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Offences Relating to Women and Children

by

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STATUS OF WOMEN

In India, women constitute nearly fifty percent of the population. About 48.60% of the rural population is that of women and they are the vital labour force of the country. However, they remain amongst the most oppressed ones and are often denied the basic human rights.

Pre-Independence:

According to studies, women enjoyed equal status and rights during the early Vedic period. However, later (approximately 500 B.C.), the status of women began to decline with the Smritis and with the Islamic invasion and later Christianity curtailing women's freedom and rights. By and large, the women in India faced confinement and restrictions. The practice of child marriages is believed to have started from around sixth century. Women played an important role in India's independence struggle.

Constitution of India:

The Constitution of India guarantees to all Indian women equality (Article 14), no discrimination by the State (Article 15(1)), equality of opportunity (Article 16) and equal pay for equal work (Article 39(d)). In addition, it allows special provisions to be made by the State in favour of women and children (Article 15(3)), renounces practices derogatory to the dignity of women (Article 51(A) (e)), and also allows for provisions to be

made by the State for securing just and humane conditions of work and for maternity relief. (Article 42).

Reservation of 50 per cent of the posts in favour of female candidates is not arbitrary. Reservation of certain posts exclusively for women is valid under Article 15(3). Clause 3 of Article 15 which permits special provision for women and children has been widely resorted to and courts have upheld the validity of special measures in legislation or executive orders favouring women. In particular, provisions in the criminal law in favour of women or in the procedural law discriminating in favour of women have been upheld. Similarly, provisions providing for reservation of seats for women in local bodies, Panchayats or in educational institutions are valid. Article 39 of the Constitution mandates certain principles of policy to be followed by the State. The State shall, in particular, direct its policy towards securing that the citizens, men and women equally have the right of adequate means of livelihood, equal pay for equal work for both men and women.

Part III of the Constitution, consisting of, Articles 12 to 35 relating to Fundamental Rights, is considered as the heart of the Constitution.

Article 14 guarantees to every person the right to equality before the law or the equal protection of the laws within the territory of India. Though

Article 14 permits reasonable classification, yet classification based on sex is not permissible.¹

In the case of *Air India v. Nagesh Mirza*², the Supreme Court, while dealing with fixation of different ages of retirement for male and female employees and preventing female employees from having children, expressed the view that the retirement of air hostesses in the event of marriage taking place within four years of service does not suffer from any irregularity or arbitrariness but retirement of air hostesses on first pregnancy is unconstitutional. It was considered that such a provision was callous, cruel and an insult to Indian womanhood.

Payment of equal pay for equal work has also been justified under Article 14. Unequal pay for materially equal work cannot be justified on the basis of an artificial classification between the two kinds of work and employment.³

Article 15 widens the scope of Article 14. Article 15 (1) prohibits the state from discriminating on the grounds of religion, race, caste, sex, place of birth or any of them. The Supreme Court has held that a law which deprived a

¹ *Chitra Ghosh v. Union of India*, AIR 1970 SC35

² AIR 1981 SC 1829

³ *Madhu Kishwar v. State of Bihar*, AIR 1996 SC 1864

female proprietress to hold and enjoy her property on the ground of her sex was held violative of Article 15.⁴

In *Yusuf Aziz v. State of Bombay*⁵, the validity of Section 497 of IPC (adultery) was challenged under Articles 14 and 15 (1) of the Constitution. Section 497 of the IPC only punishes a man for adultery and exempts the women from punishment though she may be equally guilty as an abettor and this section was held by the Supreme Court to be valid since the classification was not based on the ground of sex alone, thus relying on the mandate of Article 15(3). Even Section 354 of IPC (assault or criminal force to woman with intent to outrage her modesty) is not invalid because it protects the modesty only of women and Section 125 is valid although it obliges the husband to maintain his wife but not vice versa. Similarly, Section 14 of the Hindu Succession Act, 1956 converting the women's limited ownership of property into full ownership has been found in pursuance of Article 15(3).⁶

It is noteworthy to mention the case of *Associate Banks Officers Association v. State Bank of India*⁷, wherein the Apex Court held that women workers are in no way inferior to their male counterparts and hence there should be no discrimination on the ground of sex against women. In *Air*

⁴ *A Cracknell v. State*, AIR 1952 All.746

⁵ AIR 1954 SC 321

⁶ *Thota Sesharathamma v. Thota Manikyamma*, (1991) 4 SCC 312

⁷ AIR 1998 SC 32

*India Cabin Crew Association v. Yeshaswinee Merchant*⁸, the Supreme Court has held that the twin Articles 15 and 16 prohibit a discriminatory treatment but not preferential or special treatment of women, which is a positive measure in their favour.

Article 19 (1) (g) of the Constitution guarantees that all citizens have a right to practice any profession or to carry on any occupation or trade or business. Sexual harassment in exercise of this right at the work place amounts to its violation. In the case of *Delhi Domestic Working Women's Forum v. Union of India*⁹ relating to rape and violence of working women the Supreme Court called for protection to the victims and provision of appropriate legal representation and assistance to the complainants of sexual assault cases at the police station and in courts. To realize the concept of gender equality, the Supreme Court has laid down exhaustive guidelines in the case of *Vishaka v. State of Rajasthan*¹⁰ to prevent sexual harassment of working women at their work place. The Supreme Court held that it is the duty of the employer or other responsible person to prevent sexual harassment of working women and to ensure that there is no hostile environment towards women at their working place. These guidelines were framed to protect the rights of working women to work with dignity under

⁸ AIR 2004 SC 187

⁹ (1995) 1 SCC 14.

