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Influence of the Human Right Instrument in Children's Right Jurisprudence: An Appraisal of JJ Act

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ABSTRACT

The research paper deals with the children's human rights in India. Children are the future custodians of sovereignty, rule of law, - justice, liberty, equality, fraternity and finally international peace and security. They are the potential embodiment of our ideals, aspirations, ambitions, future hopes. They are the 'future shoulders' in the form of great philosophers, rulers, scientists, politicians, able legislators, administrators, teachers, judges, technologists, industrialists, engineers, workers, planners on which the country would rest. Human Rights Instruments specific to the rights of the child: The Declaration of the Rights of the child 1924, adopted by the fifth assembly of the League of Nations, can be seen as the first international instrument dealing with children's rights. Children are a human resource, invaluable but vulnerable.

The paper will deal with the laws applicable in the India. It will answer the questions as to What were the initial provisions before the Act?, What is the JJ Act?, What is the influence of the Act? The objective behind the paper is to understand the Initial provisions, to understand the JJ Act., to understand the influence of the act.

Keywords: Children, Human Rights.

I. INTRODUCTION

The concept of 'rights' is a concept which is historically rooted in the French and American revolutions. Simply by being human both men and women claim to have a broad range of basic human rights. United Nations was established in 1945, one of the mandates cited in its Charter was the "protection of human rights."³ This mandate has been actualized through the drafting of a series of declarations and treaties aimed at making the generalized concept of human rights more concrete.

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³Venudhar Routiya, *A Critical Study of Children Under Juvenile Justice System in India*, RESEARCH GATE, (2016)

Human rights and children rights are the two topics which are talked about all over the world, there so many issues, political theories which are concerned and connected with them. The general definition of human right which is universal and accepted by all persons is “a right, which all men, everywhere, all the time ought to have, something of which no one deprived without a grave affront to justice, something which for every human being”. There have been so many scholars who have different theories for rights. A justification given to rights whether being to legal rules or to morality distinguishes rights from a demand.

The emerging jurisprudence of the rights of the child is confined to the analysis that are based on the existing or developing international children’s rights legislation. Children’s rights are the most approved ones in the history of human rights. The United Nations Convention on the Rights of the Child defines child rights as the basic freedoms and entitlements that should be given to the citizens of the country who are below 18 years of age regardless of their colour, religion, origin, race, caste, language, wealth, opinions, birth, and other characteristics. These rights are surrounded by the children’s freedom and their family rights, civil rights, necessary education, cultural activities, healthcare and welfare and other special measures. The fact that the Convention on the Rights of the child is monitored by a quasi-judicial body i.e. the committee on the Rights of the Child, the basic positive law analysis will be augmented with the concept of jurisprudence known as "legal realism". This jurisprudential theory is rooted in the notion that law is not solely the product of statutes or legislation.

Since mid- nineteenth century recognition of rights of child has been undergoing a process of evolution. Over a period of ten years, and virtually without public awareness, the United Nations Working Group that drafted the Convention on the Rights of the Child elaborated a treaty that, in its final form, is permanently and significantly altering the concept of children's rights. This change is occurring because the Convention's drafters went beyond the previously accepted notion that the rights of children were synonymous with physical care and protection, and incorporated protection of the child's individual personality rights as well. The differences between these two types of rights can be seen by making comparisons between the Convention on the Rights of the Child and the two-international human rights covenants. Pre-Convention concepts of children's rights, the "child rights = care and protection" equation, are arguably analogous to those rights enumerated in the International Covenant on Economic, Social and Cultural Rights - a treaty that obliges governments to establish benefits, such as education and social security, for its citizens.

II. HUMAN RIGHTS IN INDIA

The Constituent Assembly of India framed the Indian Constitution, which was first time met on 9th December, 1946. The primary importance was given to human rights in the Constitution. To quote Guha, "The demand for a declaration of fundamental rights arose from four factors"⁴.

- During the time of British rule there was lack of civil liberty
- Social conditions which were particularly affecting women and untouchables
- Britishers exploited different religious and ethnic groups.
- Tenants being exploited by the landlords.

The rights proclaimed in the Universal Declaration of Human Rights were adopted by General Assembly and the constituent assembly incorporated in the Constitution of India. On 10th December, 1948 the General Assembly adopted Universal Declaration of Human Rights and at the time the Constitution of India was still in making, and the adoption influenced the framing of Indian Constitution. "Viewed from the Indian stand point, human rights have been synthesized, as it were, not as an integrated fabric by the Preambular promises and various Constitutional clause: of the National Charter of 1950⁵."

