

The Implementation of the Convention on the Rights of Children in Seven South Asian Countries

Institutionalised Children Explorations
and Beyond

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Abstract

This year marks thirty years since the Convention on the Rights of the Child (the *Convention*) entered into force and ten years since the Guidelines for the Alternative Care of Children (the *Guidelines*) were adopted. The term ‘alternative care’ refers to the placing of children in the care of someone other than a parent. Although the seven South Asian countries – Afghanistan, Bangladesh, Bhutan, India, Nepal, Pakistan and Sri Lanka – have ratified the Convention, each of the jurisdictions has reflected the Convention and Guidelines through domestic law in different ways and to different degrees. This article examines the extent to which two key child rights principles enshrined in the Convention have been incorporated into the domestic law of these countries: (a) the obligation to undertake active measures to prevent the unnecessary separation of children from their families and (b) the placing of a child in alternative care as a measure of last resort. While progress has been made across all jurisdictions, effective implementation of policies envisioned by the Convention remains elusive.

Keywords

Alternative care, children’s rights, deinstitutionalisation, institutional care, orphans

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Introduction

This year marks thirty years since the Convention on the Rights of the Child (the *Convention*) entered into force and ten years since the Guidelines for the Alternative Care of Children (the *Guidelines*) were adopted. This article examines the extent to which two key child rights principles enshrined in the Convention have been incorporated into the domestic law of South Asian countries: (a) the obligation to undertake active measures to prevent the unnecessary separation of children from their families and (b) the placing of a child in alternative care as a measure of last resort. While progress has been made across all jurisdictions, in many cases, specific rules and enforcement mechanisms are lacking. Moreover, poor access to public services and insufficient resources remain obstacles to realising the goals of the Convention. All countries in this study could benefit from greater information sharing among domestic agencies, a key reform already adopted by some jurisdictions.

Afghanistan

Afghanistan ratified the Convention on 28 March 1994 (UNCRC, 1989). Under the Constitution of Afghanistan, the state is obligated to adopt measures to ensure the physical and psychological well-being of children (Constitution of Afghanistan, 2004). The Law on Protection of Child Rights (the *LPCR*) and the Civil Code (the *Civil Code*) are the primary laws implementing the Convention and the Guidelines.

The LPCR establishes a right for children not to be separated from their parents without their consent and requires the relevant authorities to take measures to prevent child separation (Government of Afghanistan, 2019a). The LPCR also provides that guardianship of children will generally pass to family members rather than to state institutions when parents are unable to look after a child (Government of Afghanistan, 2019b). Although the LPCR does not explicitly provide that non-family or institutional care is the last resort for a child's guardianship, the Civil Code prioritises family when choosing guardianship (Government of Afghanistan, 1977). The LPCR also places a duty on public authorities to establish orphanages (Government of Afghanistan, 2019c) and to ensure the safety of children in such orphanages from harassment and violence (Government of Afghanistan, 2019d). Moreover, the LPCR provides for general rights for children, together with certain duties for public authorities to safeguard children, including in relation to disabled children and children without a guardian (Government of Afghanistan, 2019e).

Portions of the LPCR and the Civil Code reference religious principles or obligations, which may be interpreted inconsistently. Informal local courts may also defer to customary or Islamic law in determining issues of child welfare (Stanford Law School, 2017). This diversity of authority creates uncertainty as to how children will be treated and limits the impact of national legislation. Another impediment to implementation of the Convention and Guidelines is the poor access to public services suffered in many parts of the country (Government of Afghanistan, Central Statistics Organization, 2018).

Bangladesh

Bangladesh ratified the Convention on 3 August 1990 (UNCRC, 1989) and has since attempted to implement national legislation to give it full effect.

The Constitution of the People's Republic of Bangladesh does not explicitly address children's rights. Article 28(4) empowers the state to make special provisions in favour of children (Constitution of the People's Republic of Bangladesh, 1972a). In addition, there are constitutional directives relating to education, but these are not rights to education (Constitution of the People's Republic of Bangladesh, 1972b).