¹⁰ AIR 1997 SC 3011.

Articles 14, 19 and 21 of the Constitution. The Supreme Court had also observed: "*each incident of sexual harassment of women at workplace results in violation of fundamental rights of Gender Equality and the Right to Life and Liberty.*"

Article 21 contains provisions for protection of life and personal liberty of persons. In the case of *State of Maharashtra v. Madhukar Narayan Mandikar*,¹¹ the Supreme Court has held that even a woman of easy virtue is entitled to privacy and no one can invade her privacy. This article has also been invoked for the upliftment of and dignified life for the prostitutes.

The right to life enshrined in Article 21 of the Constitution also includes the right to live with human dignity and rape violates this right of women.¹²

Article 23 (1) of the Constitution of India prohibits traffic in human beings and beggars and other similar forms of forced labour. To curb the deep rooted social evil of prostitution and to give effect to this Article, the Parliament has passed The Immoral Traffic (Prevention) Act, 1956. This Act protects the individuals, both men and women, not only against the acts of the State but also against the acts of private individuals and imposes a positive obligation on the State to take all measures to abolish these evil practices.

¹¹ AIR1991 SC 207, 211.

¹² *Bodhisattwa Gautam v. Subhra Chakraborty*, AIR 1996 SC 922; *Chairman, Railway Board v. Chandrima Das*, AIR 2000 SC 988.

Another evil practice of the Devdasi system, in which women are dedicated as devdasis to the deities and temples, was abolished by the State of Andhra Pradesh by enacting the Devdasi (Prohibition of Dedication) Act, 1988. The Supreme Court has also held that traffic in human beings includes devdasis and speedy and effective legal action should be taken against brothel keepers.¹³

Similarly, evil practices are prevalent in India such as selling the female infant and girls to foreigners under the guise of inter country adoption and marriages.

The “Directive Principles of State Policy” are fundamental in the governance of the country. These Directives Principles are ideals which are based on the concept of “Welfare State” and they fix certain goals; social and economic; for immediate attainment by the Union and State Governments while formulating a policy or enacting a law. According to Article 39(a), the State shall direct its policy towards securing that the citizens men and women equally, have the right to an adequate means of livelihood.¹⁴ The Supreme Court has held that under Article 39(d), the State shall direct its policy towards securing equal pay for equal work for both men and women.¹⁵ This Article draws its support from Articles 14 and 16 and its main objective is the

¹³ *Vishal Jeet v. Union of India*, AIR 1990 SC 1412.

¹⁴ *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180.

¹⁵ *State of M.P. v. Pramod Bhartiya*, AIR 1993 SC 286.

building of a welfare society and an equalitarian social order in the Indian Union. To give effect to this Article, the Parliament has enacted the Equal Remuneration Act, 1976 which provides for payment of equal remuneration to men and women workers and prevents discrimination on the ground of sex. Further Article 39(c) is aimed at protecting the health and strength of workers both men and women.

A very important and useful provision of women's welfare and well being is incorporated under Article 42 of the Constitution. It imposes an obligation upon the State to make provisions for securing just and humane conditions of work and for maternity relief. Some of the legislations which promoted the objectives of this Article are the Workmen's Compensation Act, 1923, the Employees State Insurance Act, 1948, the Minimum Wages Act, 1948, the Maternity Benefit Act, 1961, the Payment of Bonus Act, 1965, and the like. In the case of *Dattatraya v. State of Bombay*,¹⁶ the Supreme Court held that legal provisions to give special maternity relief to women workers under Article 42 of the Constitution do not infringe Article 15(1). In the case of *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*,¹⁷ the Supreme Court held that the benefits under the Maternity Benefits Act, 1961 extend to employees of the Municipal Corporation who are casual

¹⁶ AIR 1952 SC 181

¹⁷ AIR 2000 SC 1274.

workers or workers employed on daily wages basis. This applies to the claim of non-regularized female workers for maternity relief.

Article 44 provides that the State shall endeavor to secure for the citizens, a Uniform Civil Code, throughout the territory of India. Placing reliance on Article 44 by the Supreme Court in upholding the right of maintenance of a Muslim divorcee under Section 125 of the Criminal Procedure Code has resulted a separate law of maintenance for Muslim female divorcee.¹⁸

Article 51 – A under Part IV-A of the Constitution of India lays down certain Fundamental Duties upon every citizen of India, which were added by the Forty-Second Amendment of the Constitution in 1976. The later part of Clause (e) of Article 51-A, which related to women, gives a mandate and imposes a duty on Indian citizens “to renounce practices derogatory to the dignity of women”. The duties under Article 51-A are obligatory on citizens, but it should be invoked by the Courts while deciding cases and also should be observed by the State while making statutes and executing laws.

The Protection of Women from Domestic Violence Act, 2005 (“PWDVA”)

Prior to the passing of the PWDVA in 2005 and its enforcement in October 2006, women could only seek criminal sanctions for domestic violence under Section 498A of the Indian Penal Code or Section 304B, or face the

¹⁸ *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 954

social stigma of getting a divorce. These two pieces of legislation could be used only in very limited circumstances: 498A only punishes husbands or relatives of husbands for acts of harassment or violence that would likely to drive a woman to commit suicide or cause grave danger to her life, limb or health; 304B may only be used to punish violence against a woman when the cause of her death can be shown to be related to dowry demands.

Recognizing these significant gaps in the law excluding numerous women victims, the National Commission of Women approached the Lawyer's Collective in 1993 to draft legislation to close these loopholes. After years of work and with the combined efforts of the Lawyers Collective, other women's rights groups, and input from government officials, the PWDVA was born. Its remedies consist of ex parte, interim, and permanent orders including protection orders, residence orders, monetary relief and custody orders.

