PART - I

RIGHTS OF AND RESPONSIBILITIES TOWARDS THE CHILD - A REVIEW
CHAPTER-I

INTRODUCTION

Children are not only the lovable members of a family but they are also the tendermost in the society and the most innocent citizens of a state. Children form a distinct class of persons and deserve a greater care and protection of their interests as compared to the other sections of the population. In them live the future bread-earners of the family, the farmers, labourers, the bravest soldiers, doctors, engineers, scientists and businessmen, without whom a nation cannot progress. Thus there is a threefold interest, viz, familial, social and national, involved in their protection. It has been realised 'what the best and wisest parent wants for his own child, that must the community want for all its children'.

The care of the child is no longer subject to the willful choices of parents, it has rather attained the status of a categorical imperative. Every nation, developed or developing, links its future with the present of the child. The need for special safeguards and care including appropriate legal protection being provided to the child before as well as after birth, have repeatedly been recognised at the international level.

Although the concept of protection being accorded to children is not totally new to the Indian Legal system yet the modern concept of a legal protection to children contemplating their overall welfare in its most comprehensive sense is somewhat different from the old concept and is the result of a long and continuous process transcending different legal systems and influenced by different factors in different countries. The expressions 'parental obligations', 'welfare of the child', 'child care and protection', 'state responsibility towards children' and 'rights of the child' are modern concepts some of which have grown into full fledged legal principles and depict the different facets of our responsibility towards children. The application of these concepts under the Indian legal system remains to be fully assessed and attained. 

'Welfare of the child' as a modern concept is most exhaustive in its scope, covering all aspects of a child's balanced growth viz. the nutritional, medical, psychological, educational, vocational, economic and social needs of the child. Child protection ranges from the time of his conception to the attainment of majority by him. It refers to the total well-being of the child. It includes not only the care of mal-adjusted and delinquent children but also the development of a child's physical, mental, emotional and social faculties. Thus it is the whole child and not some isolated phase of his development, which the modern concept of child protection aims at.

4. A few studies have been made on some of the concepts e.g. see Professor Paras Diwan, LAW OF PARENTAL CONTROL, GUARDIANSHIP AND CUSTODY OF MINOR CHILDREN (1968), which traces the evolution of the doctrine of 'welfare of the child' as also the 'parental obligations' in India and certain other legal systems. 
Legal history reveals that in the patriarchal legal systems, children did not have a legal status. They were not even considered as 'persons' in the eye of law and the father, in the exercise of his patria potestas, had full rights and powers of life and death over them. The patriarch could sell or hire them exactly in the same way as the keeper of a livery stable sells or hires out his horses today. In this period children had no individual rights personal or proprietary which could be enforced against the parents or the State. Neither the society nor the State had any locus standi to intervene in the parent child relationship. Ancient Hindu law was no exception to these general features.

It may appear surprising that in the early law of most of the systems, there was nothing much as to the parental obligations towards children. There was no legal obligation even to maintain children either at the Roman Law, the Greek Law or at the English Law. Hindu Law, however, provided an exception in this regard. The Sanskrit term 'Pitri' (the nominative plural of 'Pita' i.e. father) etymologically means 'protector'. The derivative meaning of the word also emphasizes the most important obligation of the father with reference to the off-spring, viz. to look-after the helpless young one and give it care and protection. The liability of a Hindu father to maintain his minor children was recognised by the sages. Manu declared: 'aged parents, the chaste wife and an infant son must be maintained even by doing hundred prohibited acts.'

8. 'A wife, a son and a slave are devoid of property, whatever they acquire becomes his whose they are'. Manu, VIII, 416.
9. The English Law recognised only a moral obligation of the father to maintain his children, but in respect to the illegitimate children even the moral obligation did not exist.
11. इदशे च मातिपत्र च सार्वक भार्यामुनि रिष्यु: I
यविथे अपायेष्यते कता भलोव्या मनु: अबवीव मनु: VIII, 389.
In India, the Dharamshashtra epoch demonstrates the second stage of the development in the status of the child when the patriarchal family transformed into the joint family and there was emergence of some individual rights of the children and curtailment in the powers of the father. The theory of sonship also improved the status of the male child. Various forms of secondary sons were recognised which was something akin to the process of legitimisation though not technically so. Hindus never considered an illegitimate son as filius nullius. The one who was directly or indirectly responsible for the birth of the child, had to provide maintenance for it.

The Hindu joint-family system also provided a social security to the children in the family. Under this system, the minor children's person and property were under the care of the father, who under the Mitakshra school was also the Karta of the joint-family. On the death of the father the eldest male member of the family became the Karta and the minors immediately came under his care and protection. A child who went to the Guru's Ashram for study, during the Brahmacharya Ashram, was under the protection of the teacher.

