

DEBATING THE AGE OF CRIMINAL RESPONSIBILITY IN INDIA

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CONSTITUTIONAL GUARANTEE & ROLE OF STATE

The Constitutional concept of the children in India is of a healthy childhood with opportunities for all-round growth and development, protected from exploitation and abuse, and unburdened by child labour forced on them by economic necessity. Children figure in the chapters containing fundamental rights and the directive principles of state policy, both of which are fundamental to the governance of the country. The Right to equality, protection of life and personal liberty and the right against exploitation is enshrined in Articles 14, 16, 17, 21, 23 and 24.

The Constitution has secured special status for children in the Indian polity since its adoption in 1950. Article 15(3) permits the State to enact special legislation for women and children. In addition to fundamental rights which children enjoy along with adults, the Constitution guarantees to children below 14 years of age that they shall not be employed to work in any factory or mine or engaged in any other hazardous employment. The Constitution directs the State to protect children of tender age against abuse and also ensure that they are not forced by economic necessity to enter avocations unsuited to their age and strength. By virtue of Article 39(f) the State is also to ensure that *children are given opportunities to develop and facilities to develop in a healthy manner and in conditions of freedom and dignity and that children and youth are protected against exploitation and against moral and material abandonment.*

Article 45 of the Constitution obligates the State to endeavour to provide for free and compulsory education to all children until they attain the age of 14 years.

However, the distribution of the subject matters between the Centre and the State perpetuated non-uniformity of approach and legislative provisions. This was evident with the passing of the 42nd Constitutional (Amendment) Act 1976 that transferred subject matters of education and administration of justice to the concurrent list. Not only were a series of Bills introduced in Parliament for the care and protection of children, a number of states also enacted the Children Acts. An impetus to enact a special law for children was provided by the UN Declaration of the

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Rights of the Child in 1958. India passed its first central legislation, namely, the Children Act 1960, applicable only to the Union Territories. It was enacted as a model to be followed by the states in the enactment of their respective Children Acts.

The constitutional guarantee of equal protection of the law became a casualty of the legislative autonomy of the states. The age below which a person was considered juvenile differed among states from 14-16 yrs to 18 yrs. The variations in definition of delinquent and neglected child and the approach towards institution under the various Children Acts also resulted in discrimination. The need for a uniform Children Act continued to be emphasized.

With the adoption by the General Assembly of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) in 1985, and recommendation for a uniform law in the 69th Report of the Committee on Subordinate legislation tabled in Parliament in 1986, Parliament enacted the Juvenile Justice Act, 1986. Though the JJA extended to the whole of India except J & K, it virtually brought about a uniform system of juvenile justice in the whole country. However the actual administration under JJA was unsatisfactory and exhibited wide disparities with the cherished principles. This Act was improved upon and Juvenile Justice (Care & Protection of Children) Act 2000 was passed by the Parliament after national consultations and specifically in recognition of India's ratification of the UN Convention on Rights of Child and other relevant international instruments.

FUNDAMENTAL PRINCIPLES & OBJECTIVES OF JUVENILE JUSTICE LEGISLATION

As the name suggests, the JJ Act has been enacted to consolidate and amend the law relating to 'juveniles in conflict with law' and 'children in need of care and protection', by providing for proper care, protection and treatment by catering to their development needs, and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through various institutions established under this enactment. The JJ(C & P) Act applies to persons who have not completed the age of eighteen years and they are referred to as children or juveniles. 'Child' includes a large number of categories in need of care and protection. 'Juvenile' refers to children alleged to or found to have committed an offence. JJA 2000 for the first time provided for "juveniles in conflict with law" and "children in

need of care and protection” to be kept separately pending their inquiries. This segregation aims to curb the corruption of the innocent child from the influence of the “criminal juvenile”.

