

# JUVENILES TO BE TRIED AS ADULTS - IS IT EASY TO DECIDE?

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## Abstract

The Juvenile Justice System of India is based on reformation, rehabilitation, treatment and the essence of restorative justice, rather than retribution. Besides procedural safeguards, there has to be an effective setup for children, which provides intensive individualised attention, care and protection to every child who has somehow walked into its fold owing to neglect or conflict with the law. 'Best interest of the child' or 'to be presumed to be innocent' does not mean that the child is immune from criminal charges, especially if they are heinous in nature.

Beginning from the Children's Act of 1960 to the Juvenile Justice Act, of 1986, the Juvenile Justice (Care and Protection of Children) Act, of 2000, and the 2015 Juvenile Justice Act, all of them resonate with the core intent of the reform of the child in conflict with the law as also to apply necessary penal consequences. Until the Delhi gang rape case (2012), the Juvenile Justice Boards gave its decision focussing on the reformation aspect, but post-Nirbhaya's case they are leaning towards the punitive aspect. This article will focus on the aspect of the need for children in the age group of 16 to 18 years, to be tried as adults for the heinous crime committed by them.

**Keywords;** *Juvenile Justice, Child, Crime, Juvenile Justice Board, Reformation, Case*

## INTRODUCTION

Under the Juvenile Justice Act 2015, a person under the age of 18 will be tried, protected and taken care of according to the circumstances. *Nirbhaya's case* of 2012<sup>1</sup> led to a strong reaction amongst the general public at the heinousness of the act perpetrated by one of the accused who was a juvenile at that time. People wanted the juvenile to be treated as an adult since his acts were the most depraved variety. They opposed his being remanded in a Home / Correctional Home for only 3 years. This led to a new reformed Juvenile Justice Act, 2015, wherein an offender between the age of 16 to 18 will be tried as an adult in Children's Court if the Juvenile Justice Board after due assessment finds that he has committed a heinous crime<sup>2</sup>.

The Supreme Court's remark on July 13, 2022, in the *Ryan School murder case*<sup>3</sup> where a 17-year-old boy had mercilessly slit open a 7-year boys throat for the only reason that it would stop the oncoming examination and parent-teacher meeting, has reignited the issue of children between 16 to 18 years who commit a heinous crime, to be tried as adults. The question that one is faced is whether the age of the offender or the seriousness of the crime should be the criteria to be tried as adults.

On another aspect, one has to also see whether the right against self-incrimination is taken away from the child who is faced with evaluations conducted by the Juvenile Board to assess the child in conflict with the law, to be tried as an adult. We also need to inspect the observation of the Supreme Court in its judgement in *Dr. Subramanian Swamy v Raju*,<sup>4</sup> Member, JJB pointed out that:

".....If the legislature has adopted the age of 18 as the dividing line between juveniles and adults and such a decision is constitutionally permissible, the enquiry by the Courts must come to an end. Even otherwise there is

<sup>1</sup> (2017) 6 Supreme Court Cases 1: (2017) 2 Supreme Court Cases (Cri) 673: 2017 SCC Online SC 533

<sup>2</sup> Sections 15 & 18 if the Juvenile Justice (Care and Protection of Children) Act, 2015

<sup>3</sup> *Barun Chandra Thakur v Master Bholu* on 13 July, 2022, available at <<https://indiankanoon.org/doc/34328129/>> (last visited on 21.01.23)

<sup>4</sup> *Dr. Subramanian Swamy and Ors v Raju* Thr.Member Juvenile Justice ... on 28 March, 2014, available at, <<https://indiankanoon.org/doc/134314390/>> (last visited, 20.01.23).

a considerable body of world opinion that all under 18 persons ought to be treated as juveniles and separate treatment ought to be meted out to them so far as offences committed by such persons are concerned.”<sup>5</sup>

The Parliamentary Committee also viewed its concern when the Bill to change the Juvenile Justice Act 2000 was discussed and debated to treat a child as an adult saying that, the clause that the Juvenile Justice Board, (JJB) will first assess whether the crime was heinous or not even before any investigation, and then within one month transfer the case to Children Court if it finds it to be so, will be a clear assumption that the child has committed the crime, which in turn is against the presumption of innocence until proven guilty.