The Hindu law vested the ultimate protection of the children in the Sovereign or King as parens patriae. Manu ordained, 'The King should protect the inherited and other property of a minor, until he has returned (from his teacher's house) or until he has passed his minority.'

A satisfactory rearing and protection of the children in the ancient Indian legal system was ensured by an effective social organisation through its institutions of joint-family, the Varnashram vyavastha and the close-nit rural community. These institutions

12. Vir Mitrodaya 1,9, Manu IX, 104.
14. Ibid;
16. बालदवादिकं रिवर्त तत्वचारणुपाल्मत | महाराज सुतकारायु साधुगमवत महाराजः।
Manu, VIII, 27, also see Gautam 10, 48; It was also the duty of the King to protect the person and property of such girls who had no one to protect them, whose family was extinct and those who were afflicted with disease. Manu, VIII, 28-29, Vishnu, III, 65.
stressed co-operate responsibilities of members towards dependents of all categories including the needy children. The Hindu Dharma which was a system of duties rather than rights and its finer values of 'propkara', 'daya' and the concept of 'pap' and 'punya' propounded by Vedas, Puranas, Ramayana, Mahabharata, and the other Dharmashastras provided a sufficient security to the well being of all categories of children in that society.

For these reasons though looked from the modern perspective certain drawbacks may surely be pointed out in the textual rules and in practice of the welfare and protection of children in ancient India, yet in the total context of the prevailing nature of the Hindu society, which is more a religio-spiritual than a materialistic one, in comparison with the other systems, child protection in terms of both parental obligations and the social responsibilities towards children in ancient India was quite moderate.

Under the early Muslim law also the father being a patriarch exercised great power over his minor children but he had an obligation to maintain them. According to Hedaya, The maintenance of minor children, rests on their father and no person can be associate or partner in furnishing it. The Muslim law also recognises the secondary obligation of the mother to maintain her children. Unlike Hindu law, the parental obligation to maintain is subject to the conditions that the children have no other means to support themselves. The father, however, has been prohibited from hiring out female children for works or send them into services with any person not within the prohibited degree.

During the administration of justice under Muslim rule the Kazi as a representative of the state, was empowered to watch the interests of minors and had the powers to remove and appoint guardians in certain cases.

19. Durr-ul-Muhtar, ibid.; see also Fatwa Alamgiri, Vol.I p.752. Among Shias, the mother has no such obligation even if she is rich, if father is too poor the obligation is that of the grandfather. Baillie I, 457.
But some newly created socio-economic conditions as a result of the British usurpation of political power in India, their interference in the economic affairs of the country and the growing western influence, weakened the protective forces in the old social structure of the country and created new situations risky to the children. *Dharma* lost its grip and old values faded in the new society. Gradually the joint-family system and the unity of interest felt in the closely knit older rural society also withered away. The orphans, the handicapped and all categories of children in need of care, who hitherto depended on the Hindu social structure for their protection became unprovided.

Modern industrial development in urban areas has been accompanied by emergence of slums, exposing the families living in these slum areas to conditions which are detrimental to the healthy growth of children. Inadequate housing, squalor and lack of sanitation contributes to the creation of unhealthy social environment. Low family income results in the denial of nutritive food and education so vital for the growth of children. The slums created conditions for the spread of delinquency and destitution among children residing in them. The continuous and enormous rise in the population of the country also added to the miseries of the children.

The new socio-economic setup gave rise to the problem of child labour. There was no age bar for employment of children, no minimum working hours or pay scale were fixed, with the result that such children were always over worked, ill-treated, and ill paid. Neither there were any safeguards for their working conditions nor for their health or welfare.

Since the British were more concerned with the administration of India and collection of revenue than the welfare of the people, obviously in the beginning of the British rule no legislative measures were taken for improving the lot of children. Slowly and

---


24. Deliberate efforts were, however, initiated by the society to protect the children under the new socio-economic conditions by establishing certain voluntary institutions to serve the orphans, the destitutes and the handicapped children, *ENCYCLOPEDIA OF SOCIAL WORK IN INDIA* (1968) p.87.
gradually in some areas, compelled by their self interest and in others under the influence of the wave of consciousness towards child welfare which took place in Europe, the State in India took certain legislative and judicial measures, protective of children. The state efforts were influenced from time to time by the 'Declarations', 'Resolutions', and 'Conventions' of the United Nations and its agencies as also the developments in the children jurisprudence in certain western legal systems.

