

## A RESEARCH ARTICLE ON THE TOPIC- THE EVOLUTION OF JUVENILE JURISPRUDENCE AND THE GUIDING PRINCIPLES

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### Abstract

The juvenile justice system was created to deal with children broadly categorized as neglected and delinquent juveniles. There are two original justifications for instituting such a separate justice system for children viz. the doctrine of *parens patriae* meaning, parents of one's country and the doctrine of *doli incapex* which means incapable of criminal intent. Consequently, children were treated as quasi-property and economic assets and were considered not as a possessor of any right to liberty but only to custody and that the state must give custody. However, with the adoption of the Geneva Declaration of the Rights of the Child in 1924, the League of Nations for the first time recognized and affirmed that children are also right possessors and that it is the responsibility of adults to uphold and protect them. Subsequently, the United Nations Convention on the Rights of the Child, 1989 became the most universally accepted and the most widely ratified human rights instrument in the history that marked the end of the welfare approach towards children and the beginning of universal acceptance of the rights of the child. The Convention laid down a comprehensive policy for the administration of juvenile justice, wherein the states parties are required to apply the four guiding principles viz. non-discrimination, the best interest of the child, survival and development and child participation, systematically. India ratified CRC in 1992 and defined child uniformly at 18 years irrespective of sex. Further, the JJ Act, 2015 laid down the general principles of care and protection of children. Overall, this paper is an attempt to understand how juvenile jurisprudence evolved over a period of time and how it has taken shape in India.

**Keywords:** the juvenile justice system, *parens patriae*, *doli incapex*, children as right possessor, guiding principles of the UNCRC, juvenile justice system in India.

### INTRODUCTION

"We are guilty of many errors and many faults, but our worst crime is abandoning the children, neglecting the fountain of life. Many things we need can wait. The child cannot. Now is the time his bones are formed, his mind developed. To him we cannot say tomorrow, his name is today". - Gabriela Mistral

It is the birth right of every child to have all opportunities and develop a personality to its fullest stature-physical, moral, mental and spiritual. Every adult was yesterday's child and every child of today will be tomorrow's adult. Childhood days are meant to be enjoyed going to school and playing, learning to relate with others and growing strong and confident through all the love and support received from family and adult members of the community. It is a precious time when the child should be made to live without any fear or insecurity and should be protected from abuse and exploitation.<sup>1</sup> According to the United Nations Convention on the Rights of the Child "child means every human being below the age of eighteen years unless the law applicable to the child, majority is attained earlier".<sup>2</sup>

The juvenile justice system is a system to regulate the processing and treatment of non-adult offenders by providing legal remedies in situations of conflict with law or neglect.<sup>3</sup> "It encompasses legislation, norms, standards, guidelines, policies, procedures, mechanisms, provisions, institutions and bodies specifically applicable to children in conflict with the law who are over the age of criminal responsibility".<sup>4</sup> Protecting children from crimes and preventing children from committing crimes are equally important as they are vulnerable due to their age and lack of understanding. Therefore, legislations incorporating the juvenile justice system have provided for treatment, rehabilitation and settlement of issues concerning juvenile delinquents<sup>5</sup>

<sup>1</sup> The UNCRC, 1989 is the first international human rights treaty to bring together the universal set of standards concerning children in a unique instrument, and the first to present child rights as a legally binding imperative available at <https://www.unicef.org/sowc05/english/childhoodef> last visited on 4/3/2019

<sup>2</sup> Article 1 of the UNCRC (1989)

<sup>3</sup> Donald J. Shoemaker, Gary Jenson Juvenile justice available at <https://www.britannica.com/topic/juvenile-justice> last visited on 4/3/2019

<sup>4</sup> Caroline Hamilton Guidance for Legislative Reform on Juvenile Justice Children's Legal Centre and United Nations Children's Fund (UNICEF) Child Protection Section, New York, p 10 (2011)

<sup>5</sup> "Juvenile delinquents are minors below 18 years of age who has committed some act that violates the law. These acts aren't called crimes as they would be for adults. Rather, crimes committed by minors are called delinquent acts" available at <https://criminal.findlaw/juvenile-justice/juvenile-> last visited on 4/3/2019

and also provisions for care, protection and development of neglected children.<sup>6</sup> It is one of the general principles of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (hereafter The Beijing Rules) that “juvenile justice shall be conceived as an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles, to protect the young and also maintain peace in society”.<sup>7</sup> The juvenile justice system is complex and its administration involves both government bodies and non-governmental organisations such as police, lawyers, adjudicatory bodies, detention facilities, correctional homes, probation services, aftercare programs and community-based non- governmental organizations.

