CHAPTER-II

RIGHT TO SPECIAL PROTECTION

Almost all the legal systems, the child is a legal person and a citizen of the State, but he is too tender to understand or utilise this legal status. Even for his physical existence a newly born child has to depend on others. He cannot feed or provide shelter to himself. Being physically weak and mentally unaware he needs some body's active help and protection for his growth. Even when he gathers his senses, his brain and body develop only gradually. It is after passing through various stages of childhood that a child reaches the age of discretion. Between the period of his birth and attainment of majority a child in no stage of his development may be compared to an adult. The needs of children are different from adults, their physical capacity and mental level is different, hence they require to be treated differently from the adults and need some special right.

It was to emphasise this special status of the children that the Declaration called upon the states to provide a special legal protection to the children for their proper development in the following words:

The child shall enjoy special protection and shall be given opportunities and facilities by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose the best interests of the child shall be given the paramount consideration.

1. The different stages may be classified as: the child in womb; newly born infant (0-1 year); pre-nursery age (1-3 years); primary age (3-5 years); school age (5-9 years); adolescence (14-18 years). At Roman Law children upto 7 years of age were called 'Infants', See INSTITUTES OF JUSTINION, Sandars, (8th ed). pp.69,347.Cf.S. Srinivasa Iyengar, THE GUARDIANS AND WARDS ACT (1912) p.11.

2. Under the Indian Majority Act, 1875 a child attains majority on completion of his eighteenth year except where a guardian has been appointed for him by the court, when he attains it on completion of twenty one years. Sec.3.

As a corollary to this special status of the child Principle Eight: of the Declaration confers a privilege upon him by laying out that the child shall in all circumstances be among the first to receive protection and relief.

Thus the law is required to perform the following functions in respect of the children as a distinct class -

(i) To afford a special protection to all children in comparison to adults.

(ii) To afford opportunities and facilities to all children to enable them to develop -
(a) in relation to all aspects of their personality viz. physical, mental, moral, spiritual and social,
(b) in a healthy and normal manner and
(c) in condition of freedom and dignity, and

(iii) to declare that the child's best interests shall be the paramount consideration in relation to all matters pertaining to children.

We shall trace hereunder to what extent the Indian Law responds to the aforesaid three functions assigned to it under the Declaration. The following questions are framed keeping the same end in view -

1. Whether the Indian Law affords any special protection to children, if so what is its nature and extent?

2. Whether the Indian Law affords proper opportunities and facilities to enable children to develop in all aspects of their personality, in a healthy and normal manner and in condition of freedom and dignity?

3. Whether the Indian Law considers the welfare of the child as the paramount consideration in all matters relating to children?

4. For instance a physically handicapped child should, as far as possible be brought up integrally with the normal children and not in isolation, failing which a psycho-complex is likely to grow in him.

5. Thus it is indignity if children are allowed to maintain themselves by begging alms.

6. Thus the courts should keep the welfare of the child as a paramount consideration in deciding any matter involving a child.
QUESTION ONE

Whether the Indian Law affords any special protection to children, if so what is its nature and extent?

(a) Constitutional safeguards

The Constitution of India treats children as a special class and affords a special protection to them. As children cannot be treated equally with adults the general principle that the state shall not deny to any person equality before the law or equal protection of the laws within the territory of India or the general prohibition that the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them enunciated as fundamental rights under Articles 14 and 15 of the Constitution of India do not apply to children as a class, in the sense that the State is authorised to confer a special protection to them different from that conferred on the adults and may discriminate in favour of them. This is known as the doctrine of protective discrimination.

As an important exception to the aforesaid general prohibition of discrimination by the state sub-clause(3) of Article 15 provides as follows -

'Nothing in this Article shall prevent the state from making any special provision for women and children.'

Explaining the true purport of this sub-clause a Division Bench of the Calcutta High Court observed -

......although grammatically and etymologically, 'for' may mean 'concerning' and although, theoretically, it is possible to think of reasonable discrimination against women and children such as that they shall not be admitted to certain sections of a public museum or an art gallery where exhibits of a certain kind are to be seen, but the ordinary meaning of 'provision for' is certainly 'provision in favour of.'

7. Article 14.
8. Article 15(1).
9. Article 15(3).
Explaining an obiter that sub-clause (3) with reference to children is an abundant caution, their Lordships further observed -

There is nothing in the rest of the Article which effects children as such, because 'age' is not one of the forbidden grounds of discrimination specified in sub-clauses (1) and (2) and hence the authorisation in clause (3) of special provisions for children, notwithstanding any thing contained in article, appears to be pointless.

With due respects to their Lordships it is submitted that mentioning 'children' under clause (3) of Article 15 is not pointless. It emphasises the intention of the Constituent Assembly to afford a special protection to the children, which could be missed to be so understood, had the children not been specifically included in the clause. The Constituent Assembly chose to adopt a positive step rather than to leave the matter to a mere chance of interpretation. The provision it is further submitted, is to be understood in the broad framework of the Constitution which seeks to provide a special protection to children through a series of provisions covering different aspects relating to them.

The constitutional prohibition of employment of children below 14 years of age in any factory or mine or other hazardous employment, contained in the part III on fundamental rights of citizens, treats the children differently from the adult citizens and aims to protect them against an abuse or exploitation of their tender age. This policy has been carried forward by the connected legislation, which also restricts the hours of work for children above fourteen years of age.

12. For instance Art.24 prohibits employment of children, Art.39(e) seeks to prohibit abuse of the tender age of children, Art.39(f) seeks to afford them opportunities and facilities to develop in a healthy manner, Art.45 provides for free and compulsory education to children.
13. Art. 24 provides that 'no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment'.
14. Art. 39(f)
15. See, The Employment of Children Act, 1938 Sec.3; The Factories Act, 1948 Section 67; The Apprentices Act, 1961 Sec.3, etc.
Although any and all laws concerning children directly or indirectly may be said to be providing special protection to them, but here-under we shall refer to only those other provisions of the Indian law, which treat the children as a separate class and provide some special protection to them which is not available to the adults. The doctrine of protective discrimination promulgated under the Constitution finds its application under several enactments both substantive and procedural, civil and criminal and central as well as local.

(b) Under Civil Laws

It is to protect the interests of children that the civil law declares a minor as incompetent to contract\(^{16}\) to employ an agent\(^{17}\), to execute a will\(^{18}\). A minor has a limited and a qualified capacity to be appointed as an agent\(^{19}\), or a trustee\(^{20}\), provided the nature of agency or trust does not hold him personally liable to any damage and does not involve the exercise of discretion\(^{21}\). Whereas transfers of property by a minor are void\(^{22}\), transfers in favour of him have been held to stand on a different footing and have been upheld being wholly beneficial to the minor\(^{23}\). Under the Indian Partnership Act, 1932 though a minor may not be a partner in a firm\(^{24}\) but with the consent of all the partners for the time being he may be admitted to the benefits of partnership\(^{25}\). In no case the minor may be personally liable for any act of the firm\(^{26}\). Under the Negotiable Instrument Act a minor may draw, indorse, deliver, and negotiate a promissory note, a bill of exchange or cheque, so as to bind all parties except himself\(^{27}\). There is no prohibition in the Negotiable Instruments Act against the minor becoming a payee or holder of negotiable instrument\(^{28}\).

16. Indian Contract Act, 1872 Sec.11
17. Ibid, Sec. 183
18. Indian Succession Act, 1925 Sec. 59
19. Indian Contract Act, 1872 Sec.184
20. Indian Trust Act, 1882 Sec.10
21. Ibid.
22. Transfer of Property Act, Sec. 7.
23. Raghava Chariar v Srinivas, 40 Mad. 308 (F.B.); Mohiri Bibi v Dharmadas Ghos, 30 Cal. 539 (F.B.)
24. Indian Partnership Act, 1932 Sec. 30
25. Ibid.
26. Ibid Sec. 30(2)
27. Negotiable Instruments Act, 1881 Sec.26
28. Ram Prasad v Sri Nivas (1925) 27 Bom. L.R. 1122; Shoor Fateh Ali v Noor Mohammad (1924) 2 Rang 1,1954 All. 156.
Thus the policy under all substantive civil laws is to confer a beneficial status upon the minor in relation to all civil transactions and wherever any transaction goes or is likely to go against his interest the law declares it void and un-enforceable.

