



# Jurisprudence of Juvenile Justice



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## I. Introduction

FROM JESUS to Gandhi, before and after, every sublime soul has beheld divinity in juvenility, and yet with the march of mankind this glorious gift has suffered culpable neglect and callous cruelty for so long and so lawlessly. The hallmark of culture and advance of civilization consists in the fulfilment of our obligation to the young generation by opening up all opportunities for every child to unfold its personality and rise to its full stature—physical, moral, mental and spiritual.

Ages of criminal neglect, despite protests by humanists, thinkers and sages in every country, have given place at long last to a gentler perception of juvenile justice and a chastened jurisprudence of the rights of the child. Human Rights are inalienable and so are the rights of the child. So long as children suffer, are victimised or are not nourished, there is no true humanism in the world. Juvenile jurisprudence, during our heartless century, burgeoned after World War I and blossomed after World War II when the U.N. placed emphasis on the dignity and worth of the child.

The *Convention on the Rights of the Child* (CRC), represents an instrument of infinite significance which binds peoples every where to co-operate “for improving the living conditions of children in every country, in particular, the developing countries and to evolve a viable jurisprudence of juvenile justice.”

The Universal Declaration of Human Rights and the International Covenants on Human Rights, which together make the *magna carta* of mankind, confers rights without discrimination of age, race, sex, religion, birth or other freedoms. The Universal Declaration of Human Rights rightly stresses that childhood is entitled to *special care and assistance*, that the family, as a fundamental unit of society, should focus on children as the new hope of tomorrow and afford all the necessary conditions for growth without which the community will be stunted. So it is that the Universal Declaration specifies in Article 24 that:

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

The voiceless child has title to legal protection before or after birth, according to canons of international justice. But the harsh truth is that the welfare of the child ranks tragically low in the agenda of state action. In our present day world, the trauma and torture, the illiteracy and deprivation, the hard labour and gross neglect which are the

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lot of the Third World's juvenile generation call for sensitive social action, united mass mobilisation and affirmative justice processes. Every child everywhere belongs to one global family and is entitled to a universal minimum of rights and title to fullness of expression and development of faculties. A hundred and thirteen nations, by consensus, promulgated the Vienna Declaration and Programme of Action where the rights of the child and of the *girl child* in particular, have justly received humane emphasis worldwide.

## II. Evolving principles and standards

The Vienna Declaration and Programme of Action makes a humanist summons on nations in the articles relating to the rights of the child. Part D of the Vienna Declaration (dealing with the rights of the child) must become the locomotive of juvenile jurisprudence. The World Conference at Vienna emphasised the principles of "First Call for Children". and underlined "the importance of major national and international efforts especially those of the United Nations Children's Fund (UNICEF), for promoting respect for the rights of the child to survival, protection, development and participation."

The Vienna Conference specifically refers to female infanticide, child prostitution, child pornography as well as other forms of sexual abuse and enjoins that measures be taken by specialised agencies 'to ensure the effective protection and promotion of human rights of the girl-child' and 'urges states to repeal existing laws and regulations and to remove customs and practices which discriminate against and cause harm to the girl child.'

Childhood and youth are subject to many visible and invisible sufferings and disabilities that several conventions and other instruments have been made part of International Jurisprudence by the United Nations. Each nation must have a special ombudsman for juvenile justice, with power,

*suo moto*, to investigate, hear cases, render verdicts and take action, including punishment. Cultural co-operation among nations, acceptance of common values of universal currency and a world watchdog, *which will not become an instrument of imperialism*, but will operate in the juvenile field as a functional Human Rights Commission with teeth is an urgent desideratum. If the Charter of the United Nations and the International Bill of Human Rights are to be taken seriously by humanity worldwide, there is need to transform the Declarations, Covenants, Conventions, Resolutions and Programmes of Action as more than mere pious wishes and paper projects and into stern commands and operational obligations.

