the marriage is ended.

Right to custody and right to guardianship do not bear the same legal doctrinaire. Guardianship is a broader term than custody. Former comprises looking after the interest of the child, such as education etc. But custody on the other hand implies physical closeness and control over the child and its upbringing. Though the custody and guardianship differ conceptually with each other, but in reality both aim at the interest of the child. Whoever between the father and the mother possesses the right, the main aim of the conferment of the right is the interest of the child, which should be the guidelines of the legislature and Judiciary.

3.8.3.1 THE HINDU MINORITY AND GUARDIANSHIP ACT, 1956

According to Section 6 of Hindu Minority and Guardianship Act, 1956 the natural guardian of a boy or an unmarried girl is the father and after him, the mother. The Kerala High Court established in the case of *Ram Chandra K. V/s Annapurni Ammal* ²⁶⁶ that under Section 6 of the Act the father is natural guardian and it is only after him the mother can be natural guardian. Only in the case of an illegitimate child, the mother is recognized as fully capable of looking after the child the right to appoint a guardian by will ignoring the testamentary guardian appointed by the father.

Thus in the case of 'illegitimate' boy or an 'illegitimate' unmarried girl, the mother is the natural guardian and after her, the father. The Act also lays down that the custody of the child has been qualified by the word, 'ordinarily' which has raised the dilemma in the Judiciary. In case of *Yasudevan V/s Viswalakshmi* ²⁶⁷ the mother was not given the custody of the child aged 2½ years despite the

²⁶⁶ AIR 1964 Ker. 271

²⁶⁷ AIR 1959 Ker. 403

provision of proviso to Section 6(9). Thus it is manifested that a mother has been assigned statutorily subservient position in the matter of the custody of her minor children.

3.8.3.2 UNDER THE MUSLIM LAW

Under the Muslim Law the concept of guardianship is distinct from the concept of custody. Muslim law entrusts *hizanat* (custody) of children in their tender age to mother and the guardianship to father during formative years of the child. In the event of the father being alive, he is the sole guardian of the person and property of the minor children. We can appoint any person by his will, a guardian of his children.

The right of *hizanat* belongs to the mother and nothing can deprive her except her own misconduct. It is a right recognized solely in the interest of the children but it is not an absolute right. This means that if at any time it is felt that in the circumstances of her life it would not be conducive to the physical, moral or intellectual welfare of the child to be kept in her custody, she can be deprived of it.

In the classical Hanafi Law the custody of the child recognizes the mother's custody until the son reaches 7 years or a daughter's puberty wherefrom the custody is transferred to the father.²⁶⁸ Accordingly in Shia Law the mother's right of custody of the child terminates when the boy reaches the age of 2. However, both the schools agree that the mother has the right to the custody of a minor girl till she attains the age of puberty.

3.8.3.3 UNDER THE GUARDIAN & WARDS ACT, 1890

The Guardian & Wards Act, 1890, governs guardianship in all other communities. It clearly lays down that the father's right is primary and no other person can be appointed as a guardian unless the father is found unfit. Thus, under the Guardians' & Ward Act 1890, the superior right of the father in respect

²⁶⁸ *Idu V/s Amiran* (1886) ILR 8 All 3222

of guardianship was established. The position of the mother as a guardian of her children was of the second grade. Even the father could under old law nominate a guardian of his children so as to exclude the mother of the child through orally or the process of the execution of deed. The mother had no power to appoint testamentary guardian even if the father of the child had expired.

3.8.3.4 THE INDIAN DIVORCE ACT, 1869, ON CUSTODY AND GUARDIANSHIP

Under the Indian Divorce Act 1869 the Court has an unfettered discretion in making interim orders for the custody, maintenance and education of the child. The discretion is to be exercised by the court in considering the consideration of any particular case. No hard and fast rule can be laid down. Thus it is evidenced that the Act 1869 emphasizes the father's prerogative.

3.8.3.5 THE PARSI MARRIAGE AND DIVORCE ACT, 1936, ON CUSTODY AND GUARDIANSHIP

Section 49 of the Parsi Marriage and Divorce Act, 1936 deals with the custody, maintenance, and adoption of the children under the age of 18 years. It empowers the court to pass such interim order and to make such provisions in the final decree as it may deem fit and proper in respect of such suits.

3.8.4 ADOPTIONS

Adoption and informal foster-care are part of our historical social tradition in India. From ancient times the practice of Adoption of a child by childless Hindu couples has been carried out with rituals and ceremonies whereby the entire community is made aware of the irrevocable legal status of the child. Like in all patriarchal societies, the emphasis was on adoption of a male child to continue the family lineage and do the religious duties, but adoption of girls was also prevalent. However, adoption was parent-centered to fulfill the needs of the parent rather than child-centered.