Section 2 of the Act provides protection against any act /conduct /omission /commission that harms or injures or has the potential to harm or injure, and it will be considered as 'domestic violence'. Under this, the law considers physical, sexual, emotional, verbal, psychological, and economic abuse or threats of the same. Even a single act of commission or omission may constitute domestic violence. Now, women do not have to suffer a prolonged period of abuse before taking recourse to the law. This legislation has widened

the scope of domestic violence and now it can be broadly related to human rights.

Very recently, on November 4, 2010 the government approved the introduction of the Protection of Women against Sexual Harassment at Workplace Bill, 2010, which aimed at providing protection to women against sexual harassment at the workplace. The Bill provides protection not only to women who are employed but also to any woman who enters the workplace as a client, customer, apprentice, and daily waged worker or in ad-hoc capacity. Students, research scholars in colleges/university and patients in hospitals have also been covered under it. Further, the Bill seeks to cover workplaces in the unorganised sectors. It allows women to complain of harassment ranging from physical contact, demand or requests for sexual favours, sexually coloured remarks or showing pornography. The bill also has a penalty provision for employers who do not comply.

It is sad that even today the number of dowry deaths in India are very high. Due to the non fulfilment of demands of dowry, many women die at the hands of their in-laws in both rural and urban India.

Indian Penal Code:

Section 304 B was introduced in the Indian Penal Code in order to strictly deal with and punish the offence of Dowry Death. It was a new offence created with effect from November 19, 1986 by insertion of the provision in the Indian Penal Code providing for a more stringent offence, than provided by Section 498A of the same Act, which deals with punishment for cruelty by husband and his relatives.

If the two conditions as mentioned in the section exist, it would constitute a "dowry death", and the husband and/or his relatives shall be deemed to have caused her death. For the purposes of this sub section, dowry shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961. The definition of 'Dowry' includes any property or valuable security given or agreed to be given either directly or indirectly:

- By one party to a marriage to the other party to the marriage; or
- By the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person at or before or any time after the marriage in connection with the marriage of the said parties

Section 304 B also provides that whoever commits a dowry death shall be punished with imprisonment for a term which shall not be less than 7 years but which may extend to imprisonment for life.

According to Section 8-A of the Dowry Prohibition Act, which came into force for taking or abetting any dowry, the burden to explain is placed on such person against whom the allegation of committing the offence is made. Similarly, under Explanation to Section 113 B of the Indian Evidence Act, there is a presumption that a death caused within 7 years of marriage is a dowry death.

The demand for dowry is itself punishable if the other ingredients of Section 304 B are established. In case of *Pawan Kumar vs. State of Haryana*¹⁹, the periphery of the word 'dowry' was considered. The earlier meaning confining and limiting dowry to the time at or before the marriage got extended and enlarged even after the marriage and that there be no need to show any agreement for the payment of such dowry to make it as a punishable offence. The Court also held that the facts proved cruelty in connection with dowry demand.

In the case of *Kunhiabdulla and Anr. v. State of Kerala*²⁰, the Supreme Court recognised that the menace of dowry cuts across caste, religion and geographical location.

Chapter XX-A of Indian Penal Code, 1860, refers to 'cruelty by husband or relatives of husband' and includes section 498-A.

¹⁹ (1998) 3 SCC 309

²⁰ AIR 2004 SC 1731

Section 498-A states, that whoever being the husband or relative of the husband of woman, subjects such woman to cruelty shall be punished with the imprisonment for a term which may extend to three years and also be liable to fine.

The section was enacted to combat the menace of dowry deaths. It was introduced in the code by the Criminal Law Amendment Act, 1983 (Act 46 of 1983). By the same Act, section 113-A has been added to the Indian Evidence Act to raise presumption regarding abetment of suicide by married woman. The main objective of section 498-A of I.P.C is to protect a woman who is being harassed by her husband or relatives of husband.

The object for which section 498A IPC was introduced is amply reflected in the Statement of Objects and Reasons while enacting Criminal Law (Second Amendment) Act No. 46 of 1983. As clearly stated therein the increase in number of dowry deaths is a matter of serious concern. The extent of the evil has been commented upon by the Joint Committee of the Houses to examine the work of the Dowry Prohibition Act, 1961. In some of the cases, cruelty of the husband and his relatives which culminate in suicide or murder of the helpless woman concerned, which constitute only a small fraction involving such cruelty. Therefore, it was proposed to amend IPC, the Code of Criminal Procedure, 1973 ('the Cr.P.C') and the Evidence Act suitably to deal effectively not only with cases of dowry deaths but also cases of cruelty to married women

by the husband, in-law's and relatives. The avowed object is to combat the menace of dowry death and cruelty.

It was held by the Supreme Court in *Kaliyaperumal vs. State of Tamil Nadu*²¹, that cruelty is a common essential in offences under both the sections 304B and 498A of IPC. The two sections are not mutually inclusive but both are distinct offences and persons acquitted under section 304B for the offence of dowry death can be convicted for an offence under sec.498A of IPC. The meaning of cruelty is given in explanation to section 498A. Section 304B does not contain its meaning but the meaning of cruelty or harassment as given in section 498-A applies in section 304-B as well. Under section 498-A of IPC cruelty by itself amounts to an offence whereas under section 304-B the offence is of dowry death and the death must have occurred during the course of seven years of marriage. But no such period is mentioned in section 498-A.

