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DOLI INCAPAX: Re- Accessing the Age of Criminal Responsibility

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Abstract: ***With the advancement of society, the aspect that presents a policy challenge for the criminal justice administration system is nature of crime that is being committed by the juveniles. Children, without any doubt form the most important stratum of the human rights pyramid. The difficulty that the current prospect presents before us is protecting both the offender and the victim. Thus the whole debate lies in providing an appropriate legal mechanism to reflect the transition from the age of childhood innocence through maturity to full responsibility under the criminal law. Along with specialised institutions such as Children's Courts and juvenile care centres, specific legal rules have been developed which differentiate the position of children and young people within the general criminal justice system. Considerable recent attention has been directed towards rules governing the minimum age of criminal responsibility, and the imposition of criminal responsibility above that age depending on a youth offender's appreciation of the wrongness of his or her act. This paper thus, analyses the international position in various countries in order to see the contemporary practices and also examines the operation of these rules, so that the right of childhood remains protected.***

Keywords: Courts, Children, Legal, Criminal, Juvenile

I. INTRODUCTION/ PROLOGUE

Juvenile delinquency, in the recent times has attracted much legislative debate and judicial intervention. But the position regarding the determination of criminal responsibility is yet uncertain because of the divided opinion of culpability and reformation. In August last year the Union Cabinet had cleared crucial amendments to the Juvenile Justice (Care and Protection of Children) Act, 2000 empowering the Juvenile Justice Board to decide whether a juvenile aged between 16-18 years is to be tried in a regular court for having committed a heinous crime that carries a punishment of seven years or more[1] and give the discretionary powers to juvenile boards to decide if 16-to-18-year-olds in rape and murder cases should be tried separately or in regular courts, after considering the factors like the *"premeditated nature"* of the offence, *"culpability"* of the juvenile and his *"ability to understand the consequences of the offence"*. It seeks to address challenges in the existing Act such as delays in adoption processes, high pendency of cases, accountability of institutions, etc.[2]

The problem of juvenile delinquency is not new. It occurs in all societies simple as well as complex, that is, wherever and whenever a relationship is affected between a group of individuals leading to maladjustments and conflict. As per statistics available with the National Crime Records Bureau (NCRB), there has been a sharp rise in rapes committed by juveniles. While in 2010, the figure was at 858, it became 1149 in 2011 and 1316 in 2012. The number of juveniles held for rape in 2013 is 1,388. Owing to the rise and brutality of sexual assaults particularly by juveniles on young girls and women, there was an increasing sense of urgency to create legal avenues for some deterrence to warn off the under-age perpetrators.[3]

II. RAISING THE CONCERN

The paper in the second part proposes to discuss the need to debate a well- settled law. This arises for two reasons. One, the frightening gang- rape-cum-murder in Delhi in which the minor accused has allegedly committed the most brutal act has shifted the spot light on juvenile offenders, their age bar, nature of crime committed and the brutality committed by them. Secondly, over the last ten years, heinous crimes like murder and rape by juveniles have increased four to five times. This is indeed a sharp rise which should not go unnoticed, unanalyzed and without debate. Therefore, the question is that even while we keep the spirit of reformation of juveniles at the back of our mind, should we link their crimes and consequent penalty to their age or to the intensity, degree and heinousness of the crime committed by them. Should a juvenile, of 17 years, go scot free after committing rape or

[1] Cabinet clears changes in JJ Act. Available at http://indianexpress.com/article/india/india-oth ers/cabinet-clears-changes-in-juvenile-justice-act/#sthash.iZBx1YYA.dpuf.
[2] The Juvenile Justice (Care and Protection of Children) Bill, 2014. Available at http://www.prsindia.org/bill track/the-juvenile-justice-care-and-protection-of-children-bill-2014-3362/
[3] Trying minors as adults for rape: Will amending Juvenile Justice Act deter crime? Available at http://www. firstpost.com /tag/juvenile-justice-care-and-protection-of-children-act

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murder? Under the present law, a juvenile cannot be kept in the Observation Home after he is 18 years old. He cannot be even kept at a regular jail because when he committed the crime he was under 18. So he walks free. This gives us an opportunity to see the recent judicial outlook in India.