When India gained independence in 1947, it was decided that all matters pertaining to family life would continue to be governed by the personal laws of each religion. The customary practice among Hindus was codified and incorporated into the Hindu Adoption & Maintenance Act, 1956. All other who wished to take a child into their family could do so only on guardianship under the Guardian and Wards Act, 1980. In 1967, 1972, 1978, 1980 attempts have been made to introduce a Uniform Adoption Bill in Parliament, which would enable persons of all religious backgrounds to take a child in Adoption. However adoption, under the following head has been discussed. (1) Adoption & Maintenance Act, 1956 and (2) Guardian and Wards Act, 1980.

Under the old Hindu law only a male Hindu could be adopted and an orphan child could not be adopted. Then there were the restrictions of caste and Gotra. Female child could not be adopted. Under the old Hindu law only the male Hindu had the right to make an adoption and the consent or dissent of his wife to the proposed adoption was immaterial. Only a sonless Hindu can adopt and only one son could be adopted.

3.8.4.1 HINDU ADOPTION & MAINTENANCE ACT, 1956

Under the modern Hindu law, every Hindu, male ²⁶⁹ or female,²⁷⁰ has capacity to make and give in adoption provided he or she has attained the age of majority and is of sound mind. A Hindu married male can adopt only with the consent of his wife. A bachelor, widower, unmarried woman or widow can make an adoption.

But a married woman cannot adopt even with the consent of the husband. A married woman can adopt during the life-time of her husband and a married Hindu male can adopt without the consent of his wife, as the case may be, if her husband in the former case, and his wife in the later has ceased to be a Hindu, or

²⁶⁹ Section 7

²⁷⁰ Section 8

has completely and finally renounced the world or has been declared by a court to be of unsound mind.

An adoption of a male child can be made only when the adopter has no Hindu son, son's son, or son's son's son, and adoption of a female child can be made only when there is no Hindu daughter or son's daughter. When the child of opposite sex is adopted the adopter must be senior by at least twenty-one years to the child.²⁷¹

Under the Hindu law for a proposed adoption no order of the court is necessary. Only in case when a guardian gives the child in adoption prior permission of the court is necessary, and no court would accord permission unless it finds that the proposed adoption would be for the welfare of the child.²⁷²

The result of adoption is that for all intents and purposes the adopted child becomes the child of the adoptive family, his position is that of a natural born son in the adoptive family, which implies that he cannot only inherit from his parents but from all other relations in his new family. On the other hand, his relationship with his natural family comes to an end.

Only a Hindu child can be adopted. An already adopted child cannot be adopted. The child must be below fifteen and unmarried, unless a custom permits the adoption of an older or married child. Two or more persons cannot simultaneously adopt the same child.

All over the world, adoption is now recognized more as a system of Childcare than as mode to provide a Child to the Childless. A Child of any other community may be in urgent and dire need of being cared for and looked after, because of the loss or indigence of the Parents or other reasons. And Adoption of such Child by suitable Parent(s) may be the only way out for his survival, growth and other development. But under the Hindu Adoption and Maintenance Act, 1956 Non-Hindu Child cannot be adopted, as there is no Law

²⁷¹ Clauses (iii) and (iv) of Section 11

²⁷² Section 9(5)

providing for adoption of such a Non-Hindu Child. Such a Child is, therefore, discriminated against solely on the ground of religion, which is countermanded by Article 15(1) of the Constitution.

However, it should be noted that the new Juvenile Justice (Care and Protection of Children) Act, 2000, has in Section 41 and Section 42 provided for Adoption and Foster Care for the Rehabilitation and Social Reintegration of such Children, as are Orphaned, Abandoned, Neglected and Abused. Provision for Adoption for Orphan or Abandoned Child, or Child of unknown Parentage has also been made in the Hindu Adoption and Maintenance Act, 1956 by the Amendment Act of 1962. But new provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 may be regarded as laudable steps to provide Adoption of Children irrespective of their *Religion of the Adopter and the Adoptee*. The Hindu Adoption and Maintenance Act, 1956, in spite of later Amendments, has still remained very much glued to religion.

3.8.4.2 THE GUARDIAN & WARDS ACT, 1980, ON ADOPTION

The provision of Adoption is also carried out by The Guardians Act, which has another advantage for the purpose of adoption. If any person except Hindus wants to provide care to children other than one's own, one has to take resort to the Guardian and Wards Act, as there is no other Adoption law available to persons belonging to other communities other than Hindus. Therefore for the purpose of inter-country adoptions, the provisions of the Guardians and Wards Act 1890 are utilized.

Section 7 of the said act provides that, when the district court is satisfied that appointment of the guardian will be for the welfare of the minor, it appoints one. But the person appointed should come under any of the four categories mentioned in the section 8 of the act.

These four categories are:

- a) Any person desirous of being guardian of the minor
- b) Any relative or friend of the minor

- c) The collector of the district within whose jurisdiction the minor resides or in which he has property, and
- d) The collector having authority with respect to the class to which the minor belongs.

