

UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD VIS-À-VIS
CHILD IN CONFLICT WITH LAW IN INDIA: AN APPRAISAL

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ABSTRACT

United Nations Convention on the Rights of the Child is a prominent international instrument that recognizes very basic rights pertaining to a child. It is concerned with the overall well being of the children of the whole world. Fortunately, India has ratified it and made laws in accordance with the said Convention and some other International Instruments have also been taken into account. However, aftermath Nirbhaya Gangrape case, a new legislation was introduced by the Indian Parliament in the area of juvenile justice. It is generally argued that the Juvenile Justice (Care and Protection of Children) Act, 2015, a recently passed law on juvenile justice, is functioning to some extent contrary to the International Instruments.

In this backdrop, the author has endeavored to highlight the relevant provisions relating to child in general and also of children alleged or found to have infringed any penal law existing in the United Nations Convention on the Rights of the Child and the Juvenile Justice (Care and Protection of Children) Act, 2015 and analyzed the extent of compliance made by India in the area of juvenile justice system. Attempt has also been made by the author to suggest the required improvements in the law as well as the functioning of the institutions.

Keywords: Child below 18 years of age, child in conflict with law, offences, police, Juvenile Justice Board

INTRODUCTION

Undoubtedly, children are the main asset of each and every country. They are the future leaders. It is therefore indispensable for the government to create and have an environment which is conducive for the well being of children. The State is under obligation to strive for care, protection and development of the children. As children are dissimilar to adults, so they seek special attention of everyone. It is because of this reason that Juvenile Justice System

works differently from Criminal Justice System. Each country has its own Juvenile Justice System based on different models. They derive their source from International Instruments.

In Indian context, the truth is which is axiomatic also that the Indian Juvenile Justice Law is based upon many such International Instruments. These are “the Standard Minimum Rules for the Administration of Juvenile Justice, 1985, UN Guidelines for the Prevention of Juvenile Delinquency, 1990, UN Convention on the Rights of the Child, 1989, UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990, Standard Minimum Rules for Non-Custodial Measures, 1990, Economic and Social Council Guidelines for Action on children in the Criminal Justice System, 1996” etc. All these instruments are important and provide a foundation to have effective juvenile justice system.

In this paper, the author has focused upon to highlight relevant provisions of the United Nations Convention on the Rights of the Child, hereinafter known as UNCRC and that of the Juvenile Justice (Care and Protection of Children) Act, 2015, hereinafter known as JJA, 2015 and then attempt has been made to explore the extent of compliance to UNCRC made by the Indian government in safeguarding the interest of “child in conflict with law”.

UNCRC AS AN IMPORTANT CONVENTION ON CHILD’S RIGHTS

The UNCRC is most the significant conventions ratified by almost every country except USA¹. India has also ratified it. This Convention has talked about the rights of children in general, covering almost every aspect of child’s well being. The below are important provisions of UNCRC that form the base for an effective juvenile justice system. These are²:

- Child is a human being who has not completed the age of 18 years.³
- It is mandatory for the State Parties to take necessary steps for ensuring non discrimination and no punishment for children on the basis of the status, activities, expressed opinions or beliefs of parents, legal guardians or family members.⁴

¹ See <https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens> (last visited on February 11, 2022).

² Convention on the Rights of the Child, available at: <https://www.ohchr.org/documents/professionalinterest/crc.pdf> (Visited on February 2, 2022).

³ *Ibid.* See art.1.

⁴ *Ibid.* See art.2.