### **The Doctrine of *Parens Patriae***

The unique system of juvenile justice is rooted in the doctrine of *Parens Patriae*. In Latin, the literal meaning is “parent of the country” according to which the “the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents”.<sup>8</sup> The doctrine had its roots in English Common law originated during the reign of King Edward I (1272-1307) with the institution of wardship by which the crown had the prerogative power to exercise various legal rights on behalf of wards.<sup>9</sup> “The king is in legal contemplation the guardian of his people, and in that amiable capacity is entitled (or rather it is his Majesty’s duty, in return for the allegiance paid him) to take care of his subjects as are legally unable, on account of mental incapacity, whether it proceed from first non-age (children): second, idiocy: or third, lunacy: to take proper care of themselves and their property”.<sup>10</sup> Thus initially, the jurisdiction of *parens patriae* was limited to a parental concern for dependent classes only. However, the reformers of the nineteenth and twentieth centuries overlooked two fundamental aspects of the original jurisdiction in their zeal to justify the juvenile court movement- first, the king’s pecuniary interests over the dependent and propertied child and second that children who received royal protection had not violated the norms of society and were therefore not delinquent. Moreover, the motivating reason to apply the *parens patriae* theory was the need to support and care for children, not to reform or rehabilitate them.<sup>11</sup> The reformers considered its application to the delinquents as a mere logical extension of the doctrine that would enable to treat delinquent and dependent child alike. “Consequently, under the banner of *parens patriae*, reformers launched plans to save the delinquent, to relieve the circumstances of his development, and to set him once more on the path of righteousness”.<sup>12</sup>

In the early 19<sup>th</sup> century, the Courts in the United States use this doctrine to justify the state’s interference in protecting children from abusive and neglecting parents and also from the cruel system of criminal justice. In 1838 the Pennsylvania Supreme Court settled the state’s right and authority to take away children from parents who were incompetent and unfit to look after their children. The *Ex parte Crouse* was a case wherein the mother of a girl filed a petition that her daughter was beyond control and that she be taken away. Consequently, she was committed to the Pennsylvania House of Refuge.<sup>13</sup> However, the girl’s father challenged that her constitutional rights were violated as there was no trial conducted before she was removed from the home. The Court dismiss the contention and held that “the House of Refuge was a place for rehabilitation and not of punishment and that although parents have a right to parental control, the right is not absolute, and if parents fail to exercise appropriately, the rights and responsibilities of caring for the child are transferred to the state”.<sup>14</sup>

According to historian Michael Grossberg, “*Ex parte Crouse* can be considered the most influential antebellum judicial analysis of newly created children’s asylum because it expanded the application of the doctrine of *parens patriae* which was later relied upon by legal reformers to support the expansion of the legal powers of juvenile courts”.<sup>15</sup> The absolute authority of the state to deny procedural rights to children otherwise available to adults was justified by asserting that the child has no right to liberty but only to custody. In case of failure to perform parental duties and in case children become delinquent, the state can intervene to rescue the child by providing the required custody. Such process is considered as civil and not criminal and therefore no question arises about the deprivation of the rights of the child for the fact that he is considered not as a possessor of any

<sup>6</sup> “Neglected child means a child less than 18 years of age whose physical, mental or emotional condition has been impaired or in danger of becoming impaired. Such impairment results from parent’s or custodian’s failure to exercise a minimum care in supplying the child with adequate food, clothing, shelter, education or medical care” available at <https://definitions.uslegal.com/n/neglected-child/> last visited on 4/3/2019

<sup>7</sup> Rule 1.4 of The Beijing Rules defines juvenile justice as an integral part of social justice for juveniles.

<sup>8</sup> Black’s Law Dictionary, 6th Edition, p 1114

<sup>9</sup> Lawrence B. Custer ‘The Origins of the Doctrine of Parens Patriae’ (1978) 27 Emory Law Journal 195.

<sup>10</sup> J. Chitty, A Treatise on the law of the prerogative of the Crown 155 (1820) available at <https://archive.org/details/atreatiseonlawp00chitgoog/page/n174> last visited on 10/10/2019

<sup>11</sup> George B. Curtis, The Checkered Career of Parens Patriae: The State as Parent or Tyrant? 25 DePaul L. Rev. 895 (1976)

<sup>12</sup> Ibid at 900

<sup>13</sup> The House of Refuge established in 1826 was to rehabilitate juveniles who are accused of or guilty of committing criminal offences. After the amendment of the law of the House, it was made possible to admit girls below 18 and boys below 21 for incorrigible and vicious conduct for reformation and not as a punishment.