Pre-Independence Legislative Efforts

The first legislative effort to provide care and protection to children may be traced back to the year 1774 when the British King's Charter conferred a special jurisdiction on the Supreme Court, Bengal, to appoint guardians and keepers for infants and their estates, according to the order and course observed in England. Charter of 1800 and 1823, granted similar powers to the Supreme Courts in Madras and Bombay respectively. Under the Indian High Courts Act, 1861 this jurisdiction was inherited by the High Courts of the aforesaid Presidency towns and was specially conferred on certain other High Courts through their Charters. Certain Courts of Wards which were established by local Acts to ensure the collection of revenue also became protective of the person of the minor ward. The process of conferring jurisdiction on the civil courts to appoint guardians of minors began with the Bengal Regulation of 1800 and culminated with the passing of the Guardians and Wards Act, 1890 which contains the present law on the subject.

The movement for a differential treatment of young offenders which simultaneously occurred in England and the United States of America left its impact on India too. The first legislative attempt to deal with children differently from adults was the Apprentices Act, 1850. It provided to bind over juvenile offenders between the

26. The first Court of Wards was established in Bengal by Regulation X of 1795. For a detailed study of the evolution and working of the Courts of Wards see Trevelyan's LAW RELATING TO MINORS, (4th ed.) pp.302-449.
The age of 10 to 18 years involved in minor offences as apprentices instead of sending them to prison. The Reformatory Schools Act, 1876 conferred powers over certain courts to send young offenders to reformatory schools instead of sentencing them to jails. But the real impetus for creating separate children courts to hear all cases involving juvenile delinquents was given by the recommendations of the Indian Jails Committee, 1920, as a result of which a series of local Children Acts were passed by different states, the first being the Madras Children Act, 1920. These Acts were enacted to provide for the custody, trial, maintenance, welfare, education and punishment of young offenders and for the protection of children and young persons who were neglected, destitute or in moral danger or otherwise in need of care and protection. Before Independence the states of Bengal (1922), Bombay (1924), Central Provinces and Berar (1926), Cochin (1926), Travencore (1959), Mysore (1943) had enacted the Children Acts.

The Indian Penal Code enacted in 1860, included extensive provisions intended to protect the child from exploitation and exposure to moral and physical hazards by defining certain offences against the child and providing punishments for those offences. The Vaccination Act, 1880, made vaccination of children against smallpox, free and compulsory and thus tried to check the increasing infanticide due to this disease. Some states later enacted their own Vaccination Acts.

A number of local statutes prohibiting smoking by children were also enacted e.g. Assam Students and Juvenile Smoking Act, 1923, Bengal Juvenile Smoking Act, 1919, Cochin Juvenile Smoking Act K-1096 (1906), Karnataka Prevention of Juvenile Smoking Act, 1911, Punjab Juvenile Smoking Act, 1918. Similarly certain state Acts sought to prevent vagrancy and begging by children. Hydrabad Prevention of Beggary Act, 1350, Karnataka Prohibition of Beggary Act, 1944; Tamil Nadu Prevention of Beggary Act, 1944, and Travencore Prevention of Beggary Act K-1120 are the instances.

The Child Marriage Restraint Act 1929 marked the culmination of the evil practice of marrying children at an quite early age. It fixed the minimum age of marriage for girls at fourteen years and for boys at eighteen years. The Children (Pledging of labour) Act, 1953, and the Employment of Children Act 1958 were designed to protect the children from the atrocities of their employers.

Certain statutes of general application passed in pre-independence era also incidentally, indirectly and sometimes even directly, secured certain interests of the children. For instance, the Indian Divorce Act 1869, The Indian Christian Marriage Act 1872, The Parsi Marriage and Divorce Act 1936 and The Special Marriage Act of 1872 sought to provide for the custody, maintenance and education of children, the marriage of whose parents was the subject of some matrimonial proceeding, e.g. divorce, judicial, separation etc. The Indian Succession Act 1925, and the Hindu Inheritance Removal of Disabilities Act, 1928 saved some rights in succession and inheritance of the illegitimate children and children born out of inter-caste marriages which were hitherto deprived of such rights. The Indian Contract Act 1872 declared the minors as incompetent to contract to save them from the atrocious contractors. The Negotiable Instruments Act, 1881 and the Indian Partnership Act 1952, allowed certain transactions by way of beneficial exemptions to the general rule of their incompetency to contract.

The Prisons Act 1894, the Indian Ports Act 1908, the Tea Districts Emigrant Labour Act, 1952, the Lunacy Act, 1912 and a few more enactments passed in different states also benefitted the children in the pre-independence-era.

Post Independence Legislative Efforts

After attainment of independence the Constitution of India, 1950 recognised the special care and protection needs of the children, some under the part on Fundamental Rights, e.g. Art.15(4) and others under the part on Directive Principles of State Policy e.g. Arts. 24,39(e),(f) and Art.45. Besides the tremendous
29. Sec. 11, Indian Contract Act, 1872.
30. Sec. 30, Partnership Act, 1952.
legislative activity of Parliament, the State legislatures relating to child protection various child welfare programmes have also been implemented at the administrative level through the six successive Five Years Plan.

