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JUVENILE JUSTICE POLICY IN INDIA THROUGH THE LENS OF INTERNATIONAL HUMAN RIGHTS STANDARDS

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ABSTRACT

Young minds are highly amenable to traumatic and dysfunctional early-childhood experiences and environmental factors and tend to fall into delinquent behaviour patterns. An innocent juvenile does not become a delinquent overnight; it is the trilogy of emotion, volition, and cognition that helps in serving a backbone to this cognition and drives him to commit severe and heinous offences. In fact, an overwhelming majority of those who come into the juvenile justice system are either from really impoverished backgrounds or have some form of mental illness or cognitive disability.

The Juvenile Justice System in India is dynamic and has evolved in respect of its acquiescence to various international conventions regarding the treatment and special protection of two categories of juveniles those who are ‘in conflict with law’ and those ‘in need of care and protection’. However, with the increasing magnitude of crimes committed by juveniles and nationwide agitation, legislators, judges, and the general public wonders till what length such safety net can be extended.

Through this research paper, the author finds out the merits and challenges of having a separate criminal justice system to deal with juvenile delinquents. The author analyses how India’s juvenile justice system is framed as per its adherence to several international agreements, conventions, or standards with an aim to reform and rehabilitate juvenile offenders. This can be done by developing meaningful opportunities for engaging them in educative and productive activities that will help them pull themselves out from a life of crime and destitution towards a life of productive sustenance. Further, the author also looks at the provisions of adoption, foster care, and other welfare facilities made available for the welfare of the children who are abandoned, orphaned, or neglected in India. At the end, the paper shall also attempt to critically analyse the challenges faced by the juvenile justice system in India.

Keywords: *juvenile justice, Doli Incapax, child in conflict of law, care and protection, human rights, international conventions, rehabilitation*

INTRODUCTION

Beginnings of Juvenile Justice Law and Policy:

“...in the prodigious misery and ignorance of the swarming masses of mankind in England, the seeds of its certain ruin are sown, I never saw that Truth so staring out in hopeless characters, as it does from the walls of this place. The children in the Jails are almost as common sights to me as my own; but these are worse, for they have not arrived there yet, but are as plainly and certainly travelling there, as they are to their Graves...”¹

The aforementioned is an extract from a letter sent by Charles Dickens on September 16th, 1843 to Angela Burdett-Coutts, the richest heiress of England at the time, sketching out the awful situation of the Ragged schools—charitable organizations set up in the 19th century England to provide for the refuge of the poor and destitute children and orphans of the working class. These schools were set up with the idea of ‘the correction and instruction of profligate youth’ in institutional treatment².

In the early 18th century, with the beginnings of industrialization, there was widespread migration from the rural to the urban areas as the vast population became employed as workers in the factories. These workers lived on very low wages and substandard living conditions. Most of them weren’t able to provide the very basic amenities for their children, let alone the more social welfare aspects such as family support, good environment, etc. this forced many young children to fall into the life of crime to fulfil their own needs and desires. This was the time when juvenile crimes became an issue requiring attention from the State authorities. Initially, the juvenile offenders were treated as “miniature adults” and subjected to the ordinary criminal justice system. Gradually, discussions were initiated and a common understanding was arrived at on this subject. It was believed that although the youth are most susceptible to fall into the life of crime and become easy vehicles through which organized crime groups carry out their criminal activities, they do not have the requisite intellectual maturity to look into the long-term consequences of their criminal behaviour. Also, an effort must be made to provide them with better living conditions so as to

¹ Ian Dooley, “Charles Dickens Describes a Ragged School to Angela Burdett-Coutts”, Cotsen Children’s Library, Princeton University, June 3, 2016. Retrieved Dec 26, 2020, from <https://blogs.princeton.edu/cotsen/2016/06/the-ragged-school-a-letter-from-charles-dickens-to-angela-burdett-coutts/>

² ‘Ragged school’, Encyclopædia Britannica, June 25, 2008. Retrieved Jan 04, 2021, from <https://www.britannica.com/topic/ragged-school>

prevent or reduce delinquent behaviour. Consequently, with the efforts of the wealthy upper-class and philanthropists of England, several charitable institutions such as ragged schools were set up to fulfil the said objective.

