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Current Developments

THE COMMISSIONS FOR PROTECTION OF CHILD RIGHTS ACT, 2005 - A CRITIQUE

Mani Gupta*

In this note, the writer comprehensively and critically analyses the various provisions of the Commissions for the Protection of Child Rights Act, 2005. The note takes a close look at the mandate, the composition, the powers and the functions of the two tier Commission for Protection of Child Rights. The note also vehemently argues for providing more financial autonomy to the Commission. The note then critically examines the innovative idea of a 'Children's Court.' Finally, it questions the efficacy of having the Commission, given the surfeit of commissions which have been entrusted the task of protecting human rights.

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I. INTRODUCTION

The Commissions for the Protection of Child Rights Act, 2005 ("the Act") passed by the Indian Parliament provides for the establishment of a two tier Commission for Protection of Child Rights ("the Commission"). The ostensible purpose of the Act is to give effect to the international obligations of the Indian Government contained in the Convention on the Rights of the Child (the "CRC").¹

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¹ Preamble, Commissions for Protection of Child Rights Act, 2005 [hereinafter 2005 Act].

The spectrum of child rights has been increasing and there has been growing consciousness to accord protection to various rights of the child such as the right to nutrition, rights of the girl child, right to expression and freedom to form opinions etc. In light of this, the Commission will have not only the task of continuously educating children and adults alike on these rights but it would also have to enforce some of these rights.

This note critically examines various aspects of the Act such as the mandate, composition, powers and functions of the Commission and State Commissions and the provisions relating to the Children's Courts in the backdrop of Paris Principles,² the working of the National Human Rights Commission ("NHRC") and the experiences of similar commissions in other parts of the world. The note also attempts to identify various issues of concern that may arise in the working of the Act and suggest possible solutions and remedies for the same.

II. MANDATE OF THE COMMISSION

The Commission's mandate is to be determined by the meaning given to the phrase "child rights." A perusal of the definition of the term "child rights" under section 2(b) of the Act³, gives the impression that the Commission has a broad mandate, which is capable of being subsequently expanded. This is so because the definition of child rights is an inclusive definition, which allows for an interpretation to include not only those rights that currently exist outside the framework of the CRC but also those which may subsequently evolve. Further, this definition enables the Commission to take cognizance of cases involving violation of child rights not only by the State but also by individuals. Therefore, it would appear that the Commission under the Act has a much broader mandate for operation in accordance with the Paris Principles.

² These principles are more formally known as "Principles Relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights" and were adopted by the United Nations General Assembly in resolution number A/RES/48/134 in the year 1993. The broad principles relate to the following heads – i) competence and responsibilities based on a broad mandate of human rights, ii) autonomy from the state and pluralism in the constitution, iii) adequate modes of operation, iv) principles relating to those commissions which quasi – judicial competence.

³ The term "child rights" is defined under § 2 (b) of the 2005 Act as follows:

"child rights" includes the children's rights adopted in the United Nations convention on the Rights of the Child on the 20th November, 1989 and ratified by the Government of India on the 11th December, 1992."

In contrast, the definition of human rights under the Protection of Human Rights Act, 1993 (“PHRA”)⁴ is restrictive as including those rights relating to the life, liberty and dignity of the individual as contained in the Constitution or contained in the international covenants namely the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”). Another restriction on the definition of human rights under the PHRA is that only those rights that are enforceable by the Courts are covered by the definition. The practical implication of this is that only fundamental rights contained in the Constitution of India are enforceable by the courts in India. As a consequence, the concurrent reading of the PHRA and the Constitution of India indicates that the NHRC can take cognizance of those violations as are committed by the State and not by private persons.