- Paramount interest of the child shall be a primary concern of all public and private social welfare institutions, legislature, judiciary and executive. Well being of a child must be ensured, taking into account the rights and duties of persons legally responsible to him or her. All institutions involve for the care and protection of a child shall abide to the set standards laid down by the competent authorities. The area of safety, health, and suitability of staff members should specifically be focused upon.⁵
- It is incumbent on the State Parties to respect the rights, duties and responsibilities of the parents, legal guardians or other persons responsible for the well being of the child to provide necessary directions and guidance as provided and recognized in the Convention.⁶
- The State Parties will have to respect the right to life inherent for the welfare of the child. They have to ensure the survival and development of the child as far as possible.⁷
- The child must be registered immediately after birth.⁸
- The State Parties should ensure that a child should remain with his or her parents unless it is very necessary to keep the child separate for his or her welfare. The State Parties are also duty bound to maintain good relations and direct contact of the child with the parents on regular basis if he or she is kept separated from his or her parents.⁹
- If the child is capable of forming his or her own views regarding any matter affecting him or her, the State Parties are under duty to assure such rights and due weightage should be given in accordance with the maturity of the child. Opportunity of being heard shall be provided to the child in accordance with the procedure given in the domestic law before any judicial and administrative proceedings.¹⁰
- The State Parties should also guarantee to the child his freedom of speech and expression in all modes. This freedom cannot be absolute so certain exceptions may be imposed on such freedoms.¹¹

⁵ *Ibid.* See art.3.

⁶ *Ibid.* See art.5.

⁷ *Ibid.* See art.6.

⁸ *Ibid.* See art.7.

⁹ *Ibid.* See art.9.

¹⁰ *Ibid.* See art.12.

¹¹ *Ibid.* See art.13.

- The freedom of religion and conscience of the child subject to certain restrictions shall be maintained. It is also provided that any advice or directions given by the parents to the child for his or her betterment shall also be respected.¹²
- The State Parties should also guarantee to the child his or her freedom of peaceful assembly and association. Reasonable restrictions may also be provided to such freedom.¹³
- The State Parties should also take care about the child's privacy particularly his or her honour and reputation.¹⁴
- Mass media is to be encouraged to help children in the promotion of social, spiritual and moral, mental and physical well being of the children.¹⁵
- It is the duty of the State Parties to ensure that both parents shall take part in the nurturing and development of their child. The paramount interest of the child will be taken into account. In the discharge of such functions the State Parties shall provide all necessary assistance to the parents, guardians and other institutions.¹⁶
- It is also the responsibility of State Parties to ensure protection of the child from all forms of violence or exploitations while the child is under the care of his or her parents or guardians.¹⁷
- The State Parties are under duty to provide special assistance and protection in the form of alternative care to the child if he or she is deprived of his or her family environment because of certain reasons.¹⁸
- In case of adoption, the State Parties should take special care about the child welfare.¹⁹
- Differently abled child is entitled for free special care and support which suites his or her dignity and self reliance.²⁰
- The State Parties should ensure the best health and rehabilitation facilities to the child.²¹

¹² *Ibid.* See art.14.

¹³ *Ibid.* See art.15.

¹⁴ *Ibid.* See art.16.

¹⁵ *Ibid.* See art.17.

¹⁶ *Ibid.* See art.18.

¹⁷ *Ibid.* See art.19.

¹⁸ *Ibid.* See art.20.

¹⁹ *Ibid.* See art.21.

²⁰ *Ibid.* See art.23.

- The State Parties should ensure that the facilities provided for the child's care, protection and treatment should be periodically reviewed.²²
- The State Parties should also ensure that the child be given such standard of living as required for his or her overall physical, spiritual, moral and social development.²³
- The children have a right to education.²⁴
- The State Parties should also ensure the right to play and comfort and other recreational activities as required to his age group. His or her right to participate fully in artistic and cultural activities shall also be ensured to the child.²⁵
- The State Parties should take special care that no child should be met to any cruel and inhumane treatment. Life imprisonment or death penalty should not be awarded to any child for any offence committed by him or her. Liberty of a child should not be curtailed arbitrarily or unlawfully. It is therefore necessary that his or her arrest, imprisonment or detention should be strictly conformed with the law and can be done as a last resort.²⁶
- Any child alleged or accused of committing any offence have human rights and shall entertain certain guarantees like to be presumed innocent until proven guilty. He shall be immediately informed of allegations and shall be not compelled to give testimony or to confess guilt etc.²⁷
- Children and adults shall be made aware about the Convention.²⁸

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015

The JJA, 2015 is a newly enacted statute governing the juvenile justice system in India which has replaced the Act of 2000²⁹. It was progressive in nature and had made several important milestones in the juvenile justice system, but with the passage of time, it was felt that the Act of 2000 was inadequate in redressing the issues of juveniles. The fuel was further added to the already existing of issues of juveniles by the happening of very unfortunate brutal

²¹ *Ibid.* See art.24.

