INADEQUACIES IN LEGISLATION ON CHILD-CARE IN INDIA

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Introduction

IT WOULD be unjust to say that India has not done anything substantial to protect its child population. When we look at the constitutional provisions and the norms of Indian laws, Central and Local, from the children's perspective we find that Indian Parliament and State Legislatures have put in their efforts, both in the pre and post Independence eras, to solve certain problems of the Nation's children and to protect some of their vivid interests. It has resulted in the passing of over a hundred statutes protective of children. Recently, the Indian judiciary, particularly the Supreme Court has also extended its benevolent inherent 'public interest' jurisdiction to the cause of this weakest segment of the human population by delivering certain historic decisions pertaining to the working conditions of child labour and undertrial juvenile delinquents placed in jails etc. Besides the legislative and judicial efforts, various child welfare programmes have been carried out and services rendered to secure the educational and health interest of the children both at the administrative and non-governmental levels.

But the question is whether we have achieved the goal of total Child-care in India as envisaged previously under the U.N. Declaration of the Rights of the Child, 1959 and now reinforced by the U.N. Convention on the Rights of the Child, 1989. the answer is apparent and in the negative. Unless we know the pitfalls, deficiencies, lacunae and gaps in our existing law relating to child care, no proper modifications may be made nor any new scheme of an integrated child-care and welfare may be mooted. Certain studies have been made in this direction including one doctrinal dissertation by this writer.

Our study reveals that the legal protections so far made available to children in India do not match to their actual needs in many areas. The existing law provides special safeguards to children both at the substantive and procedural law, whether civil or criminal and follows a policy of protective discrimination in favour of the child, yet in terms of the child's rights, parent's duties, societies' obligations and the State's responsibilities, we still lag behind the ideas set up under the U.N. Declaration and the Convention on the Rights of the Child and as compared to such child care provided at certain developed legal systems. What the Indian law has provided to the child so far only partially meets his legal needs. In some areas the existing law on child care is anamolous or ambiguous, in some areas there are legislative gaps while in many areas we have no law to protect the child. In a few areas e.g. guardianship and custody, the judicial law is more progressive and much ahead of the written law.

Certain prominent inadequacies in existing Indian laws regarding child-care and protection, found in our study, may be briefly pointed out here.

Variations in definition of child

Before ascertaining a child's legal status, a child must be defined in law. It is a difficult task because most laws which affect children have their own definition of child.[1] Thus under the Indian Majority Act, a minor is a person below the age of 18 years, while the different personal laws have their own concepts of minority.[2] Under various labour laws, a child may be a person below the age of 12, 14 or 16; age of child-hood for boys and girls may also very.[3] A conceptual confusion also persists in many areas

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1. Sujata Manohar, "The Status of the Child in Law", *The Journal of the Family Welfare*, vol. XXVI, No.2, Dec. 1979.

2. E.g. under Muslim Law the children attain majority on the age of puberty, which varies in case of male and female children.

3. The Juvenile Justice Act, 1986.

of children's jurisprudence. There is a complete freedom to Parliament and the 22 State Legislatures to coin a term or a new phrase, every time an enactment is passed.[4]

Lack of civil rights of child against parents or state

Children have no specifically defined civil rights against their parents or the state, with the exception of a right to maintenance recognised under the Hindu and the Muslim law. Under the Christian, the Parsee and the Jewish personal laws as they apply in India children do not have a legal right even to maintenance. The Summary proceedings of section 125 Cr. P.c. is the only remedy available to those children against their father. The quality and adequacy or inadequacy of maintenance provided is hardly the concern of law.

Partial application of welfare of child principle

The U.N. Declaration/Convention and our National Policy on children equally recognise that welfare of the child must be the paramount consideration in all disputes involving children. But all the substantive or adjective laws do not give place to this principle. Thus, the Guardians and Wards Act, 1890, though it recognises the welfare principle,[5] does not declare it to be of paramount consideration. Neither the welfare of the child principle finds place under provisions of the matrimonial laws dealing with custody and maintenance of children during matrimonial causes, nor is it a consideration for deciding the maintenance allowance of the children, be it under the personal laws[6] or under section 125 of the Code of Criminal Procedure, 1973. There is no obligation upon the court to consider the welfare of a child, to be given in adoptions by the natural guardian, under the Hindu Adoption and Maintenance Act, 1956 at any stage. Only the Hindu Minority and Guardianship Act declares the welfare of the child as a paramount consideration for deciding matters of guardianship and custody.[7]

Inequality and discrimination on grounds of religion or sex alone

Though right to equality is a constitutionally guaranteed fundamental right of every child, in some matters children suffer inequalities amounting to discrimination on grounds of religion, race, caste and sex only.