In suits by or against minors the law adopts a special course. A suit or other proceeding by a minor may be filed and prosecuted only through a next-friend\(^\text{29}\), while in suits against a minor the court is required to appoint a 'guardian-ad-litem' to defend it\(^\text{30}\). The conduct of such next-friends and guardians-ad-litem is regulated by the Code of Civil Procedure\(^\text{31}\). A minor judgement-debtor cannot be arrested under a civil process, as he can incur no personal civil liability.

(c) Under Criminal Laws

A similar policy of protective discrimination has been adopted under the Indian Penal Code, 1861 which declares commission of certain acts as offences\(^\text{32}\), but it provides two important exceptions in relation to children in this respect. The Penal Code declares that 'nothing is an offence which is done by a child under 7 years of age\(^\text{33}\). Even in case of a child above seven years of age and under 12 nothing is an offence, if the child has not attained sufficient maturity of understanding to judge of the nature and consequences of his own conduct on that occasion\(^\text{34}\).

The grounds on which children under seven years of age are absolved from all liability under the Penal Code is that children of such immature age are deemed incapable of forming a rational judgement about the consequences of their action. A child between the age of seven and twelve years has only a qualified immunity and is subject to his immaturity of proper understanding at the time and in the context of the offence committed\(^\text{35}\). No such exemption is available to a child above the age of twelve years\(^\text{36}\).

\(^{29}\) Code of Civil Procedure, 1908 Order XXXII, Rule 1.
\(^{30}\) Ibid. Rule 3.
\(^{31}\) Order XXXII
\(^{32}\) Indian Penal Code, 1860, Sec.40
\(^{33}\) Ibid. Sec. 82.
\(^{34}\) Ibid. Sec. 83.
\(^{35}\) Queen Empress v. Hakummmian, 27 Cal. 133; Ulla Mahapatra v. The King, 1950 Cri. 261.
\(^{36}\) Kalika Prasad v State, 1952 All. 698.
It need be submitted here that there is an apparent conflict between the provisions of Sections 82 and 83 of the Indian Penal Code and those of section 130 of the Indian Railways Act, 1890, in this respect. Section 82 and 83 occur in Chapter IV of the Indian Penal Code. Section 40 of the same code lays down that the word 'Offence' in Chapter IV denotes an offence punishable under (a) the Penal Code or (b) under any special or local law. But section 130 of the Railways Act, being a special law, embodies an exception to the general rule contained in Section 40 of the aforesaid chapter and enacts by necessary implication that a minor under the age of 12 years who commits an act or omission specified in sections 126 to 129 of the Railways Act shall be deemed to have committed an offence, and thus conflicts with the provisions of Sections 82 and 83 of the Indian Penal Code. In Emperor v Wali Mohd. where a child below 12 years of age threw stones at a railway train the court said:

In this case the Act complained of, namely throwing stones at a railway train, would ordinarily be protected under Sections 82 and 83, Indian Penal Code, and would not be punishable as an offence, under section 127, Railways Act, or under any provision of the Penal Code. But such act would be deemed to be an offence under the special provisions of Section 130 of the Railways Act, and punishable under that section.

In the submission of this writer the law should adopt a uniform policy. If immaturity of understanding may be the ground of exemption to children under the Indian Penal Code and if the law aims to protect the children during the age of immaturity, why can't the ground and aim be valid for the Railways Act. This conflict needs to be removed and the provisions of section 130 of the

37. Such offences are: Maliciously wrecking or attempting to wreck a train (Sec.126); damage to, or destruction of certain railway properties (Sec.126 A); maliciously hurting or attempting to hurt person travelling by railway (Sec.127); endangering safety of persons travelling by railway by wilful act or omission (Sec. 128); endangering safety of persons travelling by railway by rash or negligent act or omission (Sec.129).

38. 1936 Sind 185.
Indian Railways Act should be brought at par with the provisions of Sections 82 and 83 of the Indian Penal Code.

In consonance with the policy of the modern concept of the juvenile justice, the adjective criminal law in India too affords a different and privileged treatment to juvenile offenders in comparison to the adult offenders. This distinction is maintained at all the stages of prosecution viz. arrest, investigation, bail, detention, trial and conviction. Separate children courts have been constituted to try criminal cases against juvenile offenders. Even if the offence is jointly committed by a minor with an adult, the minor is to be tried separately\(^3\). Death sentence to a child is prohibited\(^4\). Imprisonment is sparingly adhered to, and if convicted they are either released after due admonition\(^5\) or probation\(^6\) or instead of being sent to jail, they are sent to correctional institutions e.g. a reformatory\(^7\) or now a special school\(^8\). The objective of the law is to keep such juveniles away from the adult offenders to save them from the social stigma and instead of punishing them, to treat, reform and rehabilitate them as good citizens. The approach is more psycho-sociological and less criminological, but its aim throughout is to protect the child.

One anomaly, however, needs to be pointed out. Under the Code of Criminal Procedure, 1973, where a youthful offender is brought before the common criminal court, the court has a discretion to decide whether the case should be tried by a children's court or the common criminal court\(^9\). While most of the local children Acts have provisions to entirely exclude the criminal courts jurisdiction\(^10\) the discretionary provisions under the Code of

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40. Ibid Sec. 22
42. Ibid. The Probation of offenders Act, 1958 Sec.
43. The Reformatory Schools Act, Sec. 8.
44. Children Act, 1950 Sec. 21(c).
45. Code of Criminal Procedure, 1973 Sec. 27.
46. U.P. Children Act, 1951 Sec. 76; Bombay Children Act, 1951 Sec.7; Saureshtra Children Act, 1956 Sec.6; Hyderabad Children Act, 1951 Sec.6.
Criminal Procedure still remain. This anomaly needs to be removed by a suitable modification of Section 27 of the Code of Criminal Procedure, 1973.

To recognize the privilege of the child of being among the first to receive protection and relief cherished by Principle Eight of the Declaration, the National Policy for Children commits that:

Children shall be given priority for protection and relief in times of distress or natural calamity.

The commitment, however, remains an executive direction there being no statutory provision making it a social duty.

Thus the answer to the first question is in the affirmative, though there is scope for further improvement, in many aspects of the privileged treatment met out to the children.

QUESTION TWO

Whether the Indian Law affords proper opportunities and facilities to children to enable them to develop in all aspects of their personality, in a healthy and normal manner and in conditions of freedom and dignity?

To enable a child to develop in a healthy and normal manner and in conditions of freedom and dignity physically, mentally, morally, spiritually and socially, existence of full opportunities and facilities for the same is the condition precedent. Principle Two of the Declaration indicates that along with other means such conditions, opportunities and facilities should also be ensured by law.

Law should create statutory responsibilities of local authorities, the Union or State Governments to create educational, vocational, medical and similar institutions of child development and welfare, to provide grant-in-aid or scholarships, free medical aid, free mid-day meals, arrange other amenities for the children, such as play ground, children libraries, museums, creches etc. The legal recognition and regulation of various voluntary organisations providing child welfare services would also be covered under this function of the law.

47. For the modification suggested see under Question III of this Chapter.
To find a proper answer to the question posed we have to trace the mandatory provisions under the Indian law, which directly or indirectly ensure any facilities and opportunities to the children for their proper development.

The Constitution of India has recognised this principle and given place to it under Part IV. The amended Article 39(f) lays down that the state shall, in particular direct its policy towards securing:

That the 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.

