CHAPTER-IV

RIGHT TO PARENTAL AND SOCIAL CARE

' The child for the full and harmonious development of his personality, needs love and understanding'. Basically, no other person can better understand the child than its mother and father and none else as they, can shower an unlimited natural love and affection upon him. It is in recognition of this need of the child for love and understanding, that the Declaration of the Rights of the Child provides:

He shall, wherever possible, grow up in the care and under the responsibility of his parents, and in any case in an atmosphere of affection and of moral and material security, a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and those without adequate means of support. Payment of state and other assistance towards the maintenance of children of large families is desirable (2).

The scope of this right of the child is three-fold. It aims to secure that:

(A) The primary responsibility to provide care and protection to children is that of the parents. This is subject to the condition that a child of tender years shall not, ordinarily be separated from his mother.

(B) The alternate duty to provide care and protection to children, specifically those without a family or without adequate means, is that of the society and the state.

(C) In any case, i.e. whether in parental care or otherwise, the child shall grow in an atmosphere of affection and moral and material security.

1. Principle Seven, Declaration of the Rights of the Child.
2. Ibid.
3. The right is qualified by the words 'wherever possible', implying several contingencies when the child may be deprived of the parental care e.g. divorce, orphaned, death of either parent neglect etc.
We shall examine here how far the law has secured the right to parental care or an alternate social care to the Indian children, in the spirits of the Declaration, in the aforesaid three aspects.

I. PARENTAL CARE

The child's first birth right is a happy home, loving parents and the soft rocking hand of the mother. It is said, half of the child's ailments vanish when the mother wraps her arms around the child. The parental love for their children is natural and spontaneous and provides a security in the mind of the child so essential for his developments physically, socially, morally and spiritually.

It is questioned, if law can in any way help the child in securing love and affection which is a matter of purely personal volition and can not be procured by compulsion? But there is no denying the fact that law is an effective instrument of implementing social policies. By defining parental responsibilities it can regulate the parental actions towards their children. Law can play a role in stabilizing families. It can fix the relative position of father and mother qua their children and generally govern the parent-child relations.

The thrust of the declaration is to ensure by appropriate legislative measures that 'wherever possible', the child shall grow up in the care and responsibility of his parents, as it is essential for the full and harmonious development of personality. It impliedly points out the functions of the law in this regard. In the best interest of the child in the first place, his guardianship and custody should belong to the parents. Secondly, a child of tender years should not, save in exceptional circumstances, be separated from his mother. Thirdly, the law should define the scope of parental responsibilities and fourthly, the law should stabilize the parental tie and strengthen the family. Thus in

legal terminology the right to parental care is parental guardianship of minor's person and the co-relative obligation of the parent attached to such right, looked at from the child's perspective.

(A) Guardianship and Custody of Parents

The law of guardianship in India is contained in two sources. The substantive law is governed by the personal laws of the different religious communities, while the adjective law is contained in the Guardians and Wards Act, 1890 which applies to all communities. But once guardianship or custody proceedings are initiated, the Guardians and Wards Act, becomes the governing law. The doctrine of welfare of the child which finds a place under the Act⁵ as judicially developed has now become almost the paramount consideration in deciding all guardianship and custody matters under the Act.⁶ Therefore, all the substantive or procedural rules of guardianship are to be read subject to the principle of welfare of the child.

Under the Hindu Minority and Guardianship Act, 1956 the father and mother have been called the 'natural guardians' of their children and there is no other natural guardian except the parents⁷. Even the step-father or step mother is not included in the category of natural guardian⁸. Between the father and the mother the guardianship of person and property of the legitimate children, during their minority and of the female children until their marriage⁹ belongs to the father¹⁰. A Hindu mother becomes entitled to the guardianship of her minor legitimate children¹¹.

5. Sections 7,17 and 25.
7. Section 6, Hindu Minority and Guardianship Act, 1956.
8. Explanation to Section 6, Ibid.
9. In the case of female minors, on her marriage the guardianship passes to her husband, Sec.6(c) Ibid.
10. It is subject to the proviso to Sec.6 and Sec.13 of the Act.
11. As distinguished from their custody and subject to the rule of guardianship of minor girls.
only 'after' the father. In the event of the death of either parent guardianship belongs to the surviving parent.

The order of guardianship of the father and mother, in the case of illegitimate children is just the reverse of that for the legitimate children. In the case of an illegitimate boy or an illegitimate unmarried girl, the guardianship first belongs to the mother and after her to the father.

The father or the mother, as the case may be, may continue to enjoy their respective rights to guardianship and custody under the Act until either of the three contingencies arises: First, that such natural guardian ceases to be a Hindu or completely and finally renounced the world by becoming a hermit (Vanaprastha) or an ascetic (Yati or Sanyasi). Second, the matter of guardianship goes to the court and such natural guardian loses his or her guardianship, it being against the welfare of the minor or in case of the father, he is found 'unfit' in the opinion of the court. Third, a matrimonial dispute arises between the parents and the court passes orders under the Hindu Marriage Act, 1955 in respect of the custody of the children.

The Proviso to Section 6 of the Hindu Minority and Guardianship Act which declares a natural guardian as disqualified for the guardianship of his children in the event of his conversion to another religion is anomalous, it is submitted. A convert natural father or mother is disqualified from acting as a guardian though to be a non-Hindu, is not a disqualification for a testamentary

12. The term 'after' denotes four circumstances viz. (1) The father losing his guardianship by ceasing to be a Hindu or finally renouncing the world (Proviso to Sec.6 Ibid)(ii) The father becoming disentitled to guardianship under the welfare Principle, (Sec.13(2) Ibid), (iii) The father rendered 'unfit' to be the guardian, under Sec.19(b) of the Guardians and Wards Act, (iv) The father dies.

13. Sec.6(b) Ibid.
14. Proviso to Sec.6, Ibid.
15. Sec. 13 Ibid.
16. Sec. 19(b), Guardian and Wards Act, 1890.
17. Sec. 26 Hindu Marriage Act, 1955.
guardian, and those appointed by the court. The provision is against the spirit of the Declaration which insists upon the child remaining in parental care and responsibility as far as possible. The proviso implies that if both the parents become converts, they will lose their natural guardianship under the Act and a third person, let him be a Hindu or a non-Hindu, may be appointed as their guardian.

The courts are basically governed by the doctrine of welfare of the child in such matters and may well subordinate the personal law, even if statutory, or the consideration of religion under Sec.17 of the Guardians and Wards Act to the welfare principle. The proviso to Sec.6, however, liable to be a hurdle in the natural guardian's continuance as such after conversion. Guardianship is now looked as an office of protection and an obligation rather than a right. Mere change of religion does not mar the parental love and affection. The proviso to section 6 of the Hindu Minority and Guardianship Act should, therefore, be deleted. It would also be in consonance with the secular character of India.

After the death of both the father and the mother the testamentary guardian appointed by the father, if any, shall get precedence over the testamentary guardian appointed by the mother, if any, in respect to the legitimate children, unless the father had become disentitled to guardianship during his life. In case of illegitimate children only, the mother has the preferential right to appoint a guardian by will.