III. COMPOSITION

As per Chapter II of the Act, the National Commission shall comprise of a Chairman and six other members.⁵ The Chairman is to be appointed on the basis of the recommendations of a three member committee headed by the Minister in charge of the Ministry of Human Resource Development instead of the Minister for Women and Child Development, whose primary mandate is to take care of issues such as child welfare and development.⁶ The other members of the Commission are to be appointed by the Central Government but no specific procedure or Selection Committee has been laid down.⁷ Instead, the Act provides that the members have to be persons of eminence who have done work in the field of child welfare and child rights.⁸ This criterion provides a leeway for subjective interpretation of the provisions by the government of the day, thereby increasing the likelihood of politicization of the appointments made on the Commission. For instance, it may be noted that on an earlier occasion, the decision to appoint ex Central Bureau of Investigation Chief, Mr. P. C. Sharma as a member of the NHRC had resulted in wide spread protests from within and outside the NHRC.⁹

⁴ The PHRA is the Act passed by the Indian Parliament to establish the NHRC on pretty much the same lines as the Commission for the Protection of Child Rights.

⁵ § 3(2), 2005 Act.

⁶ § 4, 2005 Act. This has been subsequently amended by the Commissions for Protection of Child Rights (Amendment) Act, 2006.

⁷ § 4, 2005 Act.

⁸ § 4, § 3(2)(b), 2005 Act.

⁹ A. G. Noorani, *A Policeman as Judge?*, available at <http://www.epw.org.in/epw/uploads/articles/890.pdf> (last visited May 5, 2007).

The Commissions for Protection of Child Rights Act, 2005

The appointment of NHRC's Chairperson and other members takes place under the seal of the President and on the recommendation of a six member Committee comprising of the Prime Minister and the Leader of Opposition.¹⁰ This Selection Committee offers a much broader spectrum and consequently lesser chances of politicization of the process and it would be prudent for the legislature to incorporate such a procedure under the Act.

Further, even the power of removal of the Chairman and members of the Commission has been vested in the Central Government. The removal of the Chairman and members is to be on certain specified grounds by an order passed by the Central Government.¹¹ Though the Act provides that the concerned Chairman and/or member sought to be removed has to be given an opportunity of being heard¹², the nature and procedure of any enquiry proceedings is unclear under the Act unlike under the PHRA.¹³

As a consequence of these provisions, unbridled powers have been given to the Central Government in the matter of appointment and removal. Such sweeping powers also open up the possibilities of abuse by the Government to offer post-retirement benefits to retired bureaucrats. Further, the upper age limit for membership to the Commission virtually rules out the selection of retired judges of the Supreme Court.¹⁴ It is argued by many authors in the context of the NHRC that the presence of retired members of the judiciary has been one of the important reasons that have enabled the Commission to maintain some of its independence from the Government.¹⁵ While this may be true in the context of the NHRC, the appointment of eminent lawyers, NGO workers etc. can be used an effective check against political biases and independence of the Commission.

¹⁰ § 4, Protection of Human Rights Act, 1993.

¹¹ § 7, 2005 Act.

¹² § 7(3), 2005 Act.

¹³ § 5, Protection of Human Rights Act, 1993.

¹⁴ § 5, Commissions for Protection of Child Rights Act, 2005 reads:

“The Chairperson and every Member shall hold office as such for a term of three years from the date on which he assumes office:

Provided that no Chairperson or a Member shall hold the office for more than two terms:

Provided further that no Chairperson or any other Member shall hold office as such after he has attained;- .

(a) in the case of the Chairperson, the age of sixty-five years; and

(b) in the case of a Member, the age of sixty years.”

¹⁵ Carolyn Evans, *Human Rights Commissions and Religious Conflict in the Asia – Pacific Region*, 53 INT'L & COMP. L.Q., 713 (2004). See also, Vijayashri Sripati, *Indian Human Rights Commission: A Shackled Commission?*, 18 B.U. INT'L L.J. 1 (2000) [hereinafter Sripati].

The plurality of the Commission's composition is also hindered by the fact that unlike the PHRA and the National Council for Women Act, 1990 the Commission does not have representation from other Commissions, such as the NHRC and the National Commission for Women ("NCW").¹⁶ Further, the presence of such members would also have ensured that there is better coordination amongst these several bodies, who may be working on overlapping areas of rights. On the other hand, under the PHRA, the Chairpersons of the NCW, the National Commission for Minorities and the National Commission for the Scheduled Castes and Scheduled Tribes are deemed to be members of the NHRC for the purpose of discharging its functions under section 12 of the PHRA. Similarly, under the proviso to section 3(2)(b) of the National Council for Women Act, 1990, one member each has to be from the Scheduled Caste and the Schedule Tribe each, thereby bringing in plurality in the composition of the NCW.

