

CHILDREN WITHOUT PARENTAL CARE

- A Socio-Legal Analysis from Indian Perspective-

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Context:

The Convention on the Right of Child (CRC) perceives the child as some one who needs to be supported and protected by both parents. The child by reason of physical and mental immaturity as well as helplessness deserves special safeguard and care. It is this vulnerability that provides a rationale for parental right as well as parental responsibilities over children. However due to various reasons many children are deprived of parental care and separated from their family environment.

In this paper an attempt has been made to reflect on the role of State in securing rights of children without parental care. As this is the theme of the General Day of Discussion proposed by the UN Committee on the Rights of the Child for 2005, therefore, we have tried to bring into focus the challenges of children without parental care and the provision for out-of-care children in the Indian policy framework as well as the role of State in India in regulating the situations for prevention of separation of children from their parents. We believe the children without parental care are equally entitled to all the rights conferred on them like all other children.

The CRC was convinced that the families are the fundamental unit of the society. The natural environment for the growth and well being of all the members of family particularly children should be the ideal. For this purpose necessary protection and assistance should be extended to the families so that it can assume its responsibility within the community. The CRC also recognizes that the full and harmonious development of a child's personality can be made possible in a family environment in an atmosphere of happiness, love and understanding. It is therefore worthwhile for a State party to the CRC to consider how far these high ideals can be implemented in the case of children without parental care.

The paper is founded on the notion of *parens-patriae* where State intervention is necessary in the life of a child to protect his/her best interest particularly at the early childhood so that the child can grow and develop in a holistic manner and his/her tender age is not abused. Such role of State as *parens-patriae* is widely accepted in most of the legal systems where state plays the role of the ultimate guardian of the child. Children without parental care or who are separated from their parents are often living in difficult circumstance or in a condition of moral danger. In such cases the *parens-patriae* concept needs to be applied by the State so that absence of parental care does not hamper their holistic growth. This theoretical underpinning has an impact on the formulation of policies in most of the modern States to take a pro-active role in addressing the childhood in a holistic manner.

The subject of the children without parental care varies from State to State on the basis of sociological structure of the country and the manner childhood is constructed in different cultural context. Children without parental care can be categorised on the basis of various types of human right approach. A Right based Approach to address the subject generates a meaningful debate.

In this paper we have also tried to highlight the role of State as *parens-patriae* for protection of the best interest of the children without parental care in the Indian context. For that matter the ideas shared in this paper broadly revolve round the legislative and policy framework in India to take care of children who are deprived of parental care. In this regard the analysis of the situation can have various dimensions covering different aspects like the role of State as service provider for children, State as a regulator of institutions and also State through its instrumentality of justice delivery system securing the entitlements of a determinant class of children who are deprived of their entitlement to have a family and parental care.

Children without parental care need alternative family environment. In the Indian context, until today they are rehabilitated within the extended family or joint family. However, such rehabilitation needs to be legally recognised. The legal sanction for such rehabilitation in the form of guardianship, custody and adoption are in existence but hardly followed in the practical level as children are only shifted within the family. In the absence of legal recourse

for rehabilitation, there are possibility of disentitlement of children, like in the laws of inheritance and improper maintenance.

Experience of CLAP

The views expressed in this submission is based on the experience of Committee for Legal Aid to Poor (CLAP) in India which runs a project in the nomenclature of In Defence of Child with a vision of securing rights of children through legislative measures in the domestic sphere which are in conformity with the provisions of Convention on Right of the Child (CRC). As a State party to the Convention, India is duty bound to fulfil the commitments made under the Convention. The CLAP through its project In Defence of the Child (IDC) thrives to promote the best interest of the children living in the most difficult circumstances. Children without parental care is considered by CLAP as one of the most difficult area as the parent who are the fundamental unit in the family are unavailable for various reasons to support the child to grow and develop into a full fledged human being. Considering the significance of the matter and bearing in mind that children without parental care needs special protection, the CLAP explores the legal framework through techniques of legal intervention including judicial proceedings to restore the rights of children. The present paper is not necessarily based on only legislative framework or academic research but it is based on an extensive fieldwork and sagacious effort in realisation of rights of children at the grass root level.