18. Sec.9, Hindu Minority and Guardianship Act.
19. Though religion is one of the considerations for appointment of a guardian under Sec.17 of the Guardians and Wards Act, yet it is not the only factor to decide the 'welfare of the child' and a person of another religion may equally be appointed a guardian if the welfare of the child so requires.
21. The statement of Objects and Reasons, the Caste Disabilities Removal Act, 1850.
22. Sec.9, Hindu Minority and Guardianship Act, 1956.
23. Sec.9(3) ibid
24. Sec.9 (5) ibid.
The Hindu Minority and Guardianship Act also declares that the natural guardianship of an adopted son who is a minor, passes on adoption to the adoptive father and after him to the adoptive mother. The Act is silent on the natural guardianship of adopted daughters, but the gap is supplied by the provisions of the Hindu Adoptions and Maintenance Act, 1956, which came into effect later. Section 12 of the later enactment lays down that an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes from the date of adoption. The effect of that section would be that the adoptive father and the adoptive mother would be regarded as the natural guardians of the adopted child whether a son or a daughter in lieu of his or her parents.

It is submitted that the continuance of the provision of natural guardianship of adopted son only under the Hindu Minority and Guardianship Act is liable to create confusion and doubts in the common readers' mind. Since the Hindu law now recognises adoption of minor females at par with the minor males, either the marginal title and the contents of Sections 7 of the Hindu Minority and Guardianship Act should be modified by adding the words 'or daughter' after the word 'son' at the two places, respectively or section 7 be deleted, leaving the matter to be governed by the provisions of Section 12 of the Hindu Adoptions and Maintenance Act, in respect to both the sons and the daughters. The first alternative will better serve the purpose.

The Muslim law of guardianship is customary. It also vests the natural guardianship of the legitimate minor children whether males or females with the father, in the first place. After the father the executor appointed by father's will, the father's father or his executor by will are deemed to be natural guardians in the same order of priority. The natural guardianship of father

25. Sec. 7 of the Hindu Minority and Guardianship Act.
26. The old Hindu Law did not give place to the adoption of daughter. The concept was introduced by the Hindu Adoptions and Maintenance Act, 1956, Sec. 7.
28. Section 7.
is subject to the right to 'hizanat' of the mother and other female relations. In default of these persons the duty of appointing a guardian devolves on the Kazi as the representative of the sovereign. Neither the father, nor the mother are considered as guardian of an illegitimate child, male or female. Only the Hanafi law obliges the mother of such children to have their custody, during the period of nurture.

Indian Christians, Parsees and Jews have no personal law of guardianship and are governed by the Guardian and Ward Act, 1890. Prior to independence such children were governed by the doctrine of 'justice, equity and good conscience' as under the English law. The father was regarded guardian by nature and nurture of his legitimate minor children and was entitled to their custody even if the child was at the mother's breast. After the father, the mother has been considered the natural guardian. As under English law an illegitimate child has been considered filius nullius and consequently having no legal guardian, not even the mother. In case of a child within the age of nurture, the mother's guardianship has been preferred to others.

Even after independence no change in the relative position of the father and mother as natural guardian, seems to have taken place. The old general doctrine of 'justice, equity and good conscience', however, is now replaced by the specific doctrine of 'welfare of the child'.

Guardians of the minor's person or property or both may also be declared or appointed by the District Court, under the Guardians and Wards Act, if some body moves the court by an application and the court is satisfied that it is for the welfare of a minor that an order should be made. The court has, however,

31. Macnaughtan Ibid, p. 296; Bailie V.l, p.437; the period of nurture is 7 years in case of boys and puberty in case of girls.
33. See Pradhan, LAW RELATING TO MINORS, p.75.
34. SIMPSON'S' INFANTS', 4th Ed. p.91.
36. Empress v Pamentle (1892) 8 Cal. 971; Bometsh(1908),35, Cal. 381.
37. Sec.8, describes the persons entitled to apply for such order.
38. Sec.7, Guardians and Wards Act.
no power to appoint or declare a guardian of the person of a minor whose father is living and is not in the opinion of the court, 'unfit' to be guardian of the person of the minor. The court also can not appoint a guardian of a female minor, who is married, unless in the opinion of the court, her husband is deemed 'unfit'. Similarly the court can not declare or appoint any other person as guardian, where there is already a guardian appointed by will or other instrument of the natural guardian, unless such testamentary guardian has first been removed by it.

Thus the father's superior right to guardianship recognised under all the personal laws, is retained under the Guardians and Wards Act. Mother finds no place in the whole arena of guardianship or custody under the Act. It may be surprising to note that even the term 'mother' has not been used in the whole body of the Guardians and Wards Act, a statute which contains the general law of guardianship and custody, in the country.

The rules of paternal supremacy in respect of the guardianship and maintenance of legitimate children and maternal supremacy in respect of illegitimate children, is not in conformity with the Declaration. It is only in respect of the custody of the children of tender years that the Declaration specifically mentions the role of mother. But even during that age and beyond, till he is a child, the care and responsibility of both the 'parents' is desired. Most of the developed legal systems now recognise the equal status of both the father and the mother in respect of all matters concerning the children. At some of these systems e.g. English law, though the distinction between the legitimate and illegitimate children is maintained, but so far as legitimate children are concerned, the equality of parents is now the established rule.

39. Sec. 19(b), Guardians and Wards Act.
40. Sec. 19(a), Ibid.
41. Sec. 7(3), Ibid.
42. Sec. 39, Ibid.
43. viz. it is so at the English, the Russian, the Australian, Polish, French, and German legal systems.
In the best interests of the child the judiciary in India could uplift the status of the mother qua her children\(^4\). The Hindu law has statutorily\(^4\) recognised her as an alternate natural guardian of the legitimate children after the father. But it is not so under the Muslim law. Recognition of the mother's second position at the Christian, Parsi and Jewish laws is based on the English law\(^4\). Although in the best interest of the child the judiciary has in certain cases\(^4\) considered the mother as the natural guardian, but the interpreters of law have their own limitations. The judiciary could not substitute the legislature and declare the mother as a co-equal or joint guardian with the father in respect of all duties and powers over children. This feature may be introduced only by a legislative modification of the existing law.

It is only in the event of a dispute and subject to the parties seeking the help of the court, that the Guardians and Wards Act applies, but then it does not supply the substantive rules of guardianship. To introduce the concept of joint-guardianship of the father and mother, for the benefit of children of all the communities, therefore, it would not suffice to modify the Hindu Minority and Guardianship Act and the Guardians and Wards Act. For this an integrated law of guardianship shall have to be provided keeping in view the judicial developments and the modern children - jurisprudence. One alternative is to modernise the Guardians and Wards Act, 1890, and make it applicable to all the communities notwithstanding any law or custom to the contrary. But in our submission the better alternative is to frame a uniform Children Code on all aspects of child care, welfare and protection.

(B) Mother's Custody of Children of Tender Years

Among the father and the mother, the welfare of the children of tender age lies in remaining in the custody of their mother.

45. See the Hindu Minority and Guardianship Act, Sec.6.
47. e.g. Tija Bai v Pathan Khan, 1971, S.C. 315.
The Declaration therefore cherishes that a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Both the modern Hindu law and the Muslim law, specifically recognise the mother's right to custody of her children of tender years.