It may be noted that there is no concrete legislation present in India, which deals with Inter-Country adoption. In fact before the *Laxmikant Pandey's case*²⁷³, it did not have any guidelines regarding it. High Court of Bombay and Delhi framed some rules, which were found to be quite insufficient. It is thus submitted that, though there exists no statute dealing with Inter-Country adoption in India, sufficient rule have been formulated to make it simple worldwide.

3.8.4.3 SUPREME COURT GUIDELINES ON INTER- COUNTRY ADOPTIONS:

The concept of Inter-Country adoption is relatively a new concept. It did not find place in the top priorities of the legislators. There was not and still their does not exist a legislation which primarily provides for the rules regarding Inter-Country adoption. But in the year 1984, the Hon'ble Supreme Court of India in a landmark case of *Laxmikant Pandey V/s. Union of India*²⁷⁴ laid down few principles governing the rules for Inter-Country adoption.

The case was instituted on the basis of a letter addressed to the court by a lawyer, Laxmikant Pandey alleging that social organisations and voluntary agencies engaging in the work of offering Indian children to foreign parents are indulged in malpractices. It was alleged that these adopted children were not only exposed to long horrendous journey to distant foreign countries at the risk of their life but they also ultimately become prostitutes and beggars. Supreme Court in this case expressed its opinion and framed certain rules for Inter-Country adoption. The Hon'ble Court asserted in Para 8 of the judgment that, " while supporting Inter-Country adoption, it is necessary to bear in mind that the primary object of giving the child in adoption being the welfare of the people,

²⁷³ AIR 1984 SC 469

²⁷⁴ Ibid

great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able provide to the child a life of moral and material security or the child may be subjected to moral and sexual abuse or forced labour or experimentation for medical or other research and may be placed in worse situation than that in his own country."

It further went on to give the prerequisites for foreign adoption. It stated that "In the first place, **every application from a foreigner desiring to adopt a child must be sponsored by social or child welfare agency recognised or licensed by the government of the country in which the foreigner is a resident.** No application by a foreigner for taking a child in adoption should be entertained directly by any social welfare agency in India working in the area of Inter-Country adoption or by any institution or centre or home to which children are committed by the juvenile court." The Supreme Court did not stop at that. It also insisted the age within which a child should be adopted in case of Inter-Country adoption. **"if a child is to be given in Inter-Country adoption, it would be desirable that it is given in such adoption before it completes the age of 3 years."**

The Supreme Court delivered such a ruling because it felt if a foreign parent adopts a child before he/ she attains the age of 3, he/ she has more chances of assimilating to the new environment and culture. Another important rule framed by the Court during the course of judgment was " Since there is no statutory enactment in our country providing for adoption of a child by foreign parents or laying down the procedures which must be followed in such a case, resort had to be taken to the provisions of Guardian and Wards Act, 1980 for the purpose of facilitating such adoption.

Following this judgment, the Indian courts gradually broadened the scope of adopting child to other countries. In the later judgments, the courts have also interpreted the word ' custody' to make adoption easier. The Bombay High

Court in *Re Jay Kevin Salerno* ²⁷⁵ iterated that " where the custody of a child is with an institution, the child is kept in a private nursing home or with a private party for better individual care of the child, it does not mean that the institution ceases to have the custody of the child." Therefore it may be submitted that in the absence of any explicit legislation on the subject, the Supreme Court has played a pivotal role in regulating the adoption of tendered aged children to foreign parents. It has taken the help of various international guidelines and subject to Indian culture framed the rules thereof.

3.8.5 SUCCESSION

3.8.5.1 UNDER THE HINDU LAW

By succession we mean the passing of property from one person to another person on the death of the former. Succession is of two types, (a) testamentary and (b) intestate. If a person executes a valid will as to whom the property should go on his death and his property is passed on accordingly, it is referred to as testamentary succession. If there is no valid will and the property of a deceased person passes to his heirs as provided by law, it is called intestate succession.

According to **Section 8 of the Hindu Succession Act**, where a male Hindu governed by Dayabhaga law dies leaving property or where a male Hindu governed by Mitakshara law dies leaving his separate or self-acquired property, Class I heirs will inherit his property and in their absence class II heirs of the Schedule. The Class I heirs succeed simultaneously, that is, together, and they are twelve in number. Of this mother, widow, son and daughter are primary heirs and the remaining are the near heirs of a predeceased son or paternal grandson, or son and daughter of predeceased daughter.

The Section further lays down that to determine the interest of the deceased we must assume that a partition of the property had taken place immediately before

²⁷⁵ AIR 1988 Bom 139

his death. Thus, while a son retains his interest by virtue of right by birth, and takes a share in the father's interest, the daughter is enabled to take a share in her father's interest only.

One more important rule is that if two or more heirs get a right together in the property of an intestate, the property will be divided per Capita and not per Strips until and unless there is a specific provision in this respect, such heirs will get the property as tenants-in-common. It will not devolve as property in Joint tenants.