Provisions of Parental Care

While developing the paper we have kept in mind that the theme of the General Day of Discussion “Children without Parental Care” is grouped under following two sub-themes:

- 1) States’ role in preventing and regulating separation.
- 2) Meeting the challenges of out-of-home care provision.

The above sub-themes are addressed in our paper substantiated with case studies that reflect the different challenges in implementing the rights of children without parental care. In this regard we have referred various provisions of CRC with focus on the best interest of children principle as well as from the gender perspective. The CRC have a bearing on the topic of parental care and state responsibility. The ideas have been derived from the Articles 9, 10, 11, 18, 20 referred in the Convention on the Rights of the Child. It is essential that in cases where the children are without parental care, their best interest should be the paramount consideration so far as the policies of the State are concerned.

Our experience in rendering legal services for children deprived of parental care in India, over last one decade shows that there are various reasons for children being deprived of parental care. In the Indian context, the following reasons can be attributed to the situation of absence of parental care. In the following lines we have combined together the reason for absence of parental care, the legislative and policy measures as well as in some cases we have given case studies to substantiate our argument.

The subject of children without parental care can be viewed from two broad angles. In the first instance some children who are completely out of parental care because either the parents are not alive or the parents are unpredictable/difficult to identify. In the second category there are children who have parents but separated from them. Therefore first of all two different approaches need to be adhered to for the above divisions. Naturally children without parents need special protection whereas separated children also as a vulnerable group deserve preferential treatment.

Issues, Laws and Case Studies:

- 1) **Illegitimate Child:** - Some children are being considered as illegitimate because of the nature of relationship between their parents. In the Indian context if a child is born out of wedlock the child is considered to be illegitimate. The parents of a non-marital

child ceased to have any legally recognised relationship to their child, except for a purpose of due support in the form of maintenance. These children acquire low legal status. In many cases even the parents who give birth to the child, abandon the child due to the social stigma attached to unwed motherhood. In such cases even though the parent know that they have a duty to nurture their child still they refrain from their responsibility. Similarly there are instances where the rape victim giving birth to children. These children are also treated as illegitimate child. In majority of cases such children are in the custody of unwed mother or single parent.

The illegitimate children are entitled to get Maintenance in accordance with the provision of Code of Criminal Procedure as well as in different personal laws concerning marriage and divorce in India. That is the settled principle in the verdicts of the Apex Court. The Criminal law of course made abandonment of child a crime punishable under the Indian Penal Code.

The CLAP has filed several cases of unwed mothers in the Family Court seeking maintenance for their children. Such situation arises due to false promises for marriage and keeping physical relation with the women. One Sushila Behedei a tribal woman in the village of Rajasahi, Kotgad, Baliguda, District: - Phulbani, Orissa, India gave birth to an illegitimate child after having physical relationship with Mr. Prafulla Kumar Tripathy. Sushila was working as a domestic servant in the residence of Mr. Tripathy. False promise of marriage by Mr. Tripathy led Sushila to have physical relationship. After the birth of the child Mr. Tripathy refused to accept Sushila as his wife. The lawyers' team of CLAP helped Sushila in filing a case in the Family Court for the maintenance of the newly born child. Usually the Court proceeding takes a lot of time for finalisation of the dispute.

- 2) **Death of Parents:** The sorrow state of situation is that where both the parents are dead due to various factors like disasters, epidemics and accidents, HIV/AIDS etc., in such cases all of a sudden some children become orphaned. For example, the Super Cyclone of 1999 made several children orphaned over night.

These are naturally practical concern for policy makers to immediately address the situation. In such cases the Children are referred to Orphanages and other Institutions. In India there is a law to regulate Orphanages in the shape of the Orphanages and Other Charitable Homes (Supervision and Control) Act, 1960. Similarly the Juvenile Justice (Care and Protection of Children) Act 2000 makes arrangement for regulation of certain types of Institutions for Children.

In a disaster situation, the children are worst affected. The Super Cyclone of Orissa in 1999 had affected around 3.7 million children and orphaned about 1500. The government set up children rehabilitation centre called Mamata Griha in forty places in the month of December 1999. A local woman under the supervision of professional social workers managed each Mamata Griha. There was a view that adoption of destitute children by external agencies should be discouraged. By early 2001 these Mamata Grihas were dissolved and children dispersed to their village kins. In some cases stipend was paid to the families looking after the children. But there were many cases where this was not done. CLAP conducted a large Public Hearing. It was revealed that the State is not aware of the situation of children after dissolution of the rehabilitation centres. Similarly the children who were given on adoption were not legally done.

