

Age Issue of juvenile- Not a solution by amending the age of Juvenile in Juvenile Act (A Plea to Restorative Justice particularly in case of heinous crimes committed by juveniles below 18 years)

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In the contemporary era, we see that the crimes committed by the juveniles are continuously increasing despite of harshing the penal consequences on committing of the heinous crimes as mentioned in the existing Juvenile Act, 2015. Till what date we will make amendments in the acts in lowering down the age of delinquents in determining the age of committing the criminality? Is there any criteria? On the basis of concept of equality, we can say that all children are equal and regarding that equal treatment should be given. And to give preferred treatment to children, we follow the concept of *intelligible differentia*. That is we differentiate the children on the basis of some solid criterions like age factor because we have mindset the child of more age is more understandable.

We forget that to be intelligent and understandable is a psychological factor which has to measure on the basis of individual quality. This criminality is also the psychological factor which cannot be measured on the basis only of age. This concept of psychology is individual one. From individual to individual, it varies with change in mentality. Many times, we see that a child of 7 year is more understandable than the child of age 12. This shows that we must have to treat the child at individual level. In the case of *Subramaniam swami v. Raju through Member Juvenile Justice Board & ANR*,¹ Subramaniam swami states that having regard to the object behind the enactment, the Act has to be read down to understand that the true test of "juvility" is not in the age but in the level of mental maturity of the offender. This, it is contended, would save the Act from unconstitutionality and also further its purpose. The Act is not intended to apply to serious or heinous crimes committed by a juvenile.

The article 1 of **Convention on the Rights of Child** defines the child which means every human being below the age of eighteen years unless the law applicable to the law majority is attained earlier. According to **section 2 (12) of Juvenile Justice Amendment Act, 2015, child**

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¹ [SLP (Cri.) No.1953 of 2013]

means a person who has not completed eighteen years of age. This definition provides the lacuna that if the age of majority is attained earlier in a country then that will be the age of majority. This age of majority depends on the full understanding of a person of mature age. Our country recognizes eighteen years of age and this is in consonance of various international treaties like CRC, ICCPR.

I have no issue with this definition to whom will we consider as child. In every society, there are some child who always goes against the established system of law who are known as delinquent child and in Indian law as child in conflict with the law. The first law in India was enacted in 1986 which was known as Juvenile Justice Act, 1986 which was right-based and was in conformity of United Nations Declaration on the Rights of Child and the Beijing rules of 1985. This abolished the detention of juveniles in police lock-ups. But there was not absolute mechanism to deal with the delinquent children. To cope up with such delinquent child and the process to be followed was firstly given in the Convention on the Rights of Child which was enacted in 1989 with two other important guidelines treaties ie United Nations Guidelines for the Administration of Juvenile Delinquency known as Riyadh Guidelines and second one is United Nations rules for the Protection of Juveniles Deprived of their Liberty known as JDL Rules.. Since, India has rectified CRC treaty in 1992 with other treaties and hence in furtherance of the Article 40 (3)(a) of Convention on the Rights of the Child which states that the state parties shall in particular seek the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringe the penal laws. Hence, India was enacted Juvenile Justice (Care and Protection of Children Act, 2000.

After the Nirbhaya incident of 2013, a need was felt to revise the existing juvenile justice Amendment Act of 2006 that how a child can under 18 years of the age commits the gruesome heinous offence. As the result of which the act was again amended in 2015 to make the punishment harsher for the heinous crimes committed by the juvenile in conflict with law of age group 16-18.

Main issue of confrontation all over the globe is on the age of criminal responsibility. This is the minimum age at which child has to be responsible for his acts. The original Juvenile Justice Act(JJA) treated all children between 7-18 differently as children in conflict with law. Now 2015 Act provides that children between 16-18 if commit adult crimes they may be treated as adult criminals but death sentence and life imprisonment cannot be awarded to them. So now there are three categories- (1) upto 7; (2) 7-16 if in conflict with law sent for reform upto period of three years and (3) above 18 treated as adult.

The committee on the rights of child has given the full fledge power to determine the minimum age of criminal responsibility to the party states. This concept of minimum age of criminal

responsibility is accepted in our Indian justice administration system and is present through 1890, IPC.