<sup>14</sup> *Ex parte Crouse*, 4 Wharton 9 (PA 1839)

<sup>15</sup> Available at <https://www.encyclopedia.com/children/encyclopedia> last visited on 3/3/2019

right to liberty but only to custody and what the state does is give custody to which they are entitled. “Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in a comparable context. The constitutional and theoretical basis for this peculiar system is to say the least debatable”.<sup>16</sup>

### **The Doctrine of ‘Doli Incapex’**

According to Professor Colin Howard, “no civilised society regards children as accountable for their actions to the same extent as adults...The wisdom of protecting young children against the full rigour of the law is beyond argument. The difficulty lies in determining when and under what circumstances should it be removed”.<sup>17</sup> Thus across the world, there is a separate justice system that deals with children in conflict with the law, as they are recognised as incapable of understanding the implications of their actions. In civil matters, a minor’s contract is void ab initio<sup>18</sup> and under criminal law, a child is exempted from criminal liability.<sup>19</sup>

The Hebrew law originated the notion of legal responsibility whereby crimes committed were classified as intentional and unintentional. This was further elaborated in Greek philosophy and Roman law under which a child or an insane was not criminally responsible because a child is excused by the innocence of his intentions and the insane by the fact of his misfortune.<sup>20</sup> “Children were considered incapable of “inner depravity” in their early years as they can “will nothing of good or ill” and this concept was uniformly accepted by the Patristic Fathers, the writers of moral treatises, the followers of Abailard and Aquinas, and eventually the judges and jurists of England in the fourteenth century”.<sup>21</sup> Therefore, under the Common law system, the doctrine of *doli incapex*<sup>22</sup> means children below certain age are presumed to possess insufficient discretion and intelligence to distinguish between right and wrong. The doctrine has two aspects; first, there is a conclusive presumption of innocence of children below specific age regardless of whether the child understands if his actions are right or wrong. A child under this category is absolutely immune from criminal liability because of his age in which case the presumption of *doli incapex* is irrebutted. The second aspect is that children between certain ages are considered not to possess the capacity to have criminal intent. However, for this category of children, the presumption of innocence is rebuttable subject to proving that the child is innocent and not otherwise. Here, the prosecution must not argue that children of that age normally know and understand what he did was seriously wrong, but must prove that the child in question has that capacity. “The sort of evidence that might displace the presumption could include the child’s response in an interview, a psychological or psychiatric assessment, and evidence from parents, teacher, and social worker about the child’s general ability to distinguish right from wrong”.<sup>23</sup>

According to Article 40 (3) of Convention on the Rights of the Child (hereafter CRC), the States parties should establish a reasonable minimum age below which children should be presumed incapable of committing criminal offences, however, it makes no mention of any specific minimum age for criminal responsibility (hereafter MACR).<sup>24</sup> “Rule 4 of The Beijing Rules recommends that the beginning of MACR shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity”.<sup>25</sup> Therefore, the Committee on the Rights of the Child considers 12 years as an internationally acceptable MACR and encouraged States Parties to increase their lower MACR to 12 years as the absolute minimum age and to raise it to a higher age level.<sup>26</sup> The lowest age of criminal responsibility at 7 years is found in India, Saudi Arabia and Thailand. In England, Wales, Northern Ireland, South Africa, New Zealand and Australia it is 10 years,<sup>27</sup> while in Scotland it is 8 years,<sup>28</sup> being the lowest in Europe.<sup>29</sup> 35 states in the United States do not have MACR, while the rest has it

<sup>16</sup> In Re Gault, 387 US 1 p 17 (1967)

<sup>17</sup> Howard Colin, Criminal Law 4<sup>th</sup> ed. p 343 (1982)

<sup>18</sup> In latin, it means void from the beginning, never legitimate or valid.

<sup>19</sup> Criminal liability involves both an act or omission (actus reus) and the mental intention to do so (mens rea). For the mens rea to exist, a person needs to have the mental capacity to understand the consequences of what is done.

<sup>20</sup> Anthony Platt and Bernard L. Diamond, The origin of “Right and Wrong” Test of Criminal Responsibility and its Subsequent Development in the United States; An Historical Survey, California Law Review Vol 54: 1227 1966

<sup>21</sup> Ibid

<sup>22</sup> In Latin, doli incapex means incapable of criminal intention or malice.

<sup>23</sup> Wortley Natalia, “Hello, Doli...or is it Goodbye?” International Journal of Mental Health and Capacity Law, p 234 Nov 2007

<sup>24</sup> CRC General comments no.10 (2007) Para 31- the minimum age to criminal responsibility means the following-

“Children who commit an offence at an age below that minimum cannot be held responsible in a penal law procedure. Even (very) young children do have the capacity to infringe the penal law but if they commit an offence when below MACR the irrefutable assumption is that they cannot be formally charged and held responsible in a penal law procedure. For these children special protective measures can be taken if necessary, in their best interest”;

“Children at or above the MACR at the time of the commission of an offence (or infringement of the penal law) but younger than 18 years can be formally charged and subject to penal law procedures. But these procedures including the final outcome must be in full compliance with the principles and provisions of CRC as elaborated in the present general comment.”