Immediately after independence, the Factories Act 1948 defined the conditions of service for the child labour in factories. The Plantation Labour Act, 1951, the Mines Act 1952, the Navy Act 1957, the Merchant-shipping Act 1958, the Motor Transport Workers' Act, 1961, and the Apprentices Act 1961, are the statutes which govern the employment of children in the aforesaid respective trades, vocations, and employments.

The Hindu Minority And Guardianship Act 1956, curtailed the unlimited powers of the Hindu guardians in respect of the person and properties of their children and wards. It also recognised the mother as guardian of her minor child in the event of the death of the father. The tender age of the children was sought to be secured by statutorily providing the period of maternal custody. The Act also declared 'welfare of the child' as the paramount consideration in passing any order under the Act.

The Hindu Adoptions and Maintenance Act 1959 removed various drawbacks of the traditional law of adoption and maintenance amongst Hindus. The most salient feature of this Act was to finally scrap the discrimination existing in the obligation of the parents in regard to maintenance of the illegitimate children. Hindu ladies can also now adopt a child in their independent right. It has provided a better scope for the protection of children without home. The dire consequences of illegitimacy have also been cured by the Hindu Marriage Act, 1950 and the Hindu Succession Act 1956.

The process of legislation at the local level by different states was carried further with the passage of certain Prevention of Beggary Acts, Prevention of Smoking Acts and the Vaccination

31. Sec. 8, Hindu Minority and Guardianship Act, 1956.
32. Sec.6, ibid, provides that a minor child shall remain in the custody of his mother until he attains the age of 5 years.
33. Sec.15, ibid.
34. Sec.22, Hindu Adoptions and Maintenance Act, 1956.
35. Sec.9(4) ibid.
36. Sec.15 confers legitimacy on children of void and voidable marriages.
37. e.g. Assam(1964), Bihar(1951), Bombay(1959).
38. e.g. Rajasthan(1950), Jammu and Kashmir (1986, etc.).
The states of Punjab (1949), Uttar Pradesh (1951), Hyderabad (1951) and Saurashtra (1954) also passed the Children Acts for their respective territories.

In 1960 the Parliament passed the Children Act, with the object of establishing children courts and welfare boards in the Union Territories and also to provide a model, in the light of which the existing Children Acts could be amended and brought into conformity with the modern concepts of juvenile treatment, reformation and rehabilitation. Later, the Karnataka Children Act 1964, the Assam Children Act, 1970, the Bihar Children Acts, 1970, the Madhya Pradesh Bal Adiniyam 1970, the Rajasthan Children Act, 1970, the Jammu and Kashmir Children Act, 1970, the Kerala Children Act 1972 and the Haryana Children Act 1974 were enacted on the pattern of the central Act. The Manipur Children Act was enacted in 1978. In 1982 Orissa and Tripura also passed their Children Acts. At present all the states except Nagaland have Children Acts. All Union Territories except Arunachal Pradesh, Chandigarh and Mizoram have implemented the Children Act 1960.

A series of enactments were also passed under the social scheme solely directed to save certain interests of the children, The Young Persons (Harmful Publications) Act, 1956, and the Medical Termination of Pregnancy Act 1971, the Suppression of Immoral Traffic in Women and Girls Act, 1956 covered the health and morality aspects of the childhood. The Orphanage and Other Charitable Homes (Supervision and Control) Act 1960, aims to secure a safe institutional care to the children at the voluntary level. Similarly the Probation of Offenders Act 1958, gives an opportunity to the young offenders to save themselves of their first folly and to pursue a better course of life.

DOCTRINES INFLUENCING CHILD PROTECTION

Besides the efforts of the legislature certain juristic thoughts and concepts relating to children innovated by the judiciary at different legal systems have greatly influenced the evolution of the children jurisprudence and the kind and degree of care and protection provided to children by the parents, the society and the state almost everywhere. A brief reference to these concepts, therefore becomes essential.

(A) Principle of Welfare of the Child

In England towards the close of 19th century there emerged the concept of 'Welfare of the Child', first through judicial interpretation and then by direct legislation, due to which guardianship, which was hitherto regarded as a bundle of rights over the child began to be looked into as a bundle of duties and obligations towards him. Such forceful was the impact of the doctrine of welfare that today there is almost a universal acceptance of the principle that welfare of the child in all matters pertaining to it, is the paramount consideration. Previously the principle governed the guardianship and custody disputes between the parents, but under the modern English law it is applied in all civil, criminal and administrative proceedings in respect to children.  

In the Soviet law they have gone one step further and there the welfare of the child is not only a paramount consideration but the sole consideration, in all matters pertaining to children.

