

Lecture on "PERSONAL LAWS RELATING TO CHILDREN"

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by

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LAWS RELATING TO CHILDREN

The term 'child' is not defined in the Indian Constitution. According to Article 1 of the United Nations Convention on the Rights of the Child 1989, 'a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier'. The legal definition of child tends to depend upon the purpose. There are a number legislations in India which defines the term 'Child' depending upon the purpose. Under the Indian Majority Act, 1875 and in the other Acts, the age of minority and majority was fixed.

Childhood is glorified by writers, poets, thinkers, educators etc. Not only that much importance given to children even in the Indian Constitution and the directive principles of State policy. The reason being that the childhood is a critical period in the life of an individual. They are moulded and developed based on the influence in the social environment. Their development and prosperity depends upon the future of the counter. Hence, they shall be protected by enacting laws relating to them.

Several laws have been enacted relating to the children.

They are:-

- Child Labour (Prohibition & Regulation) Act, 1986
- Child Marriage Restraint Act, 1929
- Children Act, 1960
- Children (Pledging of Labour) Act, 1933
- Commissions for the Protection of Child Rights Act, 2005
- Commissions for Protection of Child Rights (Amendment) Act,
2006
- Infant Milk Substitutes Act, 1992
- Infant Milk Substitutes Act, 2003
- Juvenile Justice (Care & Protection of Children) Act, 2000
- Juvenile Justice (Care & Protection of Children) Amendment Act,
2006
- Prohibition of Child Marriage Act, 2006
- Reformatory Schools Act, 1897
- Young Persons (Harmful Publications) Act, 1956
- Guardians & Wards Act, 1890
- Hindu Adoptions & Maintenance Act, 1956
- Hindu Inheritance (Removal of Disabilities) Act, 1928
- Hindu Minority & Guardianship Act, 1956

Orphanages & Other Charitable Homes (Supervision & Control)
Act, 1960

Women's & Children's Institutions (Licensing) Act, 1956

Right to Education Act, 2009

Our Constitution of India protects their interest. Some of the articles which protect their interest are:-

Article 14:- Equality before the law and equal protection of laws. It is available to every person including the children.

Article 15(3):- Empowers the State to make Special legal provision for women and children. It mandates the Government to ensure children's welfare constitutionally.

Article 21-A :- mandates free and compulsory education for all the children in the age group of six to fourteen years.

Article 23:- puts total ban on forced labour and is punishable under the Act.

Article 24:- prohibits employment of children in

hazardous factories below the age of fourteen years.

Article 29:- provides that no citizen shall be denied admission in any educational institution maintained by the State or receiving aid out of State funds on grounds only of religions, race, caste, language or any of them.

Article 51-A, Clause (k) and (j):- provides that the parent or guardian to provide opportunities for education to his child or as the case may be, between the age of six to fourteen years.

Directive principles in the Constitution of India also provides protection for the children such as Articles 39(e), 39(f), 41, 42, 45 and 47.

Recently the Hon'ble Apex Court had an occasion to refer about the constitutional provisions relating to children. Though the case related to sexual exploitation of the children at shelter homes at Bombay, the learned Judge of the Apex Court dealt in their judgement the constitutional provisions relating to children. The same is reported in CDJ Law Journal (CDJ 2011 SC 274 (CHILDLINE INDIA

FOUNDATION & ANOTHER Vs. ALLAN JOHN WATERS & OTHERS).

Paragraph Nos.24 to 27 are reproduced here under:-

24. Children are the greatest gift to humanity. The sexual abuse of children is one of the most heinous crimes. It is an appalling violation of their trust, an ugly breach of our commitment to protect the innocent. There are special safeguards in the Constitution that apply specifically to children. The Constitution has envisaged a happy and healthy childhood for children which is free from abuse and exploitation. Article 15(3) of the Constitution has provided the State with the power to make special provisions for women and children. Article 21A of the Constitution mandates that every child in India shall be entitled to free and compulsory education upto the age of 14 years. The word "life" in the context of Article 21 of the Constitution has been found to include "education" and accordingly this Court has implied that "right to education" is in fact a fundamental right.