- 3) **Social Out caste:** The third category is children who have their parent alive but due to various constraints they are not capable of giving parental care to their children. Some examples of this category are children of leprosy parents, of HIV/AIDS parents and parents affected by diseases like TB. Children of prostitute are also out of parental care in most of the situations, as the society perceives the situation as

children in moral danger. In India Untouchability is still practiced in several areas. It promotes social exclusion of children and their family.

- 4) **Migration and Exodus:** Due to unemployment and poverty the high rate of migration takes place mostly in the areas where tribal (indigenous people) and rural poor live. Such exodus within boundaries creates a man-made situation for children where they cannot avail parental care and separated from their parents.

In a recent case the CLAP and Action Aid India rescued 23 number of migrant bonded labourers including women and children on dated 2nd Feb. 2005 from a brick manufacturing unit called Agni Brick Unit at the place of Balianta, near the Sate capital Bhubaneswar. In a similar attempt CLAP and CACL (Campaign Against Child Labour) rescued 106 migrant bonded labourers from Laxmi Brick Unit at Kurang Village of Cuttack district on 5th Feb. 2005. Such indigenous people from Bolangir, Sambalpur, Bargarh district migrated to these brick manufacturing units in quest of finding employment thereby leaving their children in their villages. In some cases the children, who were living with their parents in the workplace, were deprived of all kinds of entitlements and exposed to hazardous occupations.

- 5) **Working Parents:** Similarly unlike the situation mentioned in Sl. No. 4 the children of working mothers also are deprived of parental care. Traditionally women were denied of their participation in economic sphere. They were the sole caretakers of children in the family. However with the changing role of women more and more women are getting into work force. In the absence of both father and mother children are deprived of parental care. It is to be mentioned here that the joint family system in India so far provided family support to children in the absence of parental care. Again with change of family structures particularly the joint family system to nuclear family, the children are left in the lurch.

In some of the service sectors crèche facility is provided to children of working mothers like women worker in Mines, Plantation, Factories, and Construction etc. The Factories Act 1948 mandates to have crèche facilities at the workplace for the children of working mothers. The Mines Crèches Rules, 1966, which was framed under the authorities the Mines Act, 1952 bestowing facilities and opportunities for children belonging to mothers working in mines. However the coverage is very low. There is a Scheme called Integrated Child Development Scheme (ICDS) to provide childcare services. Article 18(3) of CRC says that State Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child care services and facilities for which they are eligible.

The Fact Finding Mission constituted by CLAP to ascertain the status of crèche facility in different sectors reveals that in most of the cases the laws are openly violated and taking advantage of the lacuna in the labour laws the employers get rid of their responsibilities. One such instance is CLAP's report on 'Undermining Children in Mines', which documented transgression of labour laws having provision of Crèche in Sukinda Mines of Orissa.

- 6) **Single Parents:** Some children are also deprived of one parent care in situation like death and disease of one parent, matrimonial dispute, illegitimacy and separation between couples. If the child lives in a women headed family, generally in Indian context the situation is difficult, both from economic necessities and social status.
- 7) **Religious Fundamentalism:** Sometimes religion also plays an adverse role in the separation of couples, which takes away for children parental care.

A recent example where the husband uttered talaq in a state of intoxication to his wife the community demanded separation of the couples. Even though the husband latter

on brought a fatwa to the effect that the pronouncement of Talaq is illegal as per the provision of the holy Koran, the fundamentalist resisted the staying together of the couples. The couples separated from each other and the 4 numbers of children were also separated from their parents. The matter ended in a court battle, which also did not help the children to have their parent together to take care of them.

- 8) **Children in Conflict with Law:** Some children are separated from their parents as they are caught in the criminal justice system as juvenile delinquents. Although in most of the cases the environment around them is a major factor for their involvement in violating the law, still children find themselves in conflict with law. In such cases in spite of a predictable parent children are denied parental care.