The Guardians and Wards Acts, 1890, through which the doctrine of welfare was statutorily received in India, did not declare 'Welfare of the Child' as a paramount consideration. On the other hand it gave recognition to the personal law in certain matters and the rule of paternal supremacy. The Indian judiciary, however, adopted

41. Khazahalia v Shvangiras (1914) 6 Sud. SSR p.31.
42. 'Welfare of the Child' is one of the considerations under Sections 7,17 and 25 of the Guardian and Wards Act.
43. See, Sections 6,19(b) and 17(1) of the Act.
a course which was in favour of the children. It not merely acted as the supervisor of the guardians but performed its obligation as a Supreme guardian of the children and established the principle of the welfare of the child as a paramount consideration in all matters under the Act. The welfare principle has largely affected the development of almost all branches of the law relating to children, which requires an assessment.

(B) Principle of State Responsibility Towards Children

Another doctrine which has greatly influenced the evolution of children's laws in the 20th century is that of 'State responsibility towards children'. In its earlier development the thought was that State can play only a directive and supervisory role in relation to children, while their upbringing, maintenance and care was the exclusive concern of their parents. But with the emergence of the welfare state it was realised that children are a valuable human resource needing protection and the future welfare of the society and the state lies in the proper growth and welfare of its children. Therefore, parents and guardians are not the only persons obliged to maintain and protect the children, it is as much the obligation of the society and the State. If the parents or guardians fail in their duties the burden should fall on the State. In the words of Professor Pares Diwan, law as a paramount instrument of social control:

should not merely supervise and control those who are entrusted with the care of children and it should not merely protect children from social, economic, physical and moral exploitation, but also, whenever necessary, take them directly under its care. The ultimate responsibility towards children is that of society, and that responsibility is unlimited - to go to any extent in accordance with the need of the child. An idea is gaining ground, both in Eastern and Western countries, that the ultimate responsibility of children is that of the State. The State may discharge responsibility by supervising those private individuals - parents and guardians who are entrusted with the care of children or by supplementing private responsibility with public responsibility or by directly assuming responsibility, (44A).

44. Jhinker Singh v Sithal Singh, 1923 All. 267; Babu Gyan v Sudan, 1955 Nag. 195

Thus it is through the organs of the State and the instrumentality of law that the vivid interests of the child may be protected integrally.

(C) Concept of Rights of the Child

A new concept i.e. 'rights of the child' which surfaced in the early part of the 20th century is a logical consequence of the doctrines of the 'welfare of the child' and 'state responsibility towards children'. It has been fostered by the concept of fundamental 'Human Rights'. Besides jurists and the judiciary certain extra legal agencies both national and international are associating themselves in the development of the concept into a statutory reality.

The traditional jurisprudence defines the legal status of a minor in terms of his capacities and incapacities, his obligations and liabilities, in comparison to those of sui-juris persons. What is missing is that it does not deal with the rights of the child in terms of his special needs, rights to which he is entitled because he is physically tender and cannot look after himself. The jurisprudence no-doubt recognises the special status of the child but it does so more in terms of his mental immaturity rather than his physical inability.

In the traditional sense of jurisprudence a person is either a minor or a major and there are no sub-stages in between. The other sciences both social and medical recognise various stages of development of a child and distinguish his needs in terms of these different stages. Legal theory has yet to adopt that pattern and define his legal status in terms of his physical inability and also in terms of the legal protection that he needs with reference to the different stages of his childhood. Though some statutes do prescribe different ages for the purpose of protection of children in the employment, in avocations and works, different ages are also laid down for custody etc., yet the pattern is not uniform.

Sociological and psychological studies have widened the knowledge of jurists about the problems and needs of the children and the same have to be reflected in law.
In the words of Professor Peter Brett:

Surely therefore, the role of a contemporary jurisprudence is to survey the knowledge which has accumulated in other fields (particularly those of life and behavioural sciences), and to reconsider in its light our existing theory and legal doctrines. Only thus legal reform can be successfully accomplished and the law thereby come in touch with the life of the community which it serves. 45

Formulation of a Bill of Rights of Children

On the analogy of the parental rights against the child46 certain jurists have evolved certain models of child's rights against parents47. In the United States, a development, which J.C. Hall has described 'eccentric':48 has taken place in regard to the formulation of a 'Bill of Rights of Children', of which Professor H.H. Foster has been a noted protagonist49.

The reason for such a formulation, Professor Foster and Mrs. Freed suggest50 is the failure of the law and of the legal institutions to regard the child as a person. If children are persons, they state51 then '...... their points of view should be considered, adult decisions should be reasoned, and their true best interest should be reckoned within terms of reality rather than fancy'. Accordingly, they formulate the moral rights which children possess, and which they plead ought to be given legal effect, as follows52:

45. An Essay on Contemporary Jurisprudence (1975) p.87
46. See Chapter II of this work.
47. See, notably CHILDREN RIGHTS (1972), a Symposium containing contribution by Paul Adams, A.S. Neill or a Michael Duane among others, while certain other jurists call it to be more of a propagandist exercise, J.M. Eckelear, 'What are Parental Rights' (1975) L.Q.R. 210.
51. Ibid. p. 345.
52. Ibid. p.347.
First, to receive parental love and affection, discipline and guidance, and to grow to maturity in a home environment which enables him to develop into a mature and responsible adult.