The preferential right of the father to the guardianship of his legitimate minor children is subject to the limitation that 'the custody of a minor who has not completed the age of five years shall ordinarily be with the mother'.

The use of the term 'ordinarily' in the proviso denotes that the mother's right to custody is not absolute. Though the Act, does not describe the circumstances under which the mother may be deprived of such custody but as has been held by the Supreme Court in Jacob's case, the welfare of the child is the paramount consideration in deciding such matter. In Veena v Prahalad, the Madhya Pradesh High Court said that the mother's custody may be disturbed only for grave and weighty reasons.

The natural guardianship of father and others under the Muslim law also is subject to the 'Hizanat or Hiddana' or the custody rights of the mother, in respect of children of tender years, their being different ages according to the sex of the child or the sect of the parents. Under Hanafi law the Hizanat of a male child until he has completed the age of seven years and of a female child until she has attained puberty belongs to the mother during marriage and after separation from her husband.

48. Emphasis writer's, Principle 7 uses the language 'save in exceptional circumstances' to denote the same limitation.
49. Proviso to Sec.6(a) of the Hindu Minority and Guardianship Act.
51. Sec. 13(2) Ibid.
54. In the absence of evidence, puberty is presumed to be attained at the age of 15 years, Tyabji Sec.280; Fyzee, Ibid. p.208, Sec.34.
She looses this right if she is an apostate. Her marriage to a person not related to the child within prohibited degrees, immorality or severence of the child from the father are other grounds for loss of right to custody of the mother and other female relatives.

Muslim law considers the right of Hizanat as no more than the right of rearing of the children. The mother cannot surrender her right to any person, including the husband. For instance, if she obtains Khula from her husband on the stipulation that she would surrender her right of Hizanat to the father of the child, the Khula will be valid and the stipulation would be void. The guardianship and maintenance even during the mother's Hizanat belong to the father. The Privy Council in Imambandi v Mutasadai considering the nature and extent of mother's right to custody observed:

It is perfectly clear that under Mohamaden law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian.

Thus, wherever the father and mother are living together, their child must stay with them and the husband can not take the child away with him, nor can the mother take it away without the permission of the father, even during the period when she is entitled to the custody of the child, where the child is in the custody of one of its parents, the other is not be prevented from seeing and visiting it. The same seems to be the position in case of the Hindu mother's right to custody under Section 6 of the Hindu Minority and Guardianship, Act. 1956.

56. Fyzee, Ibid., Sec. 33.
57. Paras Diwan, Muslim Law in Modern India, p. 118.
58. Tyabji Sec. 238.
59. 1918, 45, I.A., 73, 83.
60. Fyzee, Ibid. p. 199.
61. 'Access' to the child is now considered as an essential element of custody if it serves the welfare of the child. Smt. Mohini v Virendra, 1977 S.C. 1359.
It is a peculiar feature of the Muslim law that it clearly separates the 'custody' of children from 'guardianship' and specially reserves the custody of children of tender years primarily to the mother and then to certain female relatives. Failing the mother the custody of children of tender years belongs to the following female relations successively viz. to mother's mother how high so ever, father's mother how high soever, full sister, uterine sister, consanguine sister, full sister's daughters, utrine sister's daughter, consanguine sister's daughter, maternal aunt in the like order as sisters, and paternal aunts in the like order as sisters.

In default of the mother and the other female relations, the custody belongs in succession to the following male paternal relations: father, nearest paternal grand father, full brother, consanguine brother, full brother's son, consanguine brother's son, full brother of the father, consanguine brother of the father, son of father's full brother, and son of father's consanguine brother, provided that no male is entitled to the custody of an unmarried girl unless he stands within the prohibited degrees of relationship to her.

The custody of a boy above 7 years of age and unmarried girl above the age of puberty, failing the father, belongs to the paternal relations mentioned above in the same order of priority.

(C) Custody of Children Consequent Upon Matrimonial Disputes Between Parents

In the event of a matrimonial dispute between the parents the guardianship and custody of the children assumes all the more importance as it is liable to affect adversely the interests of the children of marriage and all children in the family whether legitimate or illegitimate. The situation has been tackled nearly

62. The principle of this kind of guardianship is that the relations of the mother are preferred to those who are related to the child only through its father.
63. Tyabji Sec. 239; Wilson Sec. 107.
64. As to Shiaite Law, See, Tyabji Sec.245.
65. Fyzee OUTLINES OF MAHOMEDAN LAW(4th ed.) p.201
similarly under the different matrimonial Acts in case of Hindus, Christians and Parsis, and in cases of civil marriage, while the rules in case of Muslims are customary and different. The provisions of section 26 of the Hindu Marriage Act, 1955 are reproduced hereunder to illustrate the nature and extent of care and protection available to such children during the matrimonial proceedings—

In any proceedings 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, alter the decree upon application by petition 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 orders in case the proceedings for obtaining such decree were still pending, and the court may, also from time to time, revoke, suspend or vary such orders and provisions previously made.

There is no indication under Sec. 26 of the Hindu Marriage Act and the analogous provisions of all other matrimonial enactments referred to above whether the order for custody etc. under the section shall be made by the matrimonial courts in consonance with the personal law of guardianship or the courts are free to pass any order they like. Judicially it has now come to be established that the courts in such matters are governed by the 'welfare of the child' as the paramount consideration. But the welfare principle does not find a place under section 26 and the analogous sections.

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66. The Hindu Marriage Act, 1956, Sec. 26; The Indian Divorce Act, 1869, Sec. 41-44; The Parsi Marriage and Divorce Act, 1936, Sec. 49.

67. The Special Marriage Act, 1954, Sec. 38

68. Emphasis writer's.

The discretion conferred on the matrimonial courts, under section 26, is virtually absolute. The section or the rules framed by the various High Courts are silent on any guidelines for the court except a ritual reference to the wishes of the children 'wherever possible'; otherwise, the court is free to pass any order 'as it may deem just and proper'.

The 'just and proper' consideration may be looked at from the point of view of the parties to the petition, the children, or the court itself. The words 'just and proper' which are subject to, 'as it may deem', necessarily lead us to the conclusion that the justness and propriety of the order has to be judged from the courts own point of view and not that of any body else. It is nothing more than a 'balance of convenience'. The section neither contains any reference to the principle of welfare of the child. It is humbly suggested that section 26 of the Hindu Marriage Act, may be modified by adding 'and keeping their welfare as the paramount consideration' after the words, 'consistently with their wishes wherever possible' in section 26.

Under section 26, the court exercises jurisdiction over children only if it has jurisdiction in the main petition. If the matrimonial proceedings are dismissed, proceedings relating to children automatically terminate. Under the English law, from where we have borrowed these provisions, such orders can now be made even if the main petition is dismissed. Further at that law the children are also the parties to the proceedings. We have no corresponding provision under the Indian law as yet. This gap may be filled by having a specific provision in the matrimonial enactments.

73. Matrimonial Proceedings, and Property Act, 1970, Sec.3.
Justice requires that Parliament should either confer the jurisdiction on matrimonial court to cover all the aspects of child care and protection or let the matrimonial court refer the question of custody and maintenance etc. to a regular guardianship court exercising exclusive jurisdiction over children, where not only the parents but the children themselves should be parties to the proceeding. Others interested in the welfare of the children may also be allowed to intervene.