²² *Ibid.* See art.25.

²³ *Ibid.* See art.27.

²⁴ *Ibid.* See arts. 28 and 29.

²⁵ *Ibid.* See art.31.

²⁶ *Ibid.* See art.37.

²⁷ *Ibid.* See art.40.

²⁸ *Ibid.* See art.42

²⁹ See The Juvenile Justice (Care and Protection of Children) Act, 2000 (Act 56 of 2000).

gangrape in Delhi in 2012. The media, ignoring its accountability, swayed people by drifting in emotions and even some prominent politicians having political interest started criticizing vehemently the Act of 2000 as ineffective particularly in respect to children in conflict with law³⁰. The cumulative effect was that a major step was taken and the Act of 2000 got repealed finally. The new Act, however, was passed hastily ignoring views of legal scholars, Judges and leaders³¹.

The Juvenile Justice Act of 2015, like earlier Act of 2000, has adopted the standards prescribed in the International Instruments³² and aims to deal with “children in conflict with law” and “children in need of care and protection” more effectively. It lays down that the goal will be achieved by “catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation”³³.

In relation to “child in conflict with law”, the relevant provisions are discussed below:

- The Act specifically says that a child³⁴ is one who has not completed the age of 18 years.
- The Act defines the expression “child in conflict with law as a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence”³⁵. This definition is wider than that so provided in the Act of 2000. By this definition, it is now clear that a child is entitled to be governed and protected under Act of 2015. The protection will be available not only to those against whom allegation of commission of any offence has been made but also that child who has been convicted.

³⁰ See <https://indianexpress.com/article/opinion/columns/dont-appease-the-mob/> (last visited on February 4, 2022).

³¹ See <https://indianexpress.com/article/india/india-news-india/changes-in-juvenile-law-crime-against-kids-say-experts-rajya-sabha-debate-today/> (last visited on February 4, 2022).

³²The Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (1993), and other related international instruments.

³³ See The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016), Preamble.

³⁴ *Ibid*, s.2(12).

³⁵ *Ibid*. See s.2(13).

- The Act provides that there are some fundamental principles³⁶ which must be kept in mind while dealing with cases of child in conflict with law, or example principle of presumption of innocence, principle of dignity and worth, principle of participation, principle of best interest, etc.

This provision is welcome one. The legislators had appreciated the need of these principles so emphasized by UNCRC and therefore, they expressly laid down in the Act itself.

- Under the Act of 2015, the matters concerning to the children in conflict with law are dealt by Juvenile Justice Board³⁷. It is a three member Board comprising of a Principal Magistrate and two social workers. The Board has to follow child-friendly procedure, non intimidating venue of sitting and which does not resemble to a regular court³⁸.
- The Act introduces the provision of Children's Court³⁹. These courts are having jurisdiction to try children in conflict with law of age belonging 16-18 years who have been alleged to have committed heinous offences.
- The Act has also made distinction in offences. The Act talks about three categories of offences, namely petty offences, serious offences and heinous offences.⁴⁰
- If any child is apprehended by police, he or she has to be placed under the charge of specialized officer and has to be produced before the Board within twenty four hours of the apprehension. He or she shall not be placed in police lock up or in jail.⁴¹
- Under this Act, bail is a general rule and the rejection of bail is an exception.⁴²
- Under the Act, on the apprehension of a child alleged to be in conflict with law it is mandatory for the officer to inform his or her parents or guardians and direct them to be present before the Board before which the child would be produced.⁴³
- The Board has to ensure fair and speedy inquiry in relation to a child in conflict with law. For example, the Board has to satisfy itself that the child in conflict with law has

³⁶ *Ibid.* See s.3.