Our Indian Penal Code, 1890 in its section 82 and 83 which talks about *doli incapax* and *doli capax*. Section 82 of the IPC says that nothing is an offence which is done by a child under seven years of age and section 83 says that 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. So child upto the seven years is totally immuned from the penal consequences. And about the children in age group seven to twelve, it says that if he does not understands the nature and consequences, then he will not be punished. On the careful analysis of section 82 and 83 of IPC we find that IPC gives immunity to children upto 7. But children between 7-12 given qualified immunity. That means judiciary may or may not try them depending on their understanding of what is right and what is wrong.

Problem is relating to the minimum age of criminal responsibility. The international committee on the CRC states that all states have to affix the minimum age of criminal responsibility without fixing the minimum age of criminal responsibility. We are having the age of criminal responsibility in our IPC, so it said it must not be too much low as 7 years. By analyzing the age group, we gather out three categories of age group of child ie *first* upto 7 which are completely immuned from criminal responsibility, *second* between 7-16 if in conflict with law sent for reform upto period of three years and *third* between 16 to 18 which can be treated as adult in the case of heinous offence according to our current juvenile justice act, 2015.

This creates the dilemma in our juvenile justice system. We have accepted the definition of Child as given in the CRC that is 18 years but minimum age of criminal responsibility is according to our IPC. Hence the children upto the 7 years are under no criminal liability. And for the children upto 18 years there is different juvenile justice system than the adult justice delivery system. Special concern is about the children between the age group 16 to 18 who are to be treated as an adult in the case of heinous crimes. According to section 2 (33) of Juvenile Justice Amendment act, Heinous offences are the offences for which the minimum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment for seven years or more.

Here is issue because through international treaties and covenants we cannot bind the *child in conflict with law* regarding heinous crimes in a water-tight definition that if the offence is committed by the age group 16-18 are to be deal with separate system. Age should not be the criteria. It has to keep at individual level according to their level of criminal mindset of understanding. If we are discriminating them on the basis of age group then it will be injustice as the criteria should be psychological one that is according to one's own mental level.

According to a research, there is no method of determining the level of maturity. According to the research study by Elizabeth S. Scott and Laurence Steinberg, the former members of the John and Catherine T. MacArthur Foundation Research Network on Adolescent and Juvenile crime states: *“The problem with individualized assessments of immaturity is that practitioners lack diagnostic tools to evaluate psychosocial maturity and identity formation on an individualized basis. Recently, courts in some areas have begun to use a psychopathy checklist, a variation of an instrument developed for adults, in an effort to identify adolescent psychopaths for transfer or sentencing purposes. This practice, however, is fraught with the potential for error; it is simply not yet possible to distinguish incipient psychopaths from youths whose crimes reflect transient immaturity. For this reason, the American Psychiatric Association restricts the diagnosis of psychopathy to individuals aged eighteen and older. Evaluating antisocial traits and conduct in adolescence is just too uncertain.”*

So, it has to be adjudged at individual level.

On the one hand we talk about the Justice and on the other hand the best interests² of the wrongdoers to be maintained. On the one hand we say that children must be given the same right as adult at all relevant stages of the criminal procedure and on the other hand we are deterring ourselves to not give them harsh corporal punishment. How the justice can be provided or to be maintained at the stake risk to the life of the victims committed by the gruesome offenders between the ages group 16-18. Here is urgent need of adopting the principle of **restorative justice** so that victim can realize that justice is given to him or her. On one hand we talk about that equality is the basic principle of our legal system and on the other hand we are not treating the delinquents of same mentality on equal footings means unequal punishment for delinquents with same mentality in the same type of gruesome and heinous offence, ie. For upto 16 years maximum punishment is 3 years incarceration and for 16-18 imprisonment but not death penalty. Also regarding the age who should decide the age of juvenile offender, so it is Juvenile Justice Board, here also they should have to check the mentality of the juvenile offender at the individual level with the help of experts. The age should not be the criteria to decide the criminal mind set up. We can check their mental level by asking simple questions like if I stab you the knife, what will be happen to you etc. Again his after doings of his acts can well tell about his understandings like hindrance of him after committing the crime or removing the evidence from the crime scene. It means that his acts in themselves show the level of his maturity. So, here what is the need of determining the age whether he belongs to this age group or that age group?