(D) **Stability of the Family**

Principle seven of the Declaration gives recognition to the importance of 'family' as a basic social unit specially for the proper growth of the children and brings in the role of law in stabilizing and strengthening the family. This may be done mainly in two ways, viz. by ensuring stability of the parental tie or marital relations and secondly by enhancing the capability of the family, specially the mother to take care of the child financially and otherwise. Every effort should be put in by the law and State to ensure that a child is not ordinarily deprived of his parental care.

The National Policy for Children realising the vital role of parenthood has laid down:

> Efforts would be directed to strengthen family ties so that full potentialities of growth of children are realised within the normal family, neighbourhood and community environment (74).

Stability of the family or the marriage tie between the party is essential for the proper rearing of the children in the family. The first attempt of the law therefore, should be to stabilise the institution of marriage, by making the divorce laws more stringent, for every religious community, at least for the spouses having children in the family.

74. Policy 3 (XV), National Policy for Children.
The purpose of any good marriage law is the stability of the marital relation but when the marriage has broken down, due to any cause and it is not possible to reconcile, the welfare of the children lies in putting an end to the tie between the parent with maximum fairness and minimum humiliation. A disturbed family can never be conducive to the development of the children in the family. Emancipation of child from broken homes is as much in their welfare as the stability of the parental tie. Thus divorce in many cases may be a treatment for the proper rearing of the children.

As observed by Mr. Justice S.K. Ray in Anupam v Bhagwan Dass Mishra it is in the interest of public policy to maintain the continuance of matrimonial relations and to prevent, as far as possible, disruption of the same. This power is exercised not only for the benefit of the parties to the marriage, but also of their off-springs. The power, coupled with duty is mandatory and advances the social objective of stability. The Supreme Court hold that it is specially desirable from the point of view of the child's welfare, that such litigation should not be liable to endless repetition.

The matrimonial statutes in India represent a compromise in attempting to stabilize the marriage by obliging the court to try for re-conciliation and allowing every opportunity for the same and simultaneously introducing the provisions for the custody, maintenance and education of the children of marriage affected due to such proceedings, during and after the proceedings.

At certain legal systems, there also exists post-adjudicatory counselling service to sort out the arrangements that have to be made when a marriage has broken down irretrievably. For instance,
the Australian Counselling Service helps the separated parents in keeping in their continuing relationship with the children or making arrangements for their maintenance etc. The matrimonial statutes in India do not provide for any such machinery. In the larger interest of the children, the introduction of a post-adjudicatory service is desirable to be made within the frame work of the adjudicatory machinery.

(E) Economic Soundness of the Family

Besides the stability of the family its financial soundness too needs to be strengthened. Principle Six of the Declaration also makes payment of state and other assistance, towards the maintenance of children of large families desirable. The Committee for Preparation of a Programme for Children, set up by the Government of India, under the Chairmanship of Mr. Gangasaran Sinha in 1968, recognising the realities of economic situations and the struggle for existence of the common man observed:

The nation has no doubt made progress in many spheres since independence, but even now the families of less privileged section of population e.g. landless labourers forming one third of the total rural population, are not in a position to provide the necessary care and security needed for the normal growth of their children. Millions of children suffer malnutrition and other consequences of poverty. Additional support, therefore needs to be provided to enable the family to fulfil its obligations to its children, in terms of nutrition, health, education and social well-being (81).

Economic instability of the family is the most common cause of child neglect, which leads to delinquency and beggary. The neglected and delinquent children too often belong to the economically weaker section of the society. The Children Act, 1960 and other State Children Acts do provide for the institutionalisation of the neglected and delinquent children, in children

79. Australian Counselling Service. A brochure.
80. See Report of the Committee submitted on October 9, 1968.
81. Ibid. p. 4.
homes and special schools to be maintained by the State, but there is no law providing financial help to the economically unsound parents to fulfil their obligations. This approach is basically faulty and is not conducive either for the State, the society, the parents or the children themselves. Instead, if a policy to provide financial aid to such parents is adopted it will keep such children in the care and responsibility of the parents, result in a substantial decrease in the number of neglected and delinquent children.

The English legal system, which we often copy, has more than one legislations providing financial assistance to the parents and the children, as a part of an integrated social security scheme. The Child Benefit Act, 1975, confers a 'child benefit' payable to parents in respect of every qualified child. Under the Act a person is entitled to the child benefit, if he is responsible for any child under the age of 16, or if the child is receiving full-time education, under the age of 19. A person is regarded as responsible for a child if he has the child living with him or if he is contributing to the cost of providing for him at a weekly rate not less than the relevant rate of child benefit. If a husband and wife are living together, the allowance belongs to the latter, because she is generally the member of the family, who will need it to maintain the children. Benefits may also be paid under the Social Security Act, 1975 and Supplementary Benefits Act, 1966. While the first Act covers various contingencies of unemployment, sickness, maternity, widowhood and retirement etc. of the parents and is contributory, the later Act is generally available to persons above the age of 16 years, but its utility is that it provides assistance to families on low incomes in the form of family income supplement.

82. Bromley's FAMILY LAW, (5th ed.) p. 83.
84. Section 3, Ibid.
85. Bromley's FAMILY LAW, p. 85.
It is submitted that to minimise the chances of children being driven out of parental care and home environment, a law providing financial aid by the State to the parents in need of such help should be enacted. The stringent financial position of the State is no answer to the needs of the child, if mankind owes to the child the best it has to give and "their nurture and solicitude is our responsibility." (F) Planned Family-Responsible Parenthood

An improved parental care may also be secured by an indirect method of strengthening the financial status of the family and the health status of the mother viz. by having small size families. To inculcate in the masses a sense of responsible parenthood, the celebration of the International Year of the Child, began by observing January, 1979 as a 'family-planning month'. Its theme was 'delay the first, space the second, stop the third', in the interest and the well being of the child, the mother, the family and the nation. The needs of children are not only of material nature but also include developing their psychological, intellectual, moral, social and cultural capacities. These are possible only in a happy family. It is now well recognised that a planned family is really a happy family.

In a large family, the interests of the children are very often overlooked and despite the best intentions for their well being, they are generally neglected. Too many births and specially inadequate spacing between two births of children has been the most important contributing factor in depriving the child of the mother's attention. As an important link in the integrated scheme of child care and protection, family planning, therefore, deserves to find a place in the legal system. But in place of being coercive, it should rather be based on incentives and motivation.

The Medical Termination of Pregnancy Act, 1971 which enables the termination of the pregnancy on the ground of health and risk to life of the mother and also to check the birth of a would be seriously handicapped child, may be utilised to serve the social purpose of family planning by allowing such termination also where the husband and the wife have two or three children and wish to keep the family small, it is submitted. The Act should be amended accordingly.

II. SOCIAL CARE TO CHILDREN

A child's paramount need is for home and a family where he gets affection and emotional security in order to develop into a mature human being. Not every child is fortunate enough to possess such a home and a family. Orphans, destitutes, children from broken homes, neglected children, and those ill-treated or abandoned by their parents, all need the protection of law. The Declaration recognises that failing the parental care the alternative duty to provide care and protection to children, specially those without a family or without adequate means, is that of the society and the public authorities.