³⁷ *Ibid.* s.4

³⁸ *Ibid.* s.7

³⁹ *Ibid.* See s.2(20).

⁴⁰ *Ibid.* See ss. 2(33), 2(45) and 2(54).

⁴¹ *Ibid.* See s.10.

⁴² *Ibid.* See s.12.

⁴³ *Ibid.* See s.13.

not been subjected to any ill-treatment by the police or lawyer or probation officer etc. The proceedings will be conducted in simple manner as far as possible and in a child-friendly atmosphere. He or she will be given an opportunity of being heard and participate in the inquiry etc.⁴⁴

- Such child shall not be sentenced to death or for life imprisonment without the possibility of release.⁴⁵
- The important change which has been made by the Act is the introduction of the “transfer system”. It is meant for children of 16-18 age groups. If any child of such age has been alleged to have committed any heinous offence, he or she may be transferred by the Board to the Children’s Court. If the Children’s Court is also satisfied that he or she should be tried as an adult then the Court will proceed as such.
- If any such child is convicted, he or she shall not suffer any disqualification and all the relevant records of conviction of such child shall be destroyed after the expiry of the period of appeal or within a reasonable period.

ANALYSIS

- **DEFINITION OF CHILD**

The present Act is in consonance with Article 1 of UNCRC. It specifically says that a child means a human being not completed 18 years of age.

- **NON DISCRIMINATION & NO PUNISHMENT TO A CHILD**

The Act has partially complied with Article 2.2 of UNCRC. The Act has made discrimination both on the basis of age as well as on the basis of offence. The Act also envisages for punishment to such children except death penalty and life imprisonment.

- **BEST INTEREST OF THE CHILD AND CHILD’S RIGHT TO LIFE**

In theory, the Act seems to be in consonance with Articles 3 and 6 of UNCRC but in practice, things are very different. At various stages, the principle of best interest of the child is compromised. Particularly, in Child Care Institutions, much attention is required on the part of government. The minimum standards so prescribed by the competent authority in the areas of health, safety, number and eligibility of staff are

⁴⁴ *Ibid.* See s.14.

⁴⁵ *Ibid.* See s.21.

not meted out properly. This also hampers children's right to life and their proper development.

- **CHILD NOT TO SEPARATED FROM THE PARENTS AGAINST THE WILL**

The Act provides that a child may be apprehended by the police. This provision is not in consonance with Article 9 of UNCRC. In such apprehension by the police, there are many chances of torture and harassment of the children. This may also cause negative impact on the child's mind.

- **RIGHT TO EXPRESSION**

The Act has taken care of this very right, enshrined in Articles 12 and 13 of UNCRC. In fact, it is Board's responsibility to make sure engagement of child and also provide opportunity of being heard at the proceedings. In practice also, the children being innocent in nature dare to express their views freely and also encouraged by the Board.

- **NON ARBITRARINESS AND NON INTERFERENCE IN PRIVACY etc.**

With regard to Article 16 of UNCRC, the Indian law seems to be partially complied with. Use of the expression "apprehension" in the Act itself invites arbitrariness and interference, sometimes unlawful, at the hands of the police. Again non destruction of records of conviction in special circumstances also results in interference in privacy, reputation and honour.

- **RESPONSIBILITY OF PARENTS TO UPBRING AND DEVELOP CHILD**

The Act says that it is the first responsibility of parents for overall development of the child which is in consonance with Article 18 of UNCRC. In India, due to rise of broken families, children are not getting due environment which is necessary for their proper development. There are many areas where government assistance is required.

- **RESPONSIBILITY OF STATE TO TAKE APPROPRIATE MEASURES FOR CHILD PROTECTION**

The Act envisages protection of the children. It covers two types of children, namely, "child in conflict with law and child in need of care and protection". Residential care is provided to these children aiming to cater their basic needs. All measures are taken to protect them from all kind of violence, injury, abuse, exploitation, maltreatment etc. In this sense, the Act functions in consonance with Article 19, UNCRC.