“Historically the concept of juvenile justice was derived from a belief that the problems of juvenile delinquency in abnormal situations are not amenable to the resolution within the framework of traditional process of criminal law.”³ A series of legislative Acts were passed from 1847 onwards, like Apprentice Act⁴ and Reformatory School Act⁵ prescribing a reformatory and rehabilitative legal regime for treatment of Juvenile delinquency⁶. During the same time, the move to establish special courts for juveniles was initiated, for the first time, in 1847, in United States of America (USA). The first ‘Juvenile Court’ was established in 1899 in Chicago under Juveniles Offenders Act, and in England the first Juvenile court was set up in 1905. Also, the first probation law was enacted in the State of Massachusetts, USA, in 1878 and in England in 1887. In 1908, the Children’s Act was passed establishing a separate juvenile court for the first time dealing with both crime and welfare issues for children.

Taking from these developments taking place in the US and UK, several other nations’ also implemented similar laws and institutions and eventually, the subject became a matter of importance in the international community.

For understanding the concept of Juvenile Justice, it is pertinent to understand the definition of ‘child’ or a ‘juvenile’, in strictly legal sense. The term is not to be defined subjectively, but in a more numerical sense, leaving little scope for ambiguity or discretion. This is important for several reasons such as: determining the age of criminal responsibility, affixing the age of consent (for marriage and sexual relationships), fix the age of legal employment, and also for deciding the age up till which they may be legally entitled to several rights, benefits, and welfare-protection schemes under the law. Juvenile Justice Policy arrived in India and most other nations through dynamic and strong international collaborations such that, universally there is a common criterion for the trial and treatment of juveniles. In the international fora, the term ‘child’ was first defined

³ Ved Kumari, “The Juvenile Justice System In India: From Welfare to Rights”, 2nd ed. 2011

⁴ Health and Morals of Apprentices Act 1802 (42 Geo III c.73)

⁵ [1854 Youthful Offenders Act \(the Reformatory Schools Act\)](#)

⁶ Watson, John. “Reformatory and Industrial Schools.” Journal of the Royal Statistical Society, vol. 59, no. 2, 1896, pp. 255–317. JSTOR, www.jstor.org/stable/2979776. Accessed 4 Jan. 2021.

in the United Nations Convention on Rights of Child, 1989. As stated by the CRC, 'a child means every individual under the age of eighteen years unless, under the law applicable to the child, majority is attained earlier'.⁷ This has generally become an accepted definition worldwide and the same is incorporated under various statutes in the Indian law⁸.

2. INTERNATIONAL POSITION ON DIFFERENTIAL TREATMENT OF JUVENILE OFFENDERS:

2.1. International Conventions, Rules, and Guidelines:

At this time, with the increase in concerns relating to child protection and their rights, several nations have initiated discussions to adopt measures within their legal framework to safeguard the interests of the juveniles. International conventions such as UN Convention on Rights of Child, 1989⁹ (hereinafter referred to as 'CRC' or 'UNCRC'), Beijing Rules 1985,¹⁰ Riyadh Guidelines¹¹, Declaration on Social and Legal Principles relating to the Protection and Welfare of Children prescribe the internationally recognized standards for the treatment of children and most domestic legislations are based on these.

It is pertinent to note that the UN Convention on Rights of Child, 1989 ratified by 195 countries is in fact, one of the most ratified human rights treaties in the international domain.¹² The Convention

⁷ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, at Art. 1; Summary of United Nations Convention on the Rights of the Child, available at <https://rightsofthechild.org/convention-summary.htm>
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, General Assembly resolution A/RES/54/263 of 25 May 2000, Retrieved Jan 5, 2021, from <https://www.ohchr.org/en/professionalinterest/pages/opaccrc.aspx>

⁸ National Policy for Children, 2013 – a child is any person below the age of eighteen years
Indian Majority Act, 1875 – Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before.

Juvenile Justice (Care and Protection of Children) Act, 2015 – a person who has not completed eighteen years of age.
⁹ Adopted by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49

¹⁰ United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") Adopted by General Assembly resolution 40/33 of 29 November 1985

¹¹ United Nations Guidelines for the Prevention of Juvenile Delinquency Adopted and proclaimed by General Assembly resolution 45/112 of 14 December 1990

¹² "What is the Convention on the Rights of the Child?", UNICEF, Retrieved Jan 5, 2021 from <https://www.unicef.org/child-rights-convention/what-is-the-convention>

draws attention to four sets of Civil, Political, Social, Economic and Cultural rights of every child, which includes right to good standard of life, free from all forms of exploitation, along with support for childhood development and care, social security, and right to education and participation.

