

## **Defining a Child in India through its Different Legislations**

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Date of Submission: 20-03-2023

Date of Acceptance: 04-04-2023

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An attempt has been made to define who a child is in India. The problems associated with often different and contradictory understanding of children as reflected in the legal parlance has been discussed. Children are one of the most vulnerable sections of any society. Violation of the rights of children is a complex process as multiple factors are at play. What makes children vulnerable are their lack of agency, very often children find it hard to understand if their rights have been violated and incidences of crimes against them are either under-reported or not reported at all. To provide protection against violations, the legal framework provides children with legislative support. The different legislations in India define children differently. Sometimes these definitions may even contradict each other. How legislations define children reflect how the society perceive them. Some may see children as independent agents who can take responsible decisions about themselves and their lives while still others may consider them wholly dependent on adults for survival and decisions about life. This paper makes an attempt to explore the dichotomous nature of definitions prevalent in different legislations of the country.

According to the United Nations Convention on the Rights of Child, a child is any human being below the age of 18 years unless under the law applicable. This is necessary to accommodate culturally and socially divergent views on child and childhood globally. Individual countries can decide, according to their own discretion, the age limits of a child in their own laws. In India different laws related to children define children differently.

Some specific child related legislations in India are:-

1. The Factories Act of 1948 amended as the Child Labour Act 1986 amended in 2006 and then finally the Child Labour (Prohibition and Regulation) Act of 2016
2. Immoral Traffic Prevention Act, 1986.
3. The Child Marriage Prohibition Act of 2006
4. The Right of Children to Compulsory and Free Education Act of 2009.
5. The Juvenile Justice Act of 1986, amended in 2000, 2006, 2011 and finally the Juvenile Justice (Care and Protection of Children) Act, 2015.
6. Protection of children from Sexual offences Act 2012. (POSCO)

These six major legislations have been taken into account for they are considered landmark legislations concerning children's issues in India. Moreover, a deeper understanding of these legislations could reveal how the legal meaning of 'child' has evolved in India and what legal provisions are given to the children in the country.

Article 21(a) of the Indian Constitution states that all children between the ages 6 to 14 should be provided with free and compulsory education. Article 45 considers that the State should provide early childhood care and education to all children below the age of 6. Article 51(k) says that all guardians/parents of children between the ages 6 to 14 should provide them with opportunities for education.

In accordance with this, the Census of India considers children to be anyone who is below the age of 14.

Somewhat in consonance with the constitution, the Factories Act of 1948 which was amended in 1987 defines child as a person who has completed his or her 15<sup>th</sup> year of age, while an adolescent is a person who has completed his or her 15<sup>th</sup> year of age but has not completed his or her 18<sup>th</sup> year of age. No child below the age of 14 would be allowed to work in a factory. The Act stipulates that young persons (adolescents) cannot be forced to work on dangerous machinery unless they are completely aware of the dangers it involves and must be trained and supervised at all times during their work. Adolescents can work only between 6am and 7pm. Those who are not deemed adults as per this Act would not be allowed to work in a factory for more than four and half hours during the day and are not allowed to work at night. The interesting point in this Act is that it treats adolescents as adults in certain sections. There needs to be a clear record of such children working in a given factory. The Act also makes provisions for leave including paid leave and provides scope to punish parents or guardians if they make children work at two factories in the same day. Adolescents and children are prohibited from working in manufacturing units or under any dangerous environment in a factory.

The Child Labour (Prohibition and Regulation) Act of 1986 was amended as the Child Labour Act Amendment 2006 and finally The Child Labour (Prohibition and Regulation) Act of 2016. The Child Labour (Prohibition and Regulation) Act of 1986 has been one of the most debated Acts of the country as it stipulates where children can work and where they cannot. While the 1986 Act defined a child as a person who had not completed 14<sup>th</sup> year of age, in the 2016 version of the Act, a child meant a person who had not completed 14<sup>th</sup> year of age or such age as may be specified in the Right of Children to Free and Compulsory Education Act, 2009, whichever is more. It must be mentioned here that the Right of Children to Free and Compulsory Education Act considers that all children between the age group of 6 – 14 should be provided with free and compulsory education.