Second, to be supported, maintained and educated to the best of parental ability in turn for which he has the moral duty to honour his father and mother.

Third, to be regarded as a person within the family at school and below the law.

Fourth, to receive fair treatment from all in authority.

Fifth, to be heard and listened to.

Sixth, to earn and keep his own earnings.

Seventh, to seek and obtain care and treatment and counselling.

Eighth, to emancipation from the parent and child relationship while that relationship has broken down and the child has left home due to abuse, neglect, serious family conflict, or other sufficient cause, and his best interests would be served by the termination of parental authority.

Ninth, to be free of legal disabilities or in capacities save where such are completely shown to be necessary and protective of the actual interest of the child.

Tenth, and finally to receive special care, consideration and protection in the administration of law and justice so that his interests always are a paramount factor.

These jurists, however, are suspicious about the difficulty of giving effect to such a proposed Bill of Rights, on the ground that the courts and other relevant bodies may not always be in sympathy with their aims and content. The fear, it is submitted is unfounded. How can a judiciary which itself propounded the doctrine of welfare of the child and which has rather taken it to the height of declaring it to be the sole consideration, be susceptible to any thing which leads to that welfare. The proposed rights of the child are but the better means to further that welfare, which the judiciary itself cherishes. There may be disagreement about the contents and the form but not the spirit behind these rights.

To give one example, the law recognises the right of a child of tender years to remain in his mother's custody. But of

54. e.g. Sec.8, Hindu Minority and Guardianship Act, 1956.
late the welfare role of the mother has also been called in ques-
tion by both the behavioural scientists and by the judges. In
Barnett v Barnett, Hutley, J.A., specifically refuted counsel's
arguments that the principle that a girl of tender years should be
with her mother was so strong as to prevail over other considera-
tions. The psychiatrist Michael Ruther has equally emphasised
the totality of the child's experience to be considered, a mother
may be important for one aspect but not for all aspects of the
child's developments, he maintains.

The other support to a bill of rights of the child was
received from the politico-civil concept of 'Human Rights', which
later matured into legal fundamental rights in most of the legal
systems. Originating in the Magna Carta, (1215) the Petition of
Rights (1627) and the Bill of Rights (1688) in England which pro-
vided the necessary terminology and the spiritual impulses, the
Human Rights received their theoretical formulation in the 'Decla-
ration of the Rights of Man' adopted in 1789 by the French Nation-
al Assembly and pre-fixed to the Constitution of 1791 and the
'Bill of Rights' in the form of first ten amendments to the con-
sstitution of the United States of America.

Declaration of Geneva, 1924

The 'Rights of the Child' appeared on the public scene
in 1924, when the United Nations in the 'Declaration of the Rights
of the Child, 1924' (popularly called 'Declaration of Geneva')
used this phrase, for the first time at an international level.
Its entrance on the scene was of course more as a social and ethi-
ocal issue than a legal one. It came by way of a pledge of gentle-
men and women of the nations, who declared it as their duty to
meet certain obligations towards the children more in the context
of their physical needs. The term 'right' appears to have been
used here in its general sense and not in legal sense. Thus the

55. (1972) 2 A.L.R. 19 at 27.
56. MATERNAL DEPRIVATION REASSESSED (1972) at 125.
57. Subhash C. Kashyap, HUMAN RIGHTS AND PARLIAMENT (1978) p.3.;
thereafter it became the part of the law of nearly all
European States. JH, Lauter Pacht, AN INTERNATIONAL BILL OF
Declaration of Geneva added a new dimension to the concept of child's rights by bringing it to the public notice, a matter which was hitherto considered to be the exclusive concern of the family lawyers.

Through this document the International Body recognised the following obligations of the mankind towards the child:

I. The child must be protected beyond and above all considerations of race, nationality or creed,

II. The child must be cared for with due respect for the family as an entity,

III. The child must be given the means requisite for its normal development, materially morally and spiritually,

IV. The child that is hungry must be fed, the child that is sick must be nursed, the child that is physically or mentally handicapped must be helped, the mal-adjusted child must be education, the orphan and the waif must be sheltered and succoured,

V. The child must be the first to receive relief in times of distress,

VI. The child must enjoy the full benefits provided by social welfare and social security, the child must receive a training which will enable it, at the right time, to earn a livelihood, and must be protected against every form of exploitation,

VII. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellowmen.