The basic objective enshrined in these conventions is that member-states must endeavour to develop conditions that will ensure for the juvenile a meaningful life in the community, afford necessary protection and assistance so that it can fully assume its responsibilities within the community, and will foster a process of personal development and education that is as free from crime and delinquency as possible.¹³ In this sense, the juvenile justice law and policy mainly deals with two categories of juveniles - those who are ‘in conflict with law’ and those ‘in need of care and protection’.

While dealing with the first category, it provides special protection to the juvenile delinquents in terms of their prosecution and punishment. Juvenile Delinquency¹⁴ refers to the participation of minors in illegal crimes. At the point when an individual digresses from the typical course of his public activity his conduct is named as a "delinquent". All in all, when a juvenile's activities end up being perilous towards society and for him, he might be known as a juvenile delinquent.

Until the late 18th century, children in conflict with the law were treated in the same way as an adult in the criminal system, however gradually legislators and world leaders recognized that children below a certain age do not possess the requisite emotional, mental and intellectual maturity and hence, they must be dealt with differently than the ordinary criminal justice system. The primary basis for this differential treatment lies in the concept of Minimum Age of Criminal Responsibility (MACR)¹⁵ and the doctrine of Doli Incapax¹⁶. Section 82 of the Indian Penal Code (IPC) is premised on this and provides “absolute immunity from criminal legal responsibility to a child below seven years.”¹⁷ In certain cases, if it’s ascertained that the child has not yet attained

¹³ U.N. Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), Nov. 29, 1985, at Rule 1.1

¹⁴ Merriam-Webster. (n.d.). Juvenile delinquency. In *Merriam-Webster.com dictionary*. Retrieved Dec 23, 2020, from <https://www.merriam-webster.com/dictionary/juvenile%20delinquency>

¹⁵ The Minimum Age of Criminal Responsibility (MACR) is the minimum age of a child that is deemed not to have committed a crime. This concept is adopted by countries all over the world under various domestic legislations.

¹⁶ Merriam-Webster. (n.d.). Doli incapax. In *Merriam-Webster.com dictionary*. Retrieved Dec 24, 2020, from <https://www.merriam-webster.com/dictionary/doli%20incapax>

¹⁷ Indian Penal Code, 1860, Chapter IV – General Exceptions at Section 82

the ability and maturity to understand the nature of the act and its legal consequences, the age to make the child criminally responsible is raised to 12 years.

However, there is still some dissent regarding the age-determination of the juvenile across several world systems so as to make him criminally liable. Hence, the Beijing Rules of 1985 provides certain flexibility to fix the age-limit of juvenility according to a country's peculiar economic, social, political, cultural and legal system and defines a juvenile as “a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult”¹⁸.

In regard to detaining the juvenile offenders, the Havana Convention¹⁹ reiterates that deprivation of the liberty of a juvenile should be a measure of last resort²⁰ and for the minimum necessary period and should be resorted to only in exceptional cases. Further, pursuant to the recommendations adopted in the resolution of 21 July 1997, certain Guidelines for Action on Children in the Criminal Justice System were developed popularly known as the Vienna Guidelines²¹, to pursue the goals set forth in the Convention with regard to children in the context of the administration of juvenile justice, and also facilitates the implementation of obligations under various international instruments by providing assistance to States parties.

The aforementioned instruments deal more so with the treatment of juvenile offenders under the criminal system. The Riyadh Guidelines, on the other hand, discuss the prevention of juvenile delinquency through a child-centered approach that focuses on the harmonious and humanistic construction of young children in the society by engaging them in productive and socially useful activities.

2.2. Psycho-Social Reasons and Theories:

Apart from the obligations under international conventions, the merits of treatment of child offenders under a separate criminal justice system also have a sociological basis. One of the

¹⁸ U.N. Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), Nov. 29, 1985, at Rule. 2.2(a).