The Children Act, 1960 and the State Children Acts seek to provide for the care, protection and maintenance and welfare of children without a home or without adequate means of living and similar other children called 'neglected children' under the Central Act. There are slight variations in the categories of children covered under this head under the different State Children Acts. These Acts not only provide protection to orphaned or abandoned or destitute children, but also mentally retarded, uncontrollable children. Children who are in a moral danger are considered as neglected and given the same care and protection. Thus under the Bombay Children Act, 1948 any child who has no home or is found wandering without any settled abode or visible means of subsistence, and a child found begging or doing any act for consideration under circumstances contrary to the child's well being.

any child who is destitute or has an unfit parent or guardian, any child who associates with a prostitute or is exposed to moral danger, may be brought before a Juvenile Court by a police officer or a Child Welfare Officer (Probation Officer). Under the Children Act, 1960 any person authorised by the competent authority may also produce such a child and before the Welfare Board, an authority created under the Act to exercise jurisdiction over neglected children.

(A) Children Homes

If after making enquiries, the Welfare Board under the Central Children Act or a Juvenile Court under the State Acts comes to the conclusion that there is no parent or guardian to whose care the child may be entrusted, or it is not in the interest of the child that he should be so entrusted, he may be committed to the custody of a 'fit person' or a long term institution called children's home under the Central Act and a certified school under the State Acts. The child may be sent to these institutions for any period till he ceases to be a child, under the relevant Children Act. In special circumstances, the period may be extended beyond childhood, but not beyond the age of 18 years in the case of a boy and twenty one years in the case of a girl.

The Children Act institutions for such children whether established by the State or by voluntary organisations are required to observe certain minimum standards in respect of the physical facilities to be made available to such children. For instance, a children home established under the Children Act, 1960 is required to provide the child not only with accommodation, maintenance and facilities for education, but also facilities for the development of his character and abilities and give him necessary training for protecting himself against moral danger or exploitation and may also be required to perform certain other functions.

90. There are only 90 Children Homes and 84 certified schools in India.

as may be prescribed, to ensure all round growth and development of his personality. Thus the alternative institutional care made available to such children is ensured to be parent-like as far as possible. The minimum standards laid down under the Central Children Act are, however, not uniformly prescribed under all the State Children Acts. It is submitted that all the state Children Acts, which have not prescribed such minimum facilities to be provided at the respective institutions, should be modified so as to be brought at par with the Children Act, 1960.

(B) Fit Person Institutions

The Children Acts also facilitate the establishment of 'voluntary homes' and 'fit person institutions' by non-governmental organisations. These institutions are usually partly self-financed and partly state aided. They are staffed privately and the government only keeps the general control and supervision through its inspecting staff. These institutions perform the same function as are performed by the state-established children homes. Then there are provisions for the establishment of after-care organisations to look after the children leaving these institutions to help them in their rehabilitation.²²

Institutions have been established outside the perview of the Children Acts, some of which are state-owned, but most of them are established as non-governmental organisations. The number of neglected, orphaned and destitute children is so big that all children in need of care and protection cannot possibly be accommodated in these homes. According to one estimate 0.5 percent of the total child population is considered destitute, according to another out of 18 million orphaned children, as many as 7 million are destitute orphans.²⁴

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²². Sec. 12 Children Act, 1960.
²³. Perspective on the Children in India, NIPCCD, 1975.
There is a centrally sponsored Scheme of Welfare of Children in Need of Care and Protection, which was launched in 1974 for providing shelter, education and welfare services to abandoned, neglected, unwanted and orphaned and homeless children. The scheme provides for 90 percent financial assistance to voluntary organisations through the State-Governments/Union territory Administrations for extending both institutional and non-institutional services to children between 0-16 years in need of care and protection. For children in the age group 12-8 years, pre-vocational and vocational training courses are provided in addition. The institutions are also given building grants to cover 90 percent of the cost of construction of cottages.

Services of local bodies are utilised by extending the financial aid to them for implementation of the scheme, where there are no voluntary organisations.

The SOS Children Village and Family Homes, is another programme which is a distinct proof of all other types of institutional care hitherto provided for children. Started in mid-sixties, the programme to date has 17 such villages in ten states. Each village has a cluster of 20 houses and each house has nine children under the care of a mother and each village has a Director. Due to the home-like atmosphere and small family size cottage it has come to be recognised as a non-institutional service. But these are no more than a drop in the ocean and are available at pure administrative discretion and without a statutory support.

With the initial Fifth Plan allocation of Rs.8 crores it has made significant progress. The fifth plan physical target of covering 25,000 children was achieved by the end of 1978 itself.

96. i.e., foster care services etc.
Creches for Children of Working and Ailing Women

Creches have been established for the children of working women under certain labour statutes e.g. Factories Act, 1948, the Mines Act, 1952, the Plantations Labour Act, 1951; the Bidi-and Cigar Workers (Conditions-of-Employment) Act, 1966 etc.

A Central Scheme of creches for children of working and ailing women was started in February, 1975. Though it is implemented through the Central Social Welfare Board, and voluntary agencies are involved, 90 percent of the expenditure is borne by the government. Day care services including health care, supplementary nutrition, sleeping facilities, immunisation and entertainment are provided to children of the age group 0-5 years. Only those children whose parents total monthly income is less than Rs.300 are eligible for admission to the creches. The scheme has considerably expanded.

The voluntary institutions have also contributed their share of such services by establishing various creches in different parts of the country, particularly at big industrial towns. For instance, the Indian Council for Child Welfare has established creches in 17 states having 344 creches. It is reported that at least one million babies of twenty-one million born every year are abandoned soon after their birth, due to various social and economic pressures. Foundling homes have been established at certain places.

99. 'Mamta' a day-care centre has been opened at New Delhi, to cater to children 1 months to 6 years in age, from the middle income group working mothers. ICWM Programmes and Activities, A Pamphlet published in 1980, New Delhi.
100. SOCIAL WELFARE, Vol.XXVI, No.5-6 (1979), p. 12.
It has been realised that the institutional services leave behind a feeling of loneliness and backwardness in children. The children reared in the institutions develop a socio-psycho complex in them. The Declaration also recognised the need to provide all children an atmosphere of affection, which is hardly possible at the institutional level. Realising this need of the children, the Government of India in its Scheme for The Welfare of Destitute Children, also proposed a programme for providing foster care and adoption services. It is emphasised that wherever it is possible to secure the services of the foster care and adoption, efforts should be made in placing the destitute children, with these families keeping in mind, however, the influence of tradition and custom.

Accordingly the Central Government has floated a liberalised scheme for initiating measures for developing foster care services. To provide care for children affected by desertion, divorce, long illness or imprisonment or death of either parent, three foster care homes, one in Madras and two in Bombay are being run by voluntary institutions financially aided by the Government. Some state governments have also initiated Foster Service Schemes.