Further, a child, who was at the time of the death of an intestate in the womb and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the intestate shall be deemed to vest in such a case with effect from the death of the intestate.

Again, a curious problem arises when two or more such persons who are in a position that they would be heirs in each other's successions, or people who are legatees in each other's will, or others, comes to death in such circumstances that it is impossible to determine that who died first and who survived the other. Our nation, had adopted a rule according to which, when two persons died in circumstances when it is impossible to judge who died first, then for all purposes relating to succession to property, it shall be presumed, until the contrary is proved, that the younger survived the elder.

3.8.5.2.1 UNDER MUSLIM LAW

The property of a deceased Muslim is to be distributed according to the law of the school to which he belonged at the time of his death. The law of the schools to which the persons claiming the property as his shares, is immaterial. On the death of a person, who is a convert to Islam, the distribution of his property will take place according to the Muslim Law of the school, to which he became a

convert. It is noteworthy that his non-Muslim relatives will have no right to inheritance.

The inheritable property of Muslim is the amount which remains after the payment of

- 1) the funeral expenses of the deceased to a reasonable amount together with death-bed charges, including fees for medical attendance and boarding and lodging for one month previous to his death,
- 2) the expense of obtaining probate or letters of administration,
- 3) the wages due for services rendered to the deceased within three months next preceding his death by any labourer, artisan or domestic servant
- 4) all debts of the deceased
- 5) the legacies left by the deceased provided they do not exceed one third of the bequeathable property unless the heirs consent thereto after the death of the testator.

There is no distinction between ancestral and self acquired under Muslim Law. There is no distinction in the Muslim Law of inheritance between movable and immovable property, and the heirs take their shares in all the properties, whether movable or immovable. Only in case of a childless widow, a distinction is drawn under Shiah Law, between land and other properties; such women will not take share in her husband's land.

There is no special right to the eldest son except to the certain Articles of the father, such as wearing apparel, the Koran, ring, and sword in shiahs, shafais and malikis.

Any son of a Muslim does not acquire a interest in the property of a person by mere birth, till the propositus alive, the heir has got no right or interest in the property, and hence a possible heir can not transfer the interest to others.

Muslim law do not authorize relinquishment of renunciation of future right of inheritance so as to be binding upon the maker in the sense that the estate passes

to the person in whose favour, it is made. But an expectant heir may have so acted as to stop himself from claiming the inheritance when it falls due.

On the death of Muslim, the person entitled to share of his property on inheritance takes a vested interest in the share even before distribution, so that if the heir dies before distribution, his share would pass to his own heir at the time of his death.

Again the Sunni Law of Inheritance does not recognize the principle of representation. Thus, if a Muslim dies leaving a son and a number of grandsons by a predeceased son, the surviving son takes the entire inheritance to the exclusion of the grand children. But, if there be three grandsons through one predeceased son and four sons through another predeceased son, all the seven grandsons will take their shares per capita and not per strips. In other words, the estate will be divided in seven and each will get equal share.

But, Shiah Law recognizes the principle of representation, and the succession is always per stripes and not per capita. This is the way in which a Mohammedan will get his share in the estate. A minor will get the estate in the way as mentioned above. In short a minor observing Islam has no right to heirship until and unless the propositus dies.

3.9 THE CHILD AND CRIMINAL LAW

Justice and Child is distinct jurisprudential criminological branch of socio-legal speciality which is still in its infant status in India and many other countries.²⁷⁶ Multi-facet protection has been given to child under our criminal law.²⁷⁷ It is well accepted by all sociologist and criminologist of the world that children are the most important National asset, the future well being and prosperity of the Nation depends as to how they grow and develop. Therefore, special protection is essential is essential in view of their tender age, physical weak position and

²⁷⁶ Baldev Singh Malhi, Lecturer, Department of Law, Punjab University, Patiala

²⁷⁷ For example, when crime committed by children; against children; protection to child from social hazards-beggary, child marriage, cruelty, indignity and immoral trafficking etc

mental faculties. So first and foremost consideration and purpose of penal law should always be the child's welfare, reformation and rehabilitation and not punishment. The main responsibility to uphold this philosophy lies on the magistrate who can make or mar the system established by special law for children.

The reformatory and rehabilitatory approach of criminal justice, particularly for juvenile is resulted from failure of punitive methods. In spite of advanced detective equipment and methods, trained and organized huge police system and other enforcement agencies the number of Juvenile Delinquents is increasing. The highest crime committed by Juveniles is theft and burglary.

3.9.1 INDIAN PENAL CODE 1860

3.9.1.1 OFFENCES COMMITTED BY CHILDREN

Apart from general offences, offences may be committed by children and may be committed in relation to a child. Section 82, 83 deals with the offences committed by children. We can say that section 82 gives the absolute immunity whereas section 83 gives qualified immunity.

