

CHANGING PERCEPTION OF JUVENILE OFFENDER IN INDIA

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INTRODUCTION/ BRIEF HISTORY OF JUVENILE JUSTICE LAWS IN INDIA

The word 'juvenile' basically refers to persons who have not reached eighteen years of age.¹ And juvenile offenders mean children who commit an act which is in conflict with the law. Another word for them is juvenile delinquents or delinquent juveniles. A number of laws have been formulated for the purpose of ensuring protection and care of children and dealing with those in conflict with law. Through the course of time, these laws have undergone major changes and amendments in India with respect to the changing perception of juvenile offenders in the society. To begin with, this paper would be mainly dealing with juveniles in conflict with law, the subsequent changes in their laws and the impact of these changes on the concept of juvenile justice.

The first Act enacted to deal with juvenile offenders was the Children Act, 1960.² However, under this law, there was no uniformity in application of its provisions throughout the country. Therefore, after the case of *Sheela Barse v. Union of India*³, which called for uniformity in implementation of laws for juvenile delinquents, another act was brought in, called as the Juvenile Justice Act, 1986.⁴ This Act determined a boy under years 16 years of age and a girl

¹ BLACK'S LAW DICTIONARY (7th ed., 1999).

² The Children Act, 1960.

³ *Sheela Barse v. Union of India*, (1986) 3 SCC 596.

⁴ The Juvenile Justice Act, 1986.

under 18 years of age to be a child⁵ i.e., the juvenile age limit for boys was 16 years while the same for girls was 18 years. Subsequently, owing to numerous loopholes that this act entailed, a new legislation named the Juvenile Justice (Care and Protection of Children) Act, 2000⁶ was passed. It was formulated keeping in mind India's international obligations in this regard such as the United Nations Convention on the Rights of the Child (CRC)⁷ which India ratified in 1992, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985⁸ (the Beijing rules), and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990⁹ as major international standards on juvenile justice and child rights. Under this Act, the age limit for a child or juvenile was made 18 years, irrespective of gender.¹⁰ However, the series of amendments did not stop here. In the aftermath of the infamous 2012 Delhi Gang rape case, large-scale protests started to unfold demanding certain amendments in the existing Act. And as a consequence of this, the Juvenile Justice (Care and Protection of Children) Act, 2015¹¹ was enacted. The definition of the word juvenile remained the same but a major change that it brought was a reduction in the age of juvenile offenders from 18 years to 16 years for them to be tried as adults as prescribed under the Code of criminal Procedure, 1973¹² in cases of heinous crimes like rape or murder.¹³

Firstly, India follows the definition of child as laid down under the CRC i.e., "every human being below the age of eighteen"¹⁴ which was incorporated in the Juvenile Justice Act, 2000. However, the criminal responsibility in India as prescribed under Section 82 of the Indian Penal code, 1860¹⁵ is fixed as above seven years of age i.e., nothing can be considered as an offence or crime if committed by a child less than 7 years of age. However, between 7 and 12 years of

⁵ *Id.*, §2 (e).

⁶ The Juvenile Justice (Care and Protection of Children) Act, 2000.

⁷ United Nations Convention on the Rights of the Child, 1989.

⁸ United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985

⁹ United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990

¹⁰ *Supra* note 6, §2 (k).

¹¹ The Juvenile Justice (Care and Protection of Children) Act, 2015.

¹² Code of Criminal Procedure, 1973

¹³ *Id.*, §15, 18 (3).

¹⁴ *Supra* note 6.

¹⁵ The Indian Penal Code, 1860, § 82.

age, maturity level of the child is used to determine his/her criminal liability.¹⁶ Therefore, this provision causes the implementation of juvenile justice laws in India to take slight a different course with respect to international standards.

In light of this brief introduction, the paper deals with the relevance of old juvenile justice laws in India, its conformity with international standards and the subsequent amendments. It further analyses the changing perception of the society towards criminal liability of juvenile offenders and determination of their age. This paper majorly focuses on the extent of legitimacy of the recent Juvenile Justice (Care and Protection of Children) Act, 2015, its criticisms and its consequences on children in conflict with law as well as the society at large. It lastly provides a detailed analysis by the author for strong need of a rehabilitative justice approach instead of conventional punitive approach towards delinquent juveniles with the objectives of transformation, rehabilitation and social reintegration.

EVOLUTION IN THE PERCEPTION OF JUVENILE OFFENDERS IN INDIA

In the colonial times, there were significant discussions on the fate of children who violate the law and the potential measures that can be taken for their reformation. Many colonial scholars were of the opinion that institutionalization of such young offenders was essential while some opined that these children have no scope to reform as their minds are corrupted and suggested to seclude them from reformatory houses, thus, depriving them from a chance at the process of reformation.¹⁷ Regarding this, the changes that have come about are provision¹⁸ of establishment of institutions or in other words, reformation homes for juvenile offenders for the purpose to provide training and personality development programmes with the objectives

¹⁶ *Id.*, § 83.

