

## **Right to Assembly and Association of Children : A Critical Analysis, on the basis of the case of Tilottam Poudel and others v. HMG**

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### **1. General Background**

Children's rights are the human rights of children with particular attention to the rights of special protection and care afforded to the young. Definitions of children's rights range from allowing children to do whatever they wish, to the enforcement of children being physically, mentally and emotionally free from abuse<sup>1</sup>. The right to form groups, to organise and to assemble together with the aim of addressing issues of common concern is a human right<sup>2</sup>, and as such, also every child's right. The ability to organise is an important means by which people can influence their governments and leaders. The right to freedom of association and assembly is protected in international and regional human rights treaties. These rights are applicable to any issue. Mass protest is a potent symbol of the exercise of this right<sup>3</sup>. Right to peaceful assembly upholds the right to peaceful assembly which should not be denied except in situations of national security or public safety. The right to violent assembly is not upheld<sup>4</sup>. Right of association covers the right of individuals to 'associate' together and establish associations.

The Convention on the Rights of the Child (CRC) very simply provides that State parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly. Article 15 (1) reiterates provisions from other global and regional human rights

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<sup>1</sup> World Summit on Children 1990, made a declaration to promote forth three categories of rights for children, viz, their 'Survival', 'Protection', and 'Development'. The right to form assembly and association of children falls under their 'Development Rights'. A Canadian organization categorizes children's rights into three categories, including: Provision: Children have the right to an adequate standard of living, health care, education and services, and to play. These include a balanced diet, a warm bed to sleep in, and access to schooling. Protection: Children have the right to protection from abuse, neglect, exploitation and discrimination. This includes the right to safe places for children to play; constructive child rearing behavior, and acknowledgment of the evolving capacities of children. Participation: Children have the right to participate in communities and have programs and services for themselves. This includes children's involvement in libraries and community programs, youth voice activities, and involving children as decision-makers. Source: Wikipedia, the free encyclopedia [http://en.wikipedia.org/wiki/Children's\\_rights](http://en.wikipedia.org/wiki/Children's_rights) as retrieved on 25 Feb 2008

<sup>2</sup> See international instruments, Universal Declaration of Human Rights (UDHR)(1948), article 20, 23, Convention Relating to the Status of Refugees (1951), article 15, International Covenant on Economic, Social and Cultural Rights (1966), article 8, International Covenant on Civil and Political Rights (1966) article 21, 22, **Convention on the Rights of the Child (CRC) (1989), article 15**, UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990) principles 12, 13, 14. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (1998) ILO Convention (87) concerning Freedom of Association and Protection of the Right to Organise (1948)

<sup>3</sup> Geraldine Van Bueren, *'The International Law on the Rights of the Child', Save the Children*, Martinus Nijhoff Publishers, The Hague/Boston/London 1995, Ch:5, pp. 144-45

<sup>4</sup> Article *'Freedom of Assembly and Association'*, HREA News, <http://www.hrea.org/learn/guides/freedom-of-association.html> as retrieved on 23 Feb 2008

treaties<sup>5</sup>. However, the importance of its incorporation in a treaty on children's rights forces states to consider these rights in relation to children.<sup>6</sup> The rights to freedom of association is broader as it embraces the notion of coming together for the purposes of common goal. The right therefore, is equally applicable to children to associate in a wide variety of voluntary organizations from scouting and guiding to campaigning for nuclear disarmament and peace or for the establishment by children of a school union. The general international legal principles concerning the right to join a trade union equally applies to children above the legal minimum age for employment<sup>7</sup>.

The importance to children of the right to freedom of peaceful assembly is illustrated by numerous instances of other countries. Children who have this right in South Africa, on specific occasions groups of children were detained for exercising their right of peaceful assembly. At least 35 children some as young as 11 were detained under sec. 50 of the Internal Security Act 1982 to prevent them expressing their grief attending a funeral. But no soon this news spread, the executive body ordered for their release and hasn't repeated the mistake ever since<sup>8</sup>. The ambit of child rights to assembly has also been considered by courts in the U.S. in relation to imposition in cities of curfews for those under 18. The Supreme Court found as a matter of fact that the curfew ordinance in Seattle did not make a distinction between conduct calculated to harm and conduct which is essentially innocent, and held that such a curfew was an unreasonable exercise of police power<sup>9</sup> upon the children. National courts have also attempted to discuss the child's right to freedom of association in a broader context. In a case brought under the Canadian charter of Rights and Freedoms a Provincial judge argued that the association amongst members of a family including children and their parents falls within sec. 2 (d) of the Canadian Charter guaranteeing freedom of association<sup>10</sup>.