This enactment further includes provision for setting up of Child Welfare Committee in every state for ‘children in need of care and protection’. For juveniles in conflict with law, it provides for the setting up of Juvenile Justice Board in every state, a special court consisting of a Judicial Magistrate of the first class in a non-metropolitan area and two social workers of whom one should be a woman. It is also required for each and every state to setup Special Juvenile Police Unit, to deal exclusively with the juveniles. The SJPU apprehends the juvenile of committing an offence and produces him before the JJB within 24 hours of apprehension and also informs the parent, guardian or any person of juvenile’s choice about it. The SJPU must also inform the PO about the juvenile’s arrest so that information may be obtained regarding the antecedents and family background of the juvenile and other material circumstances likely to be of assistance to the Board for making the inquiry. The JJB takes into account the Probation Officer’s report while entertaining a bail application and also at the time of final disposal of the case.

The juvenile justice system stresses on future welfare of the juvenile rather than on punishment for past misdemeanors. Under no circumstances a juvenile is to kept in a police lock-up or jail. For the purpose, the law provides for the setting up of Observation Home and Special Home in each district or group of districts by the State government or by a voluntary organization in agreement with the state government. While the former is for the temporary reception of juveniles in conflict with law during the pendency of their inquiry before the JJB, the latter is meant for the reception and rehabilitation of juvenile in conflict with law, if upon completion of inquiry, the JJB is satisfied that the juvenile has to be institutionalized for his treatment.

The juvenile must benefit from his stay in these institutions as otherwise his detention shall amount to punishment and the objective of juvenile legislation will be defeated. During their stay in the Special Home a juvenile should be able to avail of education or vocational courses depending upon the child’s aptitude, and facilities for sports and co-curricular activities such as music, painting, reading, drama, yoga etc. The stay in the Special Home, as also the Observation Home, should lead to realization in the child that what he had done was wrong. While in the institution he is to be placed under the guidance of a Probation Officer and in certain cases intensive counseling and to undergo life-skill training to help him face the challenges of the world. On completion of their term in Observation Homes or Special Homes, the PO could refer the juveniles to after-care

organizations to enable them to adapt to the society and to face the world without any institutional support and lead a normal life.

The JJ Act 2000 also provides for other modes of rehabilitation apart from institutionalization. These include adoption, foster care and sponsorship that are aimed at keeping a child in family-setting to encourage his holistic growth. The objective of sponsorship is to reach out to families through different kinds of assistance such as monetary assistance for children's education, school expenses, medical help, counseling and guidance to family members.

Thus, the main intent sought to be achieved by the juvenile justice system is reformation and rehabilitation of the juvenile. It aims at balancing the juvenile's care with the control of his future behavior. While reformation is founded on the belief that a juvenile is capable of changing his attitudes and recognizing what he did was wrong, rehabilitation is founded in the belief that circumstances resulted in juvenile committing the crime, therefore the concentration is on setting right these circumstances.

CONFLICTING RIGHTS PERSPECTIVE – EQUALITY & POSITIVE DISCRIMINATION

As stated earlier, the juvenile justice system in India provides for two categories of children - 'children in need of care and protection' and 'juveniles in conflict with law'. The differential handling of the neglected child from the delinquent juvenile poses conflicting view points of equality and positive discrimination. The divide between the juveniles in conflict with law, and children in need of care and protection, has been made even more rigid under the JJ Act 2000.

This segregation is opposed to the fundamental concept of equality that treats everyone placed under like circumstances in like manner. The living conditions of these children are similar and they keep on drifting between an honest, industrious life and one of crime in their struggle for survival. Both the categories of children require state intervention in a range of circumstances. These children equally need opportunities for safe birth and survival, health care, recreation, education, protection against exploitation and abuse, as well as facilities for their all- round development and growth.

At the other side of the coin, the JJ Act 2000 has incorporated various provisions to ensure that children do not come in contact with adult offenders under any circumstance thereby ensuring that the innocent minds do not get depraved by the influence of young offenders. The rationale for this

stems from the belief that the young children are less mature and hence less blameworthy than the adults who are prone to act in haste and easily influenced by others. Thus the argument for exclusion of delinquent children reflects a sympathetic attitude towards neglected children and ignores the fact that it is not only the neglected children, but also delinquent children, who need protection from stigma. One destitute street child who is found to have committed a minor offence may not be much different from another destitute street child, so far as their characteristics or the possibility of the former having an adverse influence on the latter are concerned. The categorization of children by reference to the fact of commission of an offence, rather than to their characteristics, focuses primary attention on the offence and relegates the child to a secondary place. The criterion is contrary to the proclaimed objectives of Juvenile Justice System, which are not prevention of crime and penalization for crime committed, but the care and protection of the children and providing opportunities for a healthy life.