25. Article 23 of the Constitution prohibits traffic in human beings, beggars and other similar forms of forced labour and exploitation. Although this article does not specifically speak of children, yet it is applied to them and is more relevant in their context because children are the most vulnerable section of the society. It is a known fact that many children are exploited because of their poverty. They are deprived of education, made to do all sorts of work injurious to their health and personality. Article 24 expressly provides that no child below the age of 14 years shall be employed to work in any factory or mine or engaged in any hazardous

employment. This Court has issued elaborate guidelines on this issue.

26. The Directive Principles of State Policy embodied in the Constitution of India provides policy of protection of children with a self-imposing direction towards securing the health and strength of workers, particularly, to see that the children of tender age is not abused, nor they are forced by economic necessity to enter into avocations unsuited to their strength.

27. Article 45 has provided that the State shall endeavor to provide early childhood care and education for all the children until they complete the age of fourteen years. This Directive Principle signifies that it is not only confined to primary education, but extends to free education whatever it may be upto the age of 14 years. Article 45 is supplementary to Article 24 on the ground that when the child is not to be employed before the age of 14 years, he is to be kept occupied in some educational institutions. It is suggested that Article 24 in turn supplements the clause (e) and (f) of Article 39, thus ensuring distributive justice to children in the matter of education. Virtually, Article 45 recognizes the importance of dignity and personality of the child and directs the State to provide free and compulsory education for the children upto the age of 14 years."

THE GUARDIANS AND WARDS ACT, 1890

(i) Section 9 contemplates about the Courts having jurisdiction to entertain the application. It contemplates that with respect to the guardianship of the minor, the application has to be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

(ii) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to the District Court having jurisdiction in the place where he has the property.

(iii) Section 17(2) contemplates certain factors which have to be borne in mind while appointing or declaring a person as a guardian namely,

(a) Religion of the minor

(b) Character and capacity of the proposed guardian

- (c) Nearness of the kin to the minor
- (d) Wishes if any, of the deceased parents
- (e) Any existing or previous relation of the proposed guardian with the minor or his property
- (f) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

These are the guiding factors laid down under the **THE GUARDIANS AND WARDS ACT, 1890** which determines the welfare of the child.

The welfare of the child is of paramount consideration while deciding the said issue.

(iv) One of the important judgement under the Guardians and Wards Act, is reported in **(2010) 1 SCC 174, V.Ravi Chandran (Dr.) v. Union of India and Others**. In a case where a child was removed from one country to another in contravention of the Court orders of that country, the Course to be followed by the Courts of recipient country is that there should be a direction to the disputing

parents to present their respective claims relating to the custody of the child before the Courts of competent jurisdiction in that country which had already passed a consent order.

In that case, the Habeas Corpus petition filed before the Hon'ble Apex Court by the aggrieved father who was an USA citizen was entertained. The child was traced and a direction was given to both the father and mother to return to USA to seek orders from appropriate Court in USA where the matter was already pending. Such course of action was held to be in the best interest of the minor.

(v) A minor who has been given in adoption to an individual files an OP seeking to appoint him as guardian to the person and property of the minor. He has also filed an application seeking injunction against the "Biological Mother" of the Child.

Can the application for injunction is maintainable ?

"Yes" ! It has been so held in **2011 (2) CTC 372,**
1.Sarah Vijayalakshmi, 2.Venugopal, 3.Sarala v.

Dr.J.D.Devadatta.

The Hindu Minority and Guardianship Act, 1956

Under the Hindu Minority and Guardianship Act, 1956

Section 6 contemplates, father shall be the guardian of the minor, but however if the minor has not completed the age of 5 years it shall ordinarily be with the mother.

The welfare of the minor should be the main consideration.

