JUVENILE JUSTICE- A HARD LOOK

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Introduction

It is very ironical that on one hand we have thousands of minor as under trial and on other hand we are claiming for our position in General Assembly. The aim of writing is to critique the juvenile justice system in the light of the recent Mumbai terrorist attack case. The reference to the Mumbai attack case has been kept at a minimal since the learned judge held that the accused was not a juvenile and as such was to be tried at regular court and not at the juvenile justice board. Nevertheless, the very incident exposes the vulnerability of the entire legal system of the country.

It depicts the juvenile justice act as a weak link in the chain of our criminal system which can be exploited by anti-national elements waiting in the wings for an opportunity toour national security.

The paper focuses on the issue of age determination- possibly the biggest loophole when it comes to misusing the statute that was legislated with the intent of being child friendly and the objective of meeting the requirements of Conventions on the Rights of the Child[1]. The paper does not advocate doing away with treating children as in need of care and protection and treating them as hardened criminals. It certainly does not support reverting to the system that existed before the arrival of Juvenile Justice Act, 1986. It promotes a middle path, a scenario where stringent measures are taken against those who commit grave crimes. Letting serious crimes go unpunished in the name of juvenile justice only makes the system more prone to misuse. Juvenile delinquents should not be brutalised in the name of strict action but hardcore criminals should not be allowed to exploit the legal system and go scot free either. The structure of the paper has been modelled accordingly by dividing it into different sections. The first section deals with the arrival of Juvenile Justice Act in India- analyzing it in depth including a discussion about the system that existed before the act was passed, the need for such legislation and the reason for bringing in a new legislation on the same subject later in 2000. The second section forms the crux of the project as it deals with the issue of age determination. The conclusion that forms the third and final section is more suggestive in nature. It is devoted to discussing whether there is a need for a new legislation or an amendment in the existing one. It reflects on the issue of national security and advocates change in national interest.

History of Juvenile Justice

Juvenile Justice in India is governed by the Juvenile Justice (Care and Protection of Children) Act, 2000. It is a successor to the juvenile justice Act, 1986 and has been enacted to correct glaring

[1] India ratified the Convention on the Rights of the Child as of January 11, 1993. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, Status of Ratifications of the Principal InternationalHuman Rights Treaties, 6, (June 9, 2004), available at http://www.unhchr.ch/pdf/report.pdf as cited in Erika Rickard, Paying Lip Service to The Silenced: Juvenile Justice in India available online at http://www.law.harvard.edu/students/orgs/hrj/iss21/155-166.pdf

loopholes that were a characteristic feature of its predecessor, though entirely not without failings of its own. These statutes have been enacted in the recent past with not even a time gap of a quarter of a century as against present times. This chapter explores the situation of juvenile justice in India from the very beginning.

Ancient India though governed by a number of laws hardly had any law specially dealing with juvenile delinquency. As the problem of neglected children and juvenile delinquency grew with times, a need for legislation to that effect was felt. India, a British colony then took inspiration from England, which by then had already passed its own juvenile legislation[2]. The Apprentices Act was passed in 1850 as the first juvenile legislation to deal with children in India[3]. As per the provisions of this act, children between ten to eighteen years of age found indulging in crime were placed in apprenticeship in a trade. The Indian Penal Code came after another ten years had passed. Though it is not a specific legislation dealing with juvenile justice, nevertheless it has some provisions when it comes to underage criminals. Section 82[4] of the IPC grants blanket immunity to a child below seven years of age imbibing the principle of doli incapax. The Latin term literally means 'incapable of crime'. IPC assumes that a child less than seven years of age does not have the capacity to form a mental intent to commit a crime knowingly. Section 83[5] of the IPC is an extension of section 82 with a rider attached. It grants qualified immunity to a child aged between seven to twelve years.

The next milestone in the history of development of juvenile justice in India was The Reformatory School Act of 1876 which had a provision to empower the government to establish reformatory schools and to keep young criminals there till they found employment. Thereafter, a jail committee was appointed in 1919 following the recommendations of which separate legislations dealing with juvenile delinquency were enacted in different provinces, the first ones being in Madras[6], Bengal[7] and Bombay[8]. Since then, as Professor B.B. Pande of Delhi University puts it, "the twin concepts of "juvenile delinquency" and "juvenile justice" have gone through a constant process of evolution and refinement."[9] After we gained independence, in 1960 a new act focussing on children was passed. This was the Children Act, 1960 to "provide for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected or delinquent children and for the trial of delinquent children in the Union Territories."[10]