Certain fundamental rights guaranteed to the citizens of India are also relevant to the child citizens and help to provide them opportunities to develop morally, socially and spiritually and in conditions of freedom and dignity. For instance, Article 17 which abolishes untouchability read with Article 14, which confers the right to equality before law, places all the children in the country at par in the eye of law. Article 23 prohibits traffic in human beings and forced labour. Article 24 prohibits employment of children in factories. Article 25 guarantees freedom of conscience and religion subject to morality, and health. Article 28 provides that no religious instruction shall be provided in any educational institution wholly maintained out of State funds and no minor attending any educational institution recognised by the State or receiving aid out of state funds shall be required to take part in any religious instruction or religious workshop that may be conducted in such institution, unless his guardian has given consent thereto. All these provisions when understood in the context of the pre-constitutional socio-economic conditions ensure one way or the other, the freedom or dignity of

48. Directive Principles of State Policy
49. Sub-Clause (1) Art. 28
50. Ibid. Sub-Clause (3).
all children and provide them an opportunity to develop morally, socially and spiritually. Today, the children belonging to the one time so called 'untouchable' castes, now called as the socially and economically backward castes, have an equality of opportunity under the Indian Law.

The National Policy Resolution on Children\(^{51}\) lays down -

'It shall be the policy of the state to provide adequate services to children, both before and after birth and through the period of growth to ensure their full physical, mental and social development. The State shall progressively increase the scope of such services so that, within a reasonable time, all children in the country enjoy optimum conditions for their balanced growth.' \(^{52}\)

The Resolution then spells out the measures which shall be adopted by the State towards the attainment of these objectives, detailed in fifteen consecutive items covering almost all the aspects cherished under the Declaration of the Rights of the Child\(^{53}\). The Resolution then fixed certain orders of priority in programme formulation\(^{54}\).

Thus we have a constitutional backing and an executive policy as the framework for providing facilities and opportunities to children for their full physical, mental and social development. A perusal of the statute book reveals that there are certain laws issuing a mandate to the guardians or the state or certain other persons to supply some amenities and facilities to the children.

(a) Parental Obligations

The primary responsibility to provide opportunities and facilities to children for their proper development is that of the parents or the family. Therefore, the law has imposed certain obligations on the natural guardians. Under the personal law area the provisions of the Hindu Adoptions and Maintenance Act, 1956 which oblige the natural guardians of Hindu minors to provide maintenance to their legitimate or illegitimate children\(^{55}\) and

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51. Resolution No.1-14/74-GDO, Govt. of India, Department of Social Welfare, New Delhi, the 22nd August 1974. (See Appendix D.)
52. Ibid, Resolution (3)
53. Ibid, Measures (i) to (xv)
55. The Hindu Adoptions and Maintenance Act, 1956 Sec. 20.
which also confers a co-relative right on the minor children, are
the only statutory provisions under the personal laws. The scope
of maintenance covered under this Act is also quite wide as it
includes supply of food, clothing, residence, medical aid and in
case of an unmarried daughter also the reasonable expenses of her
marriage. In the absence of natural guardians, the other relatives
in the family on whom the father's estate devolves are also obliged
to provide similar maintenance to the minor children in the family
of the deceased.\textsuperscript{56}

But there is no statutory safeguard to Muslim, Parsi and
Christian children for similar amenities. The scope of maintenance
is limited under the customary laws. The Code of Criminal Procedure,
1973 covers all legitimate and illegitimate children\textsuperscript{57} and court may
order the father of such children to pay for their maintenance, an
amount up to Rs.500/- for every child\textsuperscript{58}, as may be decided by the
court\textsuperscript{59}.

(b) Institutional Facilities

In case the guardians of the child do not fulfil their
obligations or they are not in a position to do so and the child
becomes neglected, the law provides an alternative to such children
by way of institutional facilities. The Children Act, 1960 empowers
the executive to establish and maintain as many children homes
and special schools as may be necessary for the reception of neg-
lected\textsuperscript{60} and delinquent\textsuperscript{61} children respectively. Borstals have
been established under certain local Borstal Acts\textsuperscript{62}. The Act also
empowers the executive to certify as fit for reception of such
children any other institution, e.g. those set up by voluntary
organisations\textsuperscript{63}. The executive is also empowered to provide by
rules for the establishment or recognition of after-care organisa-
tions\textsuperscript{64}, and for the standards and the nature of services to be
maintained by such after-care organisations\textsuperscript{65}.

\textsuperscript{56} The Hindu Adoptions and Maintenance Act, 1956, Sec.3 B.
\textsuperscript{57} Sections 125-128
\textsuperscript{58} Ramesh Chander v Veena Kaushal, 1979 Cr.L.J.3.
\textsuperscript{59} The Code of Criminal Procedure, 1973 Sec.11
\textsuperscript{60} Children Act, 1960 Sec.9.
\textsuperscript{61} Ibid. Sec.10.
\textsuperscript{62} e.g. The Punjab Borstal School Act, 1926, Sec.3.
\textsuperscript{63} Sub-sections (2) of Secs. 9,10,11, respectively
\textsuperscript{64} Ibid. sec. 12(a)
\textsuperscript{65} Ibid. Sec.12(d)
Every children’s home to which a neglected child is sent is required to provide to each child not only with accommodation, maintenance and facilities for education but also with facilities for the developments of his character and abilities and give him necessary training for protecting himself against moral dangers or exploitations and also to perform such other functions as may be prescribed, to ensure an all round growth and development of his personality. The requirements in relation to delinquent children are somewhat different. The observation homes where the neglected children are kept pending enquiry have besides accommodating and providing maintenance, also to give facilities for medical examination and treatment and facilities for useful occupation.

The Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA) creates 'Protective homes' for the reception of girls and women detained or rescued under the Act.

The Orphanages and Other Charitable Homes (Supervision and Control) Act, 1960 lays down that no person shall maintain or conduct any home except under and in accordance with the conditions of a certificate of recognition granted under the Act. The certificate of recognition which is to be granted by the Board constituted under the Act is to specify the minimum standards regarding boarding, lodging, clothing, sanitation, health and hygiene, which having regard to the conditions of the locality in which the recognised Home is situated and its resources, should be complied with in the Home. The certificate shall also specify the standard of education or training to be provided for the inmates of the Home, in case the education or training of its inmates is undertaken. Other conditions and particulars may be prescribed by the State Government.

66. e.g. The Punjab Borestal School Act, 1926, Sec.12(a).
67. Ibid, Sec. 11(3).
68. SITA, 1936, Sec.21.
69. The Orphanages and other Charitable Homes(Supervision and Control) Act, 1960, Sec.13.
70. Ibid, Sec.5.
71. Ibid, Sec.16(c).
72. Ibid.
73. Ibid. Sub-clause(f) read with Sec.29.
(c) **Facilities for Children of Working Women**

Besides providing for the general measures of basic health and welfare, certain labour laws have made adoption of special measures of welfare for the children of women workers as mandatory. The Factories Act, 1948 provides that where fifty or more (thirty in case of factories) women workers are employed, a creche for their children, of prescribed age, has to be provided by the employer. Similar facilities are provided under the Mines Act, 1952 and the Beedi and Cigar Workers (Conditions of Employment) Act, 1966. The Contract Labour (Regulation and Abolition) Central Rules, 1971 so make provisions for creches to be established and maintained by contractors of the standards similar to the Factories Act, 1948. The provisions made in the Plantation Labour Act, 1951 are more elaborate. Besides providing creches they also oblige the employer to provide recreational facilities for children of workmen and when such children between the age group of 6-12 exceed 25, for a school to be set up by the employer. Medical care is also made available to the workers and their families.

The rules framed by the state governments under the above Acts, specify that the employer should make available for each child in a creche at least half a pint of milk every day and in addition give to children above two years of age wholesome refreshments.

But there are no such facilities for the children of working women in the unorganised sector (8), or in small establishments which do not come within the category of the above enactments. Women employed as clerks, teachers, nurses and similar lower level white collar employees too do not enjoy such services. Then the existing legislation is also widely violated (9). There is a felt need for a general child-care law, covering all women in need of such services, and all aspects of child-care, viz. supply of nutritious baby food, medicare and play facilities.

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74. The Factories Act, 1948, Sec.48. In case of factories the number is further reduced to 20, by the Factories (Amendment) Act, 1976.
75. The Mines Act, 1952 Sec.58
76. Section 14.
(d) Immunization Facilities

In the field of health the Central Vaccination Act, 1880 and certain State Vaccination Acts make vaccination of all children above six months and below 14 years in case of boys and eight years in case of girls as compulsory. No fee is to be charged except by a private vaccinator. The duty is cast upon the municipalities to establish vaccination circles and appoint qualified vaccinators and arrange for the vaccination of all children within its local areas. In rural areas the duty lies on the village Panchayat.

