

CHILDREN'S RIGHT TO PARTICIPATE UNDER THE JUVENILE JUSTICE SYSTEM: HUMAN RIGHTS PERSPECTIVE

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Abstract: Human rights of children have been posing serious challenges to the social reformers, legislators, policy makers and for all those who are concerned with child rights issues. There are several safeguards in the international human rights framework but implementing them in right spirit is still a challenge. Another problem in international human rights law is the hard and soft law, which is difficult to understand and may cause complexity. India is signatory to major human rights instruments. The Indian Constitution stands for protecting all its citizens and give justice to them including children. They due to their tender age and intelligence enjoy extraordinary status. It places the state under a responsibility to make special laws for protecting their rights. Most of the human rights which are spelled out in the international human rights framework do find place in part III and part IV of the Constitution. One of the challenging situations of safeguarding the interest of the children arises when they come in conflict with law or when they need utmost care and protection owing to the hard circumstances they are positioned in. Than the Juvenile justice system comes in picture along with the other constitutional safeguard. Amongst the other rights one of the rights which is given utmost significance is 'right to participation.' This right is the very moral fiber of the existence of the children. This article makes an attempt to analyze how child participation in the process of wellbeing of the child is understood and implemented. It explores how efforts for child protection at the international and national level is recognized, allowing them to express their views and opinion in the decision making process. The author also elaborates on the various factors to be taken into consideration while giving importance to the views of the children which will definitely have bearing on their reformation and rehabilitation. In the end suggestions are also given to enable child-sensitive procedure paving way to other human rights also.

IndexTerms - Right to participate, Juvenile Justice System, Human Rights, Right to Access to Justice

I. INTRODUCTION

Human rights of the children is the most crucial issue in Indian context. There are numerous challenges when we talk about human rights of the children. The magnitude of the problem is very vast and there are lot of complexities involved in it. However the extent to which a society gives protection to its children is the measure of development.¹ Children should be looked with care and affection in a environment which will enhance their wholesome development. Amongst the other human rights the 'right to participate' is the most important right inclusive of other human rights. The right of the child to participate in the process and express their views and opinion while a decision is being taken about them is very important. The international and national legal framework specifically recognizes the 'right of participation'. This is to ensure that the children become responsible citizens. As a dignified member of the community they become aware of their rights and also their duties. They must be able to appreciate their accountability and should be liable for their actions.

In the context of Juvenile Justice System participation of the child in decision making acquires important role right from the beginning. From meeting the police, to the observation home and thereafter in the decision making in all matters affecting them. For e.g to give them in adoption or foster care, establishing guilt, trial in children court, institutional custody, health care and rehabilitation program.

However there have been significant doubts and misconceptions about children's participation due to their understanding and age. Doubts are raised as to how far children are capable of forming an experienced and free view. Most of the time, they are seen as dependents on the adults in taking decision. Secondly those all who believe that the purpose of Juvenile Justice System is to limit the liberty of children and place them in state custody the participation, freedom of choice and freely expressing their opinion come in conflict with the limited liberty. It is impossible to combine these two opposed and conflicting paradigm.

The sentencing of an individual convicted of a criminal offence is largely driven by three key consideration... retributive, deterrence and rehabilitation. One should not forget that these young offenders

¹ P. ISHWARA BHAT, LAW & SOCIAL TRANSFORMATION, 606 (Eastern Book Company 2012).

are also victims of circumstances². They are used by adults at times to commit crime. The children being victim of circumstances and placed in difficult situation their needs are complex which requires a balance of welfare and justice. Reformation and rehabilitation should be the prime goal.

The right of child will raise many issues:

- a) What does participation means in theory and reality?
- b) Is it necessary for the children to participate?
- c) Is it possible to put into practice the 'principle of participation' within the juvenile justice system?
- d) What should be the approach when placing the principle into practice?

The further discussion will review how participation as a right is defined and practiced. The international and national human rights framework is discussed and the existing literature is reviewed in order to understand the concept of right to participation. Even though right to participation is significant for the children in reality the child participation poses a significant challenge in practice for various reasons including discrimination by age, denial of opportunity of being heard, tokenistic and inappropriate participatory efforts. Child's participation poses great challenges in practice for these reasons. These challenges are identified and appropriate solutions are suggested at the end.