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<sup>5</sup> Article 15. 1. provides "States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly". 2. provides, "No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others".

<sup>6</sup> Geraldine Van Bueren, *The International Law on the Rights of the Child*, Save the Children', Martinus Nijhoff Publishers, The Hague/Boston/London 1995, Ch:5, p. 144

<sup>7</sup> ILO Convention no. 87: Convention concerning freedom of association and protection of the right to organize, Article 2: "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization". UDHR, Article 23 (4) "Everyone has the right to form and to join trade unions for the protection of his interests".

<sup>8</sup> Stephen Biko, *South African Rights activist*, article posted in the title 'Right of Peaceful Assembly and Association' <http://www.un.org/Pubs/CyberSchoolBus/globalatlas/20sp.htm>, as retrieved on 12 Feb 2008

<sup>9</sup> Ginsberg v. New York 390 U.S. 629, as cited in Geraldine Van Bueren, *The International Law on the Rights of the Child*, Save the Children, Martinus Nijhoff Publishers, The Hague/Boston/London 1995, Ch:5, p. 144.

<sup>10</sup> Re J. Catholic Children's Aid Society of Metropolitan Toronto v. S48 R.F.L. (2d) 371 (1985) (Ontario Provincial Court) per Nasmith Prov. J., as cited in *ibid*, p. 145

In the context of Nepal, the issue of children's right to form assembly and associations arose in the case of Tilottam Paudel. The controversy overtly arose on the issue of whether children had the right to register their association under their own names, keeping in view of their status of minority. The judgment delivered by the Supreme Court had reiterated the children's right to form associations as their own right, by drawing reference from the standards set by the international laws. This paper is relevant to this very issue, thereby making an effort to critically analyze the Nepalese Supreme Court's judgment on the *Tilottam Paudel v. Ministry of Home Affairs and Others*, from the child rights perspective. The paper is organized into five chapters, first, provides a general outlook, second, identifies the paper's objective and methodology, third the overview of the facts and judgment of the case is given, fourth an analysis of the judgment is discussed, and fifth gives a conclusion with some recommendatory insight to promote children's right to assembly and association in Nepal.

## **2. The case of *Tilottam Paudel v. Ministry of Home Affairs and Others*<sup>11</sup>**

### **2.1 Legal/Constitutional issues raised**

Whether or not children can form an association under the prevailing laws of Nepal.

### **2.2 Facts of the case**

#### *Background:*

With the objective of protecting the basic rights of children by rising public awareness against social malpractices through various programs, some children including the petitioner applied to Nawalparasi District Administration Office (CDO) along with a recommendation letter issued by the concerned Village Development Committee for registration of an association called 'Jagriti Child Club'. The Nawalparasi CDO sought for the necessary instructions from the Ministry of Home Affairs whether it was possible to register their association even without their citizenship certificates. The Ministry of Home Affairs, communicating its decision, informed that the proposed Jagriti Club could not be duly registered since a person below the age of 16 has been described as a minor under the Nepal law and such a person could not be competent in the eyes of law. When this decision was challenged by the petitioner under Section 4 (3) of the Association Registration Act, 1977, the Home Ministry was adamant on its earlier decision.

#### *Petitioner's Contention:*

The petitioner contended that the UN Convention on the Rights of the Child, 1989, after ratification by Nepal, is binding upon all such states parties to the Convention. Under Section 9 of the Treaty Act, 1990, such a convention shall be applicable as the Nepalese laws. Denying the children's freedom to form an association as provided by that Convention shall be not only contrary to that Convention but also contrary to the right guaranteed by Article 12 (3) (c) of the Constitution of the Kingdom of Nepal, 1990. There is no provision regarding the requirement of being a Nepali citizen in the Association

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<sup>11</sup> Writ No.174, Decision no: 7020, NKP 2058 B.S. (2000 A.D.), Anka: 7, 8, p.423, case: 'Mandamus with Ceriorari', Judgment with the Full Bench of Justice Kedar Nath Upadhyaya, Justice Kedar Nath Acharya, Justice Rajendra Raj Nakhwa

Registration Act and the concerned Rules<sup>12</sup>. The petitioner and his colleagues have not been able to acquire citizenship only because of the age factor. But, one should not be treated as a non-citizen only because she does not possess a citizenship certificate. While deciding against the registration of an association it must be categorically mentioned as to which section of the law prohibited its registration. Notwithstanding the children's right to get their association registered as per Article 15 of the Convention, the denial shall tantamount lack of honesty regarding the implementation of the Convention if it is held that their association could not be registered for want of law or lack of citizenship or for any other reason.