The age group up to seven years is governed by section 82 of the IPC. Child under this age group is granted absolute immunity from every criminal liability under IPC or any other law. Child of this age is considered absolutely *doli incax*. Mens-Rea essential for crime is not attributed to an act of such infant because he is unable to entertain an evil design. So the fact that child at the time of committing an offence was below seven years of age is ipso-facto an answer to the prosecution.

This age of absolute immunity was incorporated in IPC more than 120 years back. Since there are revolutionary changes in the Criminology and Penology it would be unjust to cling to this age old rule to impose criminal responsibility at the age of seven years. It is pertinent to mention here that the English law from

where we adopted this rule has raised this age to ten years in 1963 and Children and Young Person Act 1969 further intended to raise it up to 14 years. It is nowhere below 13 years in Continental countries.²⁷⁸

It is ironical that countries having essential conditions for mental development such as healthy atmosphere, proteinic food, best health facilities and education have fixed higher age for absolute immunity. On the other hand in India where majority of the children are living in an unhealthy atmosphere and without health facilities, minimum bare bread and elementary education etc., the age of absolute immunity is kept only up to seven years. So it is submitted that it should be raised to at least ten years.

Section 83 Says that, Nothing is an offence which is done by a child above seven and below twelve years of age, who has not attained sufficient majority of understanding to judge the nature and consequences of his conduct on that occasions. This section covers the child of age group of seven to twelve years. Immunity from criminal liability in this age group is known as **qualified immunity** in the sense that child in the age group is immune from criminal liability only if he proves that he has not attained the sufficient maturity of understanding the nature and consequences of his Act. The burden lies upon the accused to plead and establish the immaturity. But presumption of the maturity of understanding the consequence of this act at such a tender age is highly unreasonable and seems to deny the protection under modern corrective and rehabilitative approach of criminal justice. It is also an approach of punitive and contradiction in our criminal law policy" On the one hand we recognize the need of a child below 18 years under Juvenile Justice Act, 2000, for protection against the heavy hands of criminal law and severities of the penal system, and on the other hand we presume a child below the age of 12 years to be sufficiently mature to shoulder criminal responsibility.... It is respectfully submitted that to be near to the protections granted to children in the developed countries like

²⁷⁸ Encyclopedia of Social Sciences 307.

U.K., U.S. etc, the minimum age of criminal liability should be ten years. The burden to prove the maturity should be on the prosecution and to achieve the end Section 105 of Evidence Act should be amended accordingly.

Further under IPC after the age of immaturity child is fully responsible for his criminal acts. But up to upper age limit child has some procedural and sentencing privileges under special laws such as Criminal Procedure Code, Probation and Offenders Act and Juvenile Justice Act. Under these laws child is protected from ordinary procedure of Criminal Courts and heavy punishments such as death imprisonment. What is upper age of child? It is not uniform in India and varies from 16 to 16 years. It is submitted that upper age limit should be extended upto 18 years uniformly.

3.9.1.2 OFFENCES COMMITTED AGAINST THE CHILDREN

Now we take up another issue , **offences committed by others in relation to children.** Explanation 3 of Section 299 of Indian Penal Code, 1860 says that the causing of the death of child in the mother's womb is not homicide. But, it may amount to culpable homicide to cause the death of living child, if any part of that child has been brought forth though the child may not have breathed or been completely born.

The explanation only says that the causing of the death of a child in the mother's womb is not homicide. It also states when the causing of death of child amounts to homicide. It may be noted that the **causing of a death of a child in the mother's womb is a punishable offence under section 315** of the Indian Penal Code.

The causing of the death of a child in the mother's womb is not homicide for the simple reason that foetus is not considered in the category of a human being. The life of a child while it remains within its mother's womb is a part of the mother's body. For this purpose, it does not have separate existence. But, as soon

as any part of the child has been brought forth from the mother's womb, it is regarded as a living human being. If the foetus dies in the mother's womb, it is not a culpable homicide. It may amount to an offence under section 312 or under section 314 or under section 315 of I.P.C. according to the facts of a case. As per this explanation, it is homicide to cause the death of a living child, if any part of that child has been brought forth though the child may not have breathed or been completely born.

The MTP Act heavily protects the woman but not the 'child'. If the pregnancy is unwanted and is the failure of contraceptive, the woman suffers a grave injury to her mental health but if the pregnancy is terminated the child loses his or her life. The mental health of a woman can be restored later on but can the child who lost its life be restored by any means?

It is very strange to note that the killing of the child in the womb is not even considered as homicide. For this sole reason, the prosecution is compelled to file cases of this nature in Section 312 of the IPC for causing a woman to miscarry and the culprit rewards only a minor punishment of a term not beyond three years or a fine or both. And if act is done with intent to prevent child from being born alive, or cause it to die after birth, the guilty can be booked under Section 315 IPC but the punishment is comparatively less than killing of human being.