¹⁷ Satadru Sen, *A Separate Punishment: Juvenile Offenders in Colonial India*, 5 THE JOURNAL OF ASIAN STUDIES (Feb., 2004), available at <http://www.jstor.org/stable/pdf/4133295.pdf?refreqid=search%3A623096d3678dc3c77756acca3bc66279>.

¹⁸ *Supra* note 6, §8; *Supra* note 11, §10 (2) (ii), §39 (2).

of reintegration and rehabilitation.¹⁹ Earlier, there were numerous shortcomings in juvenile justice system such as inaccuracy in assessment of a juvenile's maturity and reformation needs due to lack of expert advice. There was no involvement of social workers, child welfare experts etc. in the decision making process of this system.²⁰ However, change was brought about by the Juvenile Justice Act, 2015 where provisions for consultation with psychologists, psycho-social experts were laid down for the purpose of assessment of a juvenile's mental and physical capacity.²¹ Also, unlike the previous laws, it was the JJ Act that excluded the word 'punishment' to conform to the child friendly and rehabilitative treatment of delinquent juveniles and moreover, established the concept of separate juvenile courts for the adjudication of matters relating to such juveniles.²²

DETERMINATION OF JUVENILE AGE

In the case of *Arnit Das v. State of Bihar*²³, it was held that relevant date to determine whether the accused is a juvenile or not is the date when he was brought before the court/competent authority and not the date of commission of offence.²⁴ This was however criticized extensively as it did not follow the clear position laid down in the case of *Umesh Chandra v. State of Rajasthan*²⁵ where determination of age of juvenile was held to be concerned with the date of occurrence of the offence and not the trial. Subsequently, the incorrect position of *Arnit Das*

¹⁹ Yogesh Snehi, *State and Child Justice: Stories of Delinquent Juveniles*, 4 ECONOMIC AND POLITICAL WEEKLY (Oct. 9, 2004), available at

<http://www.jstor.org/stable/pdf/4415641.pdf?refreqid=search%3A623096d3678dc3c77756acca3bc66279>.

²⁰ Galan M. Janeksela, *Descriptive Analysis of Five Juvenile Justice Systems: United States, Scotland, England, India, And South Africa*, 12 INTERNATIONAL REVIEW OF MODERN SOCIOLOGY (1991), available at

<http://www.jstor.org/stable/pdf/41420985.pdf?refreqid=search%3A623096d3678dc3c77756acca3bc66279>.

²¹ *Supra* note 11, § 15(1), § 20(1).

²² Sessa Kethineni & Tricia Klosky, *Juvenile Justice and Due Process Rights of Children in India and the United States*, 15 INT'L CRIM. JUST. REV. 131 (2005); Mariam A. Abdulraheem, *A Global Diagnosis of the Predictive Factors of Juvenile Delinquency*, 18 U. BOTSWANA L.J. 1 (2014).

²³ *Arnit Das v. State of Bihar*, AIR 2000 SC 2264.

²⁴ R. N. CHOUDHARY, LAW RELATING TO JUVENILE JUSTICE IN INDIA 204-205 (2005).

²⁵ *Umesh Chandra v. State of Rajasthan*, (1982) 2 SCC 202.

was reversed in the 2005 case of *Pratap Singh v. State of Jharkhand*²⁶ which upheld the judgment in the case of *Umesh Chandra* as the correct law.²⁷ Moreover, with the 2006 amendment²⁸ to the definition of 'juvenile in conflict with law', it was made clear that date of commission of offence is to be looked at while determining the criminal liability of a juvenile on the basis of age.

CRITICAL EVALUATION OF THE JUVENILE JUSTICE ACT, 2015

In the backdrop of the brutal Delhi gang rape case, intense discussions took place regarding need for change in the perception of criminal liability of a juvenile in the laws existing at that time. The most pressing demand was for lowering the age of making juveniles criminally liable like adults for heinous crimes like rape and murder, from 18 years to 16 years. The Ministry of Women and Child Development by relying on the statistics provided by the National Crime Records Bureau emphasized that most of the heinous crimes committed by the youth of the country were committed by the children of age group 16-18 years and thus such a law to act as a deterrent was considered of utmost importance. Therefore, the Juvenile Justice (Care and Protection of Children) Act, 2015 was formulated giving effect to this need for a deterrent.

However simultaneously, a lot of criticism was raised on this provision of reduction of juvenile age limit. Firstly, it was said that this is not in consonance with India's international obligations. UN Convention on the Rights of the Child, as mentioned above defines a juvenile's age as below 18 years. Thus, the drop from 18 to 16 is said to be in contradiction with international standards. Moreover, the Convention calls for penal action as the last resort in dealing with

²⁶ *Pratap Singh v. State of Jharkhand*, (2005) 3 SCC 551.