Some inequalities on grounds of sex only are there, under the Muslim personal law in matters of *Hizanat* (custody) of children. Christian children are discriminated against on the ground of sex only under the Indian Divorce Act, 1869.

Under the Hanafi law, the mother is entitled to the *hizanat* of her male child upto the age of seven years and her female child upto her attaining puberty which in absence of proof is presumed to arrive at the age of 15 years.[8] Under the Shia law she is entitled to such custody in case of a male child till the age of two years only and in the case of female child till the age of seven years.[9] Thus, not only the Muslim law rule regarding mother's custody differs from the Hindu law rule, where it is five years uniformally for the children of both sexes, [10] there is an inter-sectoral inequality between the rules of Hanafi and Shia schools.

The age of minority to entitle the Christian child for an order of the matrimonial court in respect of his custody, maintenance and education under the Indian Divorce Act, 1869 is different for the male and female children. Under the Act, the sons of Indian fathers cease to be minors on attaining the age of 16 years

4. For instance, who was described as a 'delinquent child' under the (Central) Children Act, 1960, had been called as a 'Juvenile delinquent' under the West Bengal Children Act, 1959, as a 'Juvenile offender' under the Mysore Children Act, 1964, as a 'Youthful offender' under the Bombay Children Act, 1948 and as 'Young offender' under the Tamil Nadu Children Act, 1920. This anomaly has, however, been removed with the passing of the Juvenile Justice Act, 1986, which now uniformally applies to the whole of India.

5. See ss. 7, 17 and 25, Guardians and Wards Act, 1890.

6. E.g. Hindu Adoptions and Maintenance Act, 1956.

7. The Hindu Minority and Guardianship Act, 1956.

8. Fyzee, *Mohammedan Law* 93 (4th ed.).

9. Id. at 198; Mulla, *The Principles of Mohammedan Law,* Sec. 352; Tyabji, Sec. 238.

10. S. 6, Hindu Guardianship and Minority Act, 1956.

and the daughters on attaining the age of 13 years;[11] in other cases it means unmarried children who have not completed the age of 18 years.[12] Under the Parsi Marriage and Divorce Act, 1936, such orders may be passed with respect to children under the age of 16 years of both the sexes. Under the Hindu Marriage Act, 1956, this age is 18 years for children of both sexes.

Thus, the Indian Divorce Act is discriminatory to female children on the basis of sex, it is again discriminatory to children (of both sexes) of Indian fathers on the grounds of nationality of the father. Again inequality on grounds of religion only is discernable in the rules determining legitimacy of children in Hindu law, on the one hand and Muslim, Christian and Parsi laws on the other. While Hindu law confers a qualified legitimacy[13] on children of void and annulled voidable marriages, Muslim law retains the distinction between children of void and valid marriages. Even the applicability to Muslims of Section 112, Indian Evidence Act, which determines the legitimacy of children of valid marriages, has been doubted.[14] Similarly, there is inequality in the consequences of illegitimacy in different personal laws. Such children are discriminated against in matters of guardianship, custody, maintenance and inheritence more or less under all personal laws. Hindu law has, however, been most libaral and conferred the maximum benefits on this category of ill-fated children.

It is submitted that with a view to providing suitable care and protection to those children who are born illegitimate, enactment of a uniform law carrying the spirit of the United Nations Draft General Principles on Equality and Non-Discrimination in respect of persons born out of wedlock, is the dire need of such ill-fated children.

Want of a uniform law of adoption

There is no general law on adoption or foster care. Adoption is recognised only in Hindu law which, too, is not child-oriented and contains certain outdated concepts e.g. only a Hindu child may be adopted; the adoptive parents may not adopt a son if they have a son, a grandson or a great grandson. Similarly, a daughter cannot be adopted if there is one upto the same degrees. No permission of the court is required where the child is given in adoption by the natural guardian and his wishes are not material in such adoption. Adoption once made is irrevocable. Non-Hindus cannot adopt a child even if they wish to do so.