III. RECENT JUDICIAL TREND IN INDIA

India developed its own jurisprudence relating to children and the recognition of their rights. The Constitution has guaranteed several rights to children, such as equality before the law.[4] One of the latest enactments by Parliament is the Protection of Children from Sexual Offences Act, 2012. The provisions under the Juvenile Justice (Care and Protection of Children) Act were challenged in the case of *Salil Bali v. Union of India.*[5] This case concerned eight petitions being jointly considered by the Supreme Court regarding the juvenile justice laws in India. The petitions requested, among other things, that the Court: (a) amend the JJ Act to lower the juvenile age from 18 to 16. (b) amend the JJ Act to allow juveniles who have allegedly committed crimes such as rape and murder to be tried and punished under the laws applicable to adults.

Mr. Bali, submitted that the age of responsibility, as accepted in India, is different from what has been accepted by other countries of the world.[6] Referring to Section 82[7] and section 83[8] of the Code, he urged that even under the Indian Criminal Jurisprudence the age of understanding has been fixed at twelve years, which according to him, was commensurate with the thinking of other countries, such as the United States of America, Great Britain and Canada. Mr. Bali also contended that there was a general worldwide concern over the rising graph of criminal activity of juveniles below the age of eighteen years, which has been accepted worldwide to be the age limit under which all persons were to be treated as children. He, accordingly, urged that the provisions of Sections 15[9] and 16[10] of the Act needed to be reconsidered and appropriate orders were required to be passed in regard to the level of punishment in respect of heinous offences committed by children below the age of eighteen years, such as murder, rape, dacoity, etc. Mr. Bali submitted that allowing perpetrators of such crimes to get off with a sentence of three years at the maximum, was not justified and a correctional course was required to be undertaken in that regard. Another litigation before the apex court was a public interest litigation decided on March 28, 2014[11], where the court 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.

IV. MINIMUM AGE OF CRIMINAL RESPONSIBILITY: AN INTERNATIONAL PERSPECTIVE

Article 40[12] of the United Nations *Convention on the Rights of the Child* (UNCRC) requires signatory states to, seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law.[13] The general philosophy behind this approach is explained in the official commentary to the United Nations' *Standard Minimum Rules for the Administration of Juvenile Justice* (the "Beijing Rules").[14] Other important instruments being:

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[4] Article 15(3)- Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.
Article 21A.-Right to education.—The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.
Article 39-Certain principles of policy to be followed by the State
Article 24- Prohibition of employment of children in factories, etc.—No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment

[5] (2013) 7 SCC 705

[6] Mr. Bali also pointed out that even in the criminal jurisprudence prevalent in India, the age of responsibility of understanding the consequences of one's actions had been recognized as 12 years in the Indian Penal Code.

[7] Section 82: Act of a child under seven years of age.—Nothing is an offence which is done by a child under seven years of age.

[8] Section 83: Act of a child above seven and under twelve of immature understanding.—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.

[9] Section 15. Order that may be passed regarding juvenile.

[10] Section 16. Order that may not be passed against juvenile

[11] Dr. Subramanian Swamy and others v. Raju and others, Special Leave Petition (Crl.) no. 1953 of 2013

[12] ***Article 40***(1)- States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

[13] In particular: (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. The UNCRC does not specify any particular minimum age of criminal responsibility, but the United Nations committee responsible for monitoring compliance with it has criticised jurisdictions in which the minimum age is 12 or less.

[14] The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no age limit at all, the notion of responsibility would become meaningless.