The wishes of the child would be the main factor. But the wishes expressed to the Court may not always be their own. They may not want to hurt the feelings of the custodian parents or their wishes can be influenced by several factors which may not have come up before the Court. Each matter has to be assessed independently by the Court.

(i) As far as the Hindu Minority and Guardianship Act, 1956 is concerned, the uniform view taken by the High Court as well as the Hon'ble Apex Court is that the welfare of the child has to be taken as paramount consideration while determining the issue relating to the child custody and visitation rights. The said view was taken in the judgement reported in **(2009) 1 SCC 42, Gaurav Nagpal v. Sumedha Nagpal.**

(ii) In another case, the mother wanted to take the child to Australia where she has got job. The father was objecting that the visiting rights which he was enjoying may be curtailed. However, considering the welfare of the child as paramount importance, the mother was permitted to take the child. It has been further held that the visiting rights of the father was not altogether taken away. The said judgement was reported in **(2010) 4 SCC 409, Vikram Vir Vohra vs. Shalini Bhalla.**

(iii) In **(2010) 2 SCC 654, Athar Hussain v. Syed Siraj Ahmed and Others,** the Hon'ble Apex Court has held that the father can be a natural guardian, but the custody can be entrusted to another

person who serves the interest of the minor better. It has been further held that in the matter of custody of child, the Court is not bound by the bar under Section 19 of the Act to appoint father as a guardian.

(iv) Recently, Justice V.R.S.J delivered a judgement in a actress case. Slightly deviating from the usual pathway. Though the child was adamant that he will be with the father alone, he permitted the mother to have custody for two days.

(v) Recently adoption of Indian Children by a foreigner came in for consideration. In the decision reported in **(2010) 8 SCC 794, Craig Allen Coates v. State and Another**, it has been held in paragraph 5 as follows:-

"5. We further direct that for inter-country adoptions the procedure followed heretofore could include a reference to an expert committee on the lines constituted in the present case to ensure that inter country adoption are allowed only after full and proper satisfaction is recorded by all the agencies including a committee of experts wherever reference to such a committee is considered necessary. We are told that Central Adoption Resources Agency (CARA) has the power to make references but no expert committee as such has been constituted or identified for that purpose. In our opinion, it would be appropriate if Central Adoption Resources Agency requests the Director All India, Institute of

Medical Sciences to constitute a committee of experts to be headed by Professor and Head of the Department of psychiatry, AIIMS. CARA may have similar expert committees constituted in other States also to facilitate references to them in regard to children who may be living at distant places from Delhi."

(vi) In **2010-2-L.W.881**, our High Court had directed the Air India, the Employer to recognize the minor as the child of the applicant and confer all benefits that are available to a staff of Air India. - Adoption directed in terms of Juvenile Justice Act.

(vii) In **2010 - 2 - L.W.888 M/s.Oriental Insurance Company v. Minor Jayapriya and others**, the question that arose for consideration was whether a girl who was taken in adoption by a Christian on her death in an accident entitle to compensation. The Division Bench said YES. It would be useful to extract paragraph Nos. 27 and 28.

"27. The contention that the adoption has not been recognised in India among Christians does not merit acceptance. In (2009) 8 MLJ 309: 2010 2 L.W. 881 (R.R. George Christopher), referring to Sections 40 and 41 of Juvenile Justice (Care and Protection of Children) Act, 2000, Justice K. Chandru has held that the said Act itself was

enacted with a view to fulfil the international obligations as well as the constitutional goal envisaged in Part IV of the Constitution. Aspiring parents who intend to adopt children, without being inhibited by their personal laws, are entitled to adopt a child in terms of the provisions of the said Act. The learned single Judge has further held that Sections 40 and 41 of Juvenile Justice (Care and Protection of Children) Act, 2000 are not restricted to persons belonging to particular religion alone and upheld the plea of adoption by the applicants therein, who are Christians and held as under:

... 13. The JJ Act for the first time provides 'adoption' as a means to rehabilitate and socially reintegrate a child. It had empowered the 'State Government' and the JJ Board to give a child for adoption. This is the first secular law in India providing for adoption. The provision in Sections 40 and 41 are not restricted to persons belonging to particular religion alone....