Therefore, the petitioner prayed for invalidation of the impugned decision and the instruction of the respondents, as they violated the UN Convention on the Rights of the Child, 1989, which had acquired the legal status of the Nepal law, and the rights granted by the spirit of Registration of Association Act<sup>13</sup> and also asked for issuance of an order to the respondents to register the Jagriti Club of the petitioner.

*Defendant's Submission:*

Filing separate rejoinders the respondents justified their refusal to register the Jagriti Club of the petitioner solely on the ground that all the prospective members of the said club were only minors below 16 and thereby could not be deemed as competent in the eyes of the prevalent Nepal law. Hence, they could not be held liable in case of any violation of the law.

*Judgment:*

"Unless specifically prohibited by law it shall not be proper to opine that children can be deprived of the fundamental right relating to freedom of association guaranteed by Article 12 (2) (c) of the constitution of the Kingdom of Nepal, 1990 only for the sole reason of minority. Even in the inconsistency with prevalent Nepal laws, the provisions of the Convention on the Rights of the Child, 1989, to which Nepal is also a party, shall prevail as per Section 9 (1) of the Nepal Treaty Act, 1990. As an act of registration of the association of children shall acquire artificial or legal personality there shall be no question of citizenship or age for such an artificial or legal personality at par with a natural person".<sup>14</sup>

### **3. Analysis of the case**

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<sup>12</sup> See Association Registration Act, 1977 ('Sanstha Darta Ain', 2034 B.S.) and Association Regulations 1977 ('Sanstha Darta Niyamawali', 2034 B.S)

<sup>13</sup> The preamble of this Act states, 'This Act has been formulated keeping in view of the promotion and well-being of social, religious, literary, cultural, scientific, educational, intellectual, physical, economic, occupational, and social welfare organizations, and associations'.

<sup>14</sup> See para 14 of the case in NKP 2058 B.S. (2000 A.D.), Anka: 7, 8, p.423, case: 'Mandamus with Ceriorari.

UDHR provides very clearly that it's not only adults than can enjoy right to assembly and association<sup>15</sup>. This right is granted to everyone. Thus, in this light too, it can be analyzed that children are equally capable to possess and practice this right. Thus, the court has given the verdict, well confirming to the established principles of international law, for the well-being of children. It has been viewed in U.K. that even 'the refusal of schools to allow union activity or, for example, meetings or anti-apartheid meetings or meetings to celebrate a particular national day of an ethnic group within a school breaches the international convention relating to child rights'<sup>16</sup>. This example shows that the question of right to association of children is still in process to be recognized in the developed countries, and thus when the Supreme Court of Nepal, faced with the question, it has progressively defined the children's right to form association.

It should be pertinent to note that the Children's Act, 1991, does not impose any restrictions on setting up any association of the children. It is entirely a different matter to make special provisions by law regarding the conduct of the minor children for the protection of their interests as well as the acts of delinquencies committed on account of immaturity. While providing for the fundamental right in Part 3 of the Constitution of the Kingdom of Nepal, 1990, it had also been envisaged to make such special provisions by law for the protection and promotion of the children as compared to other citizens. The purpose of such special provisions made by the law for the protection and promotion of the children cannot be interpreted to have a meaning for imposing restrictions on the fundamental rights in contravention of the rights and interests of the children.

Secondly, under Article 15 (2) of the aforesaid convention, the authority empowered to register associations may discharge its duty in accordance with the law by taking into consideration on factors as to what type of provisions are there in the Jagriti Child Club Statute, 1997 and whether or not those provisions are in tune with the prevalent Nepal law, and which of those provisions need to be subjected to necessary restrictions for the protection of national security or for safeguarding the rights and freedom of others. But without paying any heed to the performance of the aforesaid work, the respondent Home Ministry appears to have decided not to register the association by simply raising the issue of age and citizenship of the child club members associated with the proposed association. Thus, the decision of the Supreme Court is justifiable in this regard as well.

However, in the verdict given by the Supreme Court, some considerations have been failed to be given. Although it established the notion that henceforth, Nepalese children are legally enshrined the power to form associations. However, it did not issue any directives for the parliament to add this right specifically in the Children's Act and Association Registration Act. The silence of both of these acts regarding what age group persons can form association had led to the situation of ambiguity, and as a result, this case had to be filed. In the court's decision it would have been appreciable if it issued a directive to the parliament for the purpose of including this right in the concerned acts. Because of this weakness, as yet, it is not defined by our law, what starting age group of children may form their own association. Likewise, as said earlier UDHR has clearly

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<sup>15</sup> Universal Declaration of Human Rights, 1948 article 20 provides, "**Everyone** has the right to freedom of peaceful assembly and association". (emphasis added)

<sup>16</sup> Freeman Michael, in article '*Children's Rights ten years after Ratification*', published in '*The New Hand Book of Children's Rights, Comparative Policy and Practice*', Edited by Bob Franklin, Routledge Publication, 2002, pg. 108

defined that 'everyone', meaning each person, is entitled with the right to form association. But in Nepal, the legal definition of person is not clearly done<sup>17</sup>. This needs to be looked upon by the parliament.