1. Concept of Child's Right to participation

The right to participate necessarily means the right to express his/her views freely and voluntarily participate in decision making which influences their wellbeing, future or development (mental and Physical). In context of penal juvenile justice system it is the right to express ones opinion or views in terms of establishing guilt, possible sanctions to be imposed and having a say if they have to undergo custodial or non-custodial sentencing.

The United Nations through its human rights instruments recognizes and conceptualizes the right to participation³⁴. Children who are capable of forming his or her opinion must be able to express it either by themselves or through their representatives. While taking into account their view point majorly two factors must be taken into consideration -firstly age of the child and secondly maturity of the child. Based on these authorities should decide how much weigh should be given to the child opinion. It is the responsibility of the state to ensure and safeguard the right of the child in procedural laws. All the procedures administrative or adjudicatory must provide for 'right to be heard' and 'right to participate'. These two are the very backbone of principles of natural justice. The child can express himself and when it is not possible for the child because of age or immaturity to express himself in that case must be represented by the guardian, parent, social worker or any other authority. The rules followed must be consistent with the national laws. In all matters dealing with the child the prime consideration must be the best interest of the child. Similar provisions have been made in other international instruments

Thus right to participation is comprehensive right and has following other ancillary rights included in it:

- a. The right to be heard and to have their views to be taken into account.
- b. The right also includes access to information and material from a diversity of sources.
- c. Freedom of thought and religion and freedom of association
- d. The Right of being represented
- e. The Right of conducive environment (participation in plans and programs)
- f. The Right to be informed about their rights

1.1 Importance of right to participation in juvenile justice system

Right of participation is a very important right; it requires a clear commitment and effective action plan to be a living reality. Respecting children's views suggest that such views should not be overlooked or

²Human Rights-based Approach to Programming: Human Rights and Children, available at- https://www.unicef.org/policyanalysis/rights/index_62016.html, last seen on- 31/05/2019.

³Art. 19, The Universal Declaration of Human Rights, 1948.

⁴The Universal Declaration of Human Rights, 1948 article lays down minimum human rights standards for states to follow ensures that children who are capable of forming his or her own views should have right to express their views freely in all matters affecting them.

go unnoticed. It also does not mean that children's opinion should be mechanically approved. Somewhere a balance has to be created based on personal judgments. Expressing opinion is not necessarily making it as part of taking decision; it is a process of conversation and exchange of ideas. It needs to be encouraged in which children assume increasing responsibilities and become active, patient, open-minded and democratic. In such process adults must provide direction and give active guidance to the children. When considering their views thought must be given to their age and level of maturity. It should be free from any kind of pressure and manipulations⁵. They should have freedom not to say anything if they prefer not to do so. They should not be under pressure to say something when they do not wish to. In the judicial proceedings they should not be involved as victims. Their rights in the procedure are to be protected, human rights are to be safeguarded. Their participation has to be genuine rather than mere tokenism. The process will be useful for the children as it will make them feel responsible for their actions. This will be helping them to take responsibility and have feeling of being recognized as an individual of the community. The participation will allow children to efficiently, officially and collaborate thereby respecting each other. The children must be allowed to:

1.1.1 Participate in the selection of a suitable center for placing.

The child must be involved in the choosing suitable housing. The child should be kept in proper facility and should have a say if to be given in foster care or adoption. In case of non-custodial measure the child should be left on admonition with proper follow-up.

1.1.2 Participation in the planning of the child's individual care plan

The child should be involved in the individual care plan. Child must participate in deciding for the kind of care and education. It is advisable to involve him in the longer term. Rehabilitation and acceptance by the society after the sentence has been served should be well planned. The planning should be perfect for transition into adulthood and independent life.

1.1.3 Participation in the implementation of the child's individual care plan.

The child should not be involved just at the planning level of the child's individual care plan but also in the implementation of the plan. To see if there are any challenges in the implementation. The child must be heard in periodic review of the progress rules.

1.1.4 Participation in social and cultural activities.

The child development is the most important aspect of the child upbringing. The child must be involved in theatre play, arts and performance. It will help in overall development of the child.

a. Sports and recreation.

Sports and recreation is very important for the overall development and health of the child. The children must be allowed to choose what they really want to be involved in.

b. Maintenances of contacts

The child must participate in the social life. He should be in contact with the family the legal guardianship other significance persons at regular intervals.

c. Access to media.