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- UN Rules for the Protection of Juveniles Deprived of their Liberty.[15]
- The UN Guidelines for the Administration of Juvenile Delinquency 1990 (the Riyadh Guidelines).[16]
- Guidelines for Action on Children in the Criminal Justice System.[17]
- Guidelines on Justice in Matters Involving Child Victims and Witness of Crimes.[18]

Here is a brief account of few legal systems-

➢ **CANADA:**

In regard to Canada, the Youth Criminal Justice Act, 2003, as amended from time to time, prescribes the age of criminal responsibility at twelve years. Section 13[19] of the Criminal Code of Canada, is in pari material with the provisions of Section 83[20] of the Indian Penal Code. In fact, according to the Criminal Justice Delivery System in Canada, a youth between the ages of 14 to 17 years may be tried and sentenced as an adult in certain situations. Further in Canada the Youth Criminal Justice Act governs the application of criminal and correctional law to those who are twelve years old or older, but younger than 18 at the time of committing the offence, and that, although, trials were to take place in a Youth Court, for certain offences and in certain circumstances, a youth may be awarded an adult sentence. [21]

➢ **UNITED STATES OF AMERICA:**

The first juvenile court in this America was established in Cook County, Illinois, in 1899 by the, Juvenile Court Act of 1899. In USA, in several States, no set standards have been provided, [22] reliance is placed on the common law age of seven in fixing the age of criminal responsibility, the lowest being sixteen years in North Carolina as per Juvenile Justice and Delinquency Prevention Act 1974. The general practice in the United States of America, however, is that even for such children, the courts are entitled to impose life sentences in respect of certain types of offences, but such life sentences without parole were not permitted for those under the age of eighteen years convicted of murder or offences involving violent crimes and weapons violations.

➢ **UNITED KINGDOM:**

Children accused of crimes are generally tried under the Children and Young Persons Act, 1933, as amended by Section 16(1)[23] of the Children and Young Persons Act, 1963. Under the said laws, the minimum age of criminal responsibility in England and Wales is ten years and those below the said age are considered to be *doli incapax* and, thus, incapable of having any *mens rea*. If the juvenile has committed an offence alongside an adult, he is liable to be tried in the adult courts, or both of them

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[15] U. N. General Assembly, United Nations Rules for the Protection of Juveniles Deprived of their Liberty, A/RES/45/113, 68th plenary meeting, 14 December 1990. Available at http://www.un.org/documents/ga/res/45 /a45r113.htm

[16] U. N. General Assembly, United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), A/RES/45/112, 68th plenary meeting, 14 December 1990. Available at http://www.un.org/docum ents/ga/res/45/a45r112.htm

[17] Recommended by Economic and Social Council resolution 1997/30 of 21 July 1997, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CriminalJusticeSystem.aspx

[18] ECOSOC RESOLUTION 2005/20 OF JULY 2005. Available at http://www.un.org/en/pseataskforce/ docs/guidelines_on_justice_in_matters_involving_child_victims_and.pdf

[19] Section **13-** No person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years.

[20] Section 83-Act of a child above seven and under twelve of immature understanding.—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

[21] In 2012, Parliament removed the presumptive offence scheme from the YCJA while retaining Crown applications for adult sentences for youth. Parliament also amended the adult sentencing provisions to include the following:

- If a young person is 14 years of age or older and is charged with a serious violent offence, the prosecutor must consider applying to the court for an adult sentence. If the prosecutor decides not to apply for an adult sentence, the prosecutor must advise the court. A province may decide to change the age at which this obligation is triggered from 14 to 15 or 16.
- A court can impose an adult sentence only if (a) the prosecution rebuts the presumption that the young person has diminished moral blameworthiness or culpability and (b) a youth sentence would not be of sufficient length to hold the young person accountable.
- A young person under the age of 18 who receives an adult sentence is to be placed in a youth facility and may not be placed in an adult correctional facility. Once the young person turns 18, he or she may be placed in an adult facility.

[22] At the threshold age of 18, youth are automatically under the jurisdiction of the adult criminal justice system in most states. Persons aged 16 are considered adults in three states—Connecticut, New York, and North Carolina. Persons aged 17 are considered adults in ten states—Georgia, Illinois, Louisiana, Massachusetts, Michigan, Missouri, New Hampshire, South Carolina, Texas, and Wisconsin. National Council on Crime and Delinquency, Youth Under Age 18 in the Adult Criminal Justice System, Christopher Hartney. Available at http://www.wcl.american.edu/endsilence/documents/youthunder18intheCJ system.pdf

[23] Section 16- Offences committed by children:
(1)Section 50 of the; principal Act shall be amended by substituting therein the word "ten" for the word "eight".
(2)In any proceedings for an offence committed or alleged to have been committed by a person of or over the age of twenty-one, any offence of which he was found guilty while under the age of fourteen shall be disregarded for the purposes of any evidence relating to his previous convictions; and he shall not be asked, and if asked shall not be required to answer, any question relating to such an offence, notwithstanding that the question would otherwise be admissible under section 1 of the M1Criminal Evidence Act 1898.