Quite positively, though, the Act that it makes a provision for at least two of the six members on the Commission to be women,¹⁷ thereby bringing a semblance of gender parity and plurality in the composition of the Commission. A perusal of all the provisions relating to the composition of the Commission points to the obvious conclusion that the Commission fails to meet the criterion of plurality and independence in its constitution under the Paris Principles. The Commission is tethered to the executive, which exercises a vast degree of unguided control over the Commission's constitution. Further, the plurality in the constitution has been seriously ignored and marred by the myopic sight of the drafters of the present law.

The Central Government has been given the powers to make appointment of administrative staff.¹⁸ The inability of the Commission to appoint its own staff has the potential of affecting not only the autonomy of the Commission but also its efficiency. Among the problems that may be envisaged is the problem of remaining under-staffed on account of Government's failure to make appointments on time, but also the fact that often, the staff appointed may be from the existing bureaucracy without any training in human rights and more specifically, child rights.¹⁹ It is imperative that even if the Government makes the appointments, there are certain criteria which provide for the creation of a sensitive and informed administration instead of promoting red-tapism within the Commission.

¹⁶ Sripati, *supra* note 15, at 12.

¹⁷ § 3(2)(b), 2005 Act.

¹⁸ § 11, 2005 Act.

¹⁹ Sripati, *supra* note 15, at 34.

IV. POWERS OF THE COMMISSION

The powers of the Commission may be broadly classified under the following heads –

- a) Investigative powers
- b) Advisory powers
- c) Educative powers
- d) Residuary Powers

Investigative Powers

Sections 13(1)(c) and 13(1)(j) of the Act enable the Commission to inquire into violations of child rights either on the presentation of a complaint or *suo moto*. However, the power of the Commission to take action is fettered because it is neither empowered to initiate proceedings on its own nor are its recommendations to do the same of a binding nature on the concerned Government or other authority.²⁰ As a result, the Commission is once again dependant on the Central Government or the Courts to take action in cases involving violation of child rights. Further, the Commission's recommendation for awarding interim compensation to a victim and/or his/her family is also not of binding nature.²¹ Therefore, there may be several cases where compensation is refused to be paid by the Government even in deserving cases thereby denying any sort of relief to the victim.²²

In the context of the investigative powers of the Commission, it is also important to note that the Legislature has by design or by neglect failed to make a provision for providing adequate "investigative forces" available to the Commission unlike the PHRA which makes a specific provision for making investigative staff available to the NHRC.²³ It therefore seems like an absurd

²⁰ § 15(i) and §15(ii), 2005 Act.

²¹ § 15(iii), 2005 Act.

²² Sumanta Banerjee, *Human Rights in India in the Global Context*, available at <http://www.epw.org.in/epw/uploads/articles/2421.pdf> (last visited May 8, 2007). In many cases, the author of the article reports that State Governments have obtained stay orders from Courts and thereby not paid compensation to the cases recommended by the NHRC.

²³ § 11(1)(b), Protection of Human Rights Act, 1993 reads:

"The Central Government shall make available to the Commission -

a)

proposition to suggest that the Commission should conduct an inquiry into a matter involving violation of child rights when it has not even been equipped with the necessary, trained staff for the same in marked contrast with the NHRC and the Paris Principles. In this context, instead, the legislature should have learnt from the experience of the NHRC and provided an independent investigative body to the Commission similar to the “Quick Reaction Teams” provided to the Philippines Human Rights Commission.²⁴ The teams could consist of a medical doctor, a lawyer, a trained investigator and probably a woman NGO worker that would investigate into any violation that comes to the attention of the Commission. The independent investigative agency is particularly important since the experience of the NHRC shows that a number of cases that come before it, are cases where police personnel are the alleged perpetrators of human rights abuses. In such a scenario, it would be efficacious to employ an independent body to conduct the investigation for an impartial result.