STATE POLICY ON MINIMUM AGE

As per the Juvenile Justice Act, 2000, a boy or a girl under 18 year of age is a juvenile. On contrary, as per the JJA, 1886, the age of male juvenile and female juvenile was different. It was 18 years in case of females and 16 in case of males. However JJA, 2000 has brought the age of male juvenile at par with female juveniles. The main rationale behind increasing the age of male juvenile and getting it at par with female juvenile was to bring it into conformity with the ‘United Nation’s Convention on the Rights of the Child (CRC)’ . Article 1 of CRC states for the purposes of the present convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.¹⁰⁷

In India, the JJA, 2000 defines “juvenile in conflict with law” as a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence.¹⁰⁸ The term ‘children in conflict with the law’ as stated by the United Nation’s Children Fund refers to anyone under 18 who comes into contact with the justice system as a result of being suspected or accused of committing an offence.¹⁰⁹

¹⁰⁷ See Art. 1 of CRC

¹⁰⁸ See sec. 2(l) of JJA, 2000

¹⁰⁹ Child Protection information Sheet: Children in Conflict With the law, © the United nations Children’s Fund (UNICEF), May 2006

The simple reason behind giving such exemption is the absence of ‘mens rea’ i.e. guilty mind or criminal intent, not to criminalise the acts of those who at the time of commission of the crime did not know the right from the wrong.¹¹⁰

CRC by its Article 40[3][a] requires each country, which has ratified the “United Nation Convention for the Right of the Child” to endorse “the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.

Under Section 82 of IPC, the age of criminal responsibility is set at 7 years. Nothing is an offence which is done by the child below 7 years of the age. As per section, the child under the age of 7 years doesn’t attract Juvenile Justice System as a juvenile in conflict with law and hence can’t be prosecuted. Though he could be brought before, the Child Welfare Committee, for its care, protection and rehabilitation. On the contrary most of the European Countries have fixed the age of criminal responsibility between 13 to 15 years. In India the age of criminal responsibility attracts amendment and needs to be raised.

For the age group 7-12 years, which falls within section 83 IPC states, *“Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.”*¹¹¹

The accused child in order to benefit from this legislation has to prove that he is under 12 years of age, and lacks adequate maturity to understand; therefore he didn’t know the fatal consequences of the act.

Under Indian Law, children between 7 to 12 years and between 12 to 18 years who have committed an offence is also responsible for its criminal act. She/ he ought not to be treated and sentenced in the same manner as an adult. Such child will be dealt with under Juvenile Legislation, and the focus will be zeroed at reforming and rehabilitating them only.

Since India has ratified the United Nations Convention on Rights of Child, it is bound by the article 37 of CRC. Article 37 states:

¹¹⁰ CHILD PROTECTION AND JUVENILE JUSTICE SYSTEM for juvenile in conflict with law, by CHILDLINE India Foundation, December 2006

¹¹¹ See Sec. 83 of IPC, 1860

“Article 37 (Detention and punishment): No one is allowed to punish children in a cruel or harmful way. Children who break the law should not be treated cruelly. They should not be put in prison with adults, should be able to keep in contact with their families, and should not be sentenced to death or life imprisonment without possibility of release.”¹¹²

There have been several debates as to the relevant date for the determination of juvenility. The Apex Court has held that the date of offence is to be considered for the determination of the juvenility, but in one of the case¹¹³, the Apex Court observed that the juvenility has to be determined on the date when the offender was brought before the competent authority. This judgment was widely criticized since it lacked the benefits of juvenile legislations. This legislation also did not consider the former judgment of the Supreme Court in *Umesh Chandra vs. State of Rajasthan*¹¹⁴ where it was observed that for the purpose of determination of the juvenility, the relevant date is the date of occurrence of the offence rather than the date of the trial.