Where in any case a child is cut off his or her family atmosphere for temporary or permanent period, such child shall be entitled to special assistance and protection by the State. There are provisions for alternative care which may include, foster placement, adoption etc. This is in accordance with Article 20, UNCRC.

Special attention is also given in the light of Article 23, UNCRC to those children who are mentally retarded or differently abled. The Model Rules, 2016⁴⁶ has taken care of it. Each child care institution is supposed to have special infrastructure and facilities meant for differently abled children. Provisions for having Mental Health services are there. But again in practice, position is different.

The Act and the Model Rules, 2016 recognize child's right to hygiene and health and to have access to health services. It is in tune with Articles 24 and 25 of UNCRC. Each child care institution has a Doctor and nursing staff. First aid boxes are also maintained. In case of emergency, facilities of District Hospitals are availed of. Periodic review of the treatment is also done.

- **RIGHT TO EDUCATION, REST AND LEISURE, PLAY, CULTURAL, ART AND RECREATIONAL ACTIVITIES**

The Act and the Model Rules have explicitly mentioned that adequate educational facilities must be provided to the children. Adequate facilities for sports, leisure, recreational activities are to be provided. All these provisions are in tune with Articles 28, 29 and 31, UNCRC. But again in reality, no serious steps have been taken by the government. With regard to education, provision only for basic education is there. Children in conflict with law are not having proper access to education, sports, recreational activities and of vocational training programmes. This lacuna causes serious hurdles in reintegrating those children in the society.

- **NO TORTURE, CRUELTY, INHUMANE TREATMENT OR PUNISHMENT TO CHILDREN**

The Act and the Model Rules aim to protect children from every ill treatment. It is the duty of authorities, officials, and personnels working under the Act of 2015 to satisfy themselves that no child should be subjected to torture, cruelty, inhumane treatment or

⁴⁶ See The Juvenile Justice (Care and Protection of Children) Model Rules, 2016.

punishment. The Act provides that a child will not be awarded to capital punishment or life imprisonment.

However, as we know that there is provision of different treatment of children 16-18 years of age alleged to have committed any heinous offences, such children may be subjected to punishment in contravention to Article 37, UNCRC. Further, the provision of “apprehension” of a child by police also deprives children of their liberty. There is always possibility that such apprehension might have been done arbitrarily. Further, the Convention provides that arrest, detention or imprisonment should be the last resort and for limited period. Here again, this provision is violated because apprehension of a child in conflict with law is a general practice and not last resort and duration might not be shortest one. All this are not in tune with Article 37 of UNCRC.

- HUMAN RIGHTS AND CERTAIN GUARANTEES OF A CHILD ALLEGED OF COMMITTING ANY OFFENCE

The Act explicitly guarantees basic human rights of a “child in conflict with law” in consonance with Article 40, UNCRC. However, the Act has been criticized on the ground that preliminary assessment done by Board relating to commission of heinous offence by a child above 16 years of age, is itself contrary to the general principle of presumption of innocence.

CONCLUSION

India has ratified the UNCRC in 1992 and thereby it becomes obligatory for the nation to abide by the principles and provisions provided in the Convention. Undoubtedly, India’s odyssey for juvenile justice system has been progressive one till 2015. All efforts have been made to make laws in conformity to the UNCRC, particularly after ratifying it. However, the current Act, that is, the JJA, 2015 has been labeled by some eminent legal scholars as a step taking the country to hundred years back. With the enactment of the Act, our country is moving from reformation to retribution. Provisions like transfer of children (16-18 age groups) in some cases, no fresh start provision for such children, misuse and arbitrariness etc are the areas which should be relooked and reconsidered by the government.

Another aspect which has to look upon is that of residential care both institutional based and community based. There is wide gap between theory and practice. Children are not able to develop their personality because they are not living in child friendly atmosphere. Education is not adequately been provided to them. Little attention is paid to recreational activities, sports activities and in vocational training programmes.

It is high time for the government to come forward and do more positive things in order to strengthen the existing juvenile justice system. International Instruments must be considered while making laws and policies. These instruments do provide requisite help and give solution to various problems.