28. In our considered view, the stand taken by the learned Counsel for 6th Respondent that there cannot be valid adoption among the Christians is not in consonance with the Constitution and the various judicial pronouncements. As pointed out by the learned single Judge, the Canon Law, which is

applicable to Jagadambal and 6th Respondent provides for adoption if the Civil Law of the Country permit the same. In the light of Sections 40 and 41 of Juvenile Justice Act, we do not find any embargo for adoption. In any event, the proceeding, being summary in nature, the validity or otherwise of the adoption needs no further elaboration."

Women's and Children's Institutions (Licensing) Act, 1956

The statement of objects and reasons for enacting the said act is that a large number of bogus children's houses and orphanages are existing in the country and exploiting destitute women and children. Inhuman conditions prevail in these institutions. In order to protect the women and children from such exploitation and to regulate and license the orphanages, the said resolution was enacted.

Section 3 of the Act, contemplates that no person shall establish or maintain an institution except under and in accordance with the conditions of a license granted under the Act.

When license can be granted and when it can be revoked and the penalty for contravention of the Act are set out in the said Act.

**Orphanages and Other Charitable Homes
(Supervision and Control) Act, 1960**

Under this enactment, the State Government was required to establish a Board of Control for orphanages and charitable homes in the State.

The Child Marriage Restraint Act, 1929

Under this Act, "Child" was defined as a person who, if a male, has not completed 21 years of age, and if a female, has not completed 18 years of age.

In this Act, Section 12 contemplates grant of injunction prohibiting marriage in contravention of this Act.

The Right of Children to Free and Compulsory Education Act, 2009

It came into effect from 01.04.2010.

The Young Persons (Harmful Publications) Act, 1956

Pictorial and other publications containing stories of glorification of crime, violence known as "Horror Crimes" are being circulated in India in large quantities. It tend to encourage anti-social tendencies among children and exert a harmful influence on young persons.

To prohibit the same, the said Act was enacted.

The Hindu Disposition of Property Act, 1916

The Object of the Act was to enable Hindus and Mussalmans to dispose of property by transfer for the benefit of unborn persons within certain limits.

The Juvenile Justice (Care and Protection of Children)

Act, 2000

The special features of the Act,

(i) Juvenile Justice Boards are to be constituted by the State Government to deal with the cases against Juvenile in conflict with law. Under Section 4, the Boards have to exercise powers of the metropolitan Court with bench of magistrates.

(ii) Special homes have to be established by the State Government itself or through voluntary organisations for the purpose of reception and rehabilitation of Juvenile in conflict with law.

(iii) They have to be under the charge of special Juvenile police unit or a designated police officer.

(iv) The enquiry before the Board shall be completed within four months.

(v) The child welfare committee has to be constituted under Section 29 by the state Government for the welfare of the child in need of care and protection.

Section 41 authorises the Juvenile Justice Board to give

children in adoption in accordance with the guidelines issued by the Government from time to time.

Section 2(k) defines a Juvenile which means who has not completed 18 years of age. Under the Old Act, 1986 it was 16 years for a boy and 18 years for a girl.

Section 52 deals with appeal against the orders of the competent authority, which can be filed before the Court of session.

Section 53 contemplates revision before the High Court.

Section 49 prescribes that the competent authority shall make due enquiry as to the age of the person who was brought in before it.

In **(2010) 12 SCC 180, Bachpan Bachao Andolan v. Union of India and Others**, the Hon'ble Apex Court had directed all the states to implement the provisions of the Act forthwith and constitute Juvenile Justice Boards, Child Welfare Committees and

Special Juvenile Police units in every district. The National Commission for protection of child rights constituted in 2005 act upon as nodal agency to monitor implementations of directions passed by the Supreme Court from time to time.