### **PROCEDURE WHEN A CHILD WILL BE TRIED AS AN ADULT**

The provisions of the Juvenile Justice Act of 2015 provide for the trial of children between the ages of 16 to 18 to be an adult if they have perpetrated a heinous crime. Section 2 (33) describes “Heinous crime” as “any offence punishable with more than 7 years imprisonment.”<sup>6</sup> With a tagline of 7 years or more, murder, rape, robbery, acid attacks, waging war against the government, drug trafficking, human trafficking etc, gets included. Interestingly, an offence under section 304 IPC, which has a maximum punishment of more than 7 years and no minimum sentence, cannot fall under a heinous offence. In the *Shilpa Mittal case* of 2020, the Supreme Court was also of this view and has asked the Legislature to look into this lacuna of the 2015 Act regarding section 2 (33).<sup>7</sup>

Section 15<sup>8</sup> of the Act, allows the Board to assess whether the juvenile has committed the heinous crime and if it finds that it has then it will hand them to the children's court to be tried as an adult, thus firstly segregating children into two categories, below 16 and 16 to 18. The procedure to be followed for both being different makes it against Article 14 of our Constitution.

Section 15 of the Act also prescribes that the Juvenile Justice Board must carry out an initial assessment mainly to check the mental and physical capacity to commit the crime and whether he comprehends the consequences that he may be facing, also care must be taken to check whether the child in conflict with law has committed the crime in any extenuating circumstances, before sending the accused for trial as an adult. It is also pertinent to mention that though the prescribed three months given to the Juvenile Justice Board to assess the juvenile from when he or she is first produced before them, is not a trial and just a preliminary assessment, there are no laid down rules or any methodology prescribed which can conclusively determine the mental capacity of the child in conflict with the law. Moreover, the Preliminary assessment includes: -

<sup>5</sup> *Dr Subramanian Swamy v Raju* <<https://nlrd.org/parliamentary-standing-committee-stands-up-for-child-rights-all-children-below-18-years-should-be-treated-as-children/>> (last visited 20.01.23).

<sup>6</sup> The gazette of India extraordinary, available at, <<https://cara.nic.in/PDF/JJ%20act%202015.pdf>> (last visited 21.01.23).

<sup>7</sup> *Shilpa Mittal v State of NCT of Delhi & Anr*, Cri. Appeal 34 of 2020, the S.C HELD- “Though we are of the view that the word 'minimum' cannot be treated as surplusage, yet we are duty-bound to decide as to how the children who have committed an offence falling within the 4th category should be dealt with. We are conscious of the views expressed by us above that this Court cannot legislate. However, if we do not deal with this issue there would be no guidance to the Juvenile Justice Boards to deal with children who have committed such offences which definitely are serious, or maybe more than serious offences, even if they are not heinous offences. Since two views are possible we would prefer to take a view which is in favour of children and, in our opinion, the Legislature should take the call in this matter, but till it does so, in exercise of powers conferred under Article 142 of the Constitution, we direct that from the date when the Act of 2015 came into force, all children who have committed offences falling in the 4th category shall be dealt with in the same manner as children who have committed 'serious offences'.”

<sup>8</sup> (1) In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of subsection (3) of section 18: Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts. Explanation.-- For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence. (2) Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure,

1. Social Investigation Report containing the child's, social, economic, psycho-social and other relevant information like the family background as well as recommendations. This is generally prepared by non-governmental organisations or probation officers.
2. A Social Background Report will be prepared by the child welfare officer or special juvenile police unit. This is an important piece of information in deciding the case.<sup>9</sup>
3. The physical and mental report along with drug assessment.
4. Preliminary assessment report wherein the circumstances in which the child was caught, his crime and psychological assessment by a psychologist is given.
5. Statement of witnesses.