¹⁹ United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 14 December 1990

²⁰ Du Toit, C. (2006), “A measure of last resort? Child offenders and life imprisonment.” SA Crime Quarterly, 2006(17), 13-18. Retrieved Jan 5, 2021, from <https://core.ac.uk/download/pdf/231097917.pdf>

²¹ Guidelines for the Action on Children in Criminal Juvenile System Recommended by Economic and Social Council resolution 1997/30 of 21 July 1997

reasons is the Labelling Theory²². When the society labels someone as deviant, it changes the individual's self-perception and they deliberately engage in behaviours that are "deviant" so as to conform with the ideation the society has thrust upon them.²³ In essence, labelling "leads the deviant individual to satisfy himself through the self-fulfilling prophecy²⁴ by complying oneself to the ascribed label²⁵. Therefore, if we subject the child to the same treatment as an adult in the criminal court, we effectively label him as a "criminal" and make them believe that they do not deserve to be treated like other children and are beyond reform. Hence, it becomes practically impossible to reintegrate them into the society, without making them feel stigmatized and excluded at every cornerstone of opportunity.

Further, attempting a child like an adult opens an impressionable mind to a court situation wherein they are constantly faced with a thorough examination of their activities, character, and conduct, and a conventional judgment on their guilt is pronounced. An early involvement with the criminal equity framework can have long haul negative ramifications. The impact this has on a juvenile child is especially solid since adolescence is the period in which children build up key aspects of their social identity.

Incarcerating juveniles in the adult prisons can pose a great problem for their safety and security. At the first instance, they may be victimised to sexual and emotional abuse and physical assault. Secondly, they may seek solace with hardened criminals and attempt to engage in similar behaviours nullifying any capacity of reform.

In the above context, it seems proper to evolve an appropriate policy framework for the protection, care and development of neglected children who fall into the life of crime or in extreme deprivation. This must not only include proper legislations establishing Child Welfare

²² Sherry Lynn Skaggs, "Labeling theory", Encyclopædia Britannica, October 27, 2020. Retreved on January 05, 2021, from <https://www.britannica.com/topic/labeling-theory>

²³ Vrishank Singhania, "The Revolving Door of Juvenile Justice in India", Socio-Legal Review, [National Law School of India University, Bangalore](#) Journal ISSN No.: 0973-5216, Retrieved Dec 16, 2020, from <https://www.sociolegalreview.com/post/the-revolving-door-of-juvenile-justice-in-india>

²⁴ Lee Jussim, "Self-fulfilling prophecy", Encyclopædia Britannica, August 01, 2016. Retrieved Jan 05, 2021, from <https://www.britannica.com/topic/self-fulfilling-prophecy>

²⁵ J Macionis and L Gerber, *Sociology* (7th edn, Pearson Education Canada 2010) 200.

Committees²⁶ till the grassroot level, but should also involve the active cooperation and participation of individuals, groups, communities and civil society at large.

3. JUVENILE JUSTICE LAW IN INDIA:

3.1. Child in Conflict with the Law:

Historically, both Hindu and Muslim laws had recognized juveniles as intellectually inferior and thus absolves children of all criminal liability. In the Manusmriti, a fine is charged upon the guardian for the act of a child littering streets²⁷ and the Islamic Law (Sharia) forbids the execution of juveniles²⁸ and entails them to a separate justice system.

In the nineteenth century, extending similar provisions to British India, the first ‘ragged school’ for orphans and vagrant children in India was established in 1843 through the exertions of an Englishman. The imminent need of the situation led to the introduction of the Apprentices Act of 1861.²⁹ Thereupon, the Reformatory Schools Act 1876,³⁰ later modified in 1897,³¹ was enacted that permitted a youthful offender sentenced to imprisonment or transportation or undergoing imprisonments, to be sentenced to a reformatory school instead of being detained in a prison with other adult offenders. The Code of Criminal Procedure of 1898,³² provided special treatment to juvenile offenders. The Code introduced the concept of committing juvenile offenders up-to the age of fifteen years to Reformatory Schools and provided probation for good conduct to offenders up-to the age of twenty-one.

²⁶ Juvenile Justice (Care and Protection of Children) Act, 2015 at Chapter V, Available at <http://cara.nic.in/PDF/JJ%20act%202015.pdf>

²⁷ Muller, M.F. (1886). The laws of Manu. oxford: clarendon press.