To provide similar facilities in respect of the immunization of whooping cough though a Bill was introduced in the Parliament in April, 1976, but it could not be passed.

(e) Education Facilities

Then we have a net work of state-run and state-aided educational and vocational institutions, established under the state Acts. Education is free and compulsory at the primary level in government schools and schools run by local bodies in all parts of the country. Classes VI-VIII in all states except for boys in Orissa, Uttar Pradesh and West Bengal. Education is also free upto class X stage in some states and some Union Territories. It is free for girls only in six states. In Chandigarh secondary education is free in rural areas only. Children belonging to scheduled castes and scheduled tribes get free education in all states/Union Territories upto class X. Education at the higher secondary stage (class XI-XII) is free in Gujrat, Jammu and Kashmir, Nagaland, Tamilnadu, Tripura and the Union Territories of Arunachal Pradesh, Andaman and Nicobar Islands, Dadra and Nagar Haweli, Laksh Dweep and Pondicherry. Besides, education at this stage is also free for girls in Madhya Pradesh, Manipur, Punjab and Chandigarh.

78. For instance, see the U.P. Panchayat Raj Act, 1947 Sec.15
80. viz. eleven out of the twenty two states and seven out of the nine Union Territories.
81. viz. Madhya Pradesh, Manipur, Orissa, Raj., Sikkim and U.P.
82. The State has also established vocational and technical education institutions.
Educational scholarships are provided to meritorious and poor children. In certain institutions play ground facilities for games and sports are made available. Social and cultural activities are held at some institutions. Courses on moral education are also imparted. At some places books and exercise books and dress material are made available at concessional rates. At some schools mid-day meals are provided. Some medical facilities are also made available at the school dispensaries.

(f) Non-statutory Child Welfare Services

The central government and the state governments have implemented various child welfare service schemes at the non-statutory level. Important among them are the Integrated Child Development Services Scheme (ICDS), the Mid-Day Meal Programme for Primary School Children, Immunization Programme, Special Nutrition and Feeding Programme for Pre-school children and Pregnant and Lactating mothers, Balwadi Nutrition Programme, Tamil Nadu Integrated Nutrition Project, Foster Care Schemes, Central Scheme of Welfare of Children in Need of Care and Protection, Central Scheme for Creches for Children of Working and Ailing Woman, and the Maternal and Child Health Programme.

At the voluntary level also there are various child development services and child welfare services, provided through the institutional and non-institutional care.

Though much of hectic efforts have been put up by the central and state governments in formulating and implementing various child welfare service schemes under the six consecutive Five Years Plans and amenities and facilities are being provided covering various aspects of the child's needs, but there is no legal support for these services.

83. Tamil Nadu leads the Mid Day Meal Programme.
84. For details see, SOCIAL WELFARE REPORT 1982-83, Ministry of Social Welfare, Govt. of India.
85. Orphanages; Destitute Children Homes; S.O.S. Children Villages and Bal Sadans; After Care Hostels; Institutions for handicapped children etc.
86. Multipurpose Community Centres; Juvenile Guidance Bureaux; Recreation Centres; Child Guidance Clinics; Foster-Care; Adoption; Sponsorship; Education Training and Rehabilitation of neglected and handicapped children etc.
It is submitted that in the absence of a legal framework for such services, their continuance can not be guaranteed. Policies are liable to change with changes in the government. The matter deserves a statutory guarantee and should not be left dependent upon the will of the executive or upon the contingency of availability of funds, which again are at the mercy of the executive and may vary from year to year and for one state to another.

In the absence of a comprehensive legislation such services are liable to vary disproportionately in their coverage from state to state and in different territories of the same state, due to the influence of many forces, political and otherwise. A comprehensive law guaranteeing the supply of services in all areas of the child's needs, to all the children in the country on the basis of their requirements, is the immediate need of the Indian children.

**QUESTION THREE**

Whether the Indian law considers the welfare of the child as the paramount consideration in all matters relating to him?

An important aspect of the right to special protection emphasized under the Declaration is that 'in the enactment of laws for this purpose the best interests of the child shall be the paramount consideration'. The scope of the welfare principle, as used under the Declaration, is very wide as it is sought therein to incorporate the principle in every enactment passed by the legislature, substantive or procedural, civil or criminal.

The phrase 'best interests of the child' used under the Declaration is a parallel of the principle of 'welfare of the child' developed by the judiciary. Though originally the principle of welfare of the child was applied to disputes between parents, in its gradual development it came to be applied to all types of

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88. The doctrine of welfare of the child was evolved at the English law, towards the close of the 19th century, first through judicial initiative and then by legislation.
disputes whether under the family law or the public law. Today in all advanced legal systems the welfare principle is applied by a multitude of judicial and quasi-judicial tribunals in all civil, criminal and administrative proceedings in respect to children. We may therefore, conveniently use any of the two phrases, the 'best interests of the child' or the 'welfare of the child' interchangeably.

To implement the purport of the Declaration the National Policy on Children provides that:

Existing laws should be amended so that in all legal disputes, whether between the parents or institutions, the interests of children are given paramount consideration.

The principle of welfare of the child was recognised under the Indian legal system nearly at the time of its evolution at common law first by the judiciary and then by the legislature. Originally the Supreme Courts in the Presidency towns and later the High Courts exercised an inherent jurisdiction over minors under different Regulations and Acts to the same extent as was exercisable by the Court of Chancery in England. The judges of these courts also being well versed in English law closely followed the developments at that law under the doctrine of 'Equity, justice and good conscience' and consequently the doctrine of welfare too found its recognition.

Thus in Lakshmi Bai v Shridhar the Bombay High Court held that cruelty or ill-treatment by a guardian towards the minor would be a ground for depriving the guardian of the minor's custody. In Ven Kamma v Savita Ramma where a widow sued to recover her illegitimate daughter from a women to whom she had

89. The English law, American law, Chinese law, Polish law, Soviet law etc.
91. Policy and measures, 3 (XIV).
92. Sec. Cl. 27 of Letter Patent of 1865 and Cl. 16 of Letter Patent of 1862 for the High Courts of Calcutta, Madras and Bombay issued under the Indian High Courts Act, 1861.
93. A case prior to the passing of the Guardians and Wards Act, 1890.
94. 12 Mad. 67.
entrusted her since her birth for nurture and it was found that the widow was leading an immoral life. The court dismissed the suit on the ground that it would be against 'justice, equity and good conscience' to deliver the infant to the custody of a natural guardian leading an immoral life, and by whose examples the morals of the child were likely to be corrupted.

In 1890, the welfare principle was statutorily recognised when the Guardians and Wards Act was passed. Sections 7, 17 and 25 of the Act provided that the court in appointing guardians and passing orders of custody of minors respectively, should consider the welfare of the child.

The credit for developing the doctrine of welfare of the child as a paramount consideration in India, however, goes to the judiciary rather than the legislature. The provisions of the Guardians and Wards Act gave equal importance to the personal laws of the parents and the rule of paternal supremacy in deciding question of guardianship and custody and a conflict arose between the principle of welfare of the child and the aforesaid considerations. In a fascinating study of the trend of judicial process on the conflict between the latter of the law and the welfare of the child Professor Paras Diwan observes:

Our judges swang between the letter of the law as contained in these provisions and the development of the principles in England that welfare of children is a paramount consideration. Our judges swang towards giving effect to the welfare principle, drawn back by the letter of law, they gave effect to the supremacy of paternal right. And this swang continues inclining more and more towards the rule that the welfare of the children is the paramount consideration.

This leads us to enquire as to what extent the attempts of the judiciary in establishing the welfare principle as a paramount consideration have been given effect to by the legislature under the different statutes. We shall make the enquiry with reference to the different judicial proceedings in relation to children:

95. See Secs. 6, 17 and 19(a) and (b)
(i) Guardianship and Custody Proceedings.
(ii) Custody of Children under Matrimonial Proceeding.
(iii) Proceedings for Writ of Habeas Corpus.
(iv) Maintenance Proceedings.
(v) Adoption Proceedings.
(vi) General Civil Matters.
(vii) Matters Concerning the Family.
(ix) Proceedings under the Code of Criminal Procedure.

