

Guidelines for legislative reform¹

Emilio Garcia Mendez suggests twenty political and judicial guidelines, which can be used to establish the basic principles in promoting legislative reform. These have been analyzed and expanded in the context of Law Reform that is underway in India, specifically in the area of law reform on Juvenile Justice in India.

‘The basis for discussing reform should not be the text of existing law. This is because experience has shown that, in such cases, discussion becomes reduced to technicalities, which overshadow the scope and meaning of the whole reform.’

1. **The basic reference point for law reform should be the UN Convention on the Rights of the Child, together with the other instruments that set out the principles of ‘full protection,’** (which calls for law to become effective instruments for the defence and promotion of human rights for all children and adolescents).
 - 1.1 The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules);
 - 1.2 The United Nations Rules for the Protection of Juveniles Deprived of their Liberty
 - 1.3 The United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)
2. **The contents of the new legislation should reflect the Convention.**

Comment: The Juvenile Justice (Care and Protection of Children) Act 2000 has merely invoked the CRC and failed to incorporate even the basic core principles outlined in this legally binding minimum standard. The new law has failed to engage with the principles and guidelines enshrined in the other soft law guidelines and standards in juvenile justice, despite the fact that these guidelines form the largest body of international soft law on any subject concerning children.

3. **The distinctions made by evolutive psychology should be considered judicially relevant. This means that all human beings under 11 years of age should be regarded as children and those between 12 and 18 years of age as adolescents.**

Comment: The new Act has increased the scope of the Act to cover all children who have not reached the age of 18 years. The failure to engage with the guidelines mentioned above has only exacerbated the problems related to ‘difficult and dangerous’ adolescent boys and girls who are viewed as anything but ‘children’.

¹ Comments by Arlene Manoharan, Centre for Child and the Law, NLSIU (2005) on the twenty Guidelines for Legislative Reform, Pg 13 – 14, extract from Child Rights in Latin America - From ‘irregular situation’ to full protection; Emilio Garcia Mendez, Santafe de Bogota; UNICEF International Child Development Centre; 1998. Distributed at the National Consultation on Child Rights Law organized by the Ministry of Human Resource Development, GoI in collaboration with Human Rights Law Network, June 2005

4. **The new legislation should apply to all children and adolescents and not only to the more vulnerable sectors in society. The use of the term ‘minor’, which is charged with all kinds of stigma, should be avoided.**

Comment: The JJ Act is a response to children apparently in need of care and protection by the state including child victims and also child offenders. It is important that law reform takes into account the need to respond to the needs and rights of all children through a Comprehensive Child Code.

5. **A clear distinction should be made between social and educational measures made as direct consequence of a punishable offence (ranging from warnings to the deprivation of liberty), and protection measures, which should never involve coercion or compulsory detention.**

Comment: Most children found to be in need of care and protection by the state are housed in custodial settings that are not any different from detention. They are denied access and contact with their families as a matter of right, not sent to community schools and alienated from community life. The law has to specify and provide for separate spaces and specialized services for children who are found to be in need of special protection rather than subject all children in need of care to such confinement.

6. **The concept of material or moral risk should be eliminated as a criterion for the application of social and education measures. The same applies to the vague and anti-judicial concept of children in ‘irregular situations’ (in Latin America).**

Comment: The root causes of abandonment and crime need to be addressed through socio-economic policies and programmes that ensure a basic standard of living for all citizens. Preventive programmes need to be strengthened through statutory obligations that translate into effective family support services and safety nets for children rather than the band-aid responses of social and educational measures currently in practice. Further, children who do not fall into conventional social behaviour are stigmatized and penalized in an effort to ‘reform’ them. Street children, especially girls are subject to much discrimination and harassment due to this conceptual framework.

7. **The incorporation of all the constitutional guarantees provided for all citizens should be full, explicit and obligatory.**

8. **The general principles implied by the Convention should be explicitly incorporated;**

8.1 Principle of humanity (Article 37 a and c)

8.2 Principle of legality (Article 37 b and Article 40.2 a);

8.3 Principle of jurisdiction (Article 37 d, Article 40.2 b III, Article 40.2, Article 40.3 b);

8.4 Principle of cross examination (Article 40.2 b II – IV and VI);

8.5 Principle of inviolability of the defence (Article 37 d, art 40. 4);

8.6 Principle of appeal (Article 37 d, Article 40.2 b V);

8.7 Principle of legality of the proceedings (Article 40.2. b III);

8.8 Principle of publicity of the proceedings (Article 40.2.b VII)

9. The minimum age for criminal responsibility should be established for all purposes at 18 years.

Comment: The expansion of the scope of the 2000 Act has highlighted the challenges associated with juvenile crime committed by adolescents in the age group of 16 – 18 years. The vision of the UNCRC along with juvenile jurisprudence derived from progressive theoretical frameworks needs to be reflected more clearly in the law itself. Further, the distinction between juvenile justice systems and adult criminal justice systems needs to be highlighted at policy making processes and capacity building programmes at various levels in order to shift the paradigm towards a genuinely child rights oriented normative framework.