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are tried in the Crown Courts. Juveniles are sometimes tried as adults in Crown Courts for the commission of heinous offences[24] By comparison, the criminal/ penal codes of many countries prescribe higher minimum ages of criminal responsibility[25]

- 12 years—Canada, Greece, Netherlands;
- 13 years—France, Israel, New Zealand (except for murder/ manslaughter where the age limit of 10 applies);
- 14 years—Austria, Germany, Italy and many Eastern European countries;
- 15 years—Denmark, Finland, Iceland, Norway, Sweden;
- 16 years—Japan, Portugal, Spain;
- 18 years—Belgium, Luxembourg.

V. CONCLUSION AND SUGGESTIONS

As Pandit Jawahar Lal Nehru in Constitutional Assembly Debates[26] referred that the law should be flexible and must change as per the need of the society, now it is the time where the need is reflected with the increasing ratio of crimes in India. We need to keep in mind the victim's right; there is a need to amend the laws so that a balanced approach can be achieved between both. Moreover, certain amendments should be done to maintain the record that whether the child is a habitual offender or he has committed the crime due to non-judging the consequences.

1. Section 19 of the Act which mandates the erasing of the records of the juvenile offender, should be amended to not to include crimes punishable with life imprisonment or death penalty under its ambit. In order to prevent repeated offences by an individual, it is necessary to maintain the records of the inquiry conducted by the Juvenile Justice Board, in relation to juveniles so that such records would enable the authorities concerned to assess the criminal propensity of an individual, which would call for a different approach to be taken at the time of inquiry.
2. The law should be very clear in respect to heinous crimes. A brain mapping and NARCO analysis should be done to access the *mean rea* in the juvenile who is arrested for heinous crimes. Afterwards the said report should be sent to government hospitals for the expert opinion of the specialist doctor. Once the doctor give his report to the effect that the thinking capacity of the juvenile has no defect, then the juvenile should be treated as adult and separate charge-sheet should be filed in juvenile courts.
3. Any aggravated form of sexual assault should be placed in the category of automatic legislative transfer as it involves the juvenile offender possessing a degree of intention that is enough to violate the bodily integrity of another. Though they may not be sent to the adult prisons but there should be some other method to reform them and make them realise their guilt.
4. The offences of rape by the juvenile must be made non-bailable in nature and such juvenile should be directly sent to observation home with conditions to keep the offender isolated.
5. In 1955, first U.N. Congress held in Geneva on prevention of crime and Treatment of delinquents had also resolved that the specially trained Police Officer should be appointed for this purpose. A special training is necessary for the police officer to a special police unit for handling this delinquent problem because police is the first point to contact for delinquents. Police as is generally not done, should prepare the real report about the Juvenile Delinquents. They should not conceal any fact about them and submit the real and complete report about their family background to the concerned authority to enable it to deal with the juvenile delinquent more effectively.
6. Shifting the burden of proof from the prosecution to the defence. At present the burden of rebutting the *doli incapax* presumption rests with the prosecution. A proposal sometimes advanced is to shift the burden so that the accused be required to prove (on the balance of probabilities) that he or she did not appreciate the wrongness of the act in question.

[24] Contrasting Conflict: Lowering the Age of Juvenile Justice: ***Dhruva Sareen,*** India Law Journal. Available at http://www.indi alawjournal.com/volume7/issue-2/article5.html
[25] The Age of Criminal Responsibility: Gregor Urbas, Trends and Issues in crime and criminal justice Australian Institute Of Criminology No. 181, November 2000
[26] Enlargement of Fundamental Rights with focus on Civil and Political Rights as well as Economic, Social and Cultural Rights. As accessed from indiacode.nic.in/mjr/En.%20of%20FR.doc.

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