Part II of the 1986 Act prohibited children from working in occupations listed in Part A, which included catering at railway establishments, construction work on the railway or anywhere near tracks, plastic factories etc. This Act also prohibited children working places like beedi making, tanning, and soap manufacturing, brick kilns etc. These provisions did not apply to workshops where the child was working with help of his family, or in a government recognised or aided school. In the Act of 2016, mines and inflammable substances and /or explosives were added to Section III. Besides, the Act also elaborated that the Child could be permitted to work with his/ her family, helping the family enterprise but that needs to be non- hazardous, s/he can only work after school hours or during vacations. The child may also work as an artist in an audio visual entertainment industry, including advertisement, films, television, serials or any other entertainment industry or sports activities except in circus. The conditions and safety measures for children working in these setups were specified in the Act of 2016. The 1986 Act had called for the established of a Child Labour Technical Advisory Committee who would be responsible for advising the Government about adding to the list of occupation or process where the Child could not work. This was replaced in 2016 by the Technical Advisory Committee who would advise the Government about adding to the list of occupations or processes where not just the child but even adolescents could not work. The Act of 2016 replaced the term child with adolescents in Part III. This part for both Acts discussed the conditions in which child/adolescents could work, the duration of work in an establishment, the duration of break that they could get, it banned overtime and made provisions for holiday each week. Section IV of the Act dealt with penalties. While the 1986 Act imposed imprisonment upto three months with fine if an employer was found to employ anyone under the list of Section III, this was extended to six months and even two years of imprisonment with a heavier fine under the amended Act of 2016. The 2016 Act saw the addition to a number of additional provisions like the establishment of a fund called the Child and the Adolescent Labour Rehabilitation Fund. The District Magistrate is entrusted with the responsibility to implement these provisions mentioned in the Act. From the amendment made in 2016, the two separate categories were replaced by a single category of children. So all the provisions were applicable to all children unitarily.

Keeping in mind the provisions laid down for children in the Indian Constitution, The Right of children to Free and Compulsory Education Act came into force in 2009. The main objective of this Act is to discuss the provision of quality education for Children between the age group 6 – 14 as per the rights guaranteed to them in the constitution. The Act envisages age appropriate schooling for all children and provides equal opportunities for disabled and other disadvantaged children. The Act also mentions how it is the responsibility of parents/guardians to send their children to school and the appropriate government needs to provide pre-primary education and child care. Besides this, the Act outlines the responsibilities that schools and teachers need to take up and all private and government aided schools need to provide free education to a minimum of 25% of its students especially those from disadvantaged sections of society. No child can be compelled to leave school before completing elementary education.

Looking at the provisions for children who are perceived to be juveniles, Section 82 of the Indian Penal Code says that no child below the age of 7 years can be held criminally responsible for an action. In cases of mental disability or inability to comprehend the consequences on one's action, this age is raised to 12 years.

Age of consent points out that a girl must be at least 16 years of age to give sexual consent unless she is married, if the girl is married this age is fixed at 15 years. For protection against kidnapping, abduction and related offences, the age for boys is fixed at 16 years and for girls it is fixed at 18 years.

The government had initially enacted the Juvenile Justice Act in 1986 which aimed at providing a uniform framework for juvenile justice in the country, to prevent delinquency and provide facilities to rehabilitate juvenile delinquents. However, the United Nations adopted the Convention on the Rights of a Child on the 20<sup>th</sup> of November, 1989. India ratified this on the 11<sup>th</sup> of December 1992 after which it had to bring in legislation in conformity with the CRC. The CRC focused on rehabilitation and reintegration of juveniles into the larger society. So attempts were made to adopt a child friendly judicial process that placed the interest of the child at the very top. The Juvenile justice (Care and Protection of Children) Act was passed in 2000 and has been amended thrice since then. The Juvenile Justice (Care and Protection of Children) Amendment Act of 2006, Juvenile Justice (Care and Protection of Children) Amendment Act, 2011 and finally the Juvenile Justice (Care and Protection of Children) Act, 2015. The Act of 2000 emphasized the need for social re-integration of the child victims to the

extent possible without resorting to judicial proceedings. It addressed the need to provide proper care and protection to 2 categories children, Children in Conflict with law and Children in Need of Care and Protection, through a child friendly approach in adjudication and disposition of matters keeping in mind the best interests of children and for their rehabilitation through various institutions. In the Act of 2000, a juvenile or child has been defined as one who has not completed 18<sup>th</sup> year of age. This definition has remained consistent across all the amendments that the Act underwent till 2011. However, a significant change was introduced in the Act of 2015, which stipulates that Juveniles aged between 16 and 18 would be tried as adults if they were charged with heinous crimes. This is in the aftermath of the Nirbhaya case, where one of the perpetrators was a Juvenile.