Even after this, the juvenile justice system faced different problems; the most important of them being the fact that different states had different acts to deal with juvenile delinquency which led to children in equal situation being judged differently in accordance with different provisions in different acts. The Supreme Court in Sheela Barse v. Union of India[11] observed "we would suggest that instead of each State having its own Children's Act in other States it would be desirable if the Central Government initiates Parliamentary Legislation on the subject, so that

[2] Juvenile Offenders Act, 1847 as cited in Shore, Heather, The Idea of Juvenile Crime in 19th Century England, History Today, Issue: 50 (6) available online at http://www.orange.k12.oh.us/teachers/ohs/tshreve/apwebpage/readings/juvcrime19cbr.html
[3] Edited by Witerdyk, A. John, Juvenile justice Systems: International Perspectives, 266, Canadian Scholars Press Inc. Edition: 2, 2002 available online at http://books.google.co.in/books
[4] Nothing is an offence which is done by a child under seven years of age.
[5] 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
[6] Madras Children Act, 1920
[7] Bengal Children Act, 1922
[8] Bombay Children Act, 1924
[9] Pande, B.B., Rethinking Juvenile Justice: Arnit Das Style, (2000) 6 SCC (Jour) 1
[10] Adenwalla, Maharukh, Child Protection and Juvenile Justice Sysyem: for Juvenile in Conflict with Law, 13, Childline India Foundation, December 2006
[11] (1986) 3 SCC 632

there is complete uniformity in regard to the various provisions relating to children in the entire territory of the country. The Children's Act which may be enacted by Parliament should contain not only provisions for investigation and trial of offences against children below the age of 16 years but should also contain mandatory provisions for ensuring social, economic and psychological rehabilitation of the children who are either accused of offences or are abandoned or destitute or lost. Moreover, it is not enough merely to have legislation on the subject, but it is equally, if not more, important to ensure that such legislation is implemented in all earnestness and mere lip sympathy is not paid to such legislation and justification for non-implementation is not pleaded on ground of lack of finances on the part of the State. The greatest recompense which the State can get for expenditure on children is the building up of a powerful human resource ready to take its place in the forward march of the nation."

This led to the passing of Juvenile Justice Act, 1986 for the care, protection and rehabilitation of juvenile delinquents and neglected children.[12] This act was soon replaced by Juvenile Justice (Care and Protection of Children) Act, 2000; the reason for the replacement being deficiency in the old Juvenile Justice Act of 1986 that it did not provide for the differential approach to delinquent juveniles and neglected juveniles. "The aim of J.J.A. 2000 is 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."[13]

The issue of Age Determination

Age determination has been a tricky and controversial issue in juvenile justice. A number of cases have been decided by the courts in this regard. In the context of juvenile legislation in India, a juvenile is a person who has not completed eighteen years of age[14]. Only children below seven to twelve years of age who are sufficiently mature to understand the repercussions if their act and children between twelve to eighteen years of age can be tried under Juvenile Justice Act as children below seven years of age have been granted blanket immunity, as mentioned above, by the Indian penal Code. The objective is not to treat such children as adults for their criminal behaviour but to reform and rehabilitate them[15]. I call the issue of age determination controversial because there is no clarity on the point. Even in the case of Indian Penal Code, sections 82 and 83 talk about children below and above seven years of age but it is silent about seven year old children. Who is to determine the age bracket they fall in? Section 49 (1)[16] of the Juvenile Justice Act, 2000 confers the power on competent authority to determine whether the person brought before it is a juvenile, if he/she appears to be so. But the procedure to determine juvenility of a person cannot be relied on. The two ways to determine age of the accused are documentary evidence and medical evidence.

[12] Supra 4 pg 267
[13] Preamble to Juvenile Justice (Care and Protection of Children Act), 2000.
[14] Section 2 (k) of JJ Act, 2000
[15] Supra 11 pg 24
[16] Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be.

In Jaya Mala v. Home Secretary, Government of J&K[17] the apex court held that the age as ascertained by medical examination is not conclusive proof of age. It is mere opinion of the doctor and a margin of 2 years could be on either side. In another high profile case, Bhoop Ram v. State of UP[18], the court held that in case of conflict between documentary evidence and medical report, the documentary evidence will be considered to be correct. This leads one to the conclusion that all that it needs to establish and convince court that a criminal is a juvenile is documentary proof. Now documentary proof is one of the easiest things to obtain in our country whether it is to get a license one is legally not entitled to or for furnishing age proof in the court. In such a case, even if we were to turn to medical examination, which is held not to be hundred percent conclusive proof by even medicos. By the Allahabad High Court's own admission, a doctor is not always truthful.