The Declaration of Geneva was thus a reminder to the entire mankind including the administrators, the judiciary and the legislatures of the different nations that a special protection is needed by that tiny little man, who at his birth happens to be the most vulnerable of all the young one's born to other major species of our existence, but upon whose proper development and growth depends their own future and the prosperity of nations. This gave some impetus to the public law jurists and national governments and its impact is clearly visible in the post 1924 child welfare legislation of the different states.

Declaration of Rights of the Child, 1959

In 1948 the United Nations General Assembly adopted, the 'Universal Declaration of Human Rights' which may be said to be

almost the first ever international effort to codify the fundamental human rights. The Declaration was later followed by a series of Covenants\(^{59}\). These 'Human Rights' also recognised certain rights special to the child, some of which were not covered under the 'Geneva Declaration' of 1924. The general rights declared under the Human Rights document were common to the adults and the children.

The Human Rights documents among other rights declared that all human beings are born free and equal in dignity and rights\(^{60}\), that every one has the right to a nationality, to social security and entitled to realisation of rights indispensable for his dignity and the free development of his personality; that motherhood and childhood are entitled to special care and a child, whether born in or out of wedlock, and shall enjoy the same social protection\(^{61}\); that every one has the right to education, education shall be free and compulsory at the elementary stages\(^{62}\) and that parents have a prior right to choose the kind of education that shall be given to their children\(^{63}\).

This document provided a new framework to the United Nations to modify the Geneva Declaration of 1924 considering the welfare of the children in its totality and involving the parents, the governments and the voluntary organisations alike in this welfare and the need to achieve the child welfare through legal safeguards and measures. Accordingly, the Human Rights Commission of the United Nations Economic and Social Council drew up an additional document a few years later in the new perspective. This new Bill of Rights of the children was entitled 'Declaration of the Rights of the Child' and was adopted unanimously by the General Assembly in 1959\(^{64}\). The document is appended to this work as Appendix-I. The rights, freedoms and protections sought to be conferred on the children by this Declaration may be classified as follows:

\(^{59}\) International Covenant on Economic, Social and Cultural Rights 1966; International Covenant on Civil and Political Rights 1966; International Covenant on Elimination of all forms of Racial Discrimination 1965 etc.

\(^{60}\) Art. 1 of the Universal Declaration of Human Rights

\(^{61}\) Art. 25

\(^{62}\) Art. 26.1 and 26.2

\(^{63}\) Art. 26.3

\(^{64}\) The United Nations Children's Fund (UNICEF) was assigned the responsibility to implement these rights.
1. Right to special protection.
2. Right to equality and non-discrimination.
3. Right to a name and nationality.
4. Right to parental care and social care.
5. Right to nutrition and health.
6. Right to education, play and recreation.
7. Right to protection against neglect, cruelty and exploitation.
8. Right to special care if handicapped, physically, mentally or socially.
9. Privilege of being among the first to receive relief and protection in all circumstances.
10. Right to be brought up in a spirit of universal brotherhood.

An important feature of the Declaration of the Rights of the Child, (hereinafter called, 'the Declaration') is that while emphasising the need of special safeguards of the child, it specifically refers to 'appropriate legal protection' as the primary means to provide such safeguards. It calls upon national governments and local authorities to recognise these rights and strive for their observance by legislative measures and also other measures, progressively taken in accordance with the principles enunciated in the Declaration. A similar call is made upon parents, men and women as individuals and upon voluntary organisations.

The repeated directions under the Declaration for the recognition of these rights by the national governments and to provide appropriate legal safeguards to the child, brings in the role of law in relation to the Declaration of the Rights of the Child. It is contemplated that all the principles of the Declaration should be legally recognised and enforced as legal rights of the child by the different states.

As evidenced by the trend of the post 1959 legislation of various nations a process of adoption of the right of the child, detailed under the U.N. Declaration into their legal systems by many member and non-member states has already begun.

66. Ibid.
67. It indicates to an integrated effort of child protection at all levels.
But deeply concerned that, in spite of all efforts, far too many children, especially in developing countries, are undernourished, are without access to adequate health services, are missing the basic educational preparation for their future and are deprived of the elementary amenities of life even at the juncture of the 20th anniversary of the Declaration of the Rights of the Child, the United Nations proclaimed 1979 as the 'International Year of the Child', for enhancing the awareness of the special needs of children on the part of decision makers and the public, and to promote recognition of the fact that programmes for children should be an integral part of economic and social development plans.

It also urged upon governments to expand their efforts at the national and community levels, to provide lasting improvements in the well being of their children, with special attention to those in the most vulnerable and particularly disadvantaged groups.