The lack of investigative resources, skills and power of initiating action severely inhibits the independence of the Commission and puts a question mark over it being possessed of adequate modes of protection, which is the third element of the Paris Principles for domestic institutions for preservation of human rights.

Monitoring and Advisory Functions

Like most Commissions constituted for the protection of rights, the Commission for also has a vast mandate requiring it to advise the Government and monitor various policy aspects under sub-clauses (a),(b),(d),(f),(g),(i) of Section 13(1) of the Act.

The advisory functions of the Commission are significant in so far as it can apply the requisite pressure on the Government for the enactment of better laws for the protection of child rights²⁵ and for ratification of international treaties.²⁶ In order to ensure that Commission’s recommendations attain the desired result,

b) such police and investigative staff under an officer not below the rank of a Director General of Police and such other officers and staff as may be necessary for the efficient performance of the functions of the Commission.”

²⁴ Sripati, *supra* note 15, at 32.

²⁵ Brice Dickson, *The Contribution of Human Rights Commissions to the Protection of Human Rights*, PUBLIC L., 272 (2003). The author in this article has discussed the role of domestic human rights commissions based on the work of the Commission in Northern Ireland with respect of influencing various spheres of the government including the legislature, the executive and the judiciary and the investigative powers of the commission.

²⁶ *Id.*

there should be a mechanism to ensure that they are given “full and faithful”²⁷ consideration. For instance, the Queensland Commission provides for a “child guardian” who co-ordinates with the executive namely, the Department of Child Safety.²⁸ Further, the Queensland Commission is also empowered to approach the Minister and compel him to table before the Parliament such recommendations as are not complied with by the Department of Child Safety in certain matters.²⁹ Another recommendation for the effective enforcement of the recommendations is to give the Government a time frame within which it has to respond to a recommendation made by a Commission. The time limit however must be neither illusory nor such as would take away from the immediacy of the situation.³⁰

The independence of the Commission is important in the context of the fact that India has the largest population of children³¹ and hence, it has to play the pivotal role of not only ensuring the adoption of child friendly policies, but also monitor existing policies and practises at the domestic level. At the international level, the role of domestic institutions in assisting treaty monitoring has never been emphasised more than in recent times. The inclusion of this power can serve as an effective check in ensuring that the Government fulfils its international obligations. Accordingly, the Commission could have been given powers to make reports to the international monitoring agencies such as the one constituted under the Convention on the Rights of the Child.³²

Educative Role

In a vast country like India, where a majority of the population is still not aware of its rights, the power under section 13(1)(h) assumes fundamental importance. This power is necessary to bring about the relevant societal changes and to educate children and adults alike of the rights of the child. In this respect,

²⁷ *Submission to the Advisory Committee established to Review provisions of the Protection of Human Right Act, 1993, available at <http://web.amnesty.org/aidoc/ai.nsf/a85f4dc8381ecc7b80256f33003ae7b3/28d78b62fc4d5d0b802569000069326d!OpenDocument> (last visited May 6 2007).*

²⁸ *See http://www.austlii.edu.au/au/legis/qld/consol_act/cfcaypacga_2000511/ (last visited May 6, 2007).*

²⁹ *See <http://www.childcomm.qld.gov.au/monitoring/index.html> (last visited May 6, 2007).*

³⁰ *See <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/67/67ap26.htm> (last visited May 6, 2007).*

³¹ *See <http://www.cry.org/CRYCampaign/Manifesto.htm> (last visited May 6, 2007).*

³² *Anne Galleghar, Making Human Rights Treaty Obligations A Reality: Working with New Actors and Partners, in THE FUTURE OF UNITED NATIONS HUMAN RIGHTS TREATY MONITORING 201 (Philip Alston ed., 2000).*

the Commission would be required to pursue its role at a quick pace and it should target educating children about their rights. In order to fulfil this role more meaningfully, the Commission should ensure that it publishes its literature in vernacular languages other than Hindi and English so as to reach out to a larger audience. Moreover, in this respect, the Commission should work in tandem with other Commissions and pool their resources to perform this function more effectively. For instance, the Commission could work together with the NCW to educate women about the rights of the girl child, nutritional rights of an infant and other young children, etc.