The ideals and goals projected in the U.N. instruments are a global gain. But shaping children's future by law, harmonising their lives with the right to health and happy environment has a long way to go. Law in the books and law in action are often different streets. If environmental degradation and betrayal of human health are not corrected by law and affirmative action by the executive, legislative and judicative wings of the state, tomorrow may castigate today as treacherous. So what we need is a conscientisation of the community in the field of child justice without which social justice and sustainable development will be a mockery of democracy.

The Constitution of India provides specifically that affirmative discrimination by way of making special provisions for women and children is permissible. Article 39 (e) of the Indian Constitution shows special concern for children and directs the State to secure conditions in favour of children so that their tender age is not abused nor coerced by economic necessity to enter avocations unsuited to their age or strength.

Article 45 directs the State to provide free and compulsory education for all children until they complete the age of 14 years. There is no doubt whatever that,

violating these obligations, there has been chronic dereliction of duty on the part of the State in keeping vast numbers of children illiterate, uneducated and without protective provisions against the exploitation of childhood in the shape of forced labour and unwholesome activities which condemn them to moral and material abandonment. If the state betrays its obligation, the court and the people must rise to monitor and correct this delinquency.

### III. Goals

The needs of children and our duties towards them have been expressed in the Constitution. The Resolution on a National Policy on Education has been adopted by Parliament and gives direction to state policy on the educational needs of children. India is also party to the U.N. Convention of the Rights of the Child. Goals set out in this document can reasonably be achieved by judicious and efficient use of the available national resources.

(1) *Policy and measures* The vision projected covers a comprehensive health programme nutrition service, formal or informal free and compulsory education, special attention to the children of weaker sections and those who are socially handicapped, delinquent or otherwise in need of rehabilitation. Even in litigation involving them, children's interests are to be given paramount consideration.

Although nominally a National Children's Board was constituted in 1974 and reconstituted in 1981, the majority of Indian children remain illiterate and uneducated. The majority of the 295 million children in India belong to the vulnerable sections and poverty stricken families. 1979 was the International Year of the Child and a whole decade was dedicated for the redemption of children from their neglect, destitution and deprivation. The International Year and the decade have come and gone, the

statistics escalate and the dimension of the problem remains frighteningly colossal.

Although the Constitutional obligation has been unimplemented and the international instrument like the Universal Declaration and the two Covenants and the Convention and Declaration regarding the rights of the child have persuasive force on the state, their fulfillment continues to be a low priority. Nevertheless, we may notice with comfort at least one step forward taken in the shape of the National Policy for Children to which government is committed. It emphasises the importance of education in Human Resources Development.

We may recall the U.N. Convention on the Rights of the Child, particularly Article 28 which provides:

States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall in particular:

- a) Make available primary education; compulsory and free to all;
- b) encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- d) Make educational and vocational information and guidance available and accessible to all children;
- e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

It is heartening that the Supreme Court has taken serious note of some of these obligations of the state towards the child and the Parliament has passed legislation titled the 'Juvenile Justice Act'.

India's 1981 census tells us that 80 million out of 150 million or 52 per cent of India's 6-14 age groups were not attending school and less than half of the 6-11 group were in school. Among those in the primary schools only 40% finished four years of schooling and only 23 per cent reached the VIIIth standard.

We see that not merely is national illiteracy continuing to be chronic, the absolute number of juvenile illiterates has increased from 294 million in 1951 to 482 million in 1991. India is the largest producer of the world's illiterates and the largest number of children without education. The incidence of poverty is often used as an *alibi* for children not going to school, having been diverted to do child labour.

#### **IV. Illiteracy, child labour and poverty**

The vicious circle of child illiteracy, cheap labour, and poverty catalyzing both cannot be used to deny the child its basic right to develop as a full human being. In fact, other countries with rampant poverty have fared better. China is far ahead of us. African countries have advanced beyond us. Among the 21 largest developing countries, India ranks 15th in overall literacy and 12th in the percentage attending primary schools. The denial of education is the denial of the creative potential of the child and a culpable deprivation by the State since education of the young is a categorical imperative.