Want of a law on child nutrition and child health

Surprisingly, there is no law on child nutrition and child health except in the sole area of compulsory and free vaccination against small-pox. There is no general law to provide pre-natal and post-natal services to the mother and the child.

Want of a law for physically and mentally handicapped children

The hardest hit are the physically handicapped and mentally retarded children who have no legislative protection whatsoever. The Leprosy Act and the Lunacy Act, 1912 adopt a seggregative policy and try to save the society from the lepers and the unsound rather than protect their interests. The Mental Health Act, 1981[15] which would replace the Lunacy Act too scares the mentally retarded and does not effect any major changes in the old policy except a civil and sophisticated terminology. The Ear Drums and Ear Bones (Authority for use for Therapeutic purposes) Act, 1982 and the Eye Authority for Use for Therapeutic Purposes Act, 1982 which could provide some relief to the deaf ad blind children respectively,[16] are applicable to the Union Territory of Delhi only.

11. S. 3(5), Indian Divorce Act, 1869.

12. *Ibid.*

13. See, s. 16, The Hindu Marriage Act, 1955.

14. See, S. Misbahul Hasan, "Mahmood and the Muslim Law of Legitimacy" *Aligarh Law Journal* 80-97 (1973); Tahir Mahmood, "Presumption of Legitimacy under the Evidence Act - A Century of Action and Reaction, *J.I.L.* 1.781 (Special Issue 1972).

15. The Bill was introduced in Parliament on 14.12.1981.

16. The two Acts provide for the removal of ears and eyes respectively, from the dead body of such persons who have authorised such removal, before their death.

Want of statutory financial assistance to poor parents

Neither there is any legislation providing financial assistance to the economically weak parents for the purpose of maintaining their children as available in certain developed systems[17] nor is there some scheme of social security or supplementary benefits to parents or children within the legal framework. The services provided through the Integrated Child Development Scheme are limited to certain selected projects and have no legal support. The same is the case with supplementary nutrition and the Minimum Needs Programme, immunisation and other services provided by the State under the Five Year plans.

Deficient education laws

Primary educational Acts which make education universal compulsory and free have yet to record a cent per cent enrolment, attendance and area coverage. The handicapped children are left out of the general education scheme. The part-time educational needs of child below 14 years, who is compelled to serve due to his poor economic circumstances too remains out of the purview of the Education Acts. These Acts provide no coverage to school health, nutrition services or play and recreational services as part of the schooling system.

Piecemeal protection to child labour

The concepts of hazardous and non-hazardous employment not having been defined, legal protection to child labour remains piecemeal. The labour laws that exist are uneven in their safeguards and lack proper implementation. Millions of children still work in unhealthy and hazardous conditions mostly in the unorganised sector.

Certain conflicts between judicial and statutory laws

Though the judiciary with the aid of the principle of welfare of the child has brought up the law of guardianship and custody close to the developed systems and has also achieved a uniformity between the different personal laws, yet the statutory law or the customary laws stand in their place with many discrepencies and gaps and lag behind the judicial law. For instance, all personal laws and the Guardians and Wards Act, 1890[18] retain the rule of paternal supremacy; the Muslim law does not give to the mother even a second place in the race for guardianship. Custody of the child belongs to the father as of right, except a limited right of the mother to have the custody of children of tender years[19], the upper age for which varies under the different personal laws. On the other hand the judiciary considers welfare of children as the paramount consideration in deciding such matters and the personal laws and paternal supremacy stand superceded.

Lack of specialized children courts

The judicial machinery for child protection remains to be fully child-oriented. Though juvenile justice is statutorily promised to the delinquent and neglected children yet there is great deficiency of proper Children Courts, Welfare Boards and the Juvenile Act Institutions, both short-term and long-term. Many children lie detained in prisons waiting for juvenile justice.

Civil justice is not even claimed to be juvenile. A next-friend or a *guardian-ad-litem* is their only privilege.[19] The structure and functioning of the civil courts, or even the recently created Family Courts, can hardly guarantee a patient hearing needed to keep the welfare of the child as a paramount consideration in all disputes pertaining to him. The Civil Courts or Family Courts have no powers to commit a child in need of care and

17. Under the English Child Benefit Act, 1975 a person, responsible for maintaining a child below the age of 16 years and if the child is receiving a full-time education, under the age of 19 years, is entitled to financial assistance called a 'child benefit' (ss. 1 and 2). Financial assistance is also available under the Social Security Act, 1975 and the Supplementary Benefit Act, 1966.