Children in Need of Care and Protection includes those who are without home or settled place or abode, without any dependable means of subsistence, those who live with a person (whether guardian of the child or not)- when this person threatens to kill or injure the child and there is a likelihood of the threat being carried out, children who are physically and mentally disabled or children suffering from terminal illness or incurable diseases having no one to support or look after them, those who have unfit parents or guardians who fail to look after the child, those who have been abandoned, those who are tortured or are likely to be tortured, exploited for sexual or illegal acts, those who are vulnerable and likely to be inducted into drug abuse or trafficking. Children in Conflict with law are those who are alleged to have committed an offence. The definitions for both category of children have remained the same even in the Juvenile Justice Act of 2015.

The JJ Act 2015 introduces certain principles concerning the care and protection of children in Section II. This was absent from the previous Acts. The principles include:-

1. Principle of presumption of innocence – to assume the innocence of any child till s/he reaches the age of 18.
2. Principle of dignity and worth – treating every human being with equal dignity and rights.
3. Principle of participation- every child would have the right to be heard and participate in all processes and decisions that affect his/her interest, the view of the child has to be taken into consideration keeping in mind the age and maturity of the child.
4. Principle of best interest – all decisions regarding the child should be based upon the best interest of the child and helps the child to reach their full potential.
5. Principle of family responsibility- primary responsibility of care, nurture and protection of the child would that be of the biological family or adoptive parents or foster parents.
6. Principle of safety- all measures have to be taken to ensure that the child is safe and is not subjected to any harm, abuse or maltreatment while in contact with care and protection system and thereafter.
7. Positive measures – all resources are to be mobilized including those of family and community, promoting the well- being, facilitating development of identity and providing an inclusive and enabling environment, to reduce vulnerabilities of children and the need for intervention under this Act.
8. Principle of non-stigmatising semantics- adversarial or accusatory words are not to be used in the processes pertaining to a child.
9. Principle of non- waiver of rights – no waiver of any rights of the child is permitted or valid. Any non-exercise of fundamental right is seen a waiver.
10. Principle of equality and non-discrimination – there should not be any discrimination against any child on the grounds including sex, caste, ethnicity place of birth, disability and equality of access, opportunity and treatment should be provided to every child.
11. Principle of right to privacy and confidentiality – every child has the right to privacy and confidentiality by all means throughout the judicial process.
12. Principle of institutionalization as a measure of last resort- every child would be placed in institutional care as a step of last resort only after reasonable inquiry is made into the case.
13. Principle of repatriation and restoration – Every child in the juvenile justice system have the right to be re united with his/her family at the earliest and to be restored to the same socio economic and cultural status that the child was in before s/he came under the purview of this Act unless such restoration and repatriation is not in his/her best interest.
14. Principle of fresh start – all past records of any child under the juvenile justice system should be erased except in special circumstances.
15. Principle of diversion – measures of dealing with children in conflict with law without resorting to judicial proceedings shall be promoted unless it is in the best interest of the child or society as a whole.
16. Principle of natural justice – basic procedural standards for fairness shall be adhered to including the right to a fair hearing, rule against bias and the right to review, by all persons or bodies acting in a judicial capacity under the Act.

The Acts mention the establishing Juvenile Justice Boards (JJBs) for Juveniles in conflict with Law. These boards comprise of a metropolitan or judicial magistrate and two social workers one of whom has to be a woman. Cases of Children in conflict with Law have to be heard in this board. The power of this board can also be used by the High Court or Sessions Court (High Court can function as the board if an appeal is made against the board). For