OBJECTIVES OF THIS WORK

India is a party to both the Universal Declaration of Human Rights, 1948 and the U.N. Declaration of the Rights of the Child, 1959, and thus committed to adopt the aforesaid rights of the child in the legal system through their legislative recognition and by providing legislative measures for their enforcement by a suitable judicial and administrative machinery. To honour its commitment the Government of India in 1974, adopted a National Policy for Children incorporating under it virtually all the principles of the Declaration of the Rights of the Child, leaving some of those which already found a place under the Constitution of India.

69. Para 3, ibid.
70. 22nd August 1974, Resolution No.1-14/74-C.D.D.
71. Except principle 6 which provided for parental care and the alternative duty on public authorities to maintain children without a family or without means and also for payment of state assistance in some cases.
72. viz. Principles 1, 2 (partly) and 10, respectively providing for right to equality (see Art. 14 and 15 of the Constitution of India), right to special protection (Art. 39(f)), ibid.
Though the State in India has tried to achieve the objectives of child care, welfare, and protection enshrined under the Constitution of India, the Declaration of the Rights of the Child and the National Policy for Children, through all the three organs viz. the legislature, judiciary and executive, yet judged from the hard facts and figures regarding the child population in India all these efforts seem to be disintegrated and inefficacious. Unless the pitfalls, deficiencies, lacunae and gaps in the law are not enquired into, no proper modifications in the law may be made and no new scheme of integrated welfare of the child in the modern sense of the concept may be mooted.

In a developing country like India need for providing adequate legal safeguards need not be emphasized. They assume special significance also because India is the leader of the developing nations. According to 1981 census child population in India of the age group 0-14 is estimated to be 255 million. Out of these 118, 99 million rural and 19 million urban, that is nearly 40 percent, live below poverty line. The poverty of the parents makes extremely difficult for nearly 80 percent of Indian children to get adequate nourishment required for normal physical and mental growth. The consequence of malnutrition on pregnant and lactation women is so high that India still has the third highest infant mortality rate in the world. According to Dr. C. Gopalan, Director, Nutrition Foundation of India, less than three million of the 23 million children who were born in India in 1983, will become truly healthy, physically fit, productive and intellectually capable citizen of the country.

A staggering total of 47 percent of deaths in the country took their toll in the age group 0-4 years. The under one month age group accounted for 21 percent of the deaths. See Dr. K.D. Gangrade 'Key-note address' National Seminar on Child and the Law (Dec. 1982), papers published by NIHCD, New Delhi, pp. 24-25.

It is estimated that 3 millions of the 23 millions may be expected to die in the very first year, another million, before they complete their childhood. Of the remaining 19 million nearly 9 million will reach adulthood with impaired physical stamina, low productivity and low mental abilities because of serious under-nutrition and ill health during childhood and 7 million who suffer milder forms of malnutrition will grow up with less striking physical and mental impairment.
Even after thirty three years since the directive to the state of providing universal compulsory and free primary education to all children until they complete the age of fourteen years, it could not be fully materialised. Similarly there are problems of child labour, the neglected children and juvenile delinquents. The physically handicapped children too remain statutorily unprotected.

The implementation of the existing laws also appears to suffer from a legacy of disintegration hence mal-administration. The children/juvenile courts and welfare boards created under Children Acts have not been constituted in all the parts of the country so far and the number of Children Act institutions is also insufficient to cope with their demand. There seems to be a lack of proper co-ordination between the child welfare activities at the voluntary sector and the governmental efforts.

Inspite of the nations recognition of the children as 'supremely important assets' and as 'the best human resource' and our constitutional commitment that 'children are given opportunities and facilities to develop in a healthy manner in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment' the nations children continue to suffer in various fields. There is compulsive need for an integrated approach to provide a sound and comprehensive legal protection to children in India.

75. Art. 45, Constitution of India 1950 cherished it to be provided within a period of ten years.
76. For instance there are only 11 welfare boards in the country for the neglected children, Rajasthan sharing 7 and Punjab, West Bengal, Delhi and Pondichery sharing 1 each; the Children Act 1960 has not been enforced in the Union Territories of Arunachal Pradesh, Chandigarh and Mizoram. It has not been enacted in Nagaland.
78. Introduction, National Policy for Children
79. Art. 39(f), Constitution of India.
The objectives of the present work are:

(A) To review the existing legal protections available to children in India with special reference to the U.N. Declaration of the Rights of the Child and the Government of India's National Policy Resolution on Children, with the objective of identifying gaps and other deficiencies present in the legal system and suggest reform of the law in that perspective.

(B) To demarcate areas of discrepancies and variations existing in the rules relating to children under the different personal laws in India, with the objective of finding whether this branch of law is ripe enough for unification and secularisation?

(C) To explore the feasibility of framing a separate Children Code whereby the various interests of the child could be considered integrally, both in the fields of substantive law and procedural law.