²⁷ MAHARUKH ADENWALLA, CHILD PROTECTION AND JUVENILE JUSTICE SYSTEM FOR JUVENILE IN CONFLICT WITH LAW 20-21 (2006).

²⁸ The Juvenile Justice (Care and Protection of Children) Amendment Act 2006 (33 of 2006), § 2(1).

juveniles in conflict with law to ensure best interests of the juvenile while this Act clearly overrides this policy.²⁹

Secondly, the retributive approach adopted by the Act with ‘transferred juveniles’ can be seen as a downfall in the evolution of juvenile justice system in India. Transferred juveniles refer to those juveniles above 16 years of age who can be transferred to the adult criminal justice system i.e. they can be imprisoned like and with adults. This was introduced to deter juveniles from committing heinous crimes like rape and murder. However, many psychologists and child welfare experts believe that such juveniles who can be tried as adults tend to indulge in recidivism at a higher rate as compared to those who are tried within the juvenile justice system. In fact reports and surveys in New York have showed that incarceration of such juvenile offenders leads to growth of violent criminal behavior in them instead of discouraging it.³⁰ Moreover, the data on which Maneka Gandhi, who is the Minister of Women and Child Development relied, was deemed as fallacious and delusive as it was not the correct evaluation of juvenile crimes and the current evaluation infers that it is only 1.2 percent of total crimes that are committed by juveniles throughout the country.³¹ Also, it is seen that juvenile offenders in India are generally from poor and broken families who have no mental and physical support from their homes or any other place and penalizing them would only work as a disadvantage against them and as a consequence, leaving them socially excluded and hanging them at the periphery of society.

Thirdly, it is contended that such a provision creates a false dichotomy between the level of maturity of a juvenile and gravity of the offence committed. The differentiation between petty, serious and heinous crime as done by this Act can be problematic and misleading if linked with maturity of an individual. This kind of analysis is proved to be extremely flawed because of three reasons- first is that the maturity of juveniles cannot be compared with the maturity of adults just on the basis of gravity of the offence, second is that juveniles should never be made

²⁹ Shiladitya Rakshit, *Missing the ‘Justice’ in the Juvenile Justice (Care and Protection of Children) Bill, 2014*, 8 LAW & POLICY BRIEF 1-2 (Aug., 2015), available at <http://www.jgu.edu.in/public/policypdf/Law-and-Policy-Brief-Aug-2015-Issue-8.pdf>.

³⁰ *Id.*

³¹ *Id.*

liable as adults as it defeats the purpose of a separate juvenile justice system in the first place and third is that maturity of a juvenile possibly cannot be accurately ascertained by scientific and psychological techniques.³² It is observed that because of their lack of experience and developmental skills, juveniles are more prone to react negatively to incarceration as compared to adults. This provides all the more reason for an efficient juvenile justice system which can help in reducing culpability of young adults in a positive way.

Fourthly, the JJ Act, 2015 gives Juvenile Justice Board the power to do a preliminary assessment of the maturity of the juvenile offender and gravity of his act and transfers it to the Children's Court to pass orders for a regular trial in accordance with provisions of Section 18 of the Act.³³ This can prove to be immensely problematic as a preliminary assessment of liability of the juvenile provided by the JJ Board can create prejudice in the mind of the Court³⁴ and thus, goes against the principle of presumption of innocence evolved from international standards and stated under Section 3 (i)³⁵ of the Act itself. Moreover, subjecting juveniles to regular trial like an adult would only cause the juvenile to make false choices on the pretext of forced confessions or wrongful admission to the crime, as they are more prone to get influenced and make irrational decisions than adults. Hence, this in no way at all would act a deterrent.

Lastly, another criticism it faces is the weak constitutional basis of this Act. It is observed that this Act contains provisions which goes against some basic rights laid down by the Constitution of India for example Article 14 which safeguards the code of equality which is based on reasonable classification and that there is rational nexus between the classification and objective sought. In this scenario, classification on the basis of maturity and linking it with gravity of the crime is not reasonable and does not serve the objective of juvenile justice as maturity can never be accurately determined nor its linkage with nature of the crime can solve any other purpose.³⁶ Moreover, Article 15 (3)³⁷ of the Constitution provides for special protection for children as a separate group for the purpose of their greater well-being which is

³² *Id.*

³³ *Supra* note 11, § 18 (3), § 19.

³⁴ *Supra* note 29.

³⁵ *Supra* note 11, § 3 (i).

³⁶ *Supra* note 29.