²⁸ Unnithan, N. Prabha (edited. 2013). Crime and Justice in India; ch.13, Kethineni Sesha & Braithwaite Jeremy, towards a compliance model: The Indian Supreme Court and the Attempted Revolution in Child Rights. New Delhi; sage publication,p.306.

²⁹ Act No. 52 of 1861.

³⁰ Act No. V. Of 1876.

³¹ Act No. 8 Of 1897.

³² Act No V of 1898

After Independence, Part III and Part IV of the Constitution of India which deals with Fundamental Rights and Directive Principles of State Policy respectively provides for special provisions with respect to children³³. The Fundamental Right against Exploitation provides for prohibition of traffic of children³⁴ and employment in hazardous occupations³⁵. Article 39³⁶ directs the State to undertake to ensure the child such protection and care as is necessary for his or her well-being and to secure facilities for the healthy development of children. Subsequently, Children Act, 1960 was enacted. However, at this point, the Juvenile Justice system was plagued with uneven standards, norms and practices. This was also highlighted in the case of *Sheela Barse vs State Of Maharashtra*³⁷ and the Supreme Court directed that such beneficial statute should be brought into force and administered without any delay uniformly across tall states. These loopholes were sought to be removed by the Juvenile Justice Act 1986.

As regards the contemporary times, until 2012, the Juvenile Justice (Care and Protection of Children) Act, 2000³⁸ was the primary legal framework which provided a blanket protection to all offenders who came under the definition of ‘child’ i.e., every human being below the age of eighteen years. However, in hindsight of the Delhi Gang Rape Case 2012,³⁹ this law faced nationwide criticism as regards its inadequacy to deal with heinous and grave offences committed by juveniles. This made the legislators as well as courts question till what length such safety net can be extended, and thereby, the Juvenile Justice (Care and Protection of Children) Act, 2015⁴⁰ was passed by the Parliament to better deal with the new challenges brought about by the rapidly evolving society. The fundamental change that this Act brought about was including a provision according to which, an adolescent between the age of sixteen to eighteen years, who is accused of committing a heinous offence, can be tried as an adult in the criminal courts of India. This provision is based on a presumption that an individual who has the cognitive ability and intellectual

³³ The Constitution of India, 1950, Art. 15(3), “State to make special provisions for children and women”.

³⁴ The Constitution of India, 1950, Art. 23, “Prohibition of traffic in human beings and forced labour”.

³⁵ The Constitution of India, 1950, Art. 24, “No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment”.

³⁶ The Constitution of India, 1950, Art. 39(e), "Directs the State to safeguard the tender age of children from entering into jobs unsuited to their age and strength forced be economic necessity".

³⁷ 1983 AIR 378, 1983 SCR (2) 337

³⁸ Juvenile Justice (Care and Protection Of Children) Act, 2000 Available at <https://rb.gy/ahtwno>

³⁹ **Mukesh v. State (NCT of Delhi)** [\(2017\) 6 SCC 1](#)

⁴⁰ Juvenile Justice (Care and Protection of Children) Act, 2015 Available at <http://cara.nic.in/PDF/JJ%20act%202015.pdf>

maturity to indulge him in a criminal activity of such a nature, has the capacity to understand the nature of the act and can also form a rational judgment about the consequences of such an act. Hence, he must be also subjected to the ordinary procedure because such acts are dangerous to the members of the society.

Apart from this the Act⁴¹ upholds the salient features of the previous Act which it has replaced. In Chapter II Section 3 of the Act it enumerates various principles, such as the ‘principle of presumption of innocence’, ‘principle of best interest’, and ‘principle of fresh start’, etc., which will be the guiding principles in the adjudication of any dispute involving an individual below eighteen years of age.

Other provisions have also been introduced under this Act. For ‘juveniles in conflict with law’. Observation Homes and Special Homes, and or the ‘child in need of care and protection’, Comprehensive Children’s Homes, Shelter Homes and the After-Care Organizations have been directed to be established by the States. The states must be proactive in setting up contemporary modes of dispositional alternatives like counselling and community services in accord for the rehabilitation and social re-integration of the conflicted or neglected children. Provisions for adoption, foster care and sponsorship have been added. The police has been assigned specialized role in accordance with Beijing Rules to commit any juvenile immediately to the Child Welfare Committee, Juvenile homes or any other authorised and reliable place for their safe custody. A Special Juvenile Police Unit (SJPU) is also required to be set-up in every police station. Awareness and education programmes are also to be conducted regularly in areas with high-risk factors. All this will collectively help us to reduce delinquency and promote welfare.