Residuary Powers

The residuary powers of the Commission are a tool that ought not to be underestimated because it provides the Commission with an opportunity to innovate a role for itself in society for the protection of children's rights. Under the residuary power of the Commission, the Commission should encourage and enable children themselves to make complaints about abuses especially those that may occur within social institutions such as the class room, family or in the case of street children, orphans etc by providing easier access to the Commission. In the cases of children especially those living in juvenile prisons, shelter homes etc. the Act should have made a provision to enable them to contact the Commission through a person of the Commission situated at these places.³³

Moreover, since the definition of "child rights" does not restrict itself to only those rights as are enforceable against the State, it is surprising that there are no suitable directions as to whether an individual can be compelled to pay compensation to a victim. This assumes greater importance in light of the fact that a significant number of cases of child right's violations involve individuals rather than state bodies.

Further, like NHRC, the Commission also should have been given the power to act as *amicus curiae* in cases of child rights violations. This power could be useful as the Commission will be best equipped to assist the courts in child abuse cases, especially in those which involve large scale violations of child rights.³⁴

³³ In Queensland, Australia, there is a Commission for Child and Young People and Child Guardian. This Commission serves a number of purposes similar to those of the proposed Commission. The Commission has a "Community Visitor" who is the link between children in youth detention centres etc. Available at <http://www.ccypcg.qld.gov.au/complaints/index.html> (last visited May 6, 2007).

³⁴ Ian Bynoe, Sarah Spencer, *A Human Rights Commission for the United Kingdom – Some Options*, EUR. HUM. RTS. L.R. 152 (1997). The author discusses various options for creating a human rights commission in the UK and in so doing, discusses, the

V. FINANCIAL AUTONOMY OF THE COMMISSION

The Paris Principles, as has already been stated, adopt the criterion that a Commission should be independent from the government at the domestic level. Financial autonomy is an integral part of this independence, for which the Commission is dependent on the Union and State Governments at the central and state levels respectively. The independence of the Commission can be ensured only if the Government is willing to appropriate adequate sums of money. Further, the autonomy of the Commission will be further strengthened and maintained only if the Commission has complete discretion on the manner in which it wants to spend the money to reach its goals, of course, with a certain mechanism for accountability.

VI. STATE LEVEL COMMISSIONS

While the Commission will be the body in the Centre, the State Governments have been given the power to establish State Level Commissions. The State level Commissions can play a very important role in the monitoring child rights violations primarily due to their geographical proximity to residents of a particular state. Further, the absence of state level Commissions would also hinder the efficiency of the national level Commission as it could be over burdened with complaints from all over the country. In light of these considerations, it is most surprising to note that the duty to establish State level Commissions is not mandatory in nature.³⁵

The independence of the State level Commissions is similarly affected as that of the national level Commission because of the absolute nature of powers of the State Government in matters of appointment and removal of Chairperson and member of these Commissions.³⁶

While most powers of the State level commissions are similar to that of the National Commission there is an important distinction between the two commissions. Unlike the National Commission, a State Commission is not precluded from taking cognisance of a complaint which is pending before another

various powers the commission could have. One of the suggestions put forth by the author of the article is that the commission should have the power to initiate a class action on behalf of victims.

³⁵ § 17(1), 2005 Act reads: "A State Government may constitute a body to be known as (name of State) Commission for Protection of Child Rights to exercise the powers conferred upon, and to perform the functions assigned to, a State Commission under this Chapter."

³⁶ § 17, 2005 Act.

commission.³⁷ This allows the state level commission to create an interactive relationship with other commissions such as NHRC, State Human Rights Commissions or the National Commission for Women by coordinating with these bodies when complaints relating to abuse and violation of child rights are placed before them. Further, since the state level commission has been given the power to interfere in a matter already placed before another commission, there is a possibility that the more specialised commission may be able to deal with the complaint in a better fashion. Thus, in order to ensure that no conflicts arise because of this power of the state level commissions, there is a need for providing for transfer of cases between various national and state level commissions set up for protection of human rights etc.

