Juveniles as Adults: Should the law be amended?

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1. Present Status

The present system of Juvenile justice in India is based upon the Juvenile Justice Act which was passed in 2000 with the purpose of incorporating into domestic law India’s obligations under International Law as a signatory of U.N Conventions on the rights of the child under 1989, the U.N. Standard Minimum Rules for Administration of Juvenile Justice (1985) (known as the “Beijing Rules”) and the U.N. Rules for the Protection of Juveniles Deprived of their Liberty (1990).

Underlying these international texts is the legal philosophy that juveniles lack the physical and mental maturity to take responsibility for their crimes, and because their character is not fully developed, they still have the possibility of being rehabilitated. This basic principle underlies the juvenile justice systems in many countries, including the United States and the U.K.

The JJA creates a Juvenile Justice System in which persons up to the age of 18 who commit an offence punishable under any law are not subject to imprisonment in the adult justice system but instead will be subject to:

- Advice/admonition,
- Counselling,
- Community service,
- Payment of a fine, or
- At the most, be sent to a remand home for three years.

2. Why in News

The horrific gang rape of a 23-year-old student in Delhi in 2012 sent shockwaves across India. Six men, including a juvenile, were arrested and charged with sexual assault and murder. Of the five adults, one died in police custody and the remaining four were sentenced to death by hanging.

The juvenile was sentenced to the maximum sentence possible under Indian law - three years in a reform institution. On August 31, 2013, the Juvenile Justice Board (JJB) ordered that the juvenile would go virtually free by sentencing him to only 28 months in a remand home as eight months of the total 36 months sentence had already been served. This order is subject to review by the JJB based on the behaviour of the juvenile and the police are required to expunge this crime from his record in order to ensure complete rehabilitation.

This has led to demands that minors 16 years and above, accused of serious crimes, should be tried as adults.

This proposal pertains to children between 16 and 18 years accused of crimes under Indian Penal Code Sections 302 (murder), 326A (acid attack), 376 (rape and sexual assault), 376A (rape resulting in death or vegetative state) and 376D (intercourse by management or staff of an institution).

The present Minister of Women and Child Development, Maneka Gandhi, has incorporated this demand in the final draft of the bill to amend the Juvenile Justice (Care and Protection of Children) Act, 2000.

3. Arguments in Favour

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 against women are very troubling. “Crime in India 2011” suggests that 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. This increase alone makes the case for the amendment of the JJA imperative.

Several other countries such as the U.S. and the U.K., which are both signatories to the U.N. Convention, have also faced an increase in violent crimes by juveniles, but, unlike India, they have taken action to amend their laws. Some of them have been described below.

3.1. International Scenario

3.1.1. U.S.A.

Most States in the U.S. have enacted a juvenile code of which the main objective is rehabilitation and not punishment. Juveniles appear in juvenile court and not in adult court. Juvenile courts do not have the power to impose punishment and can impose only rehabilitative measures or assistance by government programmes.

However, since the increase in violent crimes committed by juveniles in the 1990s, U.S. States have adopted a “get tough” approach in response.

In most U.S. States, the jurisdiction of juvenile courts is automatically waived when a juvenile above a certain age, usually 13 or 15, commits a violent or other serious crime, and the case is automatically transferred to adult court. A certification hearing takes place and an adult court prosecutor is required to convince the adult court that the case should be transferred. The juvenile is entitled to an attorney at the hearing and to present any evidence which mitigates against the transfer.

For example, in Indiana, South Dakota and Vermont, children as young as 10 can be tried as adults. California’s Proposition 21 which was passed in 2000 allows prosecutors to automatically try juveniles who commit felonies as adults. Under Michigan’s Juvenile Waiver Law passed in 1997, juveniles can automatically be tried as adults.

3.1.2. U.K.

Similarly, in the U.K., persons under 18 are tried by a “Youth Court” which is a special type of magistrate’s court for those aged 10-18 years. The Youth Court can issue community sentences, behavioural programmes, reparation orders, youth detention and rehabilitation programmes which last three years.

However, for serious crimes like murder or rape, the case starts in Youth Court but is transferred to a Crown Court which is the same as a Sessions Court. The Crown Court can sentence the child for offences of murder committed when the offender was a youth as well as for “grave crimes” including sexual assault and sentence the child to “indeterminate detention for public protection.”

The Crown Court can also give “extended sentence” to a minor. If a youth is jointly charged with an adult, the charge is heard and tried by a regular court. If the youth is found guilty, the Crown Court can impose a sentence which does not exceed the maximum sentence applicable to an offender who is 21 years or older. Therefore, in both the U.S. and the U.K., juveniles who commit violent crimes such as rape are prosecuted in the same manner as adults.

Not only State laws but even international conventions do not prohibit such actions in special circumstances.

3.1.3 International Conventions

The U.N. Convention and the Beijing Rules do not prohibit subjecting children/juveniles to the regular criminal justice system under certain circumstances. The state can establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.