3.2. Child in need of Care and Protection:

Every child deserves a life measured by meaningful developmental process as these early childhood experiences have long-standing impact on child’s mental, psycho-social, and moral development of the child. Young minds need to be fostered with love, respect, care, and require guarded protection so that they can grow up to become mentally healthy and productive members of the society. “A country’s future is moulded by its youth who have the potential of becoming

⁴¹ Juvenile Justice (Care and Protection of Children) Act, 2015 at Chapter II, Available at <http://cara.nic.in/PDF/JJ%20act%202015.pdf>

responsible citizens and a utilitarian human resource.”⁴² However, not every child is fortunate enough to be raised in a healthy environment. Many are abandoned by their families, or are put into labour, human trafficking, or are severely neglected and impoverished. Hence, there is a need to have some laws in place to deal with these problems and provide a stable environment for a child to be brought up in. This requirement is highlighted in various international instruments as well.

Article 3 of the CRC provides that 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. It states that the child’s superior interest will be said to have been satisfied when all his basic rights to enjoyment of life are fulfilled, and this puts the State under an obligation to make appropriate measures in this regard. It also makes it clear, that this guideline must be kept in mind in the interpretation of the other rights established in the Convention when the case refers to children.”⁴³ The ultimate objective of protection of children in international instruments is the harmonious development of their personality and the enjoyment of their recognized rights. It is the responsibility of the State to enumerate the measures it will adopt to foster this development as per its own capacity and supporting the family in performing their natural function of providing protection to the children as the members of the family.⁴⁴

The international law has reaffirmed time and again that the child is the responsibility of its parents and should grow in an environment of affection and of intellectual and material security. Concerned at the large masses of youngsters who are abandoned or become orphans owing to domestic violence, armed conflicts, natural disasters, or socio-economic crises, the international community has encouraged the development of traditional alternative care institutions such as the Kafalah of Islamic Law or other valuable alternative institutions which provide substitute care to

⁴² Mengi, Nancy. (2020). Children in Need of Care and Protection in India: Needs, Concerns and Predicaments. Journal of scientific and industrial research. 3179-3190.

⁴³ I/A Court H.R., Case of the Girls Yean and Bosico v. Dominican Republic. Preliminary objection, Merits, Reparations and Costs, Judgment of September 8, 2005. Series C No. 130, para. 134.

⁴⁴ See I/A Court H.R., Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 53 and 137.

In this regard, the best interests of the child imply a rejection of doctrines like the “irregular situation doctrine,” which makes the child an object of compassion or repression and in large part is premised on an undue perfectionism or paternalism; but it also implies a rejection of doctrines that largely ignore the vulnerability of children and adolescents in a manner inimical to proper satisfaction of their basic needs.

children who have been neglected or orphaned’ in accordance with 2009 Guidelines for the Alternative Care of Children endorsed by the United Nations.

Article 20 and 21 of the CRC provides that a child who is temporarily or permanently deprived of a health family environment, will be entitled to the assistance of the state and be put into substitute institutions vis-à-vis adoption, foster placement, etc. In furtherance of the same, ‘Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally’⁴⁵ provides detailed guidelines for States to appropriately assist the children in need of protection by implementing and administering the procedure of safe adoption and foster placement. In India, with the coming of the 2015 Act, the scope of the definition of ‘child in need of care & protection’ has widened to include the issues relating to rehabilitation, adoption, re-integration, and restoration of children in need of care and protection. “Section 2(d) of the JJ Act gives an exhaustive definition of ‘child in need of care and protection’. It includes children who are vulnerable due to social, economic or cultural disadvantages, such as those children found without any home or settled place, or mentally or physically challenged, ill children, etc. The concept of “*parens patriae*”⁴⁶ is applied according to which it becomes the legal duty of a state to make sure that the child is being taken care of by all means possible.⁴⁷

Section 40 of the JJ Act makes provisions for the rehabilitation and social reintegration of a child in need of care and protection by means of i) adoption (ii) foster care (iii) sponsorship (iv)sending the child to an after-care organisation.