The presumption of cruelty within the meaning of section 113-A, Evidence Act, 1872 also arose making the husband guilty of abetment of suicide within the meaning of section 306 where the husband had illicit relationship with another woman and used to beat his wife making it a persistent cruelty within the meaning of Explanation (a) of section 498-A.

²¹ AIR 2003 SC 3828

Section 375 of the Indian Penal Code defines rape, which means an unlawful intercourse done by a man with a woman without her valid consent. In certain cases, when consent is taken by fraudulent means or by misrepresentation, the act is still quite rightly- taken as rape. The consent of a woman of unsound mind and of a girl below 16 are not taken to be lawful consent because it is presumed that these women are not in a position to truly understand the nature and gravity of sexual intercourse.

The Supreme Court does vividly acknowledge the plight of many Indian women by stating that they often live their lives 'at the mercy' of their employers and the police and are therefore especially susceptible to violence and intimidation by men. Many of the rape cases that have been handled as PIL cases are of an extreme nature, and have led the Supreme Court to indicate broad parameters in assisting the survivors of rape.

Property Right

Prior to enactment of Hindu Succession Act 1956, Hindus in India were governed by Shastric and customary laws which varied from region to region and sometimes it varied on caste basis. A Hindu wife was not capable of holding any property separate from her husband. Of the two types of property women were to hold - Streedhan and women's estate, the holder of the later enjoyed the right during her lifetime and she could not alienate the same. To secure equality of status to improve Hindu women's right to property, Hindu

Succession Act 1956 came into force. This Act, under section 14(1) and 14(2) gives women absolute right of ownership over property and also the right to alienate it.

At the time of enactment of this Act, daughters could not become members of the co-parcenary and the Act did not afford the right of natural inheritance to daughter because of the very concept of right by birth and by reason of sex as only males can be coparceners. This Act was then amended in the year 2005 and the parliament passed the Hindu Succession (Amendment) Act, 2005. By amending sections 6 and 23 of the amended Act, daughters were given equal status to that of sons. It now provides that the daughter shall have a right to claim partition in the joint family properties as well as the right to claim right of partition in the dwelling house of the joint family and she shall also have a right to claim partition during the lifetime of her father. This privilege is only given to Hindu women. The laws applicable to Muslims & Christians do not give equal status to women.

Female Infanticide :

It is unfortunate that for one reason or the other the practice of female infanticide still prevails. One of the reasons may be the problem faced by the parents during marriage coupled with the dowry demand by the so-called educated and/or rich persons who are well placed in society. The traditional system of female infanticide whereby female child was done away with after

birth by poisoning or letting her choke on husk continues in a different form by taking advantage of advance medical techniques. Unfortunately, developed medical science is misused to get rid of a girl child before birth. Knowing fully well that it is immoral and unethical as well as it may amount to an offence; foetus of a girl child is aborted.²²

Further in the case of *Centre for Enquiry Into Health and Allied Themes (CEHAT) and Ors. v. Union of India (UOI) and Ors.*²³, the Supreme Court has admitted that:

“...in Indian Society, discrimination against girl child still prevails, may be because of prevailing uncontrolled dowry system despite the Dowry Prohibition Act, as there is no change in the mind-set or also because of insufficient education and/or tradition of women being confined to household activities. Sex selection/sex determination further adds to this adversity. It is also known that number of persons condemn discrimination against women in all its forms, and agree to pursue, by appropriate means, a policy of criminalizing discrimination against women, still however, we are not in a position to change mental set-up which favours a male child against a female. Advance technology is increasingly used for removal of foetus (may or may not

²² *Centre for Enquiry into Health and Allied Themes (CEHAT) & Ors. v. Union of India and Ors.*, AIR2001SC2007.

²³ AIR 2003 SC 3309.

be seen as commission of murder) but it certainly affects the sex ratio. The misuse of modern science and technology by preventing the birth of girl child by sex determination before birth and thereafter abortion is evident from the 2001 Census figures which reveal greater decline in sex ratio in the 0-6 age group in States like Haryana, Punjab, Maharashtra and Gujarat, which are economically better off."

Surrogacy :

A standard surrogacy arrangement involves a contract for the surrogate to be artificially inseminated, carry a foetus to term, and relinquish her parental rights over the child once born. In some countries around the world²⁴, surrogacy is legally recognized only if it is non-commercial.

India's first gestational surrogacy took place in 1994 in Chennai.²⁵ In 1997, a woman from Chandigarh agreed to carry a child for 50,000 rupees in order to obtain medical treatment for her paralyzed husband²⁶. In 1999, a villager in Gujarat served as a surrogate for a German couple²⁷. In 2001, almost 600 children in the United States were born through surrogacy arrangements. In comparison, in India, it is estimated that the number of births through surrogacy

²⁴ Greece, West Australia, and South Australia are all examples of jurisdictions that allow altruistic but not paid agreements.

²⁵ Geeta Padmanabhan, Hope in the Test Tube, THE HINDU, Jan. 19, 2006, available at <http://www.thehindu.com/thehindu/mp/2006/01/19/stories/2006011900540200.htm>.

²⁶ Sandhya Srinivasan, Surrogacy Comes Out of the Closet, SUNDAY TIMES OF INDIA, July 6, 1997, at 1.

²⁷ Jyotsna Agnihotri Gupta, Towards Transnational Feminisms: Some Reflections and Concerns in Relation to the Globalization of Reproductive Technologies, 13 EUR. J. WOMEN'S STUD. 23, 30 (2006).

doubled between 2003-2006²⁸, and estimates range from 100-290 each year²⁹ to as many as 3,000 in the last decade. A major case involving the issue of surrogacy before the Supreme Court was the case of *Baby Manji Yamada v. Union of India et al.*³⁰,

Conclusion:

The Government of India declared 2001 as the Year of Women's Empowerment (Swashakti). The National Policy For The Empowerment Of Women was framed in 2001.