The child should be given in all information. He should have access to local news paper, social media and education.

d. Organization of debates workshops and events

The child must participate in the activities held within the detention centers. debates , workshop and events held within the detention center will help them develop their personality.

1.1.5 International standards on child participation in the context of juvenile justice

Legal status of children has evolved considerably over the last decades. There have been numerous changes made to the national legislation in many countries in the world. Significant international instruments have also confirmed the status of children as right bearers who can ask for a remedy when their rights are being violated either by them or by their representative. The instruments and the national legislation are to be understood, interpreted and implemented in order to find their way into policies, legislation and daily

⁵Lucy Y Steinitz, PhD, Family Health International/ Namibia: Guidelines for Promoting Child Participation, available at- <http://www.lac.org.na/projects/grap/Pdf/CCPA-GuidelinesforChildParticipation.pdf>, last seen on- 30/05/2019.

practice. The main difficulty has been that many of them are written in such a way that a person having no legal background finds it difficult to understand. It's also difficult to make difference between hard law and soft law in international law. Many of the people may find it confusing. There have been several rules under international law relating to juvenile justice administration. Implications have been to be drawn from rules for their full implementation. ⁶It is very explicit from all the international instruments that all children who come in contact with the justice system must be treated equally. They should not be discriminated on any of the grounds such as –race, color, sexual orientation, sex , national ethnic or social origin, socio-economic condition , language, Disability birth or other status, religion, immigration or refugee status, political or other opinion.

The international legal frameworks consist of several provisions for the children participation in the process of decision making. UDHR provides that the every person has right to freedom of opinion and expression. It also mentions that this right includes freedom to hold opinions without interference and also seek, receive information and idea through any media and regardless of frontiers. This is available to all including children.⁷ India is party to the UDHR.

In the same way Beijing Rules provides that she or he shall be dealt with by the competent authority(court, tribunal, board, council etc) according to the principles of a fair and just trial⁸ she or he shall be dealt with by the competent authority (court, tribunal, board, council, etc.) according to the principles of a fair and just trial. The procedure followed shall be in the best interests of the juvenile. It should be conducted in an atmosphere of understanding and trust. It should allow the juvenile to participate and to express her or himself freely. It is difficult to formulate a definition of the competent body or person that would universally describe an adjudicating authority. "Competent authority" is meant to include those who preside over courts or tribunals (composed of a single judge or of several members). It includes professional and magistrates as well as administrative board. While dealing with juvenile offenders minimum standards of procedure should be followed. Principles those are applicable universally. These are the principles for any criminal defendant under the process known as "due process of law". In accordance with due process, a "fair and just trial" would mean the presumption of innocence, the presentation and examination of witnesses, the common legal defenses, the right to remain silent, the right to have the last word in a hearing, the right to appeal, etc.

Throughout the proceedings the juvenile shall have the right to be represented by a legal adviser⁹ or to apply for free legal aid where there is provision for such aid in the country. The parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile.¹⁰ They should be viewed as general psychological and emotional assistance to the juvenile-a function extending throughout the procedure. The competent authority's search for an adequate disposition of the case may profit, in particular, from the co-operation of the legal representatives of the juvenile (or, for that matter, some other personal assistant who the juvenile can and does really trust). Such concern can be disillusioned if the presence of parents or guardians at the hearings plays a negative role, for instance, if they display an unsympathetic attitude towards the juvenile, hence, the possibility of their exclusion must be provided for. Therefore they may, be denied participation by the competent authority if there are reasons to assume that such exclusion is necessary in the interest of the juvenile.

United Nations Rules for the Protection of Juveniles Deprived of their Liberty Adopted by General Assembly resolution of December 1990 (Havana rules) provides for the deprivation of liberty should be effected in conditions and circumstances which ensure respect for the human rights of juveniles. Juveniles detained in facilities should be guaranteed the benefit of meaningful activities and programmes which would serve to promote and sustain their health and self-respect, to foster their sense

⁶Dr Ciara Davey, Jo Lea, Catherine Shaw and Tom Burke: Children's participation in decision-making and Survey of participation workers, available at- https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/07/Childrens_participation_in_decision-making_-_survey_of_participation_workers.pdf, last seen on- 30/05/2019.