10. Punitive and protective capacities should be separate

Comment: Further comparative research on appropriate south based jurisdictions needs to inform the thinking behind recommendations for institutional framework, especially the legal and judicial system. All children are in need of care and protection while respecting their autonomy and agency as evolving citizens with varying capacities. The judicial proceedings in both the care and justice jurisdictions have to be fair, independent and impartial while being rooted in constitutional, UNCRC, other legally applicable norms and other UN guiding principles.

11. Cases that do not involve punishable offences should not be dealt with in judicial proceedings. Direct participation of the local community in cases of conflicts of a non-criminal nature is a useful indicator for alternative measures.

Comment: The scope for community policing, child sensitive Special Juvenile Police Units and other such spaces for empowering children, families and communities without unnecessary judicial intervention needs to be encouraged and promoted. However, appropriate classification, and adequate checks and balances to ensure that discretion is structured and not arbitrary is necessary.

12. Judicial competence should be preserved in non-criminal cases that may represent substantial or permanent modifications in children’s and adolescents’ legal conditions (e.g. adoption, guardianship, parental authority, change of name, etc.)

Comment: The Child Welfare Committee in its current form is unable to respond to many of the needs of children in the care jurisdiction, especially victims. It is proposed that a Judge/Magistrate be deputed to this body to hear select cases that involve judicial decisions and related matters such as change in custody, compensation, etc.

13. Strategies should be identified to formalize community participation in issues concerning protection

Comment: The child, the family, the extended family and the wider community need to be recognized as partners in the reintegration process for children in need of care. They should be effectively supported by the State sponsorship and Juvenile Justice Fund programmes.

14. The participation of municipalities in the implementation of protective or social and educational measures should be encouraged (except in cases of serious offence and measures involving deprivation of liberty)

Comment: The law has failed to recognize the strong community based support networks and traditions in our country. Alternate Dispute Resolution measures and Diversion need to be incorporated, after having put in place a normative framework, procedural guidelines and institutional structures that can effectively divert children from the justice system. Emerging insights from Models of Bal Panchayats linked to the Panchayats in villages need to be debated and suitable ideas incorporated into the law. In addition, the spaces and services of the Special Juvenile Police Units in each District, in conjunction with child and women helplines could be effectively converged to initiate such community based reception cum assessment and referral centres in a few Districts to begin with.

15. There should be obligatory legal provisions to prevent the declaration of a state of abandonment simply because parents or guardians are lacking in material resources.

Comment: Most Children's Homes are being used as Hostel facilities for children while those who are really in need of state care are unable to access the protection and care they need. The law should clearly state that these homes need to be places of succour and refuge for those who have been found to be in need of state intervention in their lives. As in the UK Children's Act 1989, only those who are found to be at risk of 'significant harm' if the state does not intervene should be admitted into state institutions under this Act. This means that both in the care and justice jurisdictions, institutionalization and detention is a measure of last resort and only for those who clearly fit certain criterion.

16. Efforts should be made to ensure that social policies for children are effective and are being implemented. Any overlap in policies should be avoided.

Comment: Despite numerous laws that have been enacted in India, there is still no comprehensive Policy on Juvenile Justice and Child Protection in the country till date. This has resulted in cursory attempts to reform law based on technicalities rather than on the basis of sound policy framework. The experience and commitment of the South African Law Commission to evolve Policy clarity through extensive research and democratic debate over more than five years needs to be emulated in India as well. Such a policy needs to be grounded in South based juvenile jurisprudence, multi-disciplinary child rights discourse, experiential insights and evidence based sociological research on children and childhood in India. The UN Commission on Human Rights has expressly called for state parties to collect data on juvenile justice, so as to inform policy, law and programme on the issue².

Inevitably, this process needs to be directed towards the drafting of a Comprehensive Child Code that harmonizes all child related law and is backed up by effective institutional mechanisms such as a progressive conceptualization of a Children's Commission.