On March 9, 2010 one day after International Women's day, Rajyasabha passed Women's Reservation Bill, ensuring 33% reservation to women in Parliament and state legislative bodies.

In India, the judiciary is the ultimate guarantor of Fundamental Rights and is the guardian of the Constitution. Naturally, the judges have a special role and responsibility in correcting the distortions in law enforcement and upholding the rights of women who approach the courts. Women generally approach the courts seeking reliefs in matrimonial disputes, in matters of

²⁸ Sudha Ramachandran, India's New Outsourcing Business - Wombs, ASIA TIMES ONLINE, June 16, 2006, http://www.atimes.com/atimes/south_asia/hf16df03.html.

²⁹ Kritivas Mukherjee, Rent-a-womb in India Fuels Surrogate Motherhood Debate, REUTERS, Feb. 12, 2007, available at www.reuters.com/article/latestCrisis/idUSDEL298735 (though noting that the number of failed attempts is likely much higher); Alifiya Khan, Surrogacy is Soaring in India, HINDUSTAN TIMES, Sept. 18, 2008,

<http://www.hindustantimes.com/StoryPage/StoryPage.aspx?id=93bca0a7-e5d0-4c06-9552-dbebb0669833>.

³⁰ Writ Petition No. 369 of 2008, Supreme Court of India.

maintenance and custody of children, domestic violence and dowry harassment cases, rape and sexual harassment as well as in discrimination in respect of employment. Parliament has enacted laws giving preferential rights to women in many of these situations. However, the enforcement of these laws depend first on the government departments entrusted with the task and when they fail to do so, with courts of law. There is enough evidence to suggest that there are many barriers in accessing justice. The Family Courts Act, 1984 is the legislative response to some of these barriers. Judiciary should also consciously recruit more and more women judges to have gender balance among judges as well. Gender justice training should extend to ministerial staff of courts and advocates also.

“CHILDREN”

CHILDREN who form 42 per cent of the India's population are at risk on the streets, at their workplace, in schools and even inside their own homes. Every year thousands of children become victims of crime – whether it's kidnappings, violent attacks, or sexual abuse.

According to National Crime Records Bureau and NHRC, crime against children increased by 3.8 per cent nationally (14,975 cases in 2005 from 14,423 in 2004); Child rape increased by 13.7 per cent (4,026 cases from 3,542 in 2004); Madhya Pradesh reported the highest number (870) followed by Maharashtra (634). Together they accounted for 37.3 per cent of rape cases. Delhi tops the list of 35 Indian cities on crime against children (852 cases of violence against children in 2005, 27 per cent of all cases) followed by Indore (448), Pune (314) and Mumbai (303). 1,327 children were reported murdered in 2005 up from 1,304 in 2004 (an increase of 1.8 per cent). Uttar Pradesh reported the highest number (390) accounting for 29.4 per cent of cases. Nearly 45,000 children go missing every year; more than 11,000 are never traced. ¹

¹ <http://www.azadindia.org/social-issues/crime-against-children.html>

Offences against children need a humanitarian legislative approach. As was opined by the Supreme Court in the case of ***Bandhua Mukti Morcha v.***

Union of India²:

“The child of today cannot develop to be a responsible and productive member of tomorrow’s society unless an environment which is conducive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children are the greatest gift to humanity. Mankind has the best hold of itself. The parents themselves live for them. They embody the joy of life in them and in the innocence relieving the fatigue and drudgery in their struggle of daily life. Parents regain peace and happiness in the company of the children. The children signify eternal optimism in the human being and always provide the potential for human development. If the children are better equipped with a broader human output, the society will feel happy with them. Neglecting the children means loss to the society as a whole. If children are deprived of their childhood — socially, economically, physically and mentally — the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order, the social stability and good citizenry. The Founding Fathers of the Constitution, therefore, have emphasised the importance of the role of the

² (1997) 10 SCC 549, at page 553

child and the need of its best development. Dr. Ambedkar, who was far ahead of his time in his wisdom projected these rights in the Directive Principles including the children as beneficiaries. Their deprivation has deleterious effect on the efficacy of the democracy and the rule of law”.

❖ **Constitutional Provisions**

There are special safeguards in the Constitutions that apply specifically to children. The Constitution has envisaged a happy and healthy childhood for children which is free from abuse and exploitation.

These provisions have been inserted into the Constitution to ensure the welfare and well being of children in the country without which it would not be possible for the nations to progress as a whole. The Constitution of India provides a comprehensive understanding of child rights. A fairly comprehensive legal regime exists for their implementation. India is also signatory to several international legal instruments including the Convention of the Rights of the Child (CRC).

Article 15(3)³ of the Constitution has provided the State with the power to make “special provisions” for women and children.

³ Article 15(3): Nothing in this article shall prevent the State from making any special provision for women and children

Article 21A of the Constitution mandates that every child in India shall be entitled to free and compulsory education upto the age of 14 years.⁴ The word “life” in the context of article 21 of the Constitution has been found to include “education” and accordingly the Supreme Court has implied that “right to education” is in fact a fundamental right.

Article 23 of the Constitution prohibits traffic in human beings, beggars and other similar forms of forced labour and exploitation. Although this article does not specifically speak of children, yet it is applied to them and is more relevant in their context because children are the most valuable section of the society. It is a known fact that many children are exploited even by the parents who allow their exploitation because of their poverty. They are deprived of education, made to do all sorts of work injurious to their health and personality.