<sup>25</sup> UN Minimum Standard Rules for the Administration of Juvenile Justice (The Beijing Rules) adopted by the General Assembly Resolution 40/33 of 29 Nov 1985, Rule 4

<sup>26</sup> Committee on the Rights of the Child, General Comment No.10 para 32 (2007)

<sup>27</sup> Section 16 Of the Children and Young Persons Act, 1963

<sup>28</sup> Sec 41 Of the Criminal Procedure (Scotland) Act 1995

<sup>29</sup> The Report of the Advisory Group on the Minimum Age of Criminal Responsibility, para 1.1 March 2016

ranging from 6 to 10 years. Norway, Sweden and Finland among the Scandinavian countries have set their MACR at 15 years which is actually above the UN standard. However, beyond these countries, Brazil, Luxembourg, Peru and Uruguay have gone further with the highest MACR at 18 years.<sup>30</sup>

Therefore, based on these two doctrines of *Parens Patriae* and *Doli Incapax*, children were considered as quasi-property and economic assets and not as a possessor of any right to liberty but only to custody. Children were recognised and treated as a separate group different from adults but their welfare was considered as a matter of charity but there was no recognition of the rights of children.

## GUIDING PRINCIPLES OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD

With the adoption of the **Geneva Convention in 1924**, the League of Nations for the first time recognised and affirmed that children are also right possessors and that it is the responsibility of adults to uphold and protect them. Later in 1989, the **United Nations Convention on the Rights of the Child** adopted by the United Nations General Assembly became the most universally accepted and the most rapidly and widely ratified human rights instrument in history. The Convention marked the end of the welfare approach towards children and the beginning of universal acceptance of the rights of the child.<sup>31</sup> The treaty has been ratified by one hundred ninety-five countries<sup>32</sup> which implies a wide global commitment towards the cause of children. The Convention brought a new perspective towards children as right holders and not merely objects of charity.<sup>33</sup> The Convention laid down a comprehensive policy for the administration of juvenile justice, wherein the states parties are required to apply the four guiding principles systematically. These principles are viz. non-discrimination, the best interest of the child, survival and development and child participation which are provided under Articles 2, 3, 6 and 12 of the Convention respectively. It also provides for the fundamental principles of juvenile justice which are found in articles 37 and 40. We shall now discuss these guiding principles as follows;

### 1. The principle of equality and non-discrimination

The appalling human rights violation and the gruesome Holocaust experience of the Second World War brought a realisation that the world needed a protector of every human individual which was possible through the United Nations. **The UN Charter** sought to promote the human rights of every individual irrespective of race, sex, language or religion, thereby making equality and non-discrimination a fundamental part of its mission. Similarly, the CRC emphasises the State's obligation to treat children including children in conflict with law equally and to protect them from discrimination.<sup>34</sup> To protect children from discrimination, attention must be given particularly to vulnerable groups such as street children, girl children, children belonging to racial, ethnic, religious or linguistic minorities, indigenous children, children with disabilities and repeated child offenders.<sup>35</sup> In this regard professionals such as police officers, prosecutors, judges and others involved in the administration of juvenile justice must be trained and well informed about the child's physical, psychological, mental and social development.

The Committee on the Rights of the Child recommends that the state parties should abolish provisions criminalising status offenses. Those offences relating to behaviours of children like homelessness, truancy and other similar acts are mostly a consequence of psychological and socio-economic problems and they are offences only when committed by children and not otherwise. Therefore, such provisions should be abolished to establish the equal treatment of children and adults under the law. These problems should be addressed by tracing the root cause and bringing a cure through protective and rehabilitative measures instead of adopting punitive measures. In this regard, the Committee referred to the UN Guidelines for the Protection of Juvenile Delinquency (the Riyadh Guidelines) which reads: "In order to prevent further stigmatization, victimization and criminalization of young persons, legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person".<sup>36</sup> Furthermore, discrimination against children in conflict with law particularly concerning access to education and employment is another issue that needs to be addressed. There should be a

<sup>30</sup> How young is too young? The age of criminal responsibility" available at <https://www.sbs.com.au/news/how-young-is-too-young> last visited on 4/3/2019

<sup>31</sup> Ved Kumari ed.al "Creative child advocacy Global Perspectives" p 24 Sage Publication 2012

<sup>32</sup> Available at <https://unric.org/en/latest-un-buzz/29608-somalia-ratifies> last visited on 24/4/2019

<sup>33</sup> Available at <https://www.unicef.org/crc/> last visited on 24/4/2019

<sup>34</sup> Article 2 of CRC- Non-discrimination-

(1). "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."