the rehabilitation of Juveniles in Conflict with law, the Government will establish Observation Homes and Special Homes in every district or group of districts. These Homes would either be set up by the government or government can form a contract with a voluntary organization to do so. Juveniles whose inquiry are underway, are usually kept in Observation Homes, as once the Board decides upon their cases, they are either sent back to their families, in the absence of family or guardian or if the Board feels that the Child requires time to rehabilitate, the child may be sent to a special Home for not more than three years. For the JJ Act of 2015, if a person within the age group of 16 – 18 is accused of committing a heinous crime, s/he would be examined by the Juvenile Justice Boards to decide if the act was committed by a ‘child’ or an ‘adult’. This decision is taken entirely by the Board after the person has been assessed by psychologists and social experts. This would ensure that the rights of the child is protected if the act has been committed by the ‘child’. The Board, in deciding whether the Act was committed as an adult or as a child, would take into consideration the age and the maturity of the child. It is assumed that within the age group 16 – 18 years, a child reaches that level of maturity where one is aware of one’s actions when/s/he commits an act of serious nature. As a result s/he may be tried as an adult in court even if s/he is a ‘child’. The entire responsibility of deciding whether the accused is an adult or child falls on the Board and this becomes crucial when the judgement is pronounced based on this fact.

Moreover the Act has also removed the clause that pertains to the trial of a person above the age of 21 years as an adult for committing a serious offence when the person was 16 – 18 years of age. Initially it was considered that if the person was a juvenile when he committed the offence, even after he became an adult, he would be tried as a juvenile since the age at the time of commission of the Act was taken into account. This clause has been removed. Apart from this, the Act has also increased the period of inquiry for children within the age group 16 – 18 when the nature of crime is serious. Several important changes are noticed -

- Juveniles are taken to Special Juvenile Police Units and the police have to report the child to the Board within 24 hours (excluding the time taken to make the journey).
- If a child is not released on bail, he is placed in the custody of an Observation Home.
- The SJPU are responsible for informing the child’s parents and the probation officer who then makes necessary enquiries into the case.
- If a child is found guilty of the offence, s/he is released after advice and counselling. The child may be released with or without a bond (release depends on the nature of the crime, those found guilty of serious offences are kept in Homes). The child may also be asked to pay a fine (if s/he is above 14 years and earns a living).
- A report has to be placed before the board by the probation officer before the release of the child. Juvenile cases cannot be handled with non-juvenile cases. This means that juveniles cannot be tried in adult courts. Moreover children in need of care and protection cannot be tried with those in conflict with law.
- The identity of the juveniles are protected, their names or pictures cannot be shown or published by the media (newspaper, magazines and visual media). Juveniles who run away from Homes can be brought back without a warrant or punishment. Any form of cruelty against the juveniles is a punishable offence.

To deal with Children in need of Care and Protection, a Child Welfare Committee has been set up. The Committee is headed by a chairperson and four other members of whom at least one has to be a woman and one expert on Children’s issues. The CWC is set up with the aim of guiding the provisions for care, treatment, protection and development of the Child. The child may be sent to a Children’s Home or a Shelter home if family or guardian is not available. Children’s Home or shelter Homes may be set up either by the Government or in collaboration with voluntary organizations. If children come from a different area or state, they need to be shifted to the closest institution and referred to the Child Welfare Committee of that area. The main purpose is to restore the Child back to family and family environment provided it is safe to do so.

The significance of rehabilitation and reintegration are also discussed in all the Acts. Non institutional solutions for the rehabilitation of the children are also mentioned in the Acts. These include adoption, foster care and sponsorship. Orphaned and abandoned children are sent for adoption. The Committee may declare a child fit for Adoption and refer him/her to an adoption agency. Foster care involves taking care of the child before he/she is up for adoption. Sponsorship programmes are to provide educational, nutritional, health and other services to families or guardians and home. The last chapter of the Act discussed miscellaneous provisions. Some of these are:-

1. Children with special needs like terminal disease need to be provided care at institutions that specialise in such care.
2. The government can set up advisory boards at different levels that would suggest ways in which various provisions could be implemented.
3. Special provisions like leave for the child on account of death of a family member, examination, illness of a kin and kith, marriage of relatives, accidents or emergencies of the same nature. But the child has to return within 7 days. If the child fails to do so, he or she would be brought back to the Home.

What is quite interesting here is that even though legally one would consider a person- child if s/he has not turned 18 years yet but if one looks at other legislations like Right to Education Act 2009, a child is a person who has not attained the age of 14 years. Somewhat in consonance is the Factories Act 1948, and the Child Labour

(Prohibition and Prevention) Act of 1986, where a child is seen as capable of work once s/he turns 14, so a 14 year old who earns is seen to acquire some degree of freedom or autonomy. Thus the State is empowered to put a child who has turned 14 years but yet to reach eighteen years of age under institutional care. The legal age for adulthood may be 18 years but implicitly the process begins much earlier, as early as 14 years of age.