⁷ Art. 19, The Universal Declaration of Human Rights, 1948.

⁸ Rule 11. The Beijing Rules, 1985.

⁹Rule 15 (1), The Beijing Rules, 1985.

¹⁰ Rule 15 (2), The Beijing Rules, 1985.

of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society.¹¹

United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) Adopted by General Assembly resolution December 1990, The Rules are intended to promote greater community involvement in the management of criminal justice, specifically in the treatment of offenders, as well as to promote among offenders a sense of responsibility towards society.¹²

1.1.6 National standards on child participation in the juvenile justice context.

The National Policy for Children, 2013 in guiding principles¹³ asserts that the children are capable of forming their views and conducive environment must be created in order that they express it freely without fear or under compulsion. Also in¹⁴ children's views especially those of girls and disadvantaged groups and marginalized community must be given importance and due consideration must be given to their age maturity and evolving capacities.

Similarly under Juvenile Justice (Care and Protection of Children) Act, 2015 same provision have been recognized¹⁵ It mentions that all the children must be heard, children who come in conflict with law and all those who need care and protection. The child has right to participate in all processes and decision affecting his interest. It also mentions that the child's view will not be automatically endorsed but their age and maturity must be taken into consideration. It's just that the officers who are handling them must be trained to create an environment conducive for the dialogue between him and the child. Children must be able to able to express themselves freely. The following factors must be taken into account:

I. The right to express their own views freely

Children must be able to put across their views freely and without any pressure. They should be put at ease and the officials must support them. They have to find out means to facilitate the expression without any manipulations or prejudice. It might happen that the children are not able to formulate their views and express. In such situation the child must be supported and guided. Psychological and emotional backing must be given to them. They might require information in a language they understand and the procedure which must be followed must be child sensitive.

II. Giving importance to the views of the child

In order to safeguard their interest and guarantee the right, they shall express their views only after having been informed. They should have information about the relevant laws, their implications, consequences and their impact on their lives¹⁶. They should be informed that they can express on their own or by their representatives. Professionals or officials are responsible for final decision should take into account their views. However it does not obligate them it must coincide with the decision.

¹¹Rule 12, The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The Havana rules). Adopted by General Assembly resolution, December 1990.

¹² Rule 1.2, The United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules). Adopted by General Assembly resolution, December 1990.

¹³(xi) children are capable of forming views and must be provided a conducive environment and the opportunity to express their views in any way they are able to communicate, in matters affecting them.

¹⁴ (xii) children's views, especially those of girls, children from disadvantaged groups and marginalized communities, are to be heard in all matters affecting them, in particular judicial and administrative proceedings and interactions, and their views given due consideration in accordance with their age, maturity and evolving capacities.

¹⁵Every child shall have a right to be heard and to participate in all processes and decisions affecting his interest and the child views shall be taken into consideration with due regard to the age and maturity of the child.

¹⁶CHILDREN'S RIGHTS: INTERNATIONAL LAWS, AVAILABLE AT- [HTTPS://WWW.LOC.GOV/LAW/HELP/CHILD-](https://www.loc.gov/law/help/child-rights/international-law.php)

[RIGHTS/INTERNATIONAL-LAW.PHP](https://www.loc.gov/law/help/child-rights/international-law.php), LAST SEEN ON- 31/05/2019.

III. Taking into account their age and maturity

While listening to the child the importance must be given to the age and maturity of the child. Giving weight to age and maturity of the child, whose views are being heard does not mean that the views expressed by an older child will get more attention than that of a younger child. It is not a mathematical calculation. It has to be assessed. Assessing the capacity of children is very difficult task. Several factors are to be taken into consideration apart from age and maturity. They should be permitted to form their independent view, on the issue in spite of their intensity of development and age. The

approach and method of communication should be such that it should give due account to the individual's needs and capacity. The authority hearing the child must have appropriate aptitude, child friendly language and skills. The way of communication should be such that the child must understand it. The right environment and setting has to be there to make the child comfortable. The official must be a keen listener. He should take time to listen to the child and ensure that the relevant information is understood by him.

IV. Body language

The official should have appropriate body language. He should be keen listener. It's very important to maintain eye contact. The first thing is to build the trust. Not to start with disbelief. This will built up the confidence of the child in the authority that whatever they are saying or doing is in his benefit.