(2). "States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members".

<sup>35</sup> Committee on the Rights of the Child, General Comment 10 (2007) on "Children's Rights in Juvenile Justice" P 4

<sup>36</sup> Article 56 of the United Nations Guidelines for the Prevention of Juvenile Delinquency, 1990 (Riyadh Guidelines)



mechanism to provide adequate support and assistance for their peaceful reintegration in society and encouraging them to play a constructive role in society.<sup>37</sup>

## 2. The principle of the 'Best interest of the child'

The preamble of the **Declaration of the Rights of the Child, 1959** reads "whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth...whereas mankind owes to the child the best it has to give." To achieve this end, the UN General Assembly laid down ten guiding principles<sup>38</sup> with the 'best interest of the child' as the cardinal principle in their upbringing including his education and that primary responsibility rest with the parents. The **Convention on the Rights of the Child, 1989** established 'the best interest of the child' as one of the guiding principles.<sup>39</sup> The term 'best interest of the child' has no standard definition; it broadly describes the well-being of the child which is determined by various factors such as the child's age and maturity, the parent's absence or presence in the life of the child, the environment where the child was brought up and his childhood experiences. Jean Zermatten proposes a definition of the 'best interest of the child' as: "The best interests of the child are a legal instrument which aims at ensuring the wellbeing of the child on the physical, psychological and social level. It establishes an obligation for public or private authorities to examine whether this criterion is fulfilled at the time when a decision must be taken on behalf of a child, and it represents a guarantee that his/her long-term interests will be taken into account. It must be used as a measuring unit when there are several competing interests".<sup>40</sup>

The Committee held that "all decisions taken within the context of the administration of juvenile justice must be taken in the best interest of the child, especially since children have different psychological, physical, emotional and educational needs. It is for this reason that the Committee felt that children must be treated differently in the criminal justice system: that they should be considered as being less culpable and their treatment processes should be geared towards social reintegration, applying principles of restorative justice".<sup>41</sup> The Committee in its concluding observations stated the 'best interest of the child' is an all-embracing principle amid an extensive interdependent rule contained in the Convention. It is not only a guide to unknown troubles and issues that may arise but also helps in giving a suitable interpretation when various provisions of the Convention do not agree with each other.<sup>42</sup>

Philosophically, though the person of a child is recognised, yet he or she has not yet developed fully to know all his or her rights and therefore still needs adult validation. It is the concept of the "best interest of the child" which validates this position of the child. "The interest of the child is thus a concept that is impossible to circumvent; it has many faults, inaccuracies, subjectivity, and relativity. But it has also enormous qualities: its flexibility, its adaptability, its richness to respect completely different legal, cultural and socio-economic contexts. It cannot be detached from the context of the CRC and it must be connected to the other rights, in particular, Article 2, the principle of non-discrimination and Article 12, right to have the child's views taken into account and the child's participation (Article 14, 15,16)".<sup>43</sup>

## 3. The principle of Survival and development

The principle of survival and development is fundamental to the life of children which is to be applied at all stages and in all settings, even to delinquent juveniles within the juvenile justice system. The Convention

<sup>37</sup> Article 40 (1) CRC

<sup>38</sup> The Declaration of the Rights of the child lays down ten principles which are as follow-

1. "The right to equality, without distinction on account of race, religion or national origin".
2. "The right to special protection for the child's physical, mental and social development".
3. "The right to a name and a nationality".
4. "The right to adequate nutrition, housing and medical services".
5. "The right to special education and treatment when a child is physically or mentally handicapped".
6. "The right to understanding and love by parents and society".
7. "The right to recreational activities and free education".
8. "The right to be among the first to receive relief in all circumstances".
9. "The right to protection against all forms of neglect, cruelty and exploitation".
10. "The right to be brought up in a spirit of understanding, tolerance, friendship among peoples, universal brotherhood".

<sup>39</sup> Article 3 CRC:

1. "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".
2. "States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures".
3. "States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision".