This controversy to put to an end by the Supreme Court in the 5 judges bench case where it was observed¹¹⁵ that the reckoning date for the determination of juvenility is the date of the offence and not the date when he is produced before the authority or the court.”

As per the need of the hour, the JJA, 2000 was amended and the amended definition under Sec. 2(l) of JJA, 2000 put to rest the debate as to the relevant date at which juvenility is to be determined.

V. FORMS OF JUSTICE AND CRIMINAL LAW REFORM

The juvenile justice system in India is an offshoot of the criminal justice system. Because of this, its approach towards children has always been marked by the tension between the protective approach of juvenile justice and the traditional approach of dealing with crime¹¹⁶. The JJ Act 2000 does not perceive the delinquency or the issue of children exploitation in holistic terms.

¹¹² http://www.unicef.org/crc/files/Rights_overview.pdf

¹¹³ *Arnit Das v State of Bihar* (2000) 5 SCC 488

¹¹⁴ 1982 AIR 1057

¹¹⁵ *Pratap Singh v. State of Jharkhand and ors.*: (2005) 3 SCC 551.

¹¹⁶ <http://www.forensic.to/webhome/drgsbajpai/lcwseminar.pdf>

Resultantly, this law does not emerge as progressive legislation in solving the problems of a child and has suffered major drawbacks in its implementation.

With an increasing trend in violence and crimes committed by juveniles, the issue of determining the age of a juvenile has constantly cropped up. There has been a lot of hue and cry in reducing the upper age limit for juveniles under the criminal justice system from 18 years to 16 years, recently in light of the gruesome facts of the Nirbhaya case.

While the child right activists have protested against the age reduction contending that it would be a regressive step and the law ought not to be changed in light of public outcry over a single case, the women activists and public pressure have demanded that the juveniles in such cases be treated at par with adults.

As per the reports of the National Crime Records Bureau (NCRB) entitled “Crime in India 2011” and “Crime in India 2012,” the percentage of crimes committed by juveniles as compared to total crimes has not significantly increased from 2001-2012. According to the NCRB statistics, India is not in the throes of a general crime wave by juveniles. However, the NCRB statistics relating to violent crimes by juveniles particularly against women are very troubling. “Crime in India 2011” suggests the number of rapes committed by juveniles has more than doubled over the past decade from 399 rapes in 2001 to 858 rapes in 2010. “Crime in India 2012” records that the total number of rapes committed by juveniles more than doubled from 485 in 2002 to 1149 in 2011. As the data suggests, between 2011 and 2012 alone, there was a massive increase in instances of rape by juveniles by nearly 300, which is almost as much as the increase in such cases over the entire previous decade.¹¹⁷ According to the NCRB statistics in 2013, the rise in crimes against women committed by juveniles was highest in cases where the modesty of a woman was outraged (132.3%) followed by word, gesture or act intended to insult the modesty of a woman (70.5%) and rape (60.3%).¹¹⁸

In view of this significant increase in crimes against women by juveniles, the law could be amended to carve out an exception on case-to-case basis and it should be up to the judiciary to

¹¹⁷ <http://www.thehindu.com/opinion/lead/balancing-the-juvenile-act/article5107620.ece>

¹¹⁸ <http://ncrb.nic.in/CD-CII2013/compendium%202013.pdf>

consider the nature of atrocity, mental culpability, intellectual capacity and circumstances affecting the juvenile in punishing him as an adult. We have a progressive society and today even a 14-16 year old might know the consequences of rape and develop criminal propensities. As age is just a number, it alone should not be allowed to override the need of balancing the interests of the juvenile and the greater interests of protecting the society from such crimes and therefore due consideration ought to be given in cases of heinous offences particularly the ones against women. At the other end, we cannot deny the fact that the exiting juvenile system has been highly inadequate in dealing with the object of reformation and rehabilitation of children. As reported by *India Today*, there are 815 remand homes in India with a capacity of 35,000. However, there are 1.7 million juvenile accused in India. Remand homes in India are not conducive to the reform and rehabilitation of juveniles as envisioned by the principles enshrined in international law.¹¹⁹ The JJ Act 2000 prescribes for the creation of different institutions for custody, adjudication and trial and treatment of juveniles. A major flaw in the system has been the non-setting up of such institutions in the states and the lack of co-ordination and concern on part of the officials and staff associated with them in training and development of the child. The education, training and recreation of children, who are in observation homes, have not been provided for. Besides, basic or school education, even higher education and training of these children should be considered in this Act.