(i) Guardianship and Custody Proceedings

Guardianship and custody under the Indian legal system are personal law matters. Among the different personal laws existing in India it is only at the Hindu law that a statutory provision has been included under the Hindu Minority and Guardianship Act, 1956[^1] which declares welfare of the child as a paramount consideration both in relation to the substantive rights to guardianship and custody of the natural guardians and as an adjective law direction to the courts to give paramountcy to the consideration of welfare of the child. Section 13 of the Act lays down the principle as follows -

(i) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(ii) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

The personal laws of Muslims, Christians, and Parsis are customary and give no place to the consideration of welfare of the child as a rule. The questions of guardianship and custody of such children are, however, decided under the common procedural law viz. The Guardians and Wards Act, 1890. That Act provides for 'the welfare of the child' as a consideration to be taken into account in deciding whether the court should appoint or declare

[^1]: Sec. 13 of the Act.
a guardian or not\textsuperscript{98} and in making the selection of the guardian\textsuperscript{99}.

In deciding the questions of custody of the minor\textsuperscript{100}, in permitting transfers of minor's property\textsuperscript{1} and in varying powers of the appointed guardians\textsuperscript{2} the welfare or the best interest of the minor is the main consideration under the Act.

The existence of certain other considerations under the Act, however, has hindered the efficacy of welfare provisions. For instance section 6 of the Act saved the parental power to appoint a guardian of the person or property of the minor under the law to which the minor is subject i.e. the personal law, from the provision of the Act. Section 19(b) of the Act prohibits the court from appointing or declaring a guardian of a minor whose father is living and is not unfit or if the minor is a married female, whose husband is not unfit. Similarly section 25 seems to confer an exclusive title to the custody\textsuperscript{4} of the ward, upon its guardian alone. Under section 17 also 'welfare of the child' is subject to the (other) provisions of this section\textsuperscript{5} and is not declared paramount. Such provisions gave rise to a conflict between the rules of personal laws and paternal supremacy and the welfare of the child principle, with no guide line under the Act to decide as to which of these considerations the court should give paramountcy.

\textsuperscript{98} Sec.8(1) reads, 'where the court is satisfied that it is for the welfare of a minor that an order should be made -

a) appointing a guardian of his person or property, or both, or
b) declaring a person to be such a guardian, the court may make an order accordingly.

\textsuperscript{99} Sec. 17 provides the considerations by which the court shall be guided to determine the welfare of the minor.

\textsuperscript{100} Guardians and Wards Act, Sec. 25.

1. Ibid. Sec. 31
2. Ibid. Sec. 32.
3. Sec. 6 provides - ' In the case of a minor ... nothing in this Act shall be construed to take away or derogate from any power to appoint a guardian of his person or property, or both, which is valid by the law to which the minor is subject'.
4. See, the marginal title to Sec. 25.
5. The section contains several other considerations e.g. age, sex, religion and wishes of the child etc.
In its attempt to resolve the aforesaid conflicts under the Guardians and Wards Act, the judiciary adopted a course which was in favour of the children. In its zeal to protect the children the judiciary assumed a jurisdiction which is something more than the usual role of a judge. In the welfare of the child, even rules of substantive law and technicalities were sacrificed. Although no line may be drawn in point of time, the trend of the earlier decisions has been to give preference to the personal law and paternal supremacy over the welfare considerations, while the later decisions treat the welfare of the child as the paramount consideration. The proposition is now firmly established by the majority of High Courts and the Supreme Court that where the welfare of the child so requires the personal law of the minor may be superceded and the preferential right of the father as a natural guardian may be sub-ordinated.

7. e.g. Yakoob v Nafooran, 5 I.C. 571; Anwar Ahmad v Samidan, 1928 Ouih 220; Siddiqunissa v Nizamuddin, 1932 All. 215; Kundan Begum v Mst. Aisha Begum, 1939 All. 5; Matalin v Ahmad Ali, 34 All. 213 (221) (P.C.); Mir v Munji, 1952 Mad. 280.
8. Besant v Narayanheah, 1914 P.C. 41; Dhan Kumari v Mahenira, 1923 Nag. 393; Parmeshwari v Empress, 23 Cal. 290; Aziz Khan v Naneh Khan, 1929 All. 458. The paramount nature of the father’s right to guardianship and custody finds its echo even in some recent judgements e.g. Vasudevan v Vishwa Laxmi, 1959 Ker. 403; Gurudeo Singh v Mst. Daulet, 1961 Raj. 30, Kota Karrenna v Parathemna 1978 A.P. 398; Smt. Sneh Lata Mathur v. Mohendra Narayan, 1979 Raj. 29.
9. Bhagwati Devi v Murlidhar Sahu, 1943 P.C. 106; Mst. Samiunnisa v Saida Khatoon, 1944 All. 202; Mst. Halimani Khatoon v Mst. Ahamadi Begum, 1949 All. 627; Aminnisa v Mukhtar Ahmad, 1969, A.L.J. 799; Saira Khatoon v Mst. Bibi Sheidar 1978 Pat. 278; Kalimunissa v Shah Salim Khas, 1976, M.L.J. 621; Ganga bai v Bheru Lal, 1976, Raj. 153, In A.V. Venkata Krishnalah v S. Satya Kumar (1978 Ker. 220). It was laid down that where the minor is subject to Hindu law, Section 13 of the Hindu Minority and Guardianship Act 1956 prevails over section 19(b) of the Guardians and Wards Act, 1890. The two sections with section 17 of the latter Act should be read harmoniously and if there be any conflict it is section 13 of the Hindu Minority and Guardianship Act that prevails. The over riding effect is clearly provided in Sections 2 and 5 of that Act.
In Tija Bai v Fathan Khan upholding the paramountcy of the principle of welfare of the child over the father's rights their Lordships of the Supreme Court held that although the father is alive and is the normal guardian the mother can be considered as the natural guardian when she was managing the affairs of the minor.

The court reiterated its view in Smt. Mohini v Virendra and gave the guardianship and custody of a 11 year boy to its mother and only access to the father. The same principle was applied in Rosy Jacob v Jacob & Chakramakkal where the Supreme Court declared that in making an order in respect of the custody of the child the welfare of the child is the paramount consideration.

As observed by Professor Paras Diwan:

The contribution of the judiciary endeavouring to develop law on progressive lines has been almost heroic, but hurdles in their way have been many and some time unsurmountable. The judges in developing law have gone very far, but they could not go far enough.

The judiciary has its own limitations, it cannot substitute the legislature. The Guardian and Wards Act, 1890, when passed, followed the pattern of the English Statute, Guardianship of Infants Act, 1886. At the English law the welfare of the minor was declared a paramount consideration under the Infants Act, 1925 and the statutory law has been vastly modified at that system since then, bringing it more and more in conformity to the welfare of the child as a paramount consideration. The concept of joint guardianship of the mother and father.

13. 1975 S.C. 2090
15. This Act repeated and replaced the Statute of 1886.
separation of guardianship from custody, custody from care and access, supervision orders and custodianship orders are some examples of it, which have now been statutorily provided under the English law.

Our legislature, it is submitted, has failed to take note of the evolution of the vast mass of judicial law different in spirit and effect from the written law and the changes in law relating to minors guardianship and custody that have taken place under the English and other legal systems. The Guardians and Wards Act, still lives in the 19th century, with hardly any substantial modification, inspite of its lacunae having repeatedly been pointed out by the judiciary since its inception. The judiciary has done its utmost, now it is the turn of the Parliament to modify the statutory law and to bring it into conformity with the judicial law and the modern concept of the welfare of the child as a paramount consideration. The following amendments are submitted to be made in the Guardians and Wards Act, 1890.

1. Section 19 of the Act should be deleted.
2. The existing marginal title of section 25 of the Act which reads 'Title of Guardian to Custody of Ward' should be substituted by the words 'Disposal of Applications for custody and allied matters'.