India's future, bearing in mind that there are over 20 million children below 14 years of age, depends a great deal on juvenile justice in its developmental dimensions. The National Policy is a printed tribute; but if, alongside of it, flourishes ill-health and il-

literacy, child labour, squalor, shanties and infant mortality, the future is bleak and the breach with the nation's trust with destiny with juvenile justice an ominous shock. The challenge of the child continues.

In 1979 (The International Year of the Child), government set up a committee under the Chairmanship of Gurupadswami to submit a report on child labour. That committee notwithstanding, the Ministry of Labour accepted child labour as a "harsh reality", taking the view that abolition of child labour is not an economic feasibility.

The culpability of the establishment is aggravated by the fact that, far from withdrawing children from labour, provision for *training of children to labour better*, is being organised.

For example, in 1978, the Handloom and Handicrafts Exports Corporation (HHEC), a Delhi-based government body had set up a training centre to train children between ages 7 to 14 to weave carpets. This job is declared hazardous and forbidden by law since the woollen fibres around are dangerous for child's lungs, eyes and skin. These children at different ages after undergoing training eight hours a day or one year enter into carpet industry for employment.

During February and May, 1983, a series of reports appeared in the newspaper regarding the rampant child labour in the fire works and match factories of Shivakasi, a town in the district of Ramanathapuram in the state of Tamil Nadu. The children in these factories are made to work nearly 15 hours a day, in spite of the occupation being scheduled as hazardous for children. This issue of

child labour in Shivakasi has ignited a national debate on the question of the legitimisation of child labour<sup>1</sup>.

### V. Social pediatrics

Social 'pediatrics', in the sense of eliminating the infirmities—social, economic and other—of children has received statutory consideration at the hands of our legislatures. Public interest litigation in the area of bonded labour of children has made some change or at least awakened the people to their crime against the younger population. It is an equally well-known fact that trafficking in children is becoming resistant to the law. Cheap labour through *dalal* is something officials blink at, and girl children often ends up in the flesh trade. The worst atrocities relate to the girl child. Middle-men also buy and sell children without the law offering little resistance.

The legislature may reasonably claim that laws against employment of children have been made in partial implementation of the promise of justice to children. The minimum age of employment has been fixed by law and hazardous employment prohibited. The period beginning with 1950 has witnessed spate of legislation based on the Labour Investigation Committee Report (1946). Today it can be claimed that in the eye of the law the right to life, which includes the right to education and development, interdicts child labour which not only risks life and opportunity for growth but also denies those freedoms and facilities *sans* which a child is condemned to midgetry, moronism and penury of creativity. The I.L.O. Convention has gone a long way in the amelioration of children's status. The Plantation Labour Act, The Mines Act, the Factories Act, The Motor Transport Workers' Act, The Beedi and Cigar Workers (Condition of Employ-

ment) Act, The Employment of Children Act (as amended in 1978) have provisions which are benignly disposed towards children.

The present priorities of government ignore the child. The minimum one expected was the implementation of the National Labour Commission recommendations of 1969. Scattered pieces of legislation are not equal to a uniform Code which liberates the child and gives it entitlement for development.

A similar situation holds good regarding child labour, child education, child nutrition, child development. Swami Agnivesh, Chairperson of the United Nations Trust Fund for Contemporary Forms of Slavery, alleged at the Vienna World Conference that child labour is still rampant:

Mahatma Gandhi always said that the test of human rights and human dignity was when "the last among the least" were empowered to realise them first. Amongst these the most defenseless and the most voiceless are the children. The International Labour Organisation has recently estimated the number of contemporary slaves at around 200 million in bonded labour and/or servitude.

He added with anguish:

The working conditions of child labourers are extremely deplorable causing various physical and mental hazards, depriving children the bliss of their childhood, education, and flowering, all of which institute their natural rights. Numerous cases of torture, beating, sexual harassment, and other forms of inhuman treatment are reported which are a reflection of the mediaeval slavery.