It is the duty of our State to ensure the overall development of the child and offer them facilities for growth and healthy life. We must not forget that these juveniles are from the lower strata of society and suffer from poverty, cruelty and neglect. They do not understand the human values of right and wrong. They need education, guidance and proper amenities to transform into mature and civilized persons.

ROLE OF SOCIETY, EXTENDED FAMILY AND PARENTS

When the rationale behind enacting juvenile legislation is 'welfare', then the society should also take the responsibility for the matter in respect to juveniles. The major sections which can do well to them are lawyers, policemen, media, social workers and NGOs.

The policemen and specially 'special juvenile police unit' should work together with other trunks of the society to fuel the working of the apprehension of juveniles. They should be trained in child

¹¹⁹ <http://www.thehindu.com/opinion/lead/balancing-the-juvenile-act/article5107620.ece>

psychology. And if in case required, NGOs shall take the custody of the juvenile in the capacity of a 'fit person' or 'fit institution'.

There are a few provisions where the state government along with voluntary organizations can enter into an agreement to set up 'observational' or 'special homes' to take care of the juvenile delinquents. The JJA should be amended to include mechanisms to oversee the proper functioning of these institutions set up for the juvenile delinquents and ensure that there is no maladministration on their part. The basic idea of juvenile justice was to reintegrate the child into family and society. This requires a proper network of rehabilitation and after care services.

The Justice Verma Committee had also recommended in its report that all juvenile homes be placed under the legal guardianship of the High Court and a panel of judges appointed to carry out spot inspections of the facilities to ensure children there are safe and well taken care of.

Since the family is the central unit responsible for the primary socialization of children, governmental and social efforts to preserve the integrity of the family, including the extended family, should be pursued. The society has a responsibility to assist the family in providing care and protection and in ensuring the physical and mental well-being of children. Adequate arrangements including day-care should be provided.

Where a stable and settled family environment is lacking and when community efforts to assist parents in this regard have failed and the extended family cannot fulfill this role, alternative placements, including foster care and adoption, should be considered. Such placements should replicate, to the extent possible, a stable and settled family environment, while, at the same time, establishing a sense of permanency for children, thus avoiding problems associated with foster drift.¹²⁰

Instead of blatantly displaying violence and crimes, media acting as a double edged tool, should educate and reflect upon the violence or the crime scenes, along with the messages on how bad it is and its fatal consequences, which are bestowed upon the offenders.

The lawyers can also be of great help to the juveniles by assisting them and providing free legal aid which will reduce the trauma suffered by them to a great extent. There are many juvenile offenders who have to bear a lot of pain and are also abused mentally and physically, since they can't afford to have a lawyer to defend their case. Thus, the role played by these stakeholders will greatly serve the cause.

¹²⁰ www.unicef.org/lac/.../UNGuidelinesPrevJuvenile%20Delinquency.doc

CONCLUSION

Children are among the most vulnerable sections in any society. They represent almost one-third of the world's population and unless they are provided with proper opportunities, the opportunity of making them grow into responsible citizens of tomorrow will be lost. Proper guidance, corrective treatment, education, healthcare etc gives a child a chance to reform. It is the responsibility of the community and the government to provide these facilities to a child in order to increase the possibility of a better life. Rather than focusing and debating upon the age of criminal responsibility, the State's prerogative to provide the children with their rights should be realized for the aim of juvenile law is reformation and rehabilitation rather than punishment. Unfortunately, the protection and development of children is not seen as a right but as a charity or welfare. The State ought to fulfill its role as *parens patriae*, a doctrine that believes that the state is the parent of the nation. Until and unless the State takes steps to enforce stringent actions on ensuring a child's rights under the juvenile justice system, the tackling of the juvenile delinquency will continue to be a growing menace with the passage of time, risking a possible debate upon further reducing the age of juvenile, to say, 14 years.



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