The following provisions be substituted in lieu of the existing section 25:

i) If any person, who is interested in the welfare of the child, applies to the court on any grounds, for placing the child in the custody of the applicant or of some one else or to pass any other order in respect to the minor including orders for access to the minor or for his maintenance, foster care or adoption or in respect to his guardian or custodian or in respect of the minor's property, the court shall decide the question having regard to the welfare of the minor as the paramount consideration.

17. Guardianship of Minors Act, 1971, Sec. 9.
20. Children and Young Persons Act, 1969, Sec.11.
If for the purpose of enforcing the order, procurement of the minor in the court is deemed necessary, the court shall order the welfare board constituted under the Children Act applicable in the area, if any, to procure such child and produce it before the court. If there is no such welfare board, the court may cause the minor to be taken into charge by a police officer not below the rank of a Sub-Inspector who should comply with the orders in plain clothes.

The modified section 25 would be wider in scope and fulfill many objects. Firstly, it gives right to every person including child welfare institutions, interested in the welfare of the minor to move the court and provides recognition to modern concepts of 'public interest litigation' and 'locus standi' recognised by the Supreme Court. Secondly, it covers not only custody but all matters pertaining to a minor viz. his maintenance, foster care, adoption etc. Thirdly, it would cover the gap in statutory law in respect to the children of the communities which do not have such a law so far. Fourthly, it would separate custody and access from guardianship. Fifthly, no specific grounds would be needed to move the court, any single ground may be sufficient. Sixthly, it introduces a proper liaison of the court with the welfare boards constituted under the Children Acts, in turn making the Children Act applicable and the child becoming entitled to the facilities of 'Observation Homes' pending enquiry by the court. Seventhly, it reforms the role of the police in such cases. Under the modified provisions the police officer is supposed to act as a friend of the child in approaching him in plain clothes and procuring him rather than arresting him. Above all the court is statutorily required to have regard to the welfare of the child as a paramount consideration while passing any order under the Act in respect to minors of any community. It is also in

coniin nonce with the Declaration of the Rights of the Child \textsuperscript{23} and our National Policy for Children.\textsuperscript{24}

(iii) Custody of Children under Matrimonial Proceedings

Since the matrimonial proceedings between spouses may result in grave consequences to the welfare of the minor children provisions have been included under the matrimonial laws of the different communities in India with respect to the custody, maintenance and education of minor children. Section 26 of the Hindu Marriage Act, 1956\textsuperscript{25}, section 38 of the Special Marriage Act, 1954, sections 41 to 44 of the Indian Divorce Act, 1869 and section 49 of the Parsi Marriage and Divorce Act, 1936\textsuperscript{26} contain the law on the point. These provisions are almost identical in their form and effect\textsuperscript{27}.

\textsuperscript{23} Principle, 2.
\textsuperscript{24} Policy, 3 (XIV)
\textsuperscript{25} Hindu Marriage Act, 1955, section 26 reads:

'Custody of Children' - In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes wherever possible, and may, after the decree, upon application by petitioner for the purpose make, from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim order in case the proceedings for obtaining such decree were still pending, and the court may also, from time to time revoke, suspend or vary any such orders and provisions previously made.

\textsuperscript{26} Also see the Foreign Marriage Act, 1969, Sec. 18.

\textsuperscript{27} Except that in case of Parsi children, the Parsi Matrimonial Court, may for the benefit of the children of marriage, settle upon them up to half of the property of their mother, if a divorce decree is passed on the ground of her adultery, Parsi Marriage and Divorce Act, Sec. 50.
None of the aforesaid provisions contains any reference to the welfare of the child as a consideration in passing any order regarding custody of children involved in such proceedings. The relief provided to children under these provisions is purely ancillary and depends on the absolute discretion of the court. There is a ritual reference to the consideration of wishes of the child whenever possible\(^{28}\), otherwise the court is free to pass such interim orders and make such provisions in the decree as it may deem just and proper.

The matrimonial courts, however, have followed nearly the same course in granting custody as has been adopted under the guardianship proceedings and have developed the law by their wide and liberal interpretations. The trend has been consistently from parental supremacy to the paramountcy of the welfare of the child\(^{29}\).

In *Asari v Asari*, the Madras High Court finding that in the circumstances of the case neither the father nor the mother was suitable to have the custody of the child, and holding the welfare of the child as the paramount consideration granted the custody to a third person.

In *Avinash Devi v Khazan Singh* before the Punjab High Court a decree for judicial separation was passed in favour of the wife on the ground of husband’s cruelty, the court granted custody of the child to the wife, till the child attained the age of seven. The wife appealed to the High Court against this limitation. Grover, J., holding that no such limitation need be placed, said that section 26 of the Hindu Marriage Act, 1955 gave complete discretion to the court but the court has to take into consideration welfare of the children which is the paramount consideration, if there has been any doubt in this regard the same has been set at rest by section 13 of the Hindu Minority and Guardianship Act, 1956.

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30. 1955 Mad. 363.
The learned judge further observed:

Even under the Act of 1890, there is a large volume of authority for holding that it is the welfare of the minor that is of paramount importance and even if a view prevailed at a certain time irrespective of every consideration the father is entitled to the guardianship and custody of the minor, it should be considered to be outmoded and shall be treated only as a matter of ancient history (32).

The Supreme Court in *Rosi Jacob v Jacob A. Chakra Makkal* set the conflict, if any, at rest and declared that in making an order in respect of the custody of the child, the welfare of the child is the paramount consideration, not the rights of the parents, whether the case be one governed by section 25 Guardians and Wards Act or section 41 or 42 of the Indian Divorce Act.

However, unless a definite provision making welfare of the child a paramount consideration in such matters is not included under all the matrimonial enactments referred to above and similar protection is not made available to the Muslim children, the possibility of adopting a different course by the courts can not be entirely excluded as the letter of law still provides them an absolute discretion.

(iii) *Proceedings for Writ of Habeas Corpus*

In a few cases proceedings have been initiated by lawful guardians for issue of a writ of *habeas corpus*, to get back the custody of their children wrongfully removed from their custody by some body. Such writ petition may be filed under Article 226 of the Constitution of India. That the well-being of the person brought before the court is protected, is what a writ of habeas corpus ensures.

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34. This was a case under the Indian Divorce Act, 1869.
Under their writ jurisdiction the High Courts have more often based their decisions on the consideration of the welfare of the child than any other factors. Thus in the matter of Josy Assam, where the parents of a child after having made over the same to others who had brought up the child as their own, made an application for the restoration of their child through a writ of habeas corpus, the court having due regard to the interest and welfare of the child in question refused to make the order. Sale, J., succinctly observed:

The rights and privileges of parents as to the control of their children are to be exercised not in the interest and for the benefit of the parents, but in the interest of and for the benefit of the children.

A Full Bench of the Kerala High Court in Margarate v Dr. Chako took the view that the inherent jurisdiction of the High Court to exercise this parens patriae jurisdiction can not be limited by any thing and the court should decide whether in the best interest and welfare of the child the custody should be entrusted to one or the other.

The Madhya Pradesh High Court in two petitions for writ of habeas corpus, Bhagwati Bait v Yadav and Budhu Lal v An Infant, has held that the father's legal right is sub-ordinated to the welfare of the child and refused to give the custody to him. Thus under the writ jurisdiction also welfare of the child is the paramount consideration for the court's decision.

(iv) Maintenance Proceedings

The question of determining the liability to and the quantum of maintenance of minor children may arise under four different types of proceedings. First, the regular proceedings in the civil court, to enforce the substantive law right of maintenance.

37. Josy Assam in the matter of 23 Cal. 290; In re Saithre, 16 Bom. 307 (317); In re Khatija Bibi, 5 Bom. L.R. 557; In re Mahim Bibi, 13 Bomb. L.R. 160; Budhu Lal v An Infant, 1971 M.P. 235; Chandra Kant v Hira Lal 1954 M.B. 43; Margrare v Dr. Shako 1970 Ker (F.B.).

38. 23 Cal. 290.

39. 1970 Ker. 1 (F.B.)