The Child Marriage Prohibition Act of 2006 defines child as a male who has not completed 21 years of age and a female who has not completed 18 years of age. If a male adult above 18 years gets into a child marriage he shall face imprisonment up to two years and or a fine that extends to Rupees 1 lakh. Unless proven otherwise, the parents and guardians of the child are considered to have failed to stop the child marriage and are also held accountable. Child marriage would also be considered void if the child is detained away from his/her parents or guardians, forced to go to a different place, sold into marriage or made to marry after which they are used for immoral purposes or trafficked. The court has the power to issue an injunction prohibition against any person, including a member of an organization or an association of people suspected of child marriage. The court may also act against a suspected child marriage on its own motion but it needs the person/association to respond to the injunction with time. Marriage carried out after an injunction is void. The Act also describes the role of a District Child Marriage Prohibition Officer who has to ensure that no Child marriage takes place in his/her jurisdiction. Rules of this Act are to be made by respective State Governments. It calls for the amendment of the Hindu Marriage Act 1955 and the repeal of The Child Marriage Restraint Act, 1929.

Immoral Traffic Prevention Act, 1986.

The Government of India has ratified the International Convention for the Suppression of Immoral Traffic in Persons and the Exploitation of the Prostitution of others in the year 1950. Hence the Indian government passed The Suppression of Immoral Traffic in Women and Girls Act 1956, which was further amended in 1986 and called the Immoral Traffic Prevention Act 1986. The Act discusses trafficking only in relation to prostitution and not in relation to other purposes like domestic work, child labour, organ harvesting etc. The Act defines child as any person who has not completed 18 years of age. If a person induces or takes a child for the purpose of prostitution then the sentence is a minimum of seven years but this can be extended to life imprisonment. Any person involved in the recruiting, transporting, transferring, harbouring or receiving of persons for the purpose of prostitution, any person attempting to commit trafficking or found in a brothel or visiting a brothel is punishable. If a person is found with a child, it is assumed that s/he has detained the child for the purpose of sexual intercourse and is punishable upto seven years that may get extended to life imprisonment or a term of ten years with a fine of Rupees one lakh rupees. Any child found in a brothel or being abused for the purpose of prostitution can be placed in an institution for their safety by a magistrate. This Act has not been amended after 1986.

Protection of children from Sexual offences Act 2012. (POSCO)

This enactment is one of the first attempts made to address the issue of sexual offences against Children. The Indian Penal Code does not speak of all kinds of sexual offences against children and it does not distinguish between an adult victim and a child victim. The POSCO Act was passed on the 22<sup>nd</sup> of May 2012. The Act defines child as any person below the age of 18 years and provides protection to all children from all kinds of assaults – sexual assaults, harassment and pornography. The Act provides a clear definition of these assaults and punishment is fixed based on the gravity of the offence committed. An offense is considered ‘aggravated’ when it is committed by a person in authority or a position of trust (security forces, police officers, public servants). The Act mentions the establishment of special courts for trial of offences keeping in mind the best interest of the child and there are also provisions for a child friendly procedure for reporting, recording evidence, investigation and trial of offences. The special courts need to complete the trial within a year from the date the case is taken up. Provisions include that the statement of the child to be taken at the place of residence or a place of the child’s choice, a woman officer needs to be present and children cannot be detained at the police station in the night. Even the intent to commit an offence is recognized as punishable by the Act, though the punishment is half of the punishment prescribed for the actual commission of the crime. The Act also prescribes punishment for the abetment of the offence and includes trafficking of children for sexual purposes. As soon as a complaint is made, the child is to be rescued and taken to shelter homes or hospital. The Special Juvenile police Unit needs to report the case to the court within 24 hours. Besides, the Act entrusts central and state government to spread awareness about these issues. The NCPCR (National Commission for Protection of Child Rights) and the SCPCR (State Commission for the Protection of Child Rights) have been given the responsibility of implementing this Act.

There has been a shift in terms how the child is perceived by law. The shift has been from considering children as passive recipients of efforts made by the government and other agencies to provide them with care and protection to considering children as active agents who play a pivotal role in shaping their lives. This by no means reduces their need to be protected and taken care of. The focus is on a holistic understanding of the children and their life experiences and thus directing efforts towards ensuring their overall development.

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