The word beggar has been explained by the Supreme Court in the case of *People's Union for Democratic Rights vs. Union of India*⁵ and held that labour or service for remuneration which is less than minimum wage, amounts to violation of article 23. This includes inadequate payment for the

⁴ Article 21A: Right to Education- The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

⁵ AIR 1982 SC 1473

work rendered by the child which may amount to begging or forced labour. Sometimes, the children of tender age are enticed for the flesh trade, thus all in violation of Article 23. In this case, which is otherwise referred to as the Asiad Workers Case, the Supreme Court said, "We are, therefore, of the view that when a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words "forced labour" under Article 23 of the Constitution of India."⁶

Article 24 expressly provides that no child below the age of 14 years shall be employed to work in any factory or mine or engaged in any hazardous employment.⁷ The Supreme Court has issued elaborate guidelines to child labour. Child labour shall not be engaged in hazardous employment. There shall be set up a Child Labour Rehabilitation Welfare Fund in which offending employer should deposit Rs. 20,000/-.

It must be noted that this article does not absolutely bar the employment of children below the age of 14 years. The employment is prohibited only in factories or mine or in any other hazardous occupation. This provision raises a question as to what are the 'hazardous' employment. While interpreting the

⁶ <http://www.swamiagnivesh.com>

⁷ http://www.hrcr.org/safrica/childrens_rights/India.html accessed on 18th August, 2010

nature and extent of hazardous employment the Supreme Court in the case of *Labourers working on Salal Project vs. State of J & K*⁸ has held that child below the age of 14 years cannot be employed and allowed to work in construction process. Supreme Court has issued various directions as to education, health, nutrition and child labour.

In *M.C. Mehta vs. State of Tamil Nadu*⁹ it was held that in view of Art 39 the employment of children within the match factories directly connected with the manufacturing process of matches and fireworks cannot be allowed as it is hazardous. Children can, however be employed in the process of packing but it should be done in area away from the place of manufacturing to avoid exposure to accidents. In addition to regulating the phases of production that could involve child labour, the court ordered that:

- Children involved in certain positions must be paid at least 60% of the minimum wage of their adult counterparts.
- Education, recreation, and socialization facilities must be provided;
- and

⁸ AIR 1984 SC 117

⁹ (1996) 6 SCC 756

- The state government must ensure that factories meet their responsibilities to provide recreation, medical care, and compulsory insurance, and must pay attention to the basic diet of children.

The Apex Court was of the opinion 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 sections. Subsequently, wide ranging directions were issued by the court with regard to the employment and exploitation of children wherein it was specifically prohibited to employ children below the age of 14 years. The Court went on to instruct the government on the importance of a child's health, nutrition, and education, and affirmed a child's constitutional right to an education.

These guidelines and directions were also reiterated in the case of *Bandhua Mukti Morcha vs. Union of India*¹⁰. Here, the Supreme Court held "whenever it is shown that the labourer is made to provide forced labour, the Court would raise a presumption that he is required to do so in consideration of an advance or other economic consideration received by him and he is, therefore, a bonded labour.

¹⁰ AIR 1997 SC 2218

There are certain other provisions contained in part IV, dealing with the Directive Principles of State Policy, which although do not lay emphasis on the child welfare directly, yet the children are bound to be the beneficiaries if these provisions are implemented. The Directive Principles of State Policy embodied in the Constitution of India provides policy of protection of children with a self- imposing direction towards securing the health and strength of workers, particularly to see that the same in the children of tender age is not abused, nor they are forced by economic necessity to enter into avocations unsuited to their strength.

Article 39 provides for certain principles to be followed by State. These principles of policy are to be followed by the State to ensure public welfare. Article 39(e)¹¹ and 39(f)¹² specifically includes children within the ambit of workmen who should not face abuse and that children should be provided with equal opportunities and facilities for their growth and development.

Clause (f) was modified by the Constitution (42nd amendment) Act 1976 with a view to emphasize the constructive role of the state with regard to children.

¹¹ Article 39: the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;"

¹² Article 39(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."

Reading article 39(e) and (f), the Constitution also incorporates a few more provisions to promote the welfare of the children. The Supreme Court has through a plethora of cases shown its concern towards the welfare of children.

This was particularly highlighted in the case of *Lakshmi Kant Pandey v Union of India*¹³ wherein the Supreme Court emphasized upon the need of child welfare in the country. In this case, the Court issued guidelines with regard to adoption of Indian children by foreign parents. The Court further emphasized that the primary purpose of giving the child for adoption is to provide a better future to the child and hence great care must be taken in permitting foreigners to adopt Indian children.

Article 45 has provided that the State shall endeavor to provide early childhood care and education for all the children until they complete the age of fourteen years. This Directive signifies that it is not only confined to primary education, but extends to free education whatever it may be upon the age of 14 years. Article 45 is supplementary to Article 24 on the ground that when the child is not to be employed before the age of 14 years, he is to be kept occupied in some educational institutions. It is suggested that Article

¹³ AIR 1984 SC 469

24 in turn supplements the clause (e) and (f) of Article 39, thus ensuring distributive justice to children in the matter of education.

Virtually Article 45 recognizes the importance of dignity and personality of the child and directs the State to provide free and compulsory education for the children upto the age of 14 years.

As per IPC, particularly, Section 82 which says that nothing is an offence which is done by a child under 7 years of age. Section 83 says that nothing is an offence which is done by a child above 7 years of age and under 12, who has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct.