Adoption⁴⁸ is a permanent settlement to provide the children with a family who takes care of children as a member of the family. All legal rights as of a natural born has is bestowed upon the adoptive child as soon as the child becomes the part of the adoptive family. The adoption process is very laborious, complex and has to go through many formalities through state authorized

⁴⁵ Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally Adopted by General Assembly resolution 41/85 of 3 December 1986

⁴⁶ *parens patriae*. (n.d.) *West's Encyclopedia of American Law, edition 2.* (2008). Retrieved January 6 2021 from <https://legal-dictionary.thefreedictionary.com/parens+patriae>

⁴⁷ Kethineni, Sesha. 2007. “The Juvenile Justice System in India: From Welfare to Rights.” Asian Journal of Criminology 1 (2): 209–11.

⁴⁸ adoption. (n.d.) *A Law Dictionary, Adapted to the Constitution and Laws of the United States. By John Bouvier..* (1856). Retrieved January 6, 2021, from <https://legal-dictionary.thefreedictionary.com/adoption>

agencies like SARA and a centralized body like CARA. Before a child is legally released for adoption, the commission will make every effort to find a child's parent or guardian, only in cases where the child is orphaned or abandoned. After all efforts have been made and the board is still unable to find any trace of the child's parents or guardians, the board may then declare the child legally free to adopt under the provisions of section 38 of the Juvenile Justice Child Protection Act), 2015.

The foster care⁴⁹ process is a relatively new and often misunderstood process in India. Foster care is a temporary replacement system designed instead of institutionalizing children with the aim of providing children with a family environment. Foster care is provided for in Article 42, which specifies that (1) Foster care may be used to accommodate certain newborns who are eventually put up for adoption on a temporary basis. (2) In foster care, a child may be placed in another family for a shorter or longer period of time, depending on the circumstances when the child's parent usually visits regularly and possibly after rehabilitation, where the children can return to their homes. (3) The state government may adopt rules for the implementation of the foster care scheme for children. However, although the Law on JJ has established provisions on foster care, it is not being implemented effectively. Very few state governments have developed foster care programs. Foster care is still mainly used as a pre-adoption procedure, which limits the potential of this method to provide family care to a child.

"In the case of *K.V. Muthu v. Angamuthu Ammal*⁵⁰, a decision prior to the JJ Act, the Indian Supreme Court dealing with eviction proceedings between a landlord and tenant had to address the question of whether a foster son would be a member of a family. The Supreme Court held that a 'foster child' is actually another person's child but is nursed, reared and adopted as his own by another person. It held that "Care must not always be maternal in raising the child and that a child has been raised with the love and care that one typically receives from one's family from foster parents, the child would surely be a part of that family."

By and large it can be said that, as regards the children in need of care and protection, India has largely failed to live up to its obligations under various conventions under the international law. It

⁴⁹ "foster care." WordNet 3.0, Farlex clipart collection. 2003-2008. Princeton University, Clipart.com, Farlex Inc. Retrievied 6 Jan, 2021, from <https://www.thefreedictionary.com/foster+care>

⁵⁰ 1996 Supp(10) SCR 188

has been unable to develop conditions that will ensure for the juvenile a meaningful life in the community and foster a process of personal development and education that is as free from crime and delinquency. India has a huge population with a majority of them lying in the youth age-group. This gives India an advantage to harness their demographic dividend in such a manner to create the best possible outcomes for the future of the nation as well as economy. However, the poor living standards, lack of access to education, sanitation, and health facilities, as well as deprivation of essential resources compels these ‘children’ or ‘juveniles’ to fall into the life of crime and delinquency. It is the responsibility of the nation to provide for care and proper treatment of these children.

4. CHALLENGES IN JUVENILE JUSTICE POLICY:

The present juvenile system in India is created on the belief that juvenile offenders can be reformed and rehabilitated. Sending them to bars or prisons may reaffirm their status and identity as “criminals”, which might endanger their process of reintegration into society.

On the one hand, critics of the juvenile justice system point out that the social and cultural landscape has changed significantly since the early 1900s when the juvenile justice system was established. They argue that the leniency perception of juvenile justice increases their failure at rehabilitation by communicating to young people that they can avoid serious consequences for their criminal actions. Critics argue that it is unfair to the victims as well as the society at large to have juvenile offenders who have committed violent crimes to be released from the jurisdiction of the juvenile court at the age of 18 or 21, without proper punishment.