³⁷ The Constitution of India, 1950, Art.15 (3).

not reflected in the provisions of this Act. Therefore, the formation of differentiation within the class of children on the basis of their maturity is in violation of Article 14 and 15 of the Indian Constitution.

CONCLUSION/ANALYSIS

In light of the above contentions, the author would like to clear her position and stance on this much debated and sensationalized Act of 2015. The author believes that 16 years of age is a reasonable age of maturity where a child develops basic cognitive abilities to be able to decide what is right and what is wrong. However, this does not mean that the child of 16 years of age can be treated as an adult. It is not even about being treated as an adult rather it is about being penalized for an act on the basis of its nature and calling for differential treatment within a class. And what if this fixation of 16 years of age is not enough? What if there are demands of lowering the age limit for juveniles even further considering that maturity is subjective? What can be the end point to this? The author strongly believes that by lowering the juvenile age and resorting to penal approach is a step backwards from achieving an effective criminal justice system in the country. Most of these juvenile offenders are from poor and broken families. They are from abysmally low social, economic and educational background devoid of any moral or developmental support. For this reason, there should be immense emphasis on rehabilitation and social reintegration of such deprived children for their overall development and empowerment. Children are the most valuable assets of a nation. They are the ones who will take on the legacy and build it to greater heights and thus the nation cannot afford to see them thrown away in jails unable to build a life for themselves. Therefore, there is a pressing need for adoption of a complete transformative and restorative justice approach for juveniles. And this can only be adopted once we do away with the conventional retributive approach.

Anger in its strongest form was outpoured in the aftermath of the 2012 Delhi Gang rape case and there was immense resentment over decision of the court to send the juvenile among the six convicts who was just 6 months short of turning 18 to a reform facility for three years, while the others were given death sentences. The author completely understands this resentment and anger and believes that the 2012 incident is one of the most tragic and unfortunate ones in the

history of this country and should be condemned in the strongest of words and actions. But according to the author, what should be also taken into consideration is the future aspect of the ones involved in such a crime and the society as a whole. If a child of 16 years of age is tried as an adult and given the maximum punishment of 7 or more years in case of a grave crime like rape or murder since a juvenile cannot be sentenced to death or life imprisonment³⁸, his/her next seven (or more) most crucial years of life will be wasted between four cramped walls of a prison cell. How will that child get any chance to reform and act upon his past deeds in order to build a career ahead? He/she will not even be able to complete their basic elementary education. This will be a great loss to the nation itself if not anything else. For instance, the juvenile offender in the *Nirbhaya case* has been given a new identity and is known to be working as a cook in some eatery shop in South Delhi.³⁹ It is said that he has been involved in numerous community service programmes where he had learnt cooking and will also be provided with higher education for building up a decent life and career ahead. This is just in furtherance of the values of our society and does not amount to injustice on anybody's part. The author would like to clarify that she is not of the view that there should be no action against such a heinous crime; rather there should be actions which would justify the position of the victim and the perception of the society as a whole vis-a-vis the juvenile offender. These actions should be in harmony with the functioning of the society and future of a valuable asset of the country. Moreover, the 2012 incident was a 'rarest of the rare' case and thus, basing such a contentious law on exceptions can prove to be extremely detrimental.

It is said that treatment of juveniles has taken a shift in India from punishment to reformation. However, the author believes that this is not the actual case and the JJ Act, 2015 has in fact brought stricter implementation of punishment for juvenile offenders instead of reformatory measures. Therefore, the author believes that in spite of creating a different class within a class, there should be proper implementation of certain rehabilitative measures already provided in the Act. These measures should be based on the assumption that crime prevention especially among young adults should not resort to penal approach rather it should be dealt in an extremely

³⁸ *Supra* note 11, §21.

³⁹The Indian Express, *Nirbhaya gangrape case: Juvenile accused is now a cook, says NGO official* (May 5, 2027), available at <http://indianexpress.com/article/india/nirbhaya-gangrape-case-juvenile-accused-is-now-a-cook-says-ngo-official-4642555/>

child-friendly and community-friendly manner. Such measure should be formulated keeping in mind the vulnerability and social pressure a child goes through in such a tender age. There should not only be provisions for proper social and psychological counseling, involvement in community services, facilities of correctional or reformation homes but it is essential that aftercare facilities⁴⁰ are also promoted so as to ensure that the delinquent child has settled back in the society. Education and meaningful socialization should be the main focus in furtherance of such an approach. Therefore, the author would like to conclude by saying that it is imperative for India to provide quality all round development to its youth which constitutes more than half of the its population. Therefore, there is a strong need to shift from the conventional punitive approach to a transformative, restorative and rehabilitative justice approach which is largely prevalent in the international domain for juveniles. And this need for such an overall strategy should be based on the objective of improving the juvenile justice system by meaningful rehabilitation and social integration.

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