The principal legal framework supporting the domestic application of the Convention is The Children Act 2013 (the *Act*), which contains a section on alternative care (Government of Bangladesh, 2013a). The Act replaced The Children Act of 1974. The Act grants the Government the power to make rules (the *Rules*) to carry out the purpose of the Act (Government of Bangladesh, 2013b). However, the Rules have not been enacted yet. The National Child Policy 2011, which replaced the National Child Policy 1994, also acts as an aspirational document by setting out the goals the Government should seek to achieve while enacting and implementing childcare legislation.

The Act views alternative care as a last resort, stating that re-integration of the child with the parents must be prioritised (Government of Bangladesh, 2013c). There are multiple provisions in the Act providing support for parents, such as counselling (Government of Bangladesh, 2013d), in order to help children reintegrate with their parents. However, the Act does not attempt to reduce or eliminate institutions for children, and there are various provisions that allow institutionalisation (Government of Bangladesh, 2013e). It is expected that the Child Welfare Board and probation officers will ensure that family-based care is given primacy as they are tasked with determining the most appropriate means of alternative care for the child, taking into account the child's best interests (Government of Bangladesh, 2013f). This procedure, combined with the certification process for child care institutes, is designed to ensure that such institutes are a last resort and will meet certain quality standards – ultimately realising the goal set forth by paragraphs 69, 71 and 73 of the Guidelines.

Bangladesh has made some progress in implementing the Guidelines. Enacting the Rules would be an important step in promoting information sharing and inter-agency cooperation.

Bhutan

Bhutan ratified the Convention on 1 August 1990 (UNCRC, 1989). Bhutan's Constitution contains several provisions protecting children's rights. For example, it obliges the state to endeavour to take appropriate measures to ensure that children are protected from all forms of discrimination and exploitation (Constitution of the Kingdom of Bhutan, 2008).

Bhutan has passed several laws implementing the Convention and the Guidelines. The most relevant is the Child Care and Protection Act of Bhutan 2011. Under this act, the government promulgated the Child Care and Protection Rules and Regulations of Bhutan 2015 and the Guidelines for the Alternative Care of Children 2017. Bhutan also passed the Child Adoption Act of Bhutan 2012 and implemented the Child Adoption Rules and Regulations 2015 and the Child Adoption Guidelines 2017. In addition, Bhutan established a National Commission for Women and Children in 2004 (NCWC). The NCWC is designated as the competent authority for the promotion and protection of children's rights in Bhutan (Government of Bhutan, 2015a).

Bhutan's legislation implementing the Guidelines and the Convention enshrines the principle that a child should be placed in alternative care only if it is necessary. It also recognises that children should not be separated from their parents against their will, unless this is determined to be necessary in the best interest of the child (Government of Bhutan, 2011). Consideration should first be given to kinship care when considering alternative care (Government of Bhutan, 2015b).

The rights of children in alternative care, along with requisite standards for the provision of care, are set out in Bhutan's legislation (Government of Bhutan, 2015c, 2017). Additionally, the NCWC has published standard operating procedures on case management for children in difficult circumstances (NCWC, 2016a). The operating procedures set out the responsibilities of the agencies involved in child protection cases and procedural actions to be followed. Provisions are included which regulate information-sharing between agencies and admission to alternative care (NCWC, 2016b).

A relevant consideration for Bhutan is the extent to which its implementing legislation regulates care in monastic institutions. Bhutan does not have a tradition of institutional care apart from monastic schools (UNICEF Bhutan, 2012). Care in monastic schools is not specifically considered in Bhutan's legislation. The Commission for Monastic Affairs of Bhutan has established a Child Care and Protection Office for child monks (UNCRC, 2016a).

One challenge for Bhutan is that its mountainous landscape may impede access to education and monitoring in remote areas. In addition, the NCWC faces financial and human resource constraints (UNCRC, 2017).