The importance of the right to freedom of association and the right to peaceful assembly to children may not at first seem apparent but they are both rights which increases the power of individuals by conferring on them the right to participate in a group activity. They therefore have a particular relevance for children as children generally do not have access to the mass media. Through marches and meetings children may gain such access. Brazilian street children were successful in attracting both national and global media attention in 1991 when they marched through the streets of the capital protesting at the lack of government action over the murders of street children. They captured national and global media attention precisely because it has the children who met and marched about the problems that they faced<sup>18</sup>. Thus, Nepal, too should in every way promote for children's demonstrations through their organized movements.

#### 4. Conclusion and Recommendations

Historically, laws had shut its eyes to children's claims to Civil and Political Rights, whilst children were defined by their incompetence, and were to be subjected to authority and control<sup>19</sup>, then the rights of the child were 'essentially a contradictory term'. Now, CRC, provides the opportunity to operate as a catalyst also for the national legislations to promote such child-friendly laws and equally keep a close watch on their enforcement<sup>20</sup>. In this same line, Nepal's legislature, executive and judiciary bodies should truly check that the society places the value of children's right to mobilize themselves in a group and respect their activities. National children's status shows that only 2.1% of the Nepalese children have 'access to' and are involved in child associations and clubs<sup>21</sup>. For the empowerment of children, promotion of their right at a wider level is one of the 'essentials' that is to be guaranteed.

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<sup>17</sup> According to Nepal Statute Interpretation Act, 2010, Sec. 2 (c), the word 'person' is defined as 'it also implies adjoined or not adjoined any company, association or community group'.

<sup>18</sup> Geraldine Van Bueren, *The International Law on the Rights of the Child*, Save the Children, Martinus Nijhoff Publishers, The Hague/Boston/London 1995, Ch:5, p. 144

<sup>19</sup> See in general, Bajpai Asha, *Child Rights in India, Law, Policy and Practice*, Second Edition, Oxford University Press, Ch:1 'Rights of Child-An Overview', pp.1-32

<sup>20</sup> "Many initial reports record that their country's constitution upholds these rights for 'everyone'. As with other civil rights the committee on the rights of the child has encouraged their incorporation into state's own legislation and 'Guidelines for Periodic reports asks for information on the measures adopted. Also, under article 1, the Guidelines asks whether any minimum age has been defined in legislation concerning the child's rights to create or form associations"- source: UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*, 1998, Ch:15, 'Child Rights to Freedom of Association and Peaceful Assembly', p.189, for more details see pp-189-194.

<sup>21</sup> See Ministry of Women, Children, and Social Welfare, Nepal Government, in its report, *The State of Children of Nepal*, 2007. Further statistics show there are 1,09,96,052 children below the age of 18 which is 47.5% of the total population of Nepal (p.13, *ibid*), Out of this number, only 1,35,680 boys and 99,463 girls (total-2,35,143) have access to children's clubs in their society. (p.62, *ibid*)

While discussing about child rights issues, their abuses and exploitation get highlighted owing to the rampant violation of their socio-economic rights. Freedom from parental authority, control, and discipline has never been a major theme of serious children's rights advocates. However, together with their 'protection' rights, the 'development' rights should not be ignored. The emergence of the paradigm in part reflects a move away from seeing children as passive recipients of adult socialization, to recognition that children are social actors in their own right, are active participants in the construction and determination of their experiences, other's people's lives, and the societies in which they live<sup>22</sup>. Every effort should be made on the part of Nepalese society to promote the development rights of the children simultaneously with their other rights. For this, special provisions to promote children's associations have to be included in the Children's Act of Nepal. Since children do not have equal access and utilize media as much as the adults can, their demonstrations through the club activities can serve to be important to know what their needs are. Thus, at every local level, schools, community centers etc. should help, aid and promote for the children's group activities. Right to be a member of a group is the participation right of a child, which inculcates in them the value of self-determination and teaches them the techniques of being able to work in groups.<sup>23</sup> Development of this value can, thus, only help build a more integrated human society in the long-run.

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<sup>22</sup> O'Kane Claire, in article '*The Development of Participatory Techniques, Facilitating Children's Views about Decisions which affect Them*', published in 'Research with Children, Perspectives and Practices', Edited by Pia Christensen and Allison James, Routledge Flamer Taylor and Francis Group Publications, 2000, p.136

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