<sup>40</sup> Zermatten Jean, The best interest of the child from the literal analysis to the philosophical scope, working report 3 P 18 (2003)

<sup>41</sup> Committee on the Rights of the Child, General Comment 10 (2007) on "Children's Rights in Juvenile Justice"

<sup>42</sup> Thomas Hammerberg, the principle of the best interest of the child- what it means and what it demands from the adults, Commission for Human Rights, Council of Europe p 3 2008

<sup>43</sup>Supra note 26 at 29

affirms the earlier declaration of the inherent rights of children to survive and to growth and development.<sup>44</sup> It further mentions that it should guide and inspire state parties to develop effective national policies and programs for the prevention of juvenile delinquency because delinquency hampers the child's development. Deprivation of liberty hinders a child's harmonious development as well as his or her reintegration in society; therefore "it should be used only as a measure of last resort and for the shortest appropriate period so that the child's right to development is fully respected and ensured".<sup>45</sup>

Development in the case of juveniles deprived of liberty is challenging as it would mean providing suitable facilities of education and other vocational training within the institutions for the holistic development of the child. However, in reality, juveniles are often kept in poor conditions with no such proper facilities and hardly any contact with the family. Upon release, such children face difficulties in finding employment because they have no skills and also in reintegrating with their family and community.<sup>46</sup> Furthermore, Article 37(a) of the CRC prohibits the imposition of capital punishment and life imprisonment without the possibility of release to persons below 18 years of age for committing an offence. This prohibition extends to an adult who is tried for an offence committed while he was below 18 years of age.

#### **4. The principle of the Child's opinion**

The fourth guiding principle laid down by CRC is that of the child's opinion considering the developing ability of the child.<sup>47</sup> To determine the best interests of the child, the child must be allowed to express his or her opinion in all matters affecting him or her without any restraint. In addition to this general right, is the right to be heard or to be represented in any administrative or judicial proceedings affecting the child without limitations such as children's education, health, living conditions or protection, separation of parents, custody, care and adoption, children in conflict with the law etc.

The right of the child to participate by exercising his right to be heard at every stage of the juvenile justice procedure has been greatly emphasised and it has acted as a powerful force not only for improvement and reform but the development of policies and programmes in all relevant contexts of children's lives.<sup>48</sup> Merely providing the right to be heard would not suffice but that the state must ensure that children are given the right to express their views free from any form of coercion, undue influence or restraint. For this reason, authorities dealing with children such as police, prosecutors and judges must be trained to deal with children in a friendly manner. Besides, legal and other appropriate assistance should be provided to the child to defend his or her case.<sup>49</sup> The elements of a fair trial that applies to adults are similarly applied to children in addition to which they have the right to support from parents or guardians and the right to privacy.

The interdependence between Articles 3 and 12 is quite interesting and important. They play a complementary role: while Article 3 establishes the objective to achieve the best interest of the child, Article 12 says that if the child has the capacity to understand matters concerning his interest than he or she should be given the right to express himself or herself without any restraint and thus is a method towards reaching that goal. "In fact, there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives".<sup>50</sup> Therefore, depending on the age and majority, the child's opinion should be given due weight. However, the child cannot take this burden alone but that by way of expressing his opinion, he or she gets the right to participate instead of having no voice whatsoever

### **JUVENILE JUSTICE SYSTEM IN INDIA**

In England and Wales, they prefer the use of the phrase 'young persons' than 'juveniles' as the term 'juvenile' carries with it, connotations of childish and immature behaviour which can be seen as labelling. Their system is "neo-correctional, characterised by stressing the responsibility of parents and children, the need for early intervention and prevention, a focus on victims and the need for effectiveness in treatment".<sup>51</sup> Even though they have separate courts for children, they are criminal court and the juveniles are treated under the same procedure as adults.

<sup>44</sup> Article 6 CRC- survival and development-(1). States Parties recognize that every child has the inherent right to life. (2). States Parties shall ensure to the maximum extent possible the survival and development of the child.

<sup>45</sup> Article 37 CRC- Torture and deprivation of liberty (b) No child shall be deprived of his or her liberty unlawfully and arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

<sup>46</sup> Supra note 3 at 28

<sup>47</sup> Article 12 CRC- The child's opinion (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

<sup>48</sup> Committee on the Rights of the Child, General Comment No. 12 (2009), The right of the child to be heard, U.N. Doc. CRC/C/GC/12

<sup>49</sup> Article 40 (2)(b)(ii)

<sup>50</sup> Supra note 43 at 18

<sup>51</sup> Ian Blakeman, The Youth Justice System of England and Wales, the 139<sup>th</sup> International Training Course, visiting experts' papers, Resource Material series no 78 UNAFEI, 2009