1.1.7 Some reservations and misconceptions about child's participation in the juvenile justice system

In spite of the recognition of the right to participation, there are several questions raised about it in reality. It's very difficult to convince the authorities that children are capable of forming their opinion. There are quite a few uncertainties and misconceptions about children's participation in the juvenile justice system mainly with those who are in conflict with law. About the children who are in need of care and protection the same opinion has been raised. The first and the foremost concern is whether children because of their age, level of maturity and developing capacities are able to form their opinion and express their views which are of their own. They are influenced by many factors. Of their surroundings, peer pressures, media influence, family and friends. Doubts are raised as to their level of understanding and maturity. Secondly historically children are seen as dependents and therefore not being able to express their opinion. Particularly in the Indian social context decisions relating to children are always taken by adults giving them hardly any space to participate in decision making. There is hardly any consultation with the child. Because of this attitude it is understood that the children cannot comprehend what is best for them?¹⁷The juvenile penal justice system has the element of curtailing the liberty whereas participation does require some kind of voluntariness and freedom of choice. This could be in relation with establishing the guilt, on possible sanctions or the evidence which is produced. There are questions as to how to combine the purpose of penal system and right to participation. Secondly children in need of care and protection would also participate in the decision making as to what should be there rehabilitation programme, as to whether they should be given in foster care or adoption, health care, choice of rehabilitation program etc. Therefore it's very essential that the child should be given priority depending on the level of maturity and age. The person in charge of the child is the best judge to see how best it can be achieved. Requirements of child protection require sensitivity, dedication and commitment. If the officials and other staff are not sensitive towards needs of children or are not trained to handle children carefully it will be very difficult to convince them importance of the child Participation.

1.1.8 Some recommendations

It's not only essential to recognize right to participation but practice and implement it in the right spirit. Following recommendations are made for effective and meaningful implementation of this right:

- I. All officials involved in the juvenile justice system must be well-trained be it police, prosecutors, lawyers, social workers or any other staff. Training must include how to make children participate in

¹⁷Participation for children and young people, available at: <https://gwedhill.gov.wales/topics/people-and-communities/people/children-and-young-people/rights/ParticipationforChildrenandYoungPeople/?lang=en>, last seen on- 29/05/2019.

the meaningful way. There has to be delicate balance between child being able to participate freely and not to participate when he doesn't want to. In any case the child's views must be respected.

- II. Children should be made aware that they have right to participation and can freely express their opinion in the entire process and participate in the decision making process which is going to affect their wellbeing.
- III. Children may express their view on their own or through an adult. They should be provided full information in the language they understand.
- IV. The child should be made aware that he or she has right to free legal aid and his views and opinions can also be expressed and represented by a lawyer if they wish so.
- V. The professionals or the officials who are responsible for final decision must create a child sensitive atmosphere however while making decision it is not necessary that the child's view and opinion should coincide with the final decision.
- VI. The information should be given in a language they understand and child sensitive procedures.

Conclusion

Child participation is very essential in the juvenile justice system. It should be respected and followed with the conviction that children are capable of forming their own opinion. They should either express on their own or should be represented by the proper authorities. Conducive environment has to be created to allow the child to express their views on anything that is concerning their lives. They are entitled to receive all the information and in the language they understand. There are other ancillary rights attached to the right to participation, which needs to be respected at the same time. The child must be aware that if he wishes to be represented by the lawyer he can be represented and he is entitled to free legal aid. All necessary information should be given to them from all sources so that they are able to form their opinion. The officials who are handling the child must be given proper training in this regard. They must respect the rights of children and encourage them to have a say in the procedure. Children whether in conflict with law or in need of care and protection must be involved in the process so that the reformation and rehabilitation becomes meaningful. Children should not be viewed as criminals even if they have committed heinous crime but rather victim of circumstances¹⁸. The child's participation must be handled sensitively rather than it being merely a tokenism.

¹⁸VED KUMARI, JUVENILE JUSTICE SYSTEM IN INDIA: FROM WELFARE TO RIGHTS (2010) (When the nature of the crime is serious, the criminal justice system treats the child as monstrous and incapable of rehabilitation and therefore equates them to adults. This is described as the crime overshadowing the child, as "the psychological, social and legal construction of 'childhood' can be lost, understated, ignored or overshadowed by the notion of 'crime'.")