In Smt. Kamlesh and anr. v. State of UP[19], the court maintained that a professional witness is prone to side with a party that engages his/her services. Thus, a doctor is not always truthful. Now, if age cannot be determined conclusively by using either documentary evidence or medical evidence, what is to be done?

The apex court in **babloo Passi and anr. v. State of Jharkhand and anr**. held that no fixed norm had been laid down by the Act for the age determination of a person and the plea of the juvenile must be judged strictly on its own merit. The medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence.

Apart from the conclusive determination of age, the question of the date when age has to be taken into account has also been a matter of controversy. In Umesh Chandra v. State of Rajasthan, it was held that it is the date of the offence that has to be considered. Arnit Das v State of Bihar[20] overruled the judgement saying that the date of commission of offence is irrelevant and it is the date of bringing the accused in the court that has to be taken into account. This was again corrected in Pratap Singh v. State of Jharkhand[21] where the court held that "the reckoning date for the determination of the age of the juvenile is the date of an offence and not the date when he is produced before the authority or in the Court."

Recommendations made by the Justice Verma Committee

Assuming that a person at the age of 16 is sent to life imprisonment, he would be released sometimes in the mid-30s. There is little assurance that the convict would emerge a reformed person, who will not commit the same crime that he was imprisoned for (or, for that matter, any other crime). The attempt made by Ms. Kiran Bedi to reform Tihar Jail inmates was, and continues to be, a successful experiment. But we are afraid that that is only a flash in the pan. Our jails do not have reformatory and rehabilitation policies. We do not engage with inmates as human beings. We do not bring about transformation. We, therefore, breed more criminals including juveniles) in our prison and reformatory system by ghettoing them in juvenile homes and protective homes where they are told that the State will protect and provide for them, but which promise is a fruitless one.

[17] AIR 1982 SC 1297
[18] AIR 1989 SC 1329
[19] 2002 CriLJ 3680
[20] AIR 2000 SC 2264
[21] AIR 2005 SC 2731

Children, who have been deprived of parental guidance and education, have very little chances of mainstreaming and rehabilitations, with the provisions of the Juvenile Justice Act being reduced to words on paper.

We are of the view that the 3 year period (for which delinquent children are kept in the custody of special home) is cause for correction with respect to the damage done to the personality of the child. We are completely dissatisfied with the operation of children's' institutions and it is only the magistrate (as presiding officer of the Juvenile Justice Board) who seems to be taking an interest in the situation. The sheer lack of counselors and therapy has divided the younger society into 'I 'and 'them'.

It is time that the State invested in reformation for juvenile offenders and destitute juveniles. There are numerous jurisdictions like the United Kingdom, Thailand, and South Africa where children are corrected and rehabilitated; restorative justice is done and abuse is prevented. We think this is possible in India but it requires a determination of a higher order.

Conclusion

"**The heinous nature of the crime. The cover-up afterwards. The denial. They were all, to me, earmarks of someone who was acting as an adult**."-Gary Gambardella[22]

The above quote summarises the methodology adopted to hoodwink the Indian criminal system by hardcore criminals. The lax provisions of the juvenile justice act like a window of opportunity which can be exploited to the fullest. Section 16 of the JJ Act lays down provisions for orders that may be passed regarding a juvenile, wherein the maximum penalty a juvenile has to pay is to remain in the observation home for three years or till he attains the age of twenty-one. In Bhoop Ram v. state of UP,[23] although the Supreme Court found that the accused had in fact committed the offence but had to quash the sentence as the accused was already twenty-eight years of age and could not be sent to an observation home. Arnit Das v. State of Bihar has been a highly controversial case and has been criticised to the core but the court seems have to have taken a contrary view from the previous case because it appears to have entertained similar apprehensions of persons evading juvenile justice action till they turn 50 years of age.[24] The problem with this decision was that it set the same yardstick for everyone whether a serial or a petty offender.

So, an amendment in the existing act is definitely necessary in order to thwart any attack on the nation. Apart from terrorists taking advantage of the lacuna in the system, serious crimes like rapes and murders also go unpunished with the offender wearing the garb of juvenility. The legislators of the country have their task cut up as they need to work out a middle path that takes the country's and society's interest into account but does not go to extremes like in the case of Arnit Das.

[22] Gary Gambardella is a career prosecutor in Bucks County, Pennsylvania. He is the only prosecutor ever elected to serve as President of the prestigious Bucks County Bar Association.
[23] Supra 19
[24] Supra 10