Such children are placed in families having adequate economic and social stability, where they are given all such facilities as boarding, lodging, clothing, medical facilities, education, technical training etc., which will ensure their proper physical, mental and emotion growth. These schemes are supplemental to

1. For instance, the Delhi Council for Child Welfare has founded a home, named PALAMA to receive such children. (PALAMA was started in Jan, 1978) A similar Foundling Home has been sponsored by the Social Welfare Department of Haryana (Compendium of schemes and services rules of social welfare department, HARYANA, pp. 21-41).


3. For instance the Social Welfare Departments of Haryana and Punjab have started such a schemes.

4. See supra note 1; see also M.V. Lalitha, Foster Care Services in Delhi, A Study, NIPSSD, 1977.
institutional services under the Children Act.

Yet another service which has been sponsored in voluntary sector is sponsorship. It is designed to provide financial help to underprivileged children while they live in their own families. It is a person to person programme. A sponsorship begins with the sponsors contributing a lumpsum every year for a child selected by the participating agency. The grant amount to the child varies from Rs.30 to 50 per month. The money goes to the aid of a particular child who in a sense becomes the 'donor's child'. The donor receives a picture of the child, a brief case history of the family and an outline of the present circumstances and needs. Thus it has an intimate personal touch, which gives the donor a chance to appreciate the effects of his help.

The programme of sponsorship was initially started by the International Union for Child Welfare (IUCW). Iniia Sponsorship Committee was set up in 1967 in Bombay, under the auspices of the IUCW in collaboration with the Canadian Save the Children Fund. Gradually it involved more than fifty social welfare agencies in about ten Indian States, as its participating members. A National Sponsorship Council was also set up for the same purpose. In 1974, this committee sponsored over 100 children in Maharashtra. The Indian Council for Child Welfare also started a sponsorship scheme in 1969, to meet the education needs of children of economically backward sections. The National Seminar on Sponsorship Programme for Children organised by the National Institute of Public Co-operation and Child Development in 1981 made several recommendations to encourage Indian Sponsorship of Children along with other alternate modes of personal care i.e. adoption, foster care.

7. e.g. Andhra Pradesh, Bihar, Gujrat, Delhi, Haryana, Kerala, Maharashtra, Tamil Nadu, West Bengal and Uttar Pradesh.
9. See, Seminar Papers published by the NIPCCD.
Adoption

In every family needs a child, every child too needs a family. The Declaration confers a right to parental care upon every child, wherever it is possible. Failing it the alternate care should also ensure the atmosphere of love and moral and material security. A substitute home should, as far as possible, provide the following:

(i) Affection and personal interest, understanding of his defects, care for his future, respect for his personality and regard for his self-esteem,

(ii) A sense of security that he can expect to remain with those who will continue to care for him till he goes out into the world on his own feet,

(iii) Opportunity of making the best of his ability and aptitude,

(iv) A share in the common life of a small group of people in a homely environment.

Does an institutionalised child get all that a good substituted home is supposed to supply? Perhaps not. The so-called institutional 'Homes' with the statutory safeguards may supply only physical amenities but lack the required personal touch and understanding and are a poor substitute to his emotional needs, which the child may get either in a foster home or home of his adoptive parent.

Unluckily, India which sends the largest number of children abroad for adoption has no uniform law of adoption for its own citizens. The repeated efforts to have uniform law of adoption have been thwarted by the minority communities who oppose such a law. The latest adoption Bill of 1980 is still pending in Parliament. Only the Hindus can statutorily give or take a child in adoptive union. 

The provisions of the Guardians and Wards Act, indirectly help the non-Hindus and foreigners who wish to adopt an Indian child.


The Hindu Adoptions and Maintenance Act, 1956 was amended in 1965 to add provisions into the Act to facilitate the adoption of an abandoned child or a child whose parentage is not known. If the child has been brought up as a Hindu, then the guardian who has so brought up the child can himself adopt or give the child in adoption to any body else after obtaining the court's permission. In passing the adoption order the court is guided by the welfare of the child as the paramount consideration. Due consideration is also given to the wishes of the child, having regard to his age and understanding. On adoption the adopted child is deemed to be the child of his or her adoptive father or mother.

Thus the Hindu Adoption's Act has its own limitations. The child to be adopted must be either a Hindu child by birth or must have been brought up as a Hindu, must be below 15 years of age and unmarried, unless there is a custom to the contrary. He must not have been previously adopted by some body else. The adoptive father or mother to be qualified to adopt must not have a living son, grand son or great grand son, in case the adoption is of a boy and must not have a daughter, a grand daughter and a great grand daughter in case the adoption is of a girl. If a child of opposite sex is being adopted the adoptive father or mother must be at least twenty one years elder than the child. The child must be actually given and taken. Thus barring a limited section of the Hindus viz. those who do not have a son or a daughter etc. no body else in India can adopt a child.

Persons of other communities wishing to take a child take resource to the Guardian and Wards Act, 1890. Under that Act a person can apply to the court for being appointed a guardian of a minor. A guardian of the person of a minor so appointed is

13. The Act does not prescribe any time limit for such bringing up of the child, it may be any reasonable time in the discretion of the court.

14. Sections 7 and 17, Guardian and Wards Act, 1890 under which the court is guided by the welfare of the minor and may consider various factors in determining such welfare, e.g. the age, sex, and religion of the child, the intelligent preference of the child, the character and capacity of the proposed guardian.
charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is subject requires. But no parent-child relationship is created in the sense of an adoption. Such ward can not be removed out side the jurisdiction of the court, without the prior permission of the court and for such purposes as may be prescribed.

According to a directive of the External Affairs Ministry, foreigners, too, can be appointed guardian by the High Courts. Later such guardians legally adopt these children according to the laws of the country in which they are domiciled. In a bid to fill the legislative gap, the Supreme Court, in September 1982, with the assistance of the Indian Council of Child Welfare, Indian Council of Social Welfare and the Central Government, formulated certain norms to be followed before foreign parents could adopt Indian children. The active involvement of certain voluntary organisations is an integrated part of this scheme. Under these guidelines, the following safeguards have to be observed lest the child may not be abused after adoption.

First, India does not send children to countries which have no adoption laws or where racialism is known to exist (e.g. children are no longer sent to England).

Secondly, before a foreign couple is considered, a registered social welfare organisation in that country has to conduct a home study and also examine whether, under the law of the land, they are permitted to adopt a child. (In Italy, for instance the adoptive couple have to be married for at least five years, with each of the spouses having to be at least 30 years old).

Thirdly, the High Court conducts a full enquiry to determine whether the child is abandoned and his age and medical records are correct.

Fourthly, investigations are conducted with the assistance of the Indian Council of Social Welfare or the Indian Council of Child Welfare(16) or the sponsoring voluntary organisation as the case may be.

15. Section 24, Guardian and Wards Act, 1890.
Fifthly till the child is legally adopted, in its new country, the adoptive parents are required to send six monthly reports to the High Court (17).

The Adoption of Children Bill, 1980 is an enabling measure aimed to meet the growing demand for a general law of adoption so that the institution of adoption becomes a means of providing homes for poor and destitute children (19). When enacted it would be applicable to all communities except Muslims, who oppose adoption on the grounds of their religious sanctions.