(A) FUNDAMENTAL RIGHTS AND HUMAN RIGHTS

Part III of our Constitution has all judicially enforceable rights which have some rights of the minorities and political rights from Article 12 to 35 which includes the right to freedom of religion, educational and cultural rights, right to equality and the right to constitutional remedies.

Fundamental rights are inalienable from the ordinary rights basically they differ from each other. No custom, law, or any administration can take them away any law made in violative of any fundamental right will be void. In the case of *ADM Jabalpur v. Shukla*⁶ it was observed that the object behind making certain rights as the fundamental rights is to guarantee the citizens and give them protection against illegal invasion by any Judicial, executive or legislative organ of the State. Earlier in the case of *Golak Nath v. State of Punjab*⁷ it was rightly observed by Chief Justice Subba Rao that "Fundamental rights are the

⁴ Sunil Deshta, *Philosophy of Right to Life, A movement from Rigidity to Flexibility*, CIVIL AND MILITARY LAW JOURNAL, 3-123 (1995)

⁵ A.B.M. MAFIZUL ISLAM PATWARIS, FUNDAMENTAL RIGHTS AND PERSONAL LIBERTY IN INDIA, PAKISTAN AND BANGLADESH, (1ST ed. 1991).

⁶ A.I.R. 1976 S.C. 1207

⁷ A.I.R. 1967 S.C. 1643

modern name for what have been traditionally known as natural rights.

The Supreme Court of India has recognised fundamental rights as “Human rights” or “Natural Rights”. The then chief justice of Supreme Court while referring to Part III of the Constitution in the case of *Keshavananda Bharati v. State of Kerala*⁸ observed that the fundamental rights are inalienable rights and are not natural rights.

For that sake of convenience, fundamental rights under the Constitution of India are divided into two categories i.e. the rights which are specified and the other rights which are not enumerated specifically.

Article 21A of the constitution which is Right to Child Education was included in the constitution by the 86th Constitution Amendment Act, 2002 as a new human right. According to the Article the state shall provide compulsory and free education to all the children between the age of six to fourteen years in a manner determined by the law. In the case of *J.P. Unnikrishnan and others v. The State of Andhra Pradesh*⁹ the Supreme Court held that every citizen of the country has right to free education until he completes the age of 14 years.

III. CHILDREN’S RIGHTS: HUMAN RIGHTS

Children are the future custodians of international peace, security, equality, liberty, rule of law, justice and sovereignty. Children just like adults are human being too and nature has given them rights too. 1979 was declared as the International Year of the Child by United Nations as the worldwide concern was raised for the well-being of the children. The first international instrument which dealt with the children’s right was the Declaration of the rights of the child 1924. Lately, in 1989 it was enshrined in the United Nations Convention on the Rights of the Child¹⁰ that the children have unique human rights and became the worldwide attention.

Around the world there are millions of children who are being exploited, discriminated and abused. These include child labourers, children exploited sexually, children affected by the armed conflicts, children living on streets or the children coming in contact of the law, coping with certain disabilities, because of religious or ethnic minority status there are suffering from discrimination.

(A) THE JURISPRUDENCE OF THE RIGHTS OF THE CHILD

⁸ A.I.R. 1973 S.C. 1461 at 1536

⁹ A.I.R. 1993 S.C. 645 at 733

¹⁰Convention on the Rights of the Child, adopted Nov. 20, 1989, 28 LLM. 1448

The fact that a quasi-judicial body monitors the Convention on the Rights of the Child, the augmentation of basic positive law was analysed by the concept of jurisprudence which is known as “legal realism.”¹¹ The root of jurisprudential theory goes through the notion that law is not a sole product of legislations or statutes. Until and unless a law has been interpreted by an authoritative body it is not a law.

Language of Convention on the Rights of the Child is a written language in a constitutive instrument, consequently it became the central element of emerging jurisprudence. There are two stages in which the convention’s language is been implemented. First, the state party must interpret the standards of convention, then the interpretation is then evaluated by the Committee on Rights of the Child.

(B) VARIOUS RIGHTS OF THE CHILDREN

Regardless of persons age, human rights apply to every human being proclaimed in the Universal Declaration of Human rights. it also applies to the children with same right as that of adults.