India

India acceded to the Convention on 11 December 1992 (UNCRC, 1989). The national government of India adopted a number of legal and policy instruments to further its commitments to child rights under the Constitution of India and the Convention. The right of every child to a family environment is recognised under two policy documents, the National Charter for Children, 2003 and the National Policy for Children, 2013. The latter also expressly recognises that institutionalism should be a measure of last resort (MWCD, 2013). The importance of a family environment is also recognised in the revised Juvenile Justice (Care and Protection

of Children) Act, 2015 (the *JJ Act*) together with the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 (the *Rules*).

The JJ Act and the Rules set out the procedure to be followed by authorities for children in need of care and protection (Government of India, 2015a, 2016). They require efforts to reunite children with their families before placing them in alternative care (Government of India, 2015b). The Integrated Child Protection Scheme is an example of government support for strengthening families. The Scheme is a centrally sponsored scheme providing basic education, health and nutrition services for early childhood development. It also provides financial support for the implementation of the JJ Act.

Some Indian states have also developed their own child protection programmes. Effective implementation at both national and state levels remains a challenge as extreme poverty and lack of resources hamper the realisation of child welfare laws.

Nepal

Nepal ratified the Convention on 14 September 1990 (UNCRC, 1989). The legal instruments implementing the Convention and the Guidelines in Nepal are the Constitution of 2015 (the *Constitution*) and the Children's Act 2075 (the *Children's Act*).

The Constitution established children's rights as fundamental rights. These rights include, *inter alia*, the right to education, the right to formative child development and the right to special protection for vulnerable children (Constitution of Nepal, 2015). However, the Constitution does not provide for all of the rights and protections envisaged by the Convention and the Guidelines, nor does it provide specific mechanisms to enforce these rights.

The Children's Act came into effect on 18 September 2018 and replaced the Children's Act of 1992. It aims to give effect to the children's rights contained within the Constitution and to enact additional children's rights as envisaged by the Convention. The Children's Act also provides for the establishment of a National Child Rights Council, state- and local-level Child Rights Committees and a local-level Child Welfare Authority (Government of Nepal, 2018a).

The Children's Act gives particular attention to the principles of alternative care contained within the Guidelines. The legislation prioritises the best interests of the child within alternative care arrangements (Government of Nepal, 2018b). The act places a responsibility on the family to provide a caring, nurturing and protected environment for the child (Government of Nepal, 2018c) while also placing an onus on government institutions and officials to prioritise the best interests of children who are in alternative care (Government of Nepal, 2018d).

The Children's Act makes clear that institutionalisation is a last resort (Government of Nepal, 2018e). Additionally, if a child is placed in alternative care and a parent or guardian can be located, the legislation requires the child to be reunited with his or her parent or guardian so long as it is in the child's best interests (Government of Nepal, 2018f).

Effective monitoring will be required to determine the impact of the Children's Act (Poudyal, 2017).

Pakistan

Pakistan ratified the Convention on 12 November 1990 (UNCRC, 1989). However, it has made little progress over the last thirty years in safeguarding children's rights. This is partially attributable to piecemeal government legislation. In 2010, the 18th Constitutional Amendment to the Constitution of Pakistan devolved legislative and administrative competence on children's issues to the Pakistani provinces (Amendment to Constitution of Pakistan, 2010). As a result, there is no comprehensive country-wide implementation of the Guidelines and no national mechanism to ensure effective implementation or accountability. Pakistan established a Ministry of Human Rights in November 2015 and proposed a bill to establish an independent National Commission on the Rights of the Child. This Commission would be mandated to recommend legislation on children's rights and oversee implementation of children's rights at the province level. Although the bill was passed in 2017 (Government of Pakistan, 2017), the Commission is yet to be established (Daily Times, 2018). The Bait-ul-Mal legislation established 159 National Centres for Rehabilitation of Child Labourers (NCRCL) which provide free education and subsistence allowance to parents (UNCRC, 2015a).