After a due preliminary assessment, and hearing of the child in conflict with law under section 18 (3), if the Board thinks that the Children's Court will adjudicate the case, the same shall be done and they will thus transfer the child in conflict with the law into the criminal justice system.<sup>10</sup>

### **SHOULD WE RETHINK BEFORE WE BRAND CHILDREN IN THE ADULT WORLD OF CRIME**

The Preamble to the 2015 Act, lays down the objective which is to safeguard the best interest of the child catering to their basic needs through proper care, protection, development, treatment, and social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters.<sup>11</sup> If we go through the history of the Juvenile Justice Act, we will see that right from the Tamil Nadu Children's Act of 1920, the Children's Act of 1960, the Juvenile Justice Act of 1986, 2000 and 2015, the cardinal principle has been the welfare of the child as it is based on the premise that we as a society should take responsibility for the deviance of a child as we have failed to provide the necessary environment for its wholesome growth and failed to cater for its emotional, psychological, intellectual and physical wellbeing. That is why the entire Act deals with the correction of juveniles based on socially acceptable and child-friendly methods.<sup>12</sup>

Section 15 of the 2015 Act is in no way curative or restorative and treating children as adults and neither child friendly nor in their best interest. Adult penalties will also bring out various other problems, like an introduction to harsh prison life, and jeopardizing safety, after incarceration, just as adults are not eligible for government services.<sup>13</sup> The Juvenile who has been treated like an adult and penalised might also have to forgo this privilege which in the earlier Act, (2000) it had, as the record of any infraction was expunged when the Child in conflict with the law, had completed his sentence.<sup>14</sup>

Another factor that needs to be taken into consideration is that the development of the brain is a continuous process till the age of maturity. Scientific studies have established that morphological and physiological changes occur in the human brain during adolescence. So, hormones are simply not to be blamed for erratic and risky

<sup>9</sup> *Ramachandran v The Inspector of Police*, H. 3 ... on 18 April, 1994, available at <<https://indiankanoon.org/doc/607331/>> (last visited 21.01.23).

<sup>10</sup> "Where the Board after preliminary assessment under Section 15 passes an order that there is a need for the said child to be tried as an adult, then the Board may order the transfer of the case to the Children' Court which have the jurisdiction to try these kinds of offences." When passing an order under Section 18 (3), all three members of the JJB must be present to ensure a majority ruling. If the Principal Magistrate and one social work member are present, the social work member who has a different perspective should record his or her dissent so that the differing viewpoints can be brought to the appellate court's attention. Giving the reason for such an order is also mandatory by the JJB.

<sup>11</sup> Preamble "Juvenile Justice (Care and Protection of Children) Act, 2015 <<https://cara.nic.in/PDF/JJ%20act%202015.pdf>>, (last visited 21.01.23).

<sup>12</sup> Ankita Kumari, *Need To Reassess Juvenile Justice (Care and Protection ) Act 2015*, Legal Services India Online Journal, available at , <<https://www.legalserviceindia.com/legal/article-6232-the-need-to-reassess-section-15-of-the-juvenile-justice-care-protection-act>>, (last visited 22.01.23).

<sup>13</sup> In the case of the State of West Bengal & Ors. v. Nazrul Islam, 2011, the Supreme Court held that no person convicted or facing charges of a criminal offence should be considered for a government job.

<sup>14</sup> In the case of *UOI & Ors. v. Ramesh Bishnoi*, 2019, a unanimous judgement was delivered by a bench of two judges namely Justice Uday Umesh Lalit and Justice Vineet Saran. The bench was of the opinion that the criminal record of a juvenile cannot and shall not act as a hindrance for securing a government job when the said person becomes an adult. It was also said that the criminal record of a child needs to be treated as erased in order for him/her to live a peaceful life without being burdened by the acts committed in the past. Available at , <<https://www.pathlegal.in/Juvenile-Crime-Shall-Not-Affect-Any-Govt.-Job-Sc-Latest-Judg-blog-2383220>> (last visited 22.01.23)



behaviour.<sup>15</sup> We cannot equate or differentiate between the mind of 15 and 16-year-old children and treating one as a child and another as an adult.