VII. CHILDREN'S COURTS

The Act empowers the State Government to designate a Sessions Court as a "Children's Court" to provide speedier trial of offences against children in every district.³⁸ These courts can play an important role in assisting the Commission as they are likely to be far more accessible to people residing in various districts across the country.³⁹

However, two significant loopholes may be taken note of in the provisions relating to Children's Courts. *First*, the power to designate such courts is discretionary.⁴⁰ The experience of the Human Rights Courts under the PHRA shows us that such blind faith on the sincerity of the state governments to establish the courts is often misplaced. Therefore, it will not be out of place to provide that the state government should be required to mandatorily set up these courts.⁴¹ Secondly, the Act only purports to name a Sessions Court as a Children's Court and in the absence of special rules of procedure and recording of evidence; the proposed Children's Court would function in the same way as ordinary criminal courts.⁴² In light of this anomaly, it would have been more expedient to establish

³⁷ § 24, 2005 Act.

³⁸ § 25, 2005 Act.

³⁹ K. G. Kannabiran, *Justice Must be Seen to be Done*, available at [http://t2web.amnesty.r3h.net/library/pdf/ACT300101998ENGLISH/\\$File/ACT3001098.pdf](http://t2web.amnesty.r3h.net/library/pdf/ACT300101998ENGLISH/$File/ACT3001098.pdf) (last visited May 6, 2007).

⁴⁰ § 25, 2005 Act.

⁴¹ *Victims of Human Rights Violations Feel Harassed*, available at <http://www.tribuneindia.com/2005/20050227/cth1.htm> (last visited May 6, 2007).

⁴² Sripati, *supra* note 15, at 35.

a Board similar to the one constituted under the Juvenile Justice Act, 2000 providing for a special procedure for trial in cases of child rights violations owing to the vulnerable nature of the victim. Further, the officers to such Children's Court should be giving special training to deal with the victims and their families in a sympathetic and humane manner. Another aspect in relation to the Children's Courts is that in order to better protect a child in conflict with the law, there should be a unification of the Juvenile Justice Boards established under the Juvenile Justice Act, 2000 and the Children's Court because eventually the purpose of the two institutions is to protect a child. Hence, it is the author's opinion that the Children's Courts being of a specialised nature should take care of those children who are in conflict with the law.

VIII. CONCLUSION

While it may be argued that a specialised body like the Commission for Protection of Child Rights is a positive move towards protection of child rights, the idea for such an independent commission does not pass the muster without obvious scepticism. The mushrooming of commissions for protection of human rights, women's rights, minority rights and now child rights, would obviously result in the dilution of the power of the various existing commissions. Further, one has to wonder as to the real need for so many independent commissions. Even while conceding the requirement for such independent bodies, it may be worthwhile for the government to consider ways of ensuring coordination between these different bodies and avoid conflict of interest by ensuring that they are able to pool in their resources for various functions, that there are official channels of communication and consultation between these commissions so that there is neither duplication of work and/or conflict of interest.

Further, in the drafting of the Act, various aspects such as the experience of the NHRC and the Paris Principles have been overlooked by the Legislature resulting in the creation of a toothless body rather than an effective vanguard for child rights in India. It appears that the Act has been passed by the parliament more to pay lip service to the protection of child rights by creating another Commission, rather than for achieving any specific results. The Commission is vested with illusory powers, and the Government has kept all important powers as would affect the independence and working of the Commission with itself. In fact, under section 33 of the Act, the Central Government reserves the power to direct policy decisions of national importance to the Commission and further makes the Central Government the final and overarching body in the case of a conflict. The scheme of the Act is such as would enable the Central Government to overrule the Commission at each and every step and control its working and even its ideology.

Instead, a possible approach could have been to strengthen the NHRC in taking cognisance of the obligations of the Government of India under the CRC and child rights in general. Further, the NHRC can suitably take action in complaints of violation of child rights committed by individuals and other non – state actors, subject to an expansion in the definition of “human rights” under the PHRA.