At the provincial level, the Guidelines are implemented by the Khyber Pakthunkhwa Child Protection and Welfare Act 2010 (the *KP Act*), the KP Child Protection and Welfare Commission, the Sindh Child Protection Authority Act 2011 and the Punjab Employment of Children Act. The Sindh Child Protection Authority coordinates and monitors child protection and sets the standards for all institutions relating to children (UNCRC, 2015b). Of provincial legislation, the KP Act and the Draft Balochistan Child Protection and Welfare Bill 2015 (the *Draft Balochistan Bill*) do the most to advance the implementation of the Guidelines.

The KP Act provides that children may be separated from their parents or guardians and taken into protection only following a court determination (KP Act, 2010). The Draft Balochistan Bill goes further. In addition to establishing a court procedure, it explicitly states that a child needs a family environment for the 'full and harmonious development of his personality' (Draft BCPW Bill, 2015a). Only the Draft Balochistan Bill explicitly provides that a child may be placed in institutional care as a matter of last resort (Draft BCPW Bill, 2015b). It also provides that a child's extended family will retain priority where a child cannot remain living with his or her parents, and that a placement with a family is preferred to a placement with an institution. It further calls for providing a permanent family home or fit person (Draft BCPW Bill, 2015c). Overall, while certain provinces have made efforts at implementing the Guidelines, the legislation that goes the furthest in implementing the Guidelines remains in

draft form. The Balochistan Child Protection Act, passed in 2016, falls short of the protections in both the Draft Balochistan Bill and Guidelines.

Sri Lanka

Sri Lanka ratified the Convention on 12 July 1991 (UNCRC, 1989). The Sri Lankan Constitution includes a general obligation on the government to promote the interests of children and youth (Constitution of the Democratic Socialist Republic of Sri Lanka, 1978).

While Sri Lanka has not implemented the Convention through legislation, it has adopted a number of policies in recent years aimed at meeting the goals of the Convention, including the National Plan of Action for Children (2016–2020), the Action Plan for the Social Protection of Children (2016–2018) and the National Plan of Action to address Sexual and Gender-based Violence (2016–2020). Specific initiatives implemented under these plans include a family foster care system, mechanism to identify and care for at-risk children, guidelines and training to strengthen social structures in support of children, improvements to inter-agency collaboration and expediting court cases involving children.

Areas of concern remain, however. The existing legal framework in Sri Lanka falls short of its obligations under the Convention. For example, pursuant to the Children and Young Persons Ordinance (the *Ordinance*), children in need of care can be detained by court order in facilities such as ‘certified schools’ (if they have reached the age of twelve), committed to the care of a fit person or a probation officer or kept with a parent/guardian who will be obligated to undergo training (Government of Sri Lanka, 2014). The Ordinance does not clarify when a child should be remanded to a care home, and courts appear to have broad discretion. According to a United Nations Human Rights Council report, in some situations, alternative care is determined without requesting the consent of the child (UNHC, 2018a). Contrary to the Ordinance, children under the age of twelve have reportedly been placed in care homes (UNHC, 2018b). Contrary to international standards, these care homes may include children requiring correctional services (UNHC, 2018c).

The Ministry of Women and Child Affairs recently drafted a comprehensive national policy on Alternative Care for Children in Sri Lanka, which seeks to address these issues. The policy is aimed at preventing the placement of children in alternative care situations unless necessary and at deinstitutionalising those children who are currently stuck in long-term care homes.

Conclusion

Implementation of the Convention remains patchy across South Asia thirty years after the Convention came into force. While all the South Asian countries

examined here have devised plans or draft legislation in light of the Convention, only a few have passed national legislation. Even where national laws exist, many of the states in this study are constrained by a lack of resources and government instability. In some countries, such as Afghanistan and Bhutan, religious and cultural traditions may lead to unique interpretations of the Guidelines. Significant progress has been made in South Asia in enshrining the principles of the Convention. The task ahead is to ensure effective implementation.

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