Even when the act amounts to culpable homicide of a child unborn the Section 316 provides lesser punishment. Only when the woman is "quick with child" the offence rewards imprisonment, which may not extend to seven years and of course shall also be liable to fine. Clearly while law makes provision for the woman, the child in the womb is ignored. Under the comment on the Section 299 some definitions are given. 'Causes death' is one of them. Here 'death' means the death of a human being as defined under Section 46 of the IPC. But this word does not include the death of an unborn child.

Under English law, the child should have completely emerged from its mother's womb, while under the Indian law (as per this explanation) any part of the child may come out of its mother's womb).

According to **Section 361 of IPC**, Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian is said to kidnap such minor or person from lawful guardianship.

The words "lawful guardian" in this section includes any person lawfully entrusted with the care or custody of such minor or other person. But this section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

Further **Section 363A** of Indian Penal Code, 1860 enumerates;

- 1) Whoever kidnaps any minor or, not being the lawful guardian of a minor, obtains the custody of the minor, in order, that such minor may be employed or used for the purpose of begging, shall be punishable with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
- 2) Whoever maims any minor in order that such minor may be employed or used for the purposes of begging shall be punishable with imprisonments for life, and shall also be liable to fine.
- 3) Where any person, not being the lawful guardian of a minor, employs or uses such minor for the purpose of begging, it shall be presumed, unless the contrary is proved, that he kidnapped or otherwise obtained the custody of that minor in order to use him for the purpose of begging.
- 4) In this section,

(a) "begging" means-

- i. soliciting or receiving alms in a public place, whether under the pretence of singing, dancing, fortune-telling, performing tricks or selling articles or otherwise :
- ii. entering on any private premises for the purpose of soliciting or receiving alms;
- iii. exposing or exhibiting, with the object of obtaining or extorting also, any sore, wound, injury, deformity or disease, whether of himself or of any other person or an animal;
- iv. using a minor as an exhibit for the purpose of soliciting or receiving alms;

(b) "minor" means-

- i. in the case of a male, a person under sixteen years of age: and
- ii. in the case of female, a person under eighteen years of age.

This section was inserted in the years 1959. In the statement of Objects and Reasons it is stated that the aim of this amendment is "to put down effectively the evil of kidnapping of children for exploiting them for begging, the provisions existing in the Penal Code are not quite adequate. There is also no special provision for deterrent punishment for the greater evil of exploiting children so as to make them object of pity."

*In one case*²⁷⁹ it has been held that there are case wherein minors are kidnapped and they are castrated with a view to make them eunuchs who could be useful as professional beggars. "It may be noted that the definition given of a minor, under the Indian Majority Act, is different from the definition given in this section. Punishment provided for offence under section 363A(1) is 10 years imprisonment and fine, and for offence under section 363A(2) is imprisonment for life and fine.

²⁷⁹ 1983 Cr. L.R. (Guj. & Mah.) 412

Section 372, talks about Selling minor for purpose of prostitution etc. According to this section, Whoever sells, lets to hire or otherwise disposes of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or elicit intercourse with any person or for any unlawful and immoral purpose or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

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

This section speaks of an offence committed by a person who sells, lets to hire or otherwise disposes of the person with requisite intent or knowledge. It strikes at the seller whoever, he may be, and the purchaser who profits out of such transactions. This section applies to all persons under eighteen years, whether male or female. Under this section it is necessary to prove that the accused intended that the person shall be employed for an immoral purpose.

Prostitution is the surrender of a girl's chastity for money. In one case²⁸⁰ it has been held that it is the offering of a person for promiscuous sexual intercourse with men. The Devdasi system is a variety of the offence of prostitution wherein girls under eighteen years are dedicated to the service of temples as basis. In one case²⁸¹ it has been held that this amounts, disposal of such minors, knowing it to be likely that they will be used for the purpose of prostitution within the meaning of this section. In one case²⁸² it has been held that the penal law

²⁸⁰ AIR 1929 Bom. 266.

²⁸¹ (1892) 16, Bom. 737.

²⁸² (1881) 1. Weir 359 (EB.)

overrides any private law or usage or religious practice of turning girls into Devdasis meant for prostitution.

Punishment for an offence under this section is imprisonment up to 10 years and fine. It is cognizable, non-bailable compoundable and triable by a Court of Sessions.

Section 373, deals with Buying minor for purposes of prostitution etc. It says that whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years with intent that such person shall be at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Any prostitute or any person keeping or managing a brothel who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved be presumed to have obtained possession of such female with the intent that she will be used for the purpose of prostitution.

This section speaks of an offence committed by person who buys, hires, or otherwise obtains possession of the person with requisite intention or knowledge, Explanation I to this section explain that when a girl under the age of 18 years is disposed off or obtained possession off, by a prostitute or a brothel-keeper, the person disposing off or obtaining possession of such girl shall be presumed to have disposed off her or obtained possession of the girl for prostitution.