The American juvenile courts on the other hand, functioned under the *parens patriae* model wherein they have a separate court for children without the requirement for the formal procedure and the judges play a parental role in rescuing the juveniles rather than punishing them. The first Juvenile court was established in Chicago, Illinois, in 1899 which became a model to Europe, Japan and the commonwealth nations in language, procedures and objectives. Looking at the history, “the juvenile court has proceeded in three waves. The first wave encompassed its creation, development, and its spread nationally and internationally; the second brought procedural safeguards and lawyers to juvenile court. The third wave, which crested in the mid-1990s, included a strong punitive current that washed away many of the court’s distinguishing features (e.g., closed hearings and confidential records) and made it much easier to prosecute children in the adult criminal justice system”.<sup>52</sup> The juvenile justice system in India took the American model. It aims at providing care, protection, treatment, development and reintegration of children in difficult circumstances by adopting a child-friendly approach. The twin doctrines of *parens patriae* and *mens rea* have provided the basis and sustenance for this process in India.<sup>53</sup> Even though both the Hindu and the Muslim laws have provisions for the maintenance of children, the juvenile justice system as a separate system developed in India during the British rule as a result of developments in the west in the field of prison reforms and juvenile justice.

The Apprentices Act 1850 was the first legislation that enabled orphans and poor children, along with juveniles between 10-18 who committed petty offences as apprentices to learn trades, crafts and employment so that they grow up with certain skills to earn a livelihood. The Act for the first time included both categories of children viz. children in need of care and protection and delinquent children and it became a prelude to all the other children related legislations to come in the future. The All India Jail committee 1919-1920 recommended a separate system for young offenders so they can be brought under reforming influences. It was pointed out that children should be treated differently from the adult; they should not be kept with adult criminals in jails as they can be easily influenced and that they should be given a chance to start afresh.<sup>54</sup> This was one of the remarkable achievements of the growth of the juvenile justice system in the country.

The Children Act 1960 was the first central legislation applicable only in the Union Territories prohibiting incarceration of children under any circumstance and it provided a separate adjudicatory body called a children court to deal with juvenile delinquents and a child welfare board to deal with neglected children. This Act also introduced the three important child institutions viz. observation homes, special homes and children homes. The Act became a model for the states. The Juvenile Justice Act, 1986 brought a uniform juvenile justice system for the entire country except for the state of Jammu and Kashmir. The Act prohibits the detention of children in police custody or jail instead, they are to be treated and rehabilitated. Under the Act, children mean girls below 18 years and boys below 16 years. However, the Act was repealed and replaced by the Juvenile Justice (Care and Protection of Children) Act, 2000 in conformity with the Convention on the Rights of Children and other United Nations Instruments signed by India, thereby bringing about a uniform age of 18 years for both girls and boys. It was twice amended in 2006 and 2011 and now repealed and replaced by the current Juvenile Justice (Care and Protection of Children) Act, 2015. Under the prevailing system, there is the Juvenile Justice Board to deal with children in conflict with the law and the Child Welfare Committee to deal with children in need of care and protection.

Under the Indian Penal Code, 1860, a child below 7 cannot be held liable for any offence, and a child between 7-12 cannot be held liable unless proven that the child is not innocent.<sup>55</sup> Therefore, the MACR in India is 7 years but a child below 18 years cannot be prosecuted for any offence under IPC. Under the Juvenile Justice Act, children should be treated to bring about reformation and rehabilitation and should not be penalised at all circumstances.

The stages of growth and development of juvenile justice in India have a similar experience as that of the western countries, the American system in particular. In its initial stage, it was the concept of ‘welfare of the child’, then there was a paradigm shift from ‘welfare’ to ‘rights’ of children and now it is focused on punishing the juvenile in case of a heinous crime. The Juvenile Justice (Care and Protection of Children) Act, 2015 came in the wake of the Nirbhaya incident which led to lowering the age of children in case of a heinous offense<sup>56</sup> by making it possible to send a child between 16-18 years in jail in exceptional circumstances. It was considered

<sup>52</sup> Steven Schlossman & David S. Tanenhaus Juvenile Court, *The Child: An Encyclopedic Companion* (Richard A. Shweder et al. Eds., p 527 (2009)

<sup>53</sup> Ved Kumari, Current issues in Juvenile Justice in India Vol 41:3&4 *The Indian Law Institute* P 392 (1999)

<sup>54</sup> Para 386-Non-criminal children in bad surroundings Report of the Indian Jails Committee, 1919-1920 P 204 available at <https://archive.org/details/eastindiajailsco01indi/page/204> last visited on 30/9/2019

<sup>55</sup> Criminal liability involves both an act or omission (*actus reus*) and the mental intention to do so (*mens rea*). For the *mens rea* to exist, a person needs to have the mental capacity to understand the consequences of what is done. Sec 82 of the Indian Penal Code excludes criminal liability of children below 7 years of age, however under sec 83 IPC, criminal liability may be excluded by proving that the child above the age of seven but below the age of 12 years has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion

<sup>56</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015 Sec 2(33) “heinous offences” includes the offences for which the minimum punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force is imprisonment for seven years or more.

as a step backward in juvenile justice because various research reports suggest that treating children as adults by sending to prisons has proven to be more harmful as they commit more offences in their later life compared with those treated under the juvenile justice system.<sup>57</sup>

### CONSTITUTIONAL SAFEGUARDS FOR CHILDREN

The Constitution as the highest law of the land has special provisions dealing with children. It encompasses most rights of CRC as the fundamental rights in part iii and as Directive Principles of State Policy under part iv of the Constitution, thereby not only adopting positive discrimination by making special provisions for children but directing the States to take positive steps to ensure healthy growth and development of children. Article 15 (3) empowers the state to make special provisions for the welfare of children. Article 24 prohibits the employment of children below 14 years of age in factories. Article 21A provides the right to education to all children from the age of six to fourteen years. Article 39 provides certain principles of policy to be followed by the State, Clauses (e) and (f) in particular are provisions dealing with the rights of children to enjoy a healthy childhood. Besides these special provisions for children, they also have equal rights just as any other adult male and female citizens of India such as right to equality, right against discrimination, right to personal life and liberty and due process of law, right to be protected from being trafficked and forced into bonded labour and right of weaker sections of the people to be protected from social injustice and all forms of exploitation. In *Satto v State of UP*, V K Krishna Iyer J observed, "Juvenile justice has constitutional roots in Articles 15(3) and 39(e) and the pervasive humanism which bespeaks the super parental concern of the State for its child citizens including juvenile delinquents. The pharmacopoeia of India, in tune with the reformatory strategy currently prevalent in civilised criminology, has to approach the child offender not as a target of harsh punishment but of humane nourishment".<sup>58</sup>

### GENERAL PRINCIPLES OF JUVENILE JUSTICE UNDER JJ ACT, 2015

India has ratified the UNCRC in December 1992 and is obliged to follow the general principles laid down in the convention in administering juvenile justice. Besides, the Juvenile Justice (Care and Protection of Children) Act, 2015 lays down 16 fundamental principles<sup>59</sup> drawn from the international standards which will guide the Central Government, State Governments, the Board, and other agencies while implementing the provisions of this Act. They consist of the principle of presumption of innocence, principle of dignity and worth, principle of participation, principle of the best interest, principle of family responsibility, principle of safety, principle of positive measures, principle of non-stigmatising semantics, principle of non-waiver, principle of equality and non-discrimination, principle of right of privacy and confidentiality, principle of institutionalisation as a measure of last resort, principle of repatriation and restoration, principle of fresh start, principle of diversion and principle of natural justice. The legislative intent behind these principles is found in the aims and objects of the Act; to ensure care, protection, development, treatment and social integration of children in a challenging situation by adopting measures which will best suit the needs of the child keeping in view the best interest of the child.

### CONCLUSION

Juvenile justice is a vital part of the justice system in a civilised society and cannot be treated with disregard, for the future of a nation depends on their children. As they are in a formative stage of development, their beliefs, opinions and personalities are evolving and changing and so there is a potential to mould and shape them. Punishment does no good in addressing the root cause of offending but will only hinder their growth and development, throwing them off course and may convert them into hardened criminals as proven and suggested by various research reports. Therefore, the focus should be on early intervention to prevent delinquency emphasising the child's right to family, education, rehabilitation and social reintegration. "Intervention with youth offenders before they graduate to serious crime is a basic principle of the juvenile justice system".<sup>60</sup> "The prevention of juvenile delinquency is an essential part of crime prevention in society. By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non-criminogenic attitudes. The successful prevention of juvenile

<sup>57</sup> Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services, Centre for Disease Control and Prevention, MMWR 2007 available at <https://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm> last visited on 10/10/2019

<sup>58</sup> *Satto and Others v. State of U.P* AIR 1979 SC 1519

<sup>59</sup> Sec 3 Juvenile Justice (Care and Protection of Children) Act, 2015

<sup>60</sup> Butts, J. Mayer, S. & Ruth, G. Focusing Juvenile Justice on Positive Youth Development, Issue Brief, # 105 Chicago: Chaplin Hall Center For Children October 2005



delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents, with respect for and promotion of their personality from early childhood”.<sup>61</sup>

Juvenile jurisprudence has been continuously evolving and developing since its inception. No matter what, the fact remains that childhood experience shapes adult behaviour and children will continue to need special attention and treatment not only for their good but for the greater good of our society. Therefore, protecting children from crime and preventing children from committing crimes are like two sides of the coin. Unless a safe and healthy childhood is ensured, there can be no hope of a worthy generation who can build a better future.

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