Thus, on the question of providing social care to children without families and those with inadequate means, the Indian law is far back the goal of a complete coverage of all the children in need of such care. All the districts in the country are not yet covered by the institutions as stipulated under the Children Act (20). The voluntary institutions, too exist at selected centres. Same is the situation with Foster-Service Schemes which are applicable in even a lesser number of places. Sponsorship schemes have no legal support, and are not spread all over the country.

The lack of a general law on adoption is badly felt. About 108 million children live in varying degrees of destitution and this number increases every year (21). The problem of providing a suitable alternate social care can only be solved through an integrated approach and creation of some agency at every level to secure and to provide all children in need of care and protection.

18. Introduced in the Lok Sabha on December 16, 1980.
19. See statement of Object and Reason of the Bill.
20. The total capacity of all Children Act Institution is about 15000, while ever year 150,000 children are apprehended by the police, Venu Gopal Rao, 'Laws Relating to Children', ADMINISTRATION FOR CHILD WELFARE (1979), pp. 98-98.
According to Principle Six of the Declaration whether a child grows up in the care and control of his parents or substituted parents or under the institutional care, in any case, he must be provided an atmosphere of affection and of moral and material security. The aim of the 'full and harmonious development of his personality' cannot be achieved unless the child has a sense of his security. It is possible either at his home or an alternate home like atmosphere where he gets a similar affection, and is assured of the fulfilment of his material needs and moral safety. Such atmosphere for the child has to be ensured by law both at the personal level and at the institutional level.

(i) At the Personal Level

The Indian law helps in securing a child's moral and material welfare. The Children Acts and certain social welfare laws better serve the children than the personal laws. Under the Children Act, 1960 a child who is found begging 22 or who lives in a brothel or with a prostitute or frequently goes to any place used for the purpose of prostitution, or is found to associate with any prostitute or any other person who leads an immoral, drunken or depraved life is included in the category of a neglected child and may be sent to the children homes by the Welfare Board. Under the U.P. Children Act, 1952 among others, a child who is under the care of a parent or guardian, who by reason of criminal or drunken habits, is unfit to have the care of the child or who frequents the company of any reputed thief, or is otherwise likely to fall into bad association or to be exposed to moral danger, or to enter upon a life of crime, is also said to be a neglected child 24.

It is submitted that the words underlined above, which appear in the definition of 'neglected child' are general words covering all unco contempliated situations. There is no such clause in Children Act, 1960 and various other State Children Acts.

22. Vagrancy and begging of children is also prohibited under various State Acts.
23. See 2(e), Children Act, 1960.
A similar general clause should therefore be included under all the Children Acts. The idea behind institutionalisation of neglected children is not merely to supply them adequate maintenance but also to save them from unhealthy influences.

If a parent or guardian or custodian uses a child for begging or gives him intoxicating liquor or dangerous drug, he is punishable under the Children Acts. Young girls in danger of exploitation are protected under the Suppression of Immoral Traffic in Women and Girls Act, 1956 as well as under the Children Acts. For instance, under the West Bengal Children Act, 1956 the court may direct the parent or other guardian to enter into a bond to exercise due care and supervision in respect of a girl who is exposed, with the knowledge of or with the connivance of her parent or guardian, to the risk of seduction or prostitution.

Under the Guardians and Wards Act, a testamentary, appointed or declared guardian may be removed, if he has been convicted of an offence implying, in the opinion of the court, a defect of character which unfits him to be guardian of his ward. The personal laws do not consider immorality of the father as a valid ground for depriving him of the custody or guardianship of his children. The case with the mother is, however, different. A Muslim mother exercising 'Hizanat' (custody) over children of tender years is liable to lose her custody, if she leads an immoral life, as where she is a prostitute. Hindu mothers too have been deprived of the custody of the child on the grounds of their leading an immoral life.

26. Section 39 Guardians and Wards Act, 1890.
27. Fyzee, Outlines of Muhammedan Law (4th edn.) p. 199; Abasi v Dunne (1878) 1 All. 598; Hussain Begum, in the matter of (1881) 7 Cal. 434.
28. Ven Kamma v Sridhar (1879) 3 Bom. 1; Kunerji v Moti Bai, 1956 Pesh. 65; Harnami v Partap 67 P.L.R. 1914; 23 I.C. 958; Tulsai v Tulsai 1924 Nag. 141; Mansa Ram v Naurati, 1925 Lah. 427; Mst. Lalita v Parmatma Prasad 1940 All. 329.
Since, welfare of the child is the paramount consideration in deciding upon the question of guardianship and custody, the supremacy and rigour of the personal laws, is vanishing at the hands of judiciary, the immorality of the father weighs equally as that of the mother or any other guardian. Both the parents are equally liable to be deprived of their guardianship or custody of the child on the grounds of their immorality.

(ii) At the Institutional Level

An institution providing care and protection to the children too should as far as possible be homely. An institution for the 'neglected children' must not be neglected and an institution for the delinquent children must not deal with such children delinquently. The policy behind institutionalisation of the neglected and delinquent children is to provide them a substituted home and not a place of detention. The whole philosophy of juvenile justice is reformative and rehabilitative. It is for such reasons that these institutions are called 'homes' or 'schools' which is a pointer to the nature of the atmosphere such institutional homes ought to provide.

The three features of homely atmosphere indicated in principle Six of the Declaration are affection, material security and moral security. Law has tried to secure the fulfilment of these requirements by the different categories of institutions whether established by the State or established by the society and recognised by the State.

A children home established under the Children Act, 1960 to receive the neglected children is required to provide not only accommodation, maintenance and facilities for education, but also provide him with facilities for the development of his character and abilities and give him necessary training for protecting himself against moral dangers or exploitation and shall also perform

29. Haliman v Ahmad, 1949 All. 627; Syiney v Magart, 1931 Cal. 365; Reginald v Sarojanjan, 1969 Mad. 35.
30. e.g. 'Observation Home', 'Children Home', 'Special School' and 'Protective Home'.


such other functions as may be prescribed, to ensure all-round
growth and development of his personality\textsuperscript{31}.

Similar facilities are to be provided at the special schools
which receive the delinquent children\textsuperscript{32}. The observation homes
meant for the short-term stay of the child, pending inquiry have
besides maintenance and medical facilities also to ensure faci-
lities for the 'useful occupation' of the child. The Children
Acts passed on the model of the Central Act of 1960, contain si-
milar provisions but the older Acts do not contain such guide lines
for the facilities to be provided at the institutions established
under these Acts to house the same categories of children\textsuperscript{33}. Nei-
ther such detailed directions are contained under the Reformatory
Schools Act, 1897.

Certain Borstal Schools Acts point out the nature of faci-
lities and atmosphere to be provided at the Borstal institutions,
by defining the term 'Borstal Institution' as a place 'in which
offenders may be detained and given industrial training and other
instruction and subjected to such disciplinary and moral influences
as will conduce to their reformation\textsuperscript{34}, and prevention of the crime.