On the other hand, defenders of the juvenile justice system criticize it for many of its shortcomings. They point out that violent subcultures and early childhood traumas caused by abuse, neglect, and exposure to violence make it more difficult to solve individual problems. If the system is adequately funded, probation officers and legal support staff could be more closely monitoring rehabilitation efforts and children. If a lot of energy is put into changing the socio-economic situation in communities, rehabilitation efforts will improve and crime will be reduced.

In the 2015 Act, heavy reliance is placed on the procedure of the JJB of age determination and the assessment of the psycho-social maturity of a juvenile between 16-18 years to commit the crime.

It is beyond possibility to accurately assess the intellectual maturity of a child and such an assessment “exceeds the limits of science”⁵¹. The arbitrariness of those tests is further worsened by the very fact that the Act doesn't mandate the JJB to use an expert or a psychologist for such assessment.

Section 15⁵² of the Act states that the JJB ‘may’ seek assistance from a panel of psychologists and/or experts. In reality, such assistance is often not sought. In the words of the Allahabad High Court, this is a “really scary state of affairs”⁵³. Further, as per section 20⁵⁴ of the Act, when the child attains the age of twenty-one years, the Children’s Court must decide whether they have “undergone reformative change” and whether they can be a “contributing member of the society”.

The case of *Durga v State of Rajasthan*⁵⁵ demonstrates the flaw in the test that is used to determine whether a child must be tried as an adult. The facts of the case found the girl, named Durga (who had not completed eighteen years of age) to have been guilty of murdering her husband during a fight. She was found to have the mental capacity to commit the crime because she was “cooperative and communicative”. She was capable of forming the requisite mens rea and was not in a state of excitement (three months after the incident). However, an inherent flaw was found in the conduction of the preliminary assessment as per the requirements of Section 15 of the Act. The Section requires appointing of a committee consisting of psychologists and psycho-social workers having experience in dealing with troubled children to conduct the preliminary assessment of the child to determine whether the said child in conflict with the law can be treated as an adult. In this particular case, it was found that the girl was not provided with her proper and effective legal remedy and it pointed out the grave loopholes in the implementation of the provisions of the Act. Hence it can be appropriately said that the tests laid down in the Act are plagued with bias, arbitrariness, and corruption and leave the child with a grave sense of injustice reaffirming their belief that this whole system is a failure.⁵⁶

⁵¹ Bonnie and Scott, ‘The Teenage Brain: Adolescent Research and the Law’ (2013) 22(2) Current Directions in Psychological Science 161.

⁵² The Juvenile Justice (Care and Protection of Children) Act 2015, s 15(1).

⁵³ *Radhika v State of Uttar Pradesh* 2019 SCC OnLine All 4911 [46].

⁵⁴ The Juvenile Justice (Care and Protection of Children) Act 2015, s 20(1).

⁵⁵ *Durga v State of Rajasthan* D.B. Criminal Appeal No. 27/2019 (High Court of Rajasthan).

⁵⁶ LW Sherman, ‘Defiance, Deterrence, And Irrelevance: A Theory of The Criminal Sanction’ (1993) 30(4) Journal of Research in Crime and Delinquency 445.

5. CONCLUSION:

The Juvenile Justice System is one of the oldest yet most dynamic fields in the space of legal studies, human rights, and social reform. Although the system has faced harsh criticisms from different ends of the spectrum from time to time, its importance and relevance remain intact. The contemporary international human rights law recognizes children as subjects of their rights and not only as objects of protection. The matter of juvenile delinquency has to be addressed by a broader multidisciplinary approach. The focus must not only be to reduce the instances of socially-unacceptable delinquent behaviours by juveniles that eventually lead to the commission of heinous crimes. Instead, the idea must be to create better-living conditions for them, exposing them to a meaningful life by engaging them in productive activities from a tender age that will facilitate their moral, mental, and social development. The International community, States, and the general public must assume a collective responsibility to provide for the welfare of poor and impoverished families so that they can raise children in an environment free of neglect, desperation, and destitution. At the same time, conscious efforts must be made to remove several shortcomings in the legislation and ensure better implementation of the procedures that are meant for the betterment of the children both who are in conflict with the law, and those who are in need of care and protection?