❖ **Sexual Abuse of Children**

The sexual abuse of children is one of the most heinous crimes. It is an appalling violation of their trust, an ugly breach of our commitment to protect the innocent. A 2007 study by the Ministry of Women and Child Development (MWCD) found that 53.22 per cent of India's children have experienced some form of sexual abuse. Against this background, the lack of specific provisions for child sexual abuse in our criminal law is a serious lacuna.

Sexual abuse of children can occur in a number of different settings. Children can be sexually abused by family members (intrafamilial) or by strangers (extrafamilial).

A more precise categorization of the term for Indian context is made under *the Prevention of Offences against the Child Bill, 2009* where it sexual abuse of children has been classified under various heads, but the bill is yet to be passed.

The Indian Penal Code defines the child as being 12 years of age. Section 376 of IPC, which punishes the perpetrators of the crime of rape, defines the age of consent to be below 16 years of age.

Although section 377, dealing with unnatural offences, prescribes seven to ten years of imprisonment, such cases can be tried in a magistrates court, which can impose maximum punishment of three years. If the abuse is repeated several times it affects children more severely, however as yet there is no law for repeated offenses against the one child. Section 509, dealing with *Word, gesture or act intended to insult the modesty of a woman*, extends to minor girls also. The gravity of the offence under section 509, dealing with obscene gestures, is less. Yet even in such cases, the child's psyche may be affected as severely as in a rape.

The matter had come to the Supreme Court in the case of *Sakshi v. Union of India*¹⁴, where a PIL was filed with growing concern, the dramatic increase of violence, in particular, sexual violence against women and children as well as the implementation of the provisions of the Indian Penal Code, namely, Sections 377, 375/376 and 354.

The Supreme Court gave the following directions;

In holding trial of child sex abuse or rape:

(i) *a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;*

(ii) *the questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;*

(iii) *the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.*

¹⁴ *Sakshi v. Union of India*, (2004) 5 SCC 518, at page 545

Child Trafficking

Child-trafficking, traditionally associated with only trafficking for commercial sex, is growing fast in India. There are no laws that specifically target child-trafficking. Commercial sex-trafficking offences are handled under the Immoral Traffic (Prevention) Act. Labour-trafficking offences are handled under the Child Labour Act for those hazardous industries in which child labour is considered an offence. There is no law prohibiting employment of children in work outside the definition of "hazardous".

Child Trafficking can be defined as:

“Sale and purchase of children for gain, within the country (intra-country) and across borders (inter-country), by deceit, fraud or force, resulting in exploitation of the person trafficked”.

Trafficking of children is done for various reasons like **Sexual Exploitation** (Forced prostitution, Socially and religiously sanctified forms of prostitution, Sex tourism, Pornography), **Illegal Activities** (Begging, Organ trade, Drug peddling and smuggling), **Labour** (Bonded labour, Domestic work, Agricultural labour, Construction work, Carpet industry, garment industry, fish/shrimp export as well as other sites of work in the formal and informal economy), **Entertainment and Sports, Adoption, Marriage.**

From the legal point of view - India has been a front-runner in the battle against human trafficking. The criminalization of trafficking flows from Article 23(1) of the Constitution.

To tackle human trafficking, we have had the necessary legislation in place, principally *the Immoral Traffic (Prevention) Act, 1956*, in addition to several provisions in labour laws and the Indian Penal Code. These form a composite legal code for the prosecution and punishment of traffickers. In addition to these legislative measures, the Supreme Court of India has touched on this issue in two prominent judgments, i.e. - *Vishal Jeet vs. Union of India* (1990) and in *Gaurav Jain v. Union of India* (1997). These judgments directed the Government of India, among other things, to prepare a 'National Plan to Combat Trafficking and Commercial Sexual Exploitation of Women and Children'. As a result of this, a National Plan was drafted in 1998 which lays down suggested measures for prevention, rescue, rehabilitation and reintegration.

In the case of *Vishal Jeet v. Union of India*¹⁵ Supreme Court gave the following directions:

¹⁵ 1990 (3) SCC 318

“(1) All the State Governments and the Governments of Union territories should direct their concerned law enforcing authorities to take appropriate and speedy action under the existing laws in eradicating child prostitution without giving room for any complaint of remissness or culpable indifference.

(2) The State Governments and the Governments of Union territories should set up a separate Advisory Committee within their respective zones consisting of the Secretary of the Social Welfare Department or Board, the Secretary of the Law Department, sociologists, criminologists, members of the women’s organisations, members of Indian Council of Child Welfare and Indian Council of Social Welfare as well the members of various voluntary social organisations and associations etc., the main objects of the Advisory Committee being to make suggestions of:

*(a) the measures to be taken in eradicating the child prostitution, and
(b) the social welfare programmes to be implemented for the care, protection, treatment, development and rehabilitation of the young fallen victims namely the children and girls rescued either from the brothel houses or from the vices of prostitution.*

(3) All the State Governments and the Governments of Union territories should take steps in providing adequate and rehabilitative homes manned by well-qualified trained social workers, psychiatrists and doctors.

(4) The Union Government should set up a committee of its own in the line, we have suggested under direction No. (2) the main object of which is to evolve welfare programmes to be implemented on the national level for the care, protection, rehabilitation etc. etc. of the

young fallen victims namely the children and girls and to make suggestions of amendments to the existing laws or for enactment of any new law, if so warranted for the prevention of sexual exploitation of children.

(5) The Central Government and the Governments of States and Union territories should devise a machinery of its own for ensuring the proper implementation of the suggestions that would be made by the respective committees.

(6) The Advisory Committee can also go deep into Devadasi system and Jogin tradition and give their valuable advice and suggestions as to what best the government could do in that regard."