41. e.g. Sec.22(1) Hindu Adoption and Maintenance Act, 1956.
Second, proceedings under the Guardians and Wards Act, 1890 seeking the discharge of an appointed or declared guardian's duty to look to the minors' support, health and education. Third, summary maintenance proceedings against the father of the minor children, under the provisions of the Code of Criminal Procedure, 1973. Fourth and lastly, the maintenance, custody and education provisions of the matrimonial statutes of different communities.

(a) Civil court proceedings of maintenance - While the Hindu law of maintenance is statutory, the other communities are still governed by their respective customary laws. This is liable to go against the welfare of the minors. For instance, maintenance under Muslim law has been defined to include only food, raiment and lodging. There is no reference to any obligation of the guardian whether moral or legal to educate the children or to bear the marriage expenses of their daughter as under Hindu law.

The customary personal laws do not contain any reference to the welfare of children. There being no statutory support to such children, the civil court can not lay its hands upon any provisions to keep the welfare of the child as a paramount consideration in passing a maintenance order in respect to such children. It is submitted that in the best interest of the minors the law of maintenance of children under the Muslim law, the Christian law and the Parsee law needs to be modified and codified.

The Hindu Adoptions and Maintenance Act, defines the term 'maintenance', but it does not prescribe any particular amount or minimum or maximum limit of such maintenance amount and leaves the quantum of maintenance to be decided by the court.

42. Guardians and Wards Act, Section 24.
43. Section 125.
44. Mulla, D.F. PRINCIPLES OF MUHAMMEDAN LAW, Sec. 369; Tyabji's MUSLIM LAW (4th ed.) Sec. 287; Baillie I 437 (441), 442 (446).
45. Hindu Adoptions and Maintenance Act, Sec. 3(b).
46. Under Sec. 125 of Cr.P.C. the Magistrate can grant a maximum amount of Rs. 500/- per month to every minor.
Though some considerations are prescribed under sub-section (2) and sub-section (3) of section 23 respectively, for making orders against the natural guardian or the heirs of the deceased guardian obliged to maintain the minor dependents of the deceased as the case may be, but the principle of 'Welfare of the Child' is missing.

The same considerations which are applicable in deciding the maintenance of the wife or the aged parents of the person, have been applied in case of children. If the claim of maintenance is made by a minor as a dependent then the governing considerations are still different. The special needs of the children and special protection required by them seems to have been lost sight of the legislature when enacting this clause.

In the submission of this writer the section needs to be suitably amended and a new sub-clause (4) may be added to section 23 as follows –

!'(4) In passing any order under this section or under section 25 of the Act (48) in respect to a minor, the court shall have regard to the welfare of the minor as a paramount consideration.'

(b) Proceedings for support under Guardians and Wards Act - A guardian of the person of a ward appointed by the court is charged with the duty of looking to the support, health and education of his ward. There is no reference to the welfare consideration in making orders as to support or maintenance of the minor under the Guardians and Wards Act. If the guardian does not fulfil his duty to support, the court may only remove him.

The modification already suggested to be made under section 25 of the Guardians and Wards Act, 1890, under the preceding sub-head, it is submitted, will cure the deficiency in the Act.

47. Sub (3) of Section 23, Hindu Adoptions and Maintenance Act, 1956.
48. Section 25 empowers the court to alter the amount of maintenance on change of circumstances.
49. Guardians and Wards Act, 1890, Sec. 24.
50. Ibid.
51. Ibid. Sec. 39(d) and (e).
in relation to maintenance also.

(c) Maintenance proceeding under the Criminal Procedure Code - Section 125 of the Code of Criminal Procedure, 1973 which provides a summary remedy to the children to claim maintenance against their fathers is also silent on the consideration of welfare of the child in passing such orders. The discretion of the court is the only consideration provided. Section 125 of the Cr. P.C. is the only remedy available to the non-Hindu illegitimate children, it is a quick remedy available to the legitimate children of all communities, the section therefore assumes an important place in the law of child care. In view of the Declaration and the policy commitment, section 125 of the Code of Criminal Procedure needs to be modified by addition of a suitable clause wherein such court may be bound to have regard to the consideration of the minor's welfare while making a maintenance order in respect of a minor child. In the submission of this writer, the following 'proviso' should be added after the existing proviso to sub-section (1) of section 125 of the Code of Criminal Procedure, 1973:

'Provided further that in making an order for such allowance in respect to a minor child, the Magistrate shall have regard to the best interests of the minor as a paramount consideration.'

(d) Claim of maintenance by children during matrimonial proceedings - See Supra sub-head (ii) ' Custody of children under Matrimonial Proceeding' under QUESTION THREE of this Chapter.

(v) Adoption Proceedings

Adoption of children is a salient feature of the Hindu law, not found in the other personal laws in India. The Hindu Adoptions and Maintenance Act, 1956, which governs adoptions neither provides for the courts permission to give or take in adoption except in case of a defacto guardian of an orphaned or destitute child wishing to take or give him in adoption, nor declares the 'welfare of the minor' to be considered, if the child is being given in adoption by the natural guardian. The child's consent

52. Section 9(4) of the Hindu Adoptions and Maintenance Act, 1956 as amended by Act 45 of 1965.
is not a condition for his adoption. The Act, however, provides for both the 'welfare' and the 'consent' of the child to be considered where the child is given in adoption by a defacto guardian. 53.

To obtain the court's prior permission is necessary for taking or giving a child in adoption under the English law, Russian law 54, the Polish law 55, the Dutch law 56 and the French law 57. The paramount consideration for the court in passing an adoption order under all these systems is the welfare of the child 58.

There are a few more features of the law of adoption furthering the 'welfare of the child' under the English and Soviet legal systems. First, the English Adoptions Act, 1958 requires that the child should have been continuously in care and custody of the applicant at least consecutively for a period of three months immediately before the presentation of the petition 60. Secondly, a concept of 'Probationary adoption' has also developed at the English law. There, the court has powers to make an interim order of adoption giving custody of the child to the applicant for a period of not exceeding two years as the period of probation, upon such terms and conditions as the court may deem fit in the interest of the child 61. Thirdly, at certain systems the court before passing any final order regarding adoption conducts an independent investigation of the bonafides of the adoption and the facts and circumstances of the case through its own ancillary agencies such as the Welfare Officer or the local authority. Fourthly, under the Russian law, if at any stage the

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53. Section 9(5).
55. (1926) 1 Sov. Uzek. RSFSR, No.13, Item 101.
59. e.g. See the Adoption Act, 1958, Sec. 7(a) and (b).
60. Ibid. Sec. 3.
61. Ibid. Sec. 8.
62. It is so at the American and English legal systems.
court finds that the adoption is proving detrimental to the interests of the child, it has powers to cancel the adoption.\(^63\)

Under the English law also under one circumstance the adoption can be revoked viz, if the child adopted was an illegitimate but is legitimated later on account of the subsequent marriage of his parents.\(^{64}\)

The Hindu Adoptions and Maintenance Act is deficient in respect of the aforesaid matters. This statute is guardian-oriented rather than child-oriented. A natural guardian has full powers to decide when he feels like to transfer dominion over the child to the adoptive parents even against the consent of the child and no body can help. It seems to stand on the old mythology of 'sonship' as an institution for the spiritual benefits of the parents. The existence of the provision in the Act which prohibits adoption of a son by a person who has a grand son or a great grand son and adoption of daughter by a person who has a grand daughter or a great grand daughter prove the prevalence of orthodoxy.\(^{65}\)

The concepts have changed under the modern law and the adoptive guardian's benefit is now subordinated to the minor's welfare. The institution is today looked at to serve the cause of the child. It provides a home to a child without a home or it shifts a child having a home to a better home in the child's own interests. Although the interests of the adoptive guardians may also be met with as a consequence of the adoption, but the child's welfare is the governing consideration. The modern laws of adoption have been drafted from that perspective.

It can not be presumed that whenever a natural guardian gives his child in adoption it shall always be in his benefit or that when a defacto guardian does so it shall always be to the child's detriment. Cases of ulterior motives of the natural guardians cannot be entirely excluded. For instance, if a divorce


\(^{64}\) Adoptions Act, 1958 Sec. 26.