On 1992 India ratified rights mentioned in the UN Convention on the rights of the child which are mentioned below:

- **The Survival Right:** According to the convention, the Survival Right includes the right to life, the attainable standard of nutrition, health and an adequate standard of living. Right to a name and nationality is also included.
- **The Right to Protection:** According to the Convention, this right includes freedom from all forms of exploitation, abuse and inhuman or degrading treatment. This includes the right to special protection in situations of emergency and armed conflict. The aim is simple, to protect vulnerable children from those who would take advantage of them and to safeguard their minds and bodies.
- **The Right to Development:** This right includes the right to be educated, to receive support for development and care during early childhood and to social security. It also includes the right to leisure, to recreation and to cultural activities.
- **Right to freedom of thought and expression:** According to the Convention, the Right to Participation accords the child access to appropriate information and the freedom of thought and expression, conscience and religion.

Human rights are Children’s right. the child is been protected as a human being. Just like

¹¹ Oliver Wendell Holmes, *Path of the Law*, 10 HARV. L REV. 457 (1896)

human rights, the constitution of children's right was by fundamental guarantees and other essential human rights like right to life, right to dignity through the protection of mental and physical integrity, the principle of non-discrimination. They are political and civil rights, they have social, cultural and economic rights like right to education right to health, right to decent standard of living, etc.

Children's rights not only include essential human rights but also include: the right to live with parents, the right to education, the right to benefit from a protection, etc.

IV. GENERAL PRINCIPLES RELATED TO CHILD RIGHTS IN INDIA

Section 3 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act, 2015) prescribes that the Central Government, the State Governments, the Board and other agencies, as the case may be, while implementing the provisions of JJ Act, 2015.

Principle of presumption of innocence, Principle of dignity and worth, Principle of participation, Principle of best interest, Principle of family responsibility, Principle of safety, Positive measures, Principle of non-stigmatizing semantics, Principle of non-waiver of rights, Principle of equality and non-discrimination, Principle of right to privacy and confidentiality, Principle of institutionalization as a measure of last resort, Principle of repatriation and restoration, Principle of fresh start, Principle of diversion, Principles of natural justice.

Although India has made remarkable progress in terms of child rights, indicators show that a lot more needs to be done. For instance, India has the highest number of new born infant deaths in the world and India has the largest numbers of child labourers in the world.

It should be understood that all persons below the age of 18 are children. Childhood is a process through which every human being passes. Children have different experiences during childhood. All children need to be protected from abuse and exploitation.

The Principles are as follows:

- Principle of being innocent
- Having some worth and dignity
- Participating principle
- The best interest of children
- Responsibility of family
- Safety principle

- Positive measures to be taken
- Rights to not be waived
- Non- discrimination and equality of children
- Confidentiality and privacy right
- Institutionalization to be taken as measure of last resort
- Restoration Principle
- Principle of fresh start
- Principle of diversion
- Principles of natural justice

V. JUVENILE JUSTICE ACT

The Juvenile Justice (Care and Protection of Children) Act, 2015 has come into force from January 15, 2016 and repeals the Juvenile Justice (Care and Protection of Children) Act, 2000. It seeks to achieve the objectives of the United Nations Convention on the Rights of Children as ratified by India on December 11, 1992. It specifies procedural safeguards in cases of children in conflict with law. It seeks to address challenges in the existing Act such as delays in adoption processes, high pendency of cases, accountability of institutions, etc. The Act further seeks to address children in the 16-18 age group, in conflict with law, as an increased incidence of crimes committed by them have been reported over the past few years.

There are various key provisions in the act which includes

- Special provisions for heinous offences committed by children above the age of sixteen years
- Separate new chapter on Adoption to streamline adoption of orphan, abandoned and surrendered children
- Inclusion of new offences committed against children
- Mandatory registration of Child Care Institutions

(A) ROLE OF THE GOVERNMENT

The Act provides for induction training of Members of Juvenile Justice Board and Child Welfare Committee within two months of their appointment (Section 4 and 27). The Chief Judicial Magistrate or Chief Metropolitan Magistrate is to review pendency of cases in the

Juvenile Justice Board once in three months and direct the Board to increase the frequency of sittings or recommend constitution of additional Board (Section 16). There is a provision for the constitution of a High-Level Committee to review the pendency of cases in the Juvenile Justice Board.

Under Section 36 of the JJ Act, 2015 Child Welfare Committees are expected to submit quarterly reports to the District Magistrate regarding pendency and nature of disposal of cases. The District Magistrate is expected to conduct quarterly review of the Child Welfare Committees and direct remedial measures to address the pendency. The District Magistrate shall send a report of his review to the State Government which may cause the constitution of additional committees, if required. If the pendency of cases continues even after three months, the State Government shall terminate the existing Committee and constitute a new Committee.