Further, prior to any appreciation of evidence, the child in conflict of law is assessed whether that person has committed a heinous crime or not. This is unconstitutional as it overturns the presumption of innocence. Are the Juvenile Justice Board really equipped to assess the heinousness of the crime is yet another matter. The Social investigation report is actually given to the Juvenile Justice Board members by the NGO or Probation officers who might under due pressure from the society or citizens, give a certain colour to their assessment. This has been pointed out by the Hon'ble Supreme court in the famous *Ryan school Murder case*.<sup>16</sup> In a Judgement given by the Bombay High Court<sup>17</sup> one can see the pitfalls of section 15 of the Act. In this case, a seventeen and half year-old boy and another sixteen-year-old boy are charged with killing a three and half year-old child, the younger boy conspiring with the older boy to do the offence, later, to "make the evidence disappear," besides screening that older boy from police detection, too. The first was tried as juvenile whereas the second boy was treated as an adult. The court commented:

"Merely on the premise that the offence is heinous and that it lends to the societal volatility of indignation, we are bracing for juvenile recidivism. Retributive approach vis-à-vis juveniles needs to be shunned unless there are exceptional circumstances, involving gross moral turpitude and irredeemable proclivity for the crime. Condemned, any juvenile is going to be a mere numeral in prison for a lifetime; reformed, he may redeem himself and may become a valuable addition to Society. Let no child be condemned unless his fate is foreordained by his own destructive conduct. For this, a single incident not revealing wickedness, human depravity, mental perversity, or moral degeneration may not be enough. Just deserts are more than mere retribution. So, I conclude that the Board, in the first place, has mechanically relied on the Social Investigation Report".<sup>18</sup> The *Jhabua murder case*<sup>19</sup> where two juveniles were tried as adults and given life imprisonment by the Sessions Judge for killing a teenager over a paltry sum of Rs 800. This was the first case after the amended Act of 2015. But the High Court reversed the verdict saying that medical factors like the fact the juveniles were drug addicts and were under its influence at the time of committing the crime, was not taken into account nor their social conditions were acknowledged in the report.

Now coming to the recent cases perpetrated by children in conflict with the law, which shakes the core of human consciousness and societal uproar to bring justice to the victim makes it seem that the changes brought about in the 2015 Act is much-needed. *The Nirbhaya case*<sup>20</sup> *Shakti Mills Gang Rape*,<sup>21</sup> *Hatigaon Rape case*<sup>22</sup>, *Mayur Vihar*

<sup>15</sup> "the timing of these changes may underlie many aspects of risk-taking behaviour. These changes, which are the consequence of puberty, occur primarily in the brain regions closely linked to emotions, arousal, and motivation, as well as to appetite and sleep patterns. Brain changes independent of puberty are those related to the development of advanced cognitive functioning. Neuroimaging studies have revealed that when interacting with others and making decisions, adolescents are more likely than adults to be swayed by their emotions." Available at <[https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3621648/#\\_\\_sec4title](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3621648/#__sec4title)> also at, <<https://www.legalserviceindia.com/legal/article-6232-the-need-to-reassess-section-15-of-the-juvenile-justice-care-protection-act2015.html#:~:text=Section%20of%20the%20JJA,other%20is%20above%20this%20age>> , Sales JM, Irvin CE. Theories of adolescent risk-taking 2009 The biopsychological model. In: Diclemente R.J, Santelli J.S, Crosby RA, editors. *Adolescent Health*. San Fransisco: John Wiley and Sons; pp. 31–50. [Google Scholar]

<sup>16</sup> *Barun Chandra Thakur v Master Bholu* on 13 July, 2022, available at <https://indiankanoon.org/doc/34328129/> (last visited on 21.01.23), wherein, (The Supreme court accepted the finding of the Punjab and Haryana High court that JJB had not given time for the lawyers of the accused to go through all the documents. It had also noted that the psychological evaluation was based on tests meant for children under 15 years of age, and the recommendation by the psychologist for testing at a better facility was denied by the JJB. Citing these reasons, the Apex court upheld the high court verdict for re-evaluation of the juvenile. It also requested the Government and National Commission for Protection of Child Rights to consider guidelines for such an evaluation.)

<sup>17</sup> *Mohamed Huzaifa Javed Ahmed ... vs The State Of Maharashtra* on 15 July 2019, available at, <https://indiankanoon.org/doc/186425503/> (last visited 22.01.23)

<sup>18</sup> *Mohamed Huzaifa Javed Ahmed v The State Of Maharashtra* on 15 July 2019, available at, <<https://indiankanoon.org/doc/186425503/>> (last visited 22.01.23).