There are several instances where the children are taken into judicial custody for violating the laws which deprived them of their parental care. The police arrested 6 innocent children named as Kalpana Patra (Age 13), Ramakanti Gadtia (Age 16), Rambha Gadtia (Age 15), Jambubati Biswal (Age 15) and Sudeshna Pradhan (Age 17) and forwarded to the jail in the Bolangir district of Orissa, India. These children were arrested along with other 42 people who were protesting against the Government's decision to construct a dam over the river of Lower Suktel in the Bolangir district, which would cause their displacement from their dear soil.

- 9) **Exploitation:** Another kind of deprivation of children from parental care is various cases of violence and exploitation of children like trafficking, child labour, street children and kidnapping etc. There are cases where a child spends most of his time outside the family to eke out a living like begging, rag picking, child labour etc. It happens due to non-availability of familial environment of love, care, sympathy and emotional sharing etc.
- 10) **Children in Armed Conflict:** - Many children are separated by militant groups to develop them as soldiers in various parts of the world. In case of India the Maoist Revolutionary Group, People's War Group take away children from the community for purposes of armed revolution.

Recommendation of CLAP

In the backdrop of the above discussion of various circumstances in which children are deprived of parental care and separated from them CLAP would like to suggest the following five points for the consideration of the UN Committee on the Rights of the child in the General Day of Discussion to be held on 16th Sept. 2005:

- 1) Poverty condition and absence of parental care are interwoven. As poverty-ridden families are very often unable to support their children to develop in a holistic manner due to their disadvantaged position, therefore, the State parties to the CRC need to strengthen their policies, schemes and institutional arrangements for addressing the condition of poverty and quality of life. A child centred approach in the poverty alleviation and eradication measures need to be adopted.
- 2) Due to provisions of personal laws many children are subjected to various types injustice. The issue of illegitimate child and adoption do not find any sanction in personal laws of different religion. Even in some of the religion including Hindu illegitimate children are not entitled to equal property right. The state parties must contemplate measures progressively to develop uniform civil laws for dealing with issues of children particularly illegitimacy and adoption. Both the issues will create opportunity either for parental care or alternative family environment.
- 3) An alternative to the parental care for children must be found on a Right Based Approach. In this regard Universal Civil Registration is a pre-condition as it offers a child a name, nationality and predictable family. Here a predictable family and parents are important because the registration of birth ensures the family in which the

child is to be attached to. The State Parties must ensure that universal childcare services are guaranteed to all children so as to cover children who are deprived of prenatal care due to the absence of parent from the family for purpose of employment and occupations.

- 4) The laws relating to custody, guardianship, foster care, institutional care along with adoption needs to be strengthened and put in place so that issues such as illegitimacy, maintenance, custody of children can be regulated by intervention of State parties which ultimately provides parental and alternative family care.
- 5) A special mechanism in the CRC should be made for abolition of trafficking of children between States. Trafficking of children always separates children from their parents and is a worst kind of exploitation. A special protocol needs to be contemplated enabling State parties to have provisions to ban such practice.

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ABOUT CLAP AND THE IN DEFENCE OF THE CHILD PROJECT

The Committee for Legal Aid to Poor (CLAP) is a non-profit making specialised professional legal support NGO operating in the State of Orissa, India. CLAP exists for promotion and protection of Human Rights and Rule of Law. It is a Social Action Group registered under Societies Registration Act, 1860 (Act XXI of 1860). From its inception CLAP promotes legal activism for establishment of Human Rights and Democratic Development, with emphasis on Rule of Law. As a principle, CLAP acts as Pro-Bono-Publico, where legal wrong or legal injury is caused or apprehended to be caused by reason of violation of Constitutional and Legal Rights and Entitlements or when any burden is imposed in contravention of constitutional or legal provisions with or without proper authority of Laws. Thus, the CLAP originated to facilitate the process of accomplishment of Human Rights through Legal Support Services and Legal Activism.

The CLAP, from its origin, places highest priority on the Rights of the Children through a strategic intervention. CLAP has launched a special programme for children viz. In Defence of the Child Project.

The CLAP launched In Defence of the Child Project in the year 1998 with a view to address the legal issues of the children from the perspective of the Convention on Rights of the Child. The Convention on the Rights of the Child (CRC) was ratified by India on 11 December 1992. Since then CLAP had been working extensively to translate the provisions of CRC in to actions at the ground level for the actual realisation of Rights of the Children.

The Project creates an environment of opportunity for holistic growth and development of children through the use of law, legal process and legal system apart from protection of rights as happens in an adversary system.