Therefore, in accordance with the U.N. Convention, the JJ Act could have established an age limit, such as 14 or 16, below which a person could not be deemed to have the capacity to commit an offence.

Rule 17 of the Beijing Rules, in turn, provides that the reaction shall be in proportion to the circumstances and the gravity of the offence as well as the circumstances and needs of the juvenile as well as the needs of society. Furthermore, personal liberty may be deprived if the juvenile is adjudicated guilty of a serious offence involving violence against another person or persistence in committing other serious offences.
Unlike the U.N. Convention, the Beijing Rules do not fix 18 as the age of a juvenile. Instead, the Beijing Rules provide for rules applicable to persons between the age of 7 and 18. Therefore, India’s international legal obligations do not prohibit it from amending the JJ Act to provide that persons between the age of 16-18 who are accused of rape, kidnapping and abduction of women and girls will be exempted from the jurisdiction of the JJB and tried in the adult criminal justice system.

Unfortunately, the current system serves neither the purpose of rehabilitation nor deterrence against future crime. 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.

While rehabilitation is certainly an important legal and societal objective, this interest surely has to be balanced with creating a legal deterrent to protect women and girls from the increasing incidence of rapes by juveniles.

4. Views against decreasing age for Juvenile’s trial

The anger felt in the country in the aftermath of the Delhi gang rape is understandable. However, amending the Juvenile Justice Act is a broader issue. Leaving aside discussions on whether lowering the juvenile age limit will achieve the stated goals and even ignoring the broader philosophical issues such as the death penalty, the purpose of the justice system - punishment or rehabilitation and even the basis of the definition of 'juvenile' - physical or mental, there are legal quandaries in lowering of the juvenile age limit.

4.1. A revisit to the International Conventions

One obstacle to amending the Juvenile Justice Act is the United Nations Convention on the Rights of the Child, an international treaty India signed and ratified in December 1992. Although Article 1 of the CRC allows each acceding state to define the juvenile age limit, Article 37(a) nevertheless stipulates that “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by person below eighteen years of age.”

A second hurdle to reducing the juvenile age limit is the International Convention on Civil and Political Rights, which India acceded to in April 1979. Article 6(5) of the ICCPR states, “Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.”

As per India’s international commitments, it may well lower the juvenile age limit from 18 to 16 but may not pursue the death penalty or a sentence of life imprisonment without possibility of parole. Thus, a new category is created between juvenile and adult. This is not very helpful for Indian bureaucrats who are considering a waiver of the juvenile age bar only in cases of the most grievous crimes such as murder, acid attack, rape, and repeat offenders in cases of robbery, kidnapping, and dacoity.

In essence, international law prohibits the very sentences for which Indian legislators are considering lowering the juvenile age limit. India may still withdraw from the treaties or enter into the record certain exceptions in congruence with new national laws. However, this move is bound to result in international pressure and greater difficulty in concluding extradition treaties with other states. For example, European law forbids extradition in cases where the offence for which extradition is requested carries the death penalty under the law of the requesting country. Some countries such as the United States enact automatic sanctions if a country’s human rights ratings fall below a certain level. India narrowly escaped sanctions over not doing enough to prevent child trafficking in 2011 thanks to political reasons.

4.2. A Revisit to the Crime Records

Activists and organizations working with children in conflict with the law point out that in the last three years, going by the National Crime Records Bureau, crimes by juveniles range between 1% and 1.2% of the total number of crimes, with more than 60% of juvenile crime linked to theft. The assumption that bringing the 16-year-olds “for premeditated murder, rape...into the purview of the adult world... will scare them”, is again unfounded speculation.
In fact, a number of studies after the United States began “getting tough” on juvenile offenders from the 1980s onwards show that juveniles incarcerated with adult criminals often get more hardened and inured to a deviant way of life. This has also been the view of Justice J.S. Verma who chaired the committee which gave recommendations to tackle gender violence.

4.3. Judicial Pronouncements by US Courts

None of this is to argue that the juvenile age limit should not be lowered or that it should be. In the landmark Roper v. Simmons case in the United States, the Supreme Court ruled that capital punishment may not be imposed for crimes committed as minors. The opinion, delivered by Justice Anthony Kennedy, declared that minors had diminished culpability due to immaturity and therefore their execution was cruel and unusual under evolving standards of decency. The opinion also cited significant US legal opinion as well as international consensus in its favour.

The US Supreme Court did not deny the brutality of some of the crimes committed by juveniles but made the interesting point that this very factor - the brutality of the crime - may overpower any mitigating arguments based on youth as a matter of course if the application of the death penalty was allowed.

However, many question the diminished culpability of juveniles. Setting the age of adulthood at 18 is arbitrary and is a cultural evolution more than a scientific one, dictated more by going to college or being drafted for military service. In a media-saturated age, juveniles today are far more aware than their predecessors were.