In ***Gaurav Jain v. Union of India***¹⁶, the Supreme Court held that juvenile homes should be used for rehabilitating child prostitutes and neglected children.

❖ **Rape of a Minor**

In ***Dhananjay Chatterjee vs. State of W.B.*** which involved rape-cum-murder, the trial court, the High Court and the Supreme Court agreed it to be a fit case for imposition of death penalty. The Court pointed out that in recent years, rising crime rate, particularly against woman had made judicial sentencing a subject of concern. The object of sentencing should be to see

¹⁶ 1997 (8) SCC 114

that criminal does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done.

The sentence of death appears more appropriate where rape and murder is committed by an accused having criminal record.

The emerging inference is that if a girl child is raped and murdered, the probability of death sentence is highest.

❖ Child Delinquency and Neglected Children of Juvenile

The Juvenile Justice Act, 1986 (for short, the 'JJ Act') was enacted to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of such matters relating to disposition of delinquent juveniles. The Act sought to achieve a uniform legal framework for juvenile justice in the country as a whole so as to ensure that no child, in any circumstance, is lodged in jail and police lock-up. This is being ensured by establishing Juvenile Welfare Boards and Juvenile Courts to deal adequately with the subject.

The object of the Act, therefore, is to provide specialised approach towards the delinquent or neglected juveniles to prevent recurrence of juvenile delinquency in its full range keeping in view the developmental needs of the child found in the situation of social maladjustment. That aim is secured by

establishing observation homes, juvenile houses, juvenile homes or neglected juvenile and special homes for delinquent or neglected juveniles.

As per Indian law, the Juvenile Justice (Care and Protection of Children) Act, 2000 defines a juvenile as a person below the age of 18 years. The Act intends to provide care and protection to juveniles, who violate laws in India. The Act intends to settle the issues in the best interest of children and not with an intention to punish them under criminal law. This Act is a comprehensive legislation that provides for proper care, protection and treatment of children in conflict with law and children in need of care and protection by catering to their development needs, and by adopting a child friendly approach. It conforms to the UNCRC and other relevant national and international instruments.

A clear distinction has been made in this Act between the juvenile offender and the neglected child. It also aims to offer a child increased access to justice by establishing Juvenile Justice Boards and Child Welfare Committees. The Act has laid special emphasis on rehabilitation and social integration of the children and has provided for institutional and non-institutional measures for care and protection of children. The non-

institutional alternatives include adoption, foster care, sponsorship, and after care.

'Neglected juvenile' which is more relevant for the purpose of this case, has been defined in Section 2(1) to mean a juvenile who (i) is found begging; or (ii) is found without having any home or settled place of abode and without any ostensible means of subsistence and is destitute; (iii) has a parent or guardian who is unfit or incapacitated to exercise control over the juvenile; or (iv) lives in a brothel or with a prostitute or frequently goes to any place used for the purpose of prostitution, or is found to associate with any prostitution or any other person who leads an immoral, drunken or depraved life; (v) who is being or is likely to be abused or exploited for immoral or illegal purposes or unconscionable gain.

In order to understand the JJ Act and how juveniles have to be safeguarded, I request all of you to go through the recent decision of the Supreme Court in *Hari Ram vs. State of Rajasthan*, 2009 (13) SCC 211.

One of the land mark judgments in the sphere of child and minor welfare is *Sheela Barse and Others vs. Union Of India Others*¹⁷. In this case, the Supreme Court made an order issuing various directions in regard to

¹⁷ AIR 1986 SC 1773

physically and mentally retarded children as also abandoned or destitute children who are lodged in various jails in the country for 'safe custody'. The Court directed the Director General of Doordarshan as also the Director General of All India Radio to give publicity seeking cooperation of non-governmental social service organizations in the task of rehabilitation of these children. The Court declared that it was "extremely pained and anguished that these children should be kept in jail instead be being properly looked after, given adequate medical treatment and imparted training in various skills which make them independent and self-reliant."

❖ Child Labour

In India, the Child Labour (Regulation and Prohibition) Act, 1986 does not define the term "child labour". It defines "child" as a person who has not completed his fourteenth year of age.¹⁸ Further it prohibits child labour in hazardous occupations and processes as listed in the schedule of the Act.

Poverty remains the root cause of child labour. All the other causes, though differentiated and made specific, in some way or the other emanates from poverty. People living below poverty line do not get sufficient to sustain themselves. In such situations, it becomes imperative for them to send their children to work. Child labour in turn hampers physical and mental growth

¹⁸ Section 2(ii), The Child Labour (Regulation & Prohibition) Act, 1986

of children and deprives them of education. Going to school, instead of betterment, proves to be waste of hard earned resources of the family and so parents are unwilling to send their children for education. This hampers their upward social movement and restricts them to the unorganized sector. This keeps them in poverty and they are unable to better their situation and thus the vicious circle of poverty and child labour continues.

This Act has provided certain specific provisions to tackle child labour and has given many concrete provisions for abolition of child labour. It prohibits employment of children below the age of 14 in all hazardous occupations and processes.¹⁹

❖ **Child Marriage**

Child Marriage is the most unfortunate practices followed in India even today. Child Marriage is an abuse of children especially girls by their own parents in the form of celebration.

The Child Marriages Act, 2006, as it exists prohibits marriage for women younger than 18 and men under age 21.

❖ **Foeticide and Infanticide**

Foeticide is punishable under Section 315 of IPC which reads as;

¹⁹ Section 3, The Child Labour (Regulation & Prohibition) Act, 1986.