The Punjab Borstal Rules, 1932 provides for the adoption of
certain steps with a view to treat children of different categories
differently. For instance, the Superintendent is obliged to divide
the inmates of a Borstal institution into five grades\textsuperscript{35} according
to their industry and good conduct after close personal observa-
tions of their general behaviours, amenabilities, to discipline

\begin{itemize}
\item \textsuperscript{31} Section 9(3) Children Act, 1960.
\item \textsuperscript{32} Section 10(3).
\item \textsuperscript{33} e.g. The U.P. Children Act, 1951; East Panjab Children Act,
1949.
\item \textsuperscript{34} Emphasis Writers; Section 2(1) The Punjab Borstal Act, 1926.
\item \textsuperscript{34A} Section 2(a), The Bombay Borstal Schools Act, 1929.
\item \textsuperscript{35} The five grades are, Penal Grade, Ordinary Grade, Special
Grade, Star Grade and Monitor Grade, Rule 13(a) Punjab
Borstal Rules, 1932.
\end{itemize}
and attention to instruction\(^36\). Where an inmate is believed to be exercising a bad influence, he is to be placed for three months in the 'Penal Grade' in the interest of the inmate himself or of the other inmates.

Rule 14 of the Punjab Borstal Rules, 1932, also provide sufficient means of separating the inmates in single cubicals at night, adequate accommodation for post-adolescent, separate from that for adolescent, proper sanitary arrangements, water supply, food, clothing, bedding for the inmates, the means of giving industrial training to inmates, barracks or other suitable buildings, to be used as a school for imparting education to inmates, proper segregation wards for the quarantine of newly admitted inmates, an infirmary hospital, proper place for the treatment of the sick, proper infectious diseases.

Besides these every, an inmate child is allowed to have interviews or write letters\(^37\) to his friend(s), once or twice a month. The Superintendent may refuse to allow any visit from any person whom he thinks likely to exercise an undesirable influence upon the inmates\(^38\). If during the visit, a Borstal official observes any thing unusual and irregular, he is obliged to at once put an end to the visit\(^39\) similarly the Superintendent may peruse every letter written by or addressed to an inmate and may for sufficient reasons refuse to issue or deliver any such letter\(^40\). Notice of serious illness or death of inmate is to be required to be given to their parents or close relatives\(^41\).

Education and industrial training is also to be provided to the delinquent children kept in the Borstal\(^42\). Physical drill and gymnastics is to be taught to all physically fit inmates\(^43\). No

\(^36\) Rule 13(c).
\(^37\) Rule 15.
\(^38\) Rule 14(7).
\(^39\) Rule 15.
\(^40\) Rule 16.
\(^41\) Rule 17
\(^42\) Rule 20.
\(^43\) Rule 21.
prohibited article⁴⁴ is to be introduced into the institution or supplied to inmates or received possessed or transferred by him⁴⁵. The religious observances of every inmate is to be respected and part of every Sunday has to be devoted to direct moral instructions.

These institutions, thus perform 'three in one' functions of a family, a school and a hospital. The same pattern is desirable for every institution housing the neglected or the delinquent children.

The Policy of segregation adopted under the Children Acts for housing the 'neglected' children in children homes and the 'delinquent' children in special schools is aimed at keeping the innocent children from their comparatively hardened brothers who have developed delinquency. The 'atmosphere' in the institution was the guiding factor before the legislature in adopting such policy. A perusal of the state Children Acts reveals that most of these Acts do not provide separate institutions for the two categories of children. All such Children Acts should therefore, be amended to incorporate the policy of segregating the institutionalised neglected children from the delinquent children in the best interest of the innocent children.

It has been proved by the psychologists that any formal institutional life or any situation in which personal touch or intimate contact or a homely atmosphere is excluded is definitely unfavourable to the healthy development of mind and body of the child⁴⁶. Current thinking in welfare services has been for 'de-institutionalisation' of these services where children que for their food and sleep in large dormitories. Instead, what is now advocated is the creation of facilities, akin to a normal home, where a homely atmosphere is created and a small number of children live in a cottage with mother, to look after them.⁴⁷

⁴⁴ Prohibited by paragraph 606 of the Punjab Jail Manual.
⁴⁵ Rule 23.
Such a pattern is followed by S.O.S. Children's Villages in India where cottages are kept as far as possible like a natural family, with brothers and sisters of varying age living and participating in different programmes. Further, as a residential programme for children has to be used as a substitute for the family, the physical plant of the residential programme and the personnel working in it assume great importance. The rules should also prescribe certain minimum qualifications for employment of personnel in whose contact and supervision such children have to grow. The minimum standards prescribed must be implemented in their spirit and not content.

Empirical researches carried out by social scientists on the working of the Children Act institutions, conditions therein and their impact on the institutionalised children note the gaps in the legislative policy and its implementation. While the Children Acts make a clear distinction between the destitute and the delinquent children in theory, it is not very much in evidence in practice. These institutions suffer from a pronounced inadequacy of staff. It has come out that the children rounded up under the Children Acts, are in the majority neglected and non-delinquent.

Two studies made for Maharashtra and Rajasthan respectively, to assess the influences of these institutions on the non-delinquent children conclude that most of the children who had discontinued their education could continue it, however, their formal education and vocational training were not always adequate to ensure them jobs after they left the institution. The


49. The Planning Commission estimate is about 3.5 percent of children in the age group of 0-4 are destitute orphans, NIPCCD, Perspectives On The Children in India, 1975; the number of orphans is estimated to be 12.72 million, K.E. Pathak, 'Estimate of Future Child Population' CHILDREN IN INDIA, ibid, p. 198.


institutions were more often than not, unable to help. Mandakini Khandekar has criticised the welfare schemes for the institutionalised care of deprived children which she observes, are merely concerned with custodial care and not with their human growth and development through an individualised care and job-oriented training in a supportive environment.

Alfred De-souza, who made a study of creches in Delhi summed up:

The physical environment of the creches for under-privileged children is characterised by congestion, poor ventilation and lack of facilities required for environmental protection, the psychological social environment too, is rather neglected and this can be seen from the inadequate play equipment and the lack of organised activities conducive to the development of the physical and mental health of the children. The quality of environment of the creches suggests a concept of child in which the emphasis is on custodial care for the convenience of the mother rather than on the development needs of the child.

Nearly similar observations were made regarding special schools by Tara Ali Beg. The institutions set up by the Children Acts, she maintains, were more concerned with correctional services than with anything relating to the well-being of the child so that this legislation did more to protect society from Children than the other way round.

Some of the reports regarding abuse of children at these institutions that have been made public touch the peak of moral degradation. Two such recent reports of high level enquiries referred to charges of outsiders living in the home premises and indulging in homosexual acts with the children and the children

53. Ibid.
54. CHILDREN IN INDIA (1979) p. 155.
being employed as domestic servants at the residence of the officials\textsuperscript{57}, while the other refers to the homosexuality of adult inmates of a jail with the delinquent children\textsuperscript{58}.

Such instances of moral and material in-security of the institutionalised children, calls for not only a strict enforcement of the existing provisions regarding institutional care but also indicate the deficiencies of such provisions and the need to modify them suitably.

\textsuperscript{57} See Hindustan Times, dated August 30, 1983.
\textsuperscript{58} See, Report of the District Judge, Delhi, re-Tihar Jail, New Delhi, November, 1983; See also B.R. Chohan, 'Correctional Institutions for Children' SOCIAL WELFARE, February, 1977, p.16.