(B) INDIAN JUVENILE JUSTICE ACT AND IMPORTANT PROVISIONS

Section 2 (I)¹² of the Juvenile Justice Act, 2000 defines juvenile in conflict with law as a juvenile under the age of 18 years and above 10 years who has been alleged to commit a crime. There is no consensus over the definition of child which creates lots of dilemma and confusion over the treatment of child in legal purposes.

Section 2 (d) of the Act, mentions different category of children which is “Children in Need for Care and Protection”. These are the children who are found without any settled place or without any home and without any means of subsistence. They can be children who lives in street, who are indulging in begging, orphaned, who are abandoned, who are being abused, who are victim of child trafficking and who are mentally ill or suffering from any form of deformity. The JJ Act protects such children and their rights. there are various laws which are prevalent in reference to juvenile justice in India and has been talked upon by R.N. Choudhary (2005) and justice S.K. Bhattacharya also discuss about the same (2000).¹³

The children who live alone or under difficult situations are considered to be prone or vulnerable to commit crime. The need to add this category came from the approach of th JJ Act. The very easy way to convert them into delinquents is any trigger point in their life and they’ll become criminals. The provisions were made in JJ Act which included both the categories of children, one who are offenders and one who are likely to indulge in some heinous acts.

¹²S.K. Bhattacharya, *Juvenile Justice: An Indian Scenario*, REGENCY PUBLICATIONS,(2000)

¹³Mousumi, *Juvenile Justice in India*. INTERNATIONAL JOURNAL OF INTERDISCIPLINARY AND MULTI-DISCIPLINARY STUDIES. 1 (6): 64-70. (2014).

As there are two categories of children so there are also two different institutions which deals with same i.e. the children who are vulnerable under the Child Welfare Committee and offenders under the Juvenile Justice Board.

The Board consists of two social workers and one of them should be a woman, a metropolitan judge, or judicial magistrate of first class. Every police station is supposed to have a Special Juvenile Police Unit which the act also talks about. All the persons mentioned above is preferred to have sensitivity in matters related to children, or must be trained in the child psychology.

“There are high chances that a crime is committed by a juvenile with an adult, in that case joint trial of juvenile offender cannot be held with other adult criminals. Further, the act restricts the bail as a right to the offender and the apprehension of juveniles irrespective of the fact that whether the offence committed is bailable or not.”

“The trials conducted are in an informal manner, the offender cannot be brought handcuffed to the Juvenile Justice Board. The police and other officials are dressed in an informal way. Media is been restricted from revealing the identity of the offender, it is always concealed. There are special homes for the offenders in which they are kept for observations and children who are in need of care and protection are sent to Children’s home.”

(C) AMENDMENTS REQUIRED UNDER JUVENILE JUSTICE ACT

“The definition of a child given under Indian Legal system was questioned.

Malvika Tyagi (2016)¹⁴ also felt that with the ongoing trend of juveniles being involved in violent crimes in India, the intervention of state is required to make amendments and to bring in new legal provisions. The Juvenile Justice Act 2015 took into the matter and took out some amendments. The new legal provisions mentioned that if a child of 16 years or above commits a heinous crime, the assessment of his physical and mental maturity has to be made by the Juvenile Justice Board. The maturity level will be matched with his capacity to commit an offence and his ability to understand the consequences of his act and the circumstances by which he committed the act.”

The bill of Juvenile Justice was introduced in Lok Sabha in 2014, after the post Nirbhaya case it was felt that some stringent actions has to be taken against the children involving in the crime between the age group of 16 to 18. Per se, the serious crimes have not been in the Indian Acts, but it might take into category where the punishment would entail for 7 years or

¹⁴ Government of India, *Crimes in India*, NATIONAL CRIME RECORDS BUREAU (2014).

more for adults. The JJ Act of 2000 was flawed with issue of implementation, and the new bill which was introduced was to close these loop holes.

The earlier Acts dealing with Juvenile Justice in India have had serious implementation issues - the Bill (which became an Act) sought streamline the adoption process of orphaned and abandoned children. Through the 2016 Act, foster care has been introduced, under which families can take up responsibilities of juveniles in conflict with law, or the orphaned or abandoned children.