² See Report of the 60th Commission on Human Rights, April – May 2004

17. The priority of children’s issues should be made effective by introducing specific mechanisms to guarantee that a minimum percentage of national funds are allocated for the implementation of policies provided for by the law.

Comment: The failure of the state to protect the socio-economic rights of children and their families is a major cause for the increase in children entering the justice system as well as the increasing rates of recidivism. The state has to be made accountable for its child citizens. The social movement needs to be supported by legal norms and programmatic policy frameworks that reflect this commitment.

18. Judicial authorities must receive support in terms of material and technical resources to ensure they are able to comply with the provisions of the law.

Comment: The social work members on the Child Welfare Committees and the Juvenile Justice Boards need to be supported in the fulfillment of their judicial functions through a host of systemic and financial resources. These should be initiated in line with the One Stop Justice System models that are being developed based on the recommendations of the South African Law Commission in South Africa.

19. Euphemisms typical of the culture of ‘compassion-repression’ should be eliminated.

Comment: Children are social actors with agency and subjects before law. Our country has failed to respect the inherent dignity and rights of children as social actors in Legislative, Judicial and Executive arenas at the level of state intervention. Families, communities and civil society in general have not yet institutionalized a culture of respect for children as persons in their own right. Law has an important role to play in setting such a normative standard that can directly influence and impact the lives of children.

20. The child should become a priority issue on the agenda of Latin American integration.

Comment: The child rights discourse is still in its infancy in India. It is time for the child rights movement to impact state policy as well as civil society responses through solidarity based people’s movements and collective action that respect the rights and duties of children, their families, extended families and the community. The radical vision of the UNCRC and indigenous child rights principles and practices that go beyond it needs to be disseminated and institutionalized into the agendas of all significant actors and players who have a role to play in this regard. Child rights education should be a priority in the Educational policies and Institutions of higher learning at various levels, including the various Judicial, Police and State Administrative Academies.

Additional Guidelines:

- 1. Inclusive and participatory processes as a fundamental principle:** As referred to earlier, it is important that the Ministry and other actors and stakeholders partnering in the process of law reform design and facilitate democratic dialogue in order to arrive at policy consensus on Juvenile Justice. Lessons need to be drawn not only from insights emerging

from experiential and grounded knowledge from below, but from the Constitution of India, the Bill of Rights, International binding and non-binding standards, and comparative jurisdictions. Essentially such knowledge needs to be derived from and contribute to a wider rights discourse that incorporates the voices of children and their families, especially those who have experienced the Justice system in India.

2. **The impact of law and law reform on the social movement:** Law is only one tool in a package of instruments that could be used to trigger social change. The State and civil society actors engaging with the issue of child rights need to draw from multiple sources and evolve multiple and complementary strategies to protect and enforce the rights of children. The impact of law and law reform processes on the social movement needs to be understood so that effective strategies are evolved to sustain and strengthen a solidarity based movement in the interest of children, their families and communities. Concerted attempts need to be taken to enhance the potential to build solidarity and to strengthen activism and pressure from below while minimizing the negative impacts of such processes.

Analysis into the political scenario at the micro and macro level, especially in a post 911 globalizing world needs to be understood, so that law reform is not undertaken in a hasty manner. The child rights movement needs to be vigilant in order to work at various levels to influence policy, parliamentary debate and legislative processes in the interest of the marginalized and in line with progressive rights based approach.

3. **Examining the inherent and hidden bias in law:** Prior to legislating on any matter it is imperative that policy consensus as well as feedback from a wide variety of sources be solicited prior to legislating on any subject. In an era of heightened politico-legal responses to terrorism and national security issues, it is important that feedback is solicited from civil liberties lawyers, practitioners active in the child rights and people's movement and groups of children who are supported to critique and analyze the law. This is so that every attempt is made to understand and respond to any legislative flaws due to language, drafting or conceptual biases.
4. **Clarity on the role of law:** It is important to arrive at policy clarity on where the law should intervene and where the law should abstain. Areas for programmatic intervention should also be listed as a complement to legal intervention. This is especially important with regard to vulnerable constituencies such as children and marginalized families who are unable to resist the unnecessary and often oppressive intrusion of the more powerful (state) into their lives.

Conclusion: It is hoped that this National Consultation is only the beginning of a concerted response by the Ministry in partnership with key actors and stakeholders on this issue. The above guidelines could help frame a strategic plan of action aimed at a comprehensive policy on children that finally translates into sensitive and progressive law rooted in a child rights discourse.