Again our government takes the rescue from the fact that we have signed the CRC and other treaties so we are bound by it. It is also not so simply because firstly treaties are only the understandings between the sovereign states. Here Vienna Declaration's mention is must which is the treaty on the Law of Treaties which till now India has not rectified but Indian Supreme

² CRC, Article 3(1) and 40 (1).

Court has accepted its norms as a customary status. For India, if any treaty to be enacted in India has to be in confirmation with our Constitution. Then if our Parliament passes the bill in the favour of that treaty, and then it will be enacted through our national legislations. It means that our Parliament can abolish any law if it is inconsistent with our Constitution. So, it can abolish the treaty also. Usually, the purpose of international treaties is political one, to get the international support. But this support should not be at the stake of the innocent victims.

It is to be kept in mind the children of today time; we see that they are much smarter than we are. Their IQ level is continuously increasing with the help of advance technology. This technology benefits also reached to the villages also. It means that rarest people are spare from getting the benefit of the technology. They well know about the heinous crimes. Usually the victims of these delinquent offenders are the girls of small age who cannot protect themselves and easily becomes their prey and after committing the crime they even don't spare the lives of those innocent girls and after committing the crime they also try to clear the evidence. They know about what is rape, how drastic consequences are of it, they even know the meaning of dignity of a woman particularly more than 8 years of age of today's time. The Juvenile Justice Act, 2015 enlisted the age group between 16-18 who to be tried as adult if they commits the heinous crime and also that according to section 21 of the Juvenile Justice Act, 2015 they will not get the life imprisonment or death penalty. Research shows that heinous crimes committed by the juveniles are continuously increasing³. If we did not give harder punitive methods then they will never take the lesson. Such crimes will never decrease. Edmund Burke states that *adopting restorative justice practices has a significant impact on the recidivist levels of juvenile offenders*.⁴ Here, if they are to be tried as an adult so why not punishment be there as an adult.

Then, rescue is taken in the name of international norms. We must not forget that ever that universal virtue is Justice. It is also accepted by the international norms. If there is need to change, there is need to change the international conventions like CRC particularly in the arena of age determination and if delinquents are to be tried as adult then full application must be given to the rules and procedures applicable to adult including the punishment. Reason is simple that they well know the flaws of our legal system which they get through the sections like section 18 of Juvenile Justice Act, 2015 which says that a child below the age of sixteen, despite of type of offence whether petty or heinous, they can be release after due admonition. We know that children are our assets and need to be protected but if children are filled with such a level of criminality, how can we say them **a child** because children are innocent and these are those who cannot discriminate between what is just and what is unjust. We have not to give unnecessary protection to the children at the stake of life of others particularly when they are fully aware of their acts.

³ According to NCRB report, 2018.

⁴ Edmund F. McGarrell, U.S. Department of Justice, Restorative Justice Conferencing as an Early Response to Young Offenders, August, 2001, available at <https://www.ncjrs.gov/pdffiles1/ojjdp/187769.pdf> (Retrieved on 14 March , 2019)

In the area of heinous crimes particularly, the age should be that which is given in our IPC and that there should be no classification of age group. It means that all children above 7 years should be dealt equally on the basis of their understanding. And it is not very difficult for the judges to assess that a particular child is understanding the consequences of his acts or not. Because of the loopholes in the juvenile legal system, the crimes are continuously increasing in spite of getting lowering.

Conclusion

Through my article, I come to the conclusion that provisions of our IPC have to be follow in the case of minimum age of criminal responsibility and in the case of heinous crimes provisions regarding process of adult trial must be applicable to all without any kind of discrimination so that welfare to the society and justice to the victim should be maintained. For this, it is must to adopt the principle of restorative justice. To reduce the age in relation to heinous crimes is not the solution. Solution is in determining each case at its own individual level and circumstances. And this is utmost responsibility of the administration to provide justice to all. Government cannot shrewdly goes away from its responsibility by saying that it is our utmost goal to protect the interest of the child. It must not be at-least in the matters of heinous crimes. Every child above 7 years has to be tested according to his own mentality to maintain the equilibrium of justice in the society. It can be the working model for the current contemporary situation in India.