A Brothel is a variety of disorderly house, a place resorted to by persons of one or both sexes for heterosexual or homosexual practices, particularly for reward.

Section 376 of IPC has two parts and three explanations, Part one punishes a rapist, who does not fall under part two, with (i) minimum punishment of imprisonment which shall not be less than 7 years but which may be for life or (ii) for a term which may extend to 10 years and also fine (iii) if the person raped is his own wife and is under 12 years of age, he shall be punished with imprisonment up to 2 years or fine or with both. If sentence for less than 7 years is to be imposed the Court has to state the reasons thereof.

'Part two of the section has seven clauses: Clauses (a) to (g). These clauses enumerate the cases of custodial rape, rape on pregnant woman, rape on a girl under 12 years of age and gang rape. Punishment for these types of rapes is a minimum imprisonment of 10 years which may in suitable cases extend to life imprisonment and fine. For imposing less than 10 years imprisonment punishment the Court is required to state reasons as per proviso to part two.

3.9.2 THE CRIMINAL PROCEDURE CODE, 1973

Under the Reformatory Schools Act and Cri.P.C some of the provisions relating to the nature of the sentence to be awarded to young offenders were provided which was very similar to ordinary Criminal court. It was only after the recommendation of Jail Committee (119-20). States like Madras(1920) and Bengal(1922) enacted Children Acts providing separate courts with easy procedure for children. To achieve uniformity section 29B was inserted in Cri.P.C in 1923 which is redrafted as section 27 of the present Cri.P.C with some changes. Section 27 is read as "Any offence not punishable with death or imprisonment for life, committed by any person who at the date when he appears or is brought before the court is under the age of sixteen years, may be tried by the Court of a Chief Judicial Magistrate, or by any Court specially empowered under the Children Act, 1960 or any other law for the time being in force providing for the treatment, training and rehabilitations of youthful offenders".

This section²⁸³ provides for jurisdiction in respect of an offence, when the two conditions are fulfilled, viz;

1. Offence is committed by a child, under the age of 16 years.
2. Offence should not be punishable with death or imprisonment for life.

Thus it is clear that section 27 applies only to offences punishable other than death or life imprisonment and even in that sphere it is permissive which is obvious from words "may be tried". It means child under 16 years accused of any offence punishable other than death or life imprisonment may be tried by the Court of a 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 rehabilitations of youthful offenders

But now we are having juvenile justice Act which has repealed children Act, 1960, according to juvenile Justice Act, 2000, Juvenile should be dealt with by the Juvenile Court and in absence of a Juvenile Court by the concerned first class magistrate's Juvenile Court. In *Ram Prasad v. State of Bihar*²⁸⁴ one of the accused was 16 years old and he was convicted undergo 5 months imprisonment. There was no overt act alleged against him. The Supreme Court directed his discharge from jail immediately and criticized the joint trial of child accused with adults in the absence of Children Act in the State of Bihar and detention of children in regular prison.

According to **Section 125** of Cr.P.C. the father is under the statutory obligation to maintain his minor child, irrespective of the fact that such a child is legitimate, illegitimate, married or unmarried. This liability continues till the minority of children and the minor is unable to earn for himself. If any child becomes able to maintain himself then fathers liability to maintain children ceases. This provision applies equally to Muslim and Hindu child.

²⁸³ Section 27, of Cr.P.C.1973

²⁸⁴ 1990 Cr. L.J. 351 (Bom.)

If the child is with mother and mother refuses to live with her husband, the child is entitled to maintenance. A divorced woman having the custody of child, can claim maintenance for herself and for her minor child. Even an unchaste woman can also claim maintenance for a minor child from the father.

Sub clauses (b)&(c) of Sub Section (1) of Section 125 of criminal Procedure Code lays down that "if any person having sufficiently means, neglects or refuses to maintain his legitimate or illegitimate minor child, whether married or unmarried, but unable to maintain itself, And legitimate or illegitimate child who has attained the majority (not being married daughter) but because of physical or mental injury is unable to support itself. Then magistrate of first class may make a monthly allowance for maintenance".

The matrimonial court has power to pass interim orders in these matters during the pendency of the proceedings. On passing of a decree the court can pass permanent orders also.

Any such allowances for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order or, from the date of application for maintenance or interim maintenance and expenses of proceedings, as the case may be.

Section 126 talks about the procedure to be followed while making an application under Section 125, and Section 127& 128 provides for alteration in allowance and enforcement of order of maintenance respectively.

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

The concept of juvenile justice is composed of two important ideas, namely fairness or justness to children and alternative justicing standards. This Act consolidates and amend the law relating to Juveniles in conflict with law and children in need of care and protection. It provides for proper care, protection

and treatment of juveniles by catering to their developmental needs and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interests of children and for their ultimate rehabilitation through various institutions established under this enactment.