\(^{65}\) Under Shastric Hindu law a father and his son, grand son and great grand son are deemed to constitute one body.
takes place between the spouses, the guardian in whose custody a child is left with, may feel to dispense with him, and choose to give him in adoption. Similarly there may be motives, behind taking a child in adoption. To save the child from all such risks and to serve his best interests it is necessary to borrow the good features of the foreign systems, as discussed above.

To bring the Hindu Adoptions and Maintenance Act, 1956, in consonance with the modern law of adoption and keeping in view the welfare of the child as the paramount consideration, the following modifications are submitted to be made in the Act -

(i) Section 11- A be added in the Act as follows -

1. Any person who wishes to give or to take a child in adoption shall apply for the court's prior permission to do so.

2. The court may before passing any orders under the Act cause an investigation to be conducted in the facts and circumstances of the case through the Child Welfare Officer or any other person or agency appointed by it and to report to the court on such matters as it may deem fit.

3. The court may before passing a final adoption order, for the child to be given in the temporary custody of the adoptive parent for a period of not exceeding two years as the court may deem fit, and may also pass a supervision order appointing the child welfare officer or any other person to act as the supervisor and to submit quarterly reports to the court.

4. The court in passing any order under the Act shall regard the welfare of the child as the paramount consideration and may also consider his age, sex, his wishes, where the child is in a position to form a rational judgement and the reports of the welfare officer or supervisor, if any appointed under sub-section (2) or (3).

(ii) Sub-clause (i) of the section 10 which reads 'he or she is a Hindu' should be deleted.

(iii) Sub-clause (i) of section 11 should be deleted.

(iv) Sub-clause (ii) of section 11 should be deleted.
(v) A new section 17-A should be added as follows -

17-A on the application being made to the court by the minor or the welfare officer or any other person interested in the welfare of the minor or the court suo moto regards that the adoption is not proved in the welfare of the minor, it shall inquire into the matter and on considering the report of the child Welfare Officer, if any and such other matter as it deems fit, revoke the adoption order made by it.

(vi) A new section 17-B should be added as follows -

17-B - If the court comes to know that a minor in respect of whom any proceedings are pending or have been disposed of under the Act is, for any reason in need of maintenance care and protection, the court may pending inquiry order such child to be placed in an observation home. And where no other suitable arrangements is made for his maintenance care and protection, may order such child to be kept in the Children's Home, for such period as the court deems fit, until he attains majority.

(vii) A new definition should be added as sub-clause (d) of section 3 as follows -

'(d) - 'Welfare Officer' means the officer appointed or authorised to act as such by the state government and until such appointment is made a Probation officer appointed under the Children Act applicable in the area or any other person as may be prescribed'.

(vi) General Civil Matters

Order XXXII of the Code of Civil Procedure is the general procedural law governing suits by or against minors. It provides that every suit by a minor must be instituted through a 'next-friend' and every suit against a minor must be defended through a 'guardian for suit'. Rule 4 of the Order which provides the consideration for acting or appointment as next-friend or guardian for suit, lays down that where a minor has a certificated guardian no other person shall be given the conduct of the suit for or against a minor unless the court considers for reasons to be

67. Ibid., Rule 3.
recorded that it is for the minors welfare that another person be permitted to act or to be appointed. The Order seeks to ensure that any compromise or agreement proposed in such suit is for the benefit of the minor, by requiring the guardian's affidavit and pleader's certificate to that effect. It also grants powers to the court to examine its beneficial nature.

Where the minor has no certificated guardian the only relevant consideration is that he must not have an interest adverse to that of the minor. The same is the case in removing such next-friend or guardian or allowing him to retire. It is submitted that all cases of appointing, removing or permitting to retire a next-friend or guardian-at-litem, the entire welfare of the minor in the context of the proceedings must be considered by the court, mere considering 'interest adverse to minors' may not serve the purpose in all cases. The following 'proviso' should be added after the existing proviso to sub-clause (1) of Rule 4 of order XXXII of the Code of Civil Procedure—

Provided further that in permitting a next-friend to act or in appointing a guardian for suit, or in removing or permitting to retire a next-friend or guardian for suit the court shall regard the best interest of the minor as a paramount consideration.

(vii) Matters concerning the Family

The recently added order XXXII A which governs suits and other proceedings relating to matters concerning the family including legitimacy, guardianship, custody, maintenance and adoption etc. of a minor, does not contain a reference to the welfare consideration in passing any orders in relation to such matters. Rule 3 imposes a duty upon the court to make efforts for settlement of the matter between the parties. In a case where minor himself is a party to the proceedings Order XXXII safeguards his interests, but where he is not a party to the proceeding,

68. Order XXXII Rule 7.
69. Ibid., Rule 4.
70. Ibid., Rules 9 and 11.
73. For instance, children are not the necessary parties in a matrimonial proceeding while the proceedings very much affect them.
there is no statutory safeguard to guarantee the minors welfare. It is submitted that the following provision be added as Rule 5-A under Order XXXA of the Code of Civil Procedure -

'In making any order or decree in a matter to which this Order applies, the court shall have regard to the best interests of the minor, if any, who is likely to be affected by such order or decree, as a paramount consideration'.

(viii) Proceedings Before Children Courts and Welfare Boards

What the concept of 'welfare of the child' is deemed to convey under the civil jurisdiction, the concept of 'juvenile justice' is understood to cover under the criminal law. The whole theory of setting up separate children court's and welfare board's for children is based upon the considerations of meeting the best interests of the children. In India all the states have their separate children Acts. Though there are certain local variations but the notion of children's ultimate welfare pervades through all of them. Here we shall examine the relevant provisions of the Children Act, 1960 which is considered to be the model Act on the subject to know how far the welfare consideration has been incorporated in the enactment for deciding measures for the child.

The Children Act, 1960 which prescribes the procedure for the trial of juvenile offenders and aims to provide for the care, protection, maintenance, welfare of the neglected and delinquent children, prescribes the following circumstances to be taken into consideration in making any orders under the Act, namely -

(a) age of the child,
(b) the circumstances in which the child is living,
(c) the report made by the Probation Officer,
(d) the religious persuasion of the child,
(e) such other circumstances as may in the opinion of the competent authority, be required to be taken into consideration in the interest of the child, (74A).

74. See the long title of the Children Act, 1960.
74(a). Emphasis written. 
Thus welfare of the child is not a paramount consideration and the matter is left to the discretion of the competent authority. The Act having been considered as a model must be a real model and should specifically declare the paramountcy of the welfare consideration. It is submitted that to meet these ends the following provision should be added at the end of section 33 of the Children Act, 1960 and a similar modification should be made under the relevant sections of all the State Children Acts viz. -

Section 33 (2) - In making any order under the Act, the competent authority shall have regard to the welfare of the child as the paramount consideration.

(ix) Proceedings under the Code of Criminal Procedure

Since the possibility of the trial of a minor through the general criminal procedure cannot be entirely excluded for more than one reasons, the Code of Criminal Procedure obliges the criminal court to record special reasons in its judgement for not dealing with a youthful offender according to the provisions of the Children Act, 1960 or any other law for the time being in force, for the treatment, training or rehabilitation of youthful offenders. Similar reasons are to be recorded by the court where it does not release such juvenile delinquent after due admonition or on probation under the provisions of the Probation of Offenders Act, 1958 or under the Code of Criminal Procedure. But nowhere in the code there is any direction to criminal court to consider the interest or welfare of the young offender during investigation or trial or in passing the sentence.

76. e.g. non existence of a Children Act for the local area, non constitution of the children court in the area, non-reference of the case to the children court by the criminal court etc.
77. Cr.P.C. sec. 361(b).
78. Probation of Offender's Act, 1958 Sec. 3.
79. Ibid., Sec. 4.
80. Cr. P.C. Sec.160.
It is submitted that to secure the welfare of the youthful offender during investigation, trial and in the order of sentence the following proviso should be added to section 27 of the Code of Criminal Procedure, 1973—

'Provided that in taking a decision for a youthful offender to be tried under this Act, the court shall have regard to the best interests of the minor. The interests of the minor shall be the paramount consideration at every stage of investigation, trial and in giving the judgement.'