However, awareness is not the same as maturity - in fact, researchers have shown that adolescence can last well into the mid-20s for many people while some attain a maturity much earlier.

The argument to lower the juvenile age limit in select cases is exactly what the Roper v. Simmons opinion warned against - the lower age limit is sought only for some crimes as the public is swayed by an emotional response to their brutality than by reason alone. If India’s legislators genuinely felt that juveniles today were attaining a certain level of maturity earlier, then why is the age of adulthood itself not lowered? How is it possible for someone to be mature enough to commit rape, dacoity, or murder but not to drink, join the military, or vote?

4.4. Supreme Court in India

The apex court in a public interest litigation decided on March 28, 2014, in Dr. Subramanian Swamy and others v. Raju and others, refused to read down the provisions of the JJ Act, 2000, in order to account for the mental and intellectual competence of a juvenile offender and refused to interfere with the age of a juvenile accused, in cases where juveniles were found guilty of heinous crimes.

It was held by the Court that the provisions of the Act are in compliance with Constitutional directives and international conventions. The Court further stated that the classification of juveniles as a special class stood the test of Article 14 of the Constitution, and that the Court should restrict itself to the legitimacy and not certainty of the law. While refusing to allow the Delhi gang rape juvenile offender to be tried as an adult, the Supreme Court pointed out in its order that underage crime still forms only a tiny percentage of the large body of crime in the country.

5. Way-Forward

Merely going through a differential process for juvenile offenders is not enough. It is obvious that the social contract underlying a lenient regime requires equal attention to be paid to the design and implementation of a proper rehabilitation process. Society will only countenance shielding young offenders guilty of great brutality from the rigours of adult justice if it is confident that they will indeed benefit from the rehabilitative approach to juvenile justice.

In India, we need to guard against the complacent belief that a stint in a remand home is enough for their rehabilitation. The atmosphere in many such facilities is not conducive for reformation, and in fact may toughen or entrench criminal propensities. The system should not end up creating a new underclass that combines a sense of triumph over avoiding a prison term after committing heinous crimes, with the psychological effects of
staying under bleak, hope-denying conditions. That means the problem lies in the implementation of the provisions in the Act. Some of them have been explored below.

5.1. Problems in implementation of the JJ Act, 2000

Among the many urgent aspects of juvenile justice reform is the need to focus on the abysmal state of our remand homes in terms of their physical condition as well as the attitude of the staff.

The second is the attitude of the police towards juvenile offenders which necessarily affects investigation. The draft bill’s proposal (given in appendix) to have the district magistrate as the chief of the child welfare committee has also met with condemnation from child rights activists who point out that given his workload, this is an unrealistic expectation. Presently, a member of civil society is chosen by the state government to head this body. The draft bill puts humungous responsibility on the Juvenile Justice board to ensure that each case is examined meticulously before it is transferred to a regular court. Much will of course depend on how this responsibility is fulfilled.

Another issue was that one of the common misconceptions is about the difference between the minimum age of criminal responsibility and "juvenility". There are various provisions of the Act like Individual Care Plans that enforcement agencies do not even know about and that the law does in fact provide graded treatment for juveniles and that the Juvenile Justice Board can use its discretion in deciding appropriately on a case-by-case basis. The basis of judicial treatment of juveniles must be the "behaviour" and not the nature of the offence because the JJ Act is not retributive and was never meant to be. To support the argument, the experience of the United States shows that giving harsh punishments to children has not reduced juvenile crimes.

Alongside is the Mental Health Programme which the Juvenile Justice Act mandatorily requires for the rehabilitation of juveniles, but has not been implemented at all. There is the urgent need for creating "infrastructure of awareness" for proper implementation. Then there are the needs of "children in need of care & protection", a classification recognised and protected by the Juvenile Justice Act of 2000. For bringing these children onto an equal platform as all children, it is important to actively implement the "after-care programmes" which extend up to the age of 21.

6. Conclusion

Separate legislations have existed in many countries around the world since the early 20th century for the care and protection of children, including child offenders. The present system in India was introduced by a 1986 Act and improved upon in 2000. The JJ Act, 2000, a progressive legislation, replaced the regular judicial process with a reformatory regime, favouring supervised probation or stay in an observation home over imprisonment. The law tries to reform a young offender’s conduct rather than confine him for decades in a prison with adult criminals, which only works to fan recidivist tendencies.

Making juvenile correctional facilities more humane is one part of the answer. But to address the need for proportionality — not so much in punishment as in the necessity of socio-psychological repair — when a young offender commits truly heinous crimes, a longer period of sustained counselling and rehabilitation ought to be an essential part of the juvenile justice process even after the maximum period of remand is over.

Legislative responses ought to be well thought-out, and lawmakers need to be wary of tinkering with existing laws because of moral panic over one incident. The idea of carving out an exception in the Juvenile Justice Act for children between the ages of 16 and 18 when they are accused of rape, murder, and other serious offences is completely retrograde.