It was made compulsory that each and every district of the State has to set up Juvenile Justice Board and Child Welfare Committee, with at least one-woman member. It was also mentioned that if any child is found or caught committing crime will be first send to a preliminary assessment to check the child's capacity to commit a crime.

To control the delinquency of juvenile the JJ Act has paid a lot of attention to prevent the crime. The act put lot of emphasis on the role of family and control of community on individual, because there are scenarios where we can see that the family and community has weakened.¹⁵ The most functional and structural unit of society id the Family. According to the act, family has a very important role to play in upbringing, nurturing, taking care and protection the children. Children are groomed to become responsible member of the society and family keeps them away from bad habits like watching pornography, substance abuse, etc.

VI. CONCLUSION

There has been change in the tends of juvenile crimes and so do the punishment also. It seems that Indian government has been taking very progressive steps and keeping pace with the emerging and changing trends which can be seen through the Juvenile Justice Act. There was step taken to lower the age of juvenile in the law but Justice Verma committee took a stand against it the report said that "Any attempt of reducing the age of juvenility, or excluding certain children from the purview of the Juvenile Justice (Care and Protection of Children) Act 2000 on the basis of nature of the offence and age, will violate guarantees made under the Constitution and international instruments, the United Nation Convention of Rights of the Child (UNCRC) .

The Supreme Court of India took a stand against the suggestion made by the committee. It was argued that children up to the age of 18 years are malleable and they can be reformed

¹⁵ Neelu Mehra et al, *Juvenile Justice Systems in United States and India: Modern Scenario and Much Needed Modifications*, JOURNAL OF LAW AND CRIMINAL JUSTICE (2014).

through restoring and redeeming techniques according to the expert notion of psychologists. It was then argued that as their mind gets easily polluted if they are put with adult criminals they will again get socializes into the world of crime and will convert them into hard core criminals. The courts kept this in mind and they didn't want to burden the jails with criminals and also the fact that they have to deal with habitual criminals.

According to the latest trends which was analysed in India, it was indicated that the laws existing prior 2016 were proven to be not deterrent. If the child is constantly exposed to the violence and there is lack of understanding about the crime committed makes them prone to the tendencies of delinquency. If there is no guardian to help them or play a responsible role to filter the information the problem gets worse.

As the world is proceeding further, in the time of globalization and industrialization, the parental control has become weak as compared to earlier where strong parenthood could prevent individual from committing offences.

Indian society which was connected through various primary groups like family, peers, close kin circles, neighbourhood ties etc. is now becoming ineffective and which can be one of the reasons which lead to the present trends in delinquency of juvenile.

It should be kept in the mind that the any changes in the large social system will affect the sub- legal system. So, if the changes in the society are occurring in very fast pace then the legal system has to go in sync with the society. Which the Juvenile Justice Act has brought into being.

VII. SUGGESTION

To deal with the issue of Juvenile Delinquency in India there can be some suggestions made. In past few years the Indian government has taken lots of steps and made efforts to deal with the problem, and has somewhat implemented also. There were many legislations, act and provisions for juvenile which were laid down and it was founded that they were followed properly. But there can be other suggestions made for example, more often it is found that the members of the Juvenile Justice Board are incompetent in the matter related to child so, they should be trained in a child psychology and should be sensitized in the matter related to children.

In Police Station there are various Special police unit and various provisions to deal with the Juveniles. But the truth is these units are nor in function. So, whenever the cases related to neglected children or police dealing with the juvenile delinquency is take to the station the

police department is not able to handle the matter in way, they are supposed to handle it. They are mostly very insensitive when these matters come to them.

It is suggested that stringent steps should be taken to make the laws pertaining to Juvenile Delinquency be made effective, so that the department or anyone should be able to deal with the matter in a friendly manner.

The shelter and observation Homes around the country should be monitored properly as these are the places where juveniles are sent for reformation and often children become breeding grounds for more offences because instead of giving proper counselling and handling the problem effectively, they create an atmosphere for resocialization of the juveniles into criminal world. There many instances of shelter homes or observation homes being indulged in very serious offences. For the matter of rehabilitation and reformation it is very important that the matter should be dealt tactfully. Participation of community and sensitizing them in the matters related to juvenile delinquency is very important because if they are told that how children are been neglected and how rehabilitation and reformation of children is important it may help in the proper administration of the Juvenile Justice. There are many informal bodies like registered Residential Associations in different areas which can be involved to take care of the cases in which children have very deviant behaviour or parents are just not able to control them effectively. Families plays a very important role in socialization and social control so; families can be involved with other groups to take preventive measures.