18. S. 19(b), Guardians and Wards Act, 1890.

19. See, Order XXXII, Code of Civil Procedure, 1908.

protection to a Juvenile Home, to keep him in their own wardship or appoint supervisors in respect of children, in any situation needing a watch over the parents or guardians.

Inadequacy of auxilliary services under juvenile laws

Although certain institutional and support services[20] have been provided under the Juvenile Justice Act, 1986, still a big gap is felt in administrative machinery required to properly implement the Juvenile Justice Act and other allied laws and provisions on child-care. It is regrettable that the conceptual advances made in the philosphy of juvenile justice and child-care and welfare have not found their reflection even in the recent juvenile legislation in India. There is need to recognise and statutorily provide for some auxilliary services such as Juvenile Police Bureaux, Child Guidance Clinics and Child Orientation and Research Institutes, to train the entire personnel involved in the implemention of juvenile justice. Some standby local agency is also required to protect and provide children in their immediate needs.

Lack of an integrated approach to child care

Above all our efforts in the arena of juvenile justice-civil, criminal and protective are disintegrated. A proper linkage between the judicial child-care and administrative child-care on the one hand and the governmental and non-governmental efforts on the other hand is missing. The role of voluntary organisations has not been properly defined. The non-institutional services of the society are neither recognised nor regulated by the law. Due to lack of proper liaison and coordination the child welfare becomes segmented and misses a look at the child as an integral whole. Indian children miss many advantages and the protection that is available to their brethren in the developed and affluent countries.

As revealed by our short review, the existing legislative framework only partially meets the requisite legal needs of the children in terms of the U.N. Convention on the Rights of the Child. Having been ratified by over 20 nations the U.N. Convention on Children is now a legal document and an integral part of international law. India being a party to it and having ratified it, is legally obliged to incorporate the rights of the child contained in the Convention into its legal framework. Further, the state has to report regularly on its efforts to implement these rights to the permanent committee set up by the U.N.O. It is the right time for us to start implementing the Convention in its spirit and words, to the extent we can, in our socio-economic conditions.

Suggestions

Review of the National Policy on Children 1974

The National Policy resolution of 1974 relating to children is based upon the principles laid down in the U.N. Declaration of the Rights of the Child 1959. The principal measures and priority areas need to be revised now in the light of the new goals and areas of priority stipulated under the Convention of 1989.

Review of existing legislation on children

The most important task for the State is of getting reviewed the entire Indian law relating to children in detail in the context of the U.N. Convention and to find out the areas where the Indian law responds to the requirements of the Convention and the areas where it lacks or fails. The gaps and lacunae may than be supplied by amending the existing laws or by enacting new laws whereever required, so as to provide legal coverage to all the Rights of the Child in the Convention.

Some research studies of reviewing the law relating to children, have been made with reference to the Declaration of the Right of the Child, 1959, one being that by this writer.[21] It would be a major research project, but its relevancy is immediat and urgent.

20. E.g. the probation officer and the panel of honorary social workers provided under the Juvenile Justice Act, 1986.

21. See, K. S. Sharma, "Legal protection to children in India : Compulsive Need for an Integrated Approach," a Ph.D. thesis, submitted to the Panjab University, 1984.

Enactment for giving effect to convention: The Children Code.

Mere ratification of the convention by the Government of India or a mere Resolution of adoption of the Convention by Parliament will not make the Convention a law of the land. A new and further legislation is also essential for the purpose. Article 253 of the Constitution empowers Parliament to legislate for the whole of the country or any part thereof for implementing any such Convention or decision made at any international conference, association or other body.

The most important question here is whether the Convention may be made the law of the land by a single enactment, or multiple enactments shall have to be passed by Parliament? In the submission of this writer the better course is to enact an Integrated and Uniform Children Code for India, which should cover the entire gamut of legislation in India relating to children in one compass. Such Code should contain not only the substantive rights of the children, contemplated in the U.N. Convention, but also provide an integrated set-up of exclusive Children Courts to adjudicate upon these rights and an Integrated Administrative set-up from the Centre to the village level, to look after the actual implementation of the child's rights. The writer's study[22] aforesaid, provides a model of such Children Code for India.

22. *Ibid.*