1. Jose Varghese, *Law Relating to the Employment of Children in India*, 3-4.

The welfare of a child is indivisible and a holistic approach to project juvenile justice must deal with the negative and positive aspects, as does, to a large extent, the English Children Act. We cannot claim that the Children Act 1960 and the Juvenile Justice Act of 1986 passed in India are as effective as the English counterpart although the inspiration for both came from the English statutes. When we deal with the child we have to deal with parents too, especially in societies where divorce is frequent and poverty is omnipresent. The guardianship of the child must depend upon the interests and well-being of the child, not on the personal law only. Likewise, the question of criminal responsibility of a child, when an offence is committed, needs special attention. The question of neglect and delinquency *vis-a-vis* children is a delicate and sensitive branch of law, and depends very much on concern and commitment for the tender age of the juvenile. In India, more and more crimes are committed by adults *using children as tools*. Here we come upon the need for a Penal Code dealing with young persons which meets the manifold difficulties of the problems of juvenile culpability and curative methodology. Psychiatric inputs may then be necessary to help the court pass appropriate sentences, custodial or non-custodial. After care organisations also call for careful design, depending on the country and culture and social milieu. Certified schools, industrial schools, children's homes and the like, along with foster care, adoption, sponsorship and other human techniques may have to be compassionately created. In India there is not even an adoption law because religious differences have made it difficult for even a facultative national legislation on adoption. Inter-country adoption has its own dangers although the Indian court, at the highest level, has laid down guidelines.

Even so, the fact remains that inter-

country adoption deprives the child of its title to native culture, its citizenship and promotes the likelihood of being a second-class citizen in later years in the foreign country. Racism, cultural discrimination and the helplessness of the child in a foreign jurisdiction cannot be overcome by all that the Supreme Court has laid down.

## VI. Jurisprudence of juvenile justice

The finest hour of juvenile justice jurisprudence arrived in India when the Juvenile Justice Act 1986 was passed. Prior to that, there were many imitative Children Acts producing chaos in operation.

The Children Act, 1960, was preceded by the United Nations Declaration of the Rights of the Child in 1959. Concepts became more refined and juvenile justice was adopted by the U.N. General Assembly in 1985 followed in India by the Juvenile Justice Act, 1986. There is more scientific and comprehensive treatment of the subject in the 1986 law which deals with neglected juveniles as well as delinquent juveniles. Prostitution, narcotic drugs and psychotropic substances, observation homes and places of safety are topics relevant in the juvenile context and have received legislative attention now.

The Indian jurisprudence of juvenile justice is the wayward victim of legislative chaos or statutory slumber. And even when a fine piece has been put on the statute book, meaningful execution is distances away. If inaction is a form of action, the executive is culpable of non-enforcement of the law as any serious student of the subject will agree.

The tragic irony is that the State Children's Acts continue *de facto* in many parts of the country, because the Juvenile Justice Act visualises various structures and functionalities and expenditures and states may not be ready for these matters.

Neglected juveniles and delinquent juveniles fall under different categories and punitive provisions regarding each must necessarily be different. Many miscellaneous matters regarding duties of parents, appointment of officers, people's participation through advisory boards, health care for juveniles and the like find specific statutory expression in the Juvenile Justice Act. Had this juvenile justice legislation been brought into force throughout the country, the protection, development, correction and rehabilitation of younger delinquents would have received therapeutic jurisprudential attention sufficient to meet the obligations under the Constitution.

There are many sins committed by the state which cannot be forgiven but those which relate to the welfare of children deserve condign public censure because the child has the first call on the state's resources. Because children are voiceless and voteless they are neglected with impunity by those in power who will be held guilty by the future.

An ombudsman for juvenile justice with a statutory presence and powers for oversight and report, inspection and audit would impart a democratic dimension to a social sector which cannot be solely entrusted to the bureaucracy.

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