The constitution of India, in several provisions including clause (3) of Article 15, clauses (e) and (f) of Article 39, articles 45 and 47, imposes on the State a primary responsibility of ensuring that all the needs of children are met and that their basic human rights are fully protected.

The General Assembly of the United Nations has also adopted the Convention on the Rights of the Child on 20th November, 1989. Convention on the Rights of the Child has prescribed a set of standards to be adhered to by all state parties is securing the best interest of the child; It emphasizes on the **social reintegration of child victims, to the extent possible, without resorting to Judicial proceedings;**

The Government of India has ratified the convention on the 11th Dec. 1991. Therefore it was expedient to reenact the existing law relating to Juveniles bearing in mind the standards prescribed in the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the protection of Juveniles Deprived of their liberty (1990) and all other relevant international instruments.

The term "Juvenile justice" before the onset of delinquency may refer to social justice: In *Arnit Das v. State of Bihar*²⁸⁵, the Supreme Court has held that the Juvenile Justice Act provides for justice after the onset of delinquency. The social factor leading to the birth of delinquency and the preventive measures which would check Juvenile delinquency legitimately fall within the scope of social

²⁸⁵ AIR 2000 SC 2264

justice. Once a boy or a girl has assumed delinquency, his or her treatment and trial at the hands of the justice delivery system is taken care of by the provisions of the Juvenile Justice Act.

The Act aims at laying down a uniform juvenile Justice system in the country avoiding lodging in jailor police lock-up of the child; and providing for prevention and treatments of Juvenile delinquency, for care, protection, etc. post-Juvenility... Thus the legislative aims and objectives go to show that this legislation has been made for taking care and custody of a Juvenile during investigation, inquiry and trial. i.e. from the point of time when the Juvenile is available to the law administration and justice delivery system. It does not make any provision for a person involved in an offence by reference to the date of its commission by him. The long title of the Act suggest that the content of the Act is the Justice aspect relating to Juvenile.

Though the JJ Act does not have the character of a comprehensive child development legislation, it was seen as a welcome development. However, unfortunately, many states in India are yet to make necessary Rules to enforce the JJ Act. One positive aspect of the JJ Act is that it provides for decision-making devices like the Juvenile Justice Boards and Child Welfare Committees having multidisciplinary composition. Nonetheless, it was observed that in many places the Juvenile Justice Boards (JJB) and the Child Welfare Committees (CWC) are not constituted at all.

The previous experience shows that in many places where such bodies were constituted under the JJ Act 1986, its members were not sensitive and passionate to the cause of child rights. In the absence of a sensitive juvenile justice system, even those children who are brought before the system continued to suffer. It is time for professionals from all disciplines to give a serious thought to this situation and make efforts to ensure that the JJ Act is properly implemented with the help of carefully constituted and multidisciplinary JJBs and CWCs.

This new Act should include procedural guarantees such as right to counsel, right to speedy disposal of cases and right to child friendly proceedings. In most of the advanced countries one of the most resorted to dispositional alternative is the compulsory education order. Children must be allowed to participate in the running of the homes. The education of these children should be in keeping with the market trends²⁸⁶. The inspection of the institutions should be carried out to with some special issues in mind. Homosexual behavior is largely common in institutions. There should be compensation provide for children who have been victims of custodial and institutional abuse as per the Supreme Court decision in the case of *Nilabati Sehara v State of Orissa*²⁸⁷.

The Government schemes relating to child development, education and child labour should reach the children in institution. Recruitment and personnel policies of the staff in these homes need to be immediately reviewed so that committed and sensitized people are involved in looking after children²⁸⁸.

3.10. CONCLUSION

In the light of the insightful analysis of the object, scope, nature and the hidden philosophy of children laws under various enactments, it is observed that the accepted morality of the day is the public policy which operates as rule of law²⁸⁹ for public good and welfare of the community.²⁹⁰ On the basis of these principles as discussed above, an agreement against public policy is void.²⁹¹ The concept of public policy in contract law pertaining to children is based on the age, incapacity, and inexperience of an infant. Similarly, under various laws

²⁸⁶ *Bajpai Asha, Child Rights in India - Law, Policy and Practice*, O UP, New

²⁸⁷ AIR 1993, SC.

²⁸⁸ *Bajpai Asha, Child Rights in India - Law, Policy and Practice*, O UP, New

²⁸⁹ *Egerton V/s brownlow (Earl)* (1853) 1 OER 359; Lord Truro remarked that 'public policy' is that principle of law which holds that no subject can unlawfully do which has a tendency to be injurious to the public or is against the public good.

²⁹⁰ Ibid

²⁹¹ *James V/s Randoll*. (1774) 1 COW p.37, Lord Field laid down that a contract contrabonos mores (contrary to good morals) is void. In India under S.23, Indian Contract Act, court has to see whether a particular object or consideration is moral or not.

pertaining to children as shown above the same factors are taken into account on humanitarian considerations to protect the interests of children.

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