<sup>19</sup> Decided on 13.01.2017

<sup>20</sup> On 16-12-2012, the capital witnessed the most heinous crime whereby a physiotherapy student was brutally gang raped in a moving bus in which she was travelling with a male friend. One of the co-accused was under-age. This was one of the prominent cases that brought out the flaw with the then-juvenile system.

<sup>21</sup> Another heinous case saw the involvement of minors who was 17 years old at the time of committing the sex offence. In July/August 2013, out of seven persons arrested in two separate gang rape cases committed upon a photojournalist and a telephone operator, in Shakti Mills Compound (Mumbai), two were minors.

*Murder case.*<sup>23</sup>—*Minor “Rape and Murder” case*<sup>24</sup>, all of these incidents bring out the fact that such mental depravity cannot go unpunished and the fact that those who commit such crimes regardless of age, have to put some thought towards it. There may be various reasons attributable towards such crime, be it family background, financial stability, mental growth, dependence on drugs and alcohol, peer pressure, easy access to internet pornography, boredom or just the thrill to do something daring, yet children in conflict with the law who commit heinous crimes as mentioned under section 2 (33) of the Act, should not get immunity from being proceeded against, as per the gravity of their offence.

### **IS THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015 VIOLATIVE OF THE FUNDAMENTAL RIGHTS OF THE CHILDREN?**

The inclusion of sections 15 and 18 (3) of the Act has been debated by erudite, legal scholars, NGO’s Student body etc. The crux of these sections is that a minor age 16 to 18, who is involved in a heinous crime, on the report of preliminary assessment by the Juvenile Board, be tried in the Children’s Court as an adult and be subjected to the criminal procedure. This differential treatment of minors is the major point of criticism as it leads to the violation of Article 14 i.e. Right to Equality.

A child’s constitutional right to privacy and right against self-incrimination is also jeopardized when a child in conflict with the law for a heinous crime is assessed preliminarily by the Juvenile Justice Board, and somehow innocent till proven guilty also seems like a far cry.

On the other hand, if we consider Article 14 of the constitution and the 2015 Act, we can see that intelligible differentia has been used to differentiate between petty offences and heinous crimes so that children committing the former should not be treated the same and punished the same as the latter. Both these classes are treated, rehabilitated and reformed according to their special need thereby ensuring the protection of Article 14.

If we consider sections 15 and 18(3), we will see that even after assessment of juveniles who commit heinous crimes as adults and are tried by Children Court, under section 19(3) Juvenile Justice Act 2015, the child is kept in a safe place till he attains 21 years of age and then only shifted to Jail, thus ensuring that the fundamental right to live with dignity is appropriated to them.

An article written by Astha Mishra gives an important input, “It is worth mentioning that Article 51-A of the Indian Constitution makes a distinction between international law and treaty obligations. If it is understood that international law is being referred to as customary international law which further stands for a law that is accepted as a standard law practice adopted by nations across the globe then the Juvenile Justice Act, 2015 is in coherence with the international practice with regards to punishment for the heinous crime committed by juvenile across the globe. If international customary law is taken into consideration, then the position in USA, UK and Canada concludes that the minor can be prosecuted under criminal law for grave and heinous crimes committed by them.”<sup>25</sup>

Justice PN Bhagwati and Justice RS Pathak highlighted the miserable plight of juvenile prisoners in the case of *Munna v State of UP*<sup>26</sup> as under, namely:

“Juvenile delinquency is, by and large, a product of social and economic maladjustment. Even if it is found that these juveniles have committed any offences, they cannot be allowed to be maltreated. They do not shed their fundamental rights when they enter the jail. Moreover, the object of the punishment is reformation, we fail to see what social objective can be gained by sending to jails where they could come into contact with hard criminals and lose whatever sensitivity they may have to finer and nobler sentiments.”

### **SUGGESTIONS & CONCLUSION**

It is important that Juveniles who commit heinous crimes, cannot take the cover of Juvenile Justice Act, but treating them as adults and punishing them goes against the reformatory object of the Act. It would be advisable that the sentence should not be as severe or can be under seven years, of which after attaining the age of 21, the children in conflict with law can be given parole. They can be made to do community work with active involvement of the stake holders like the Parole officer, the community itself and family and friends. This will

<sup>22</sup> In September 2013, a group of five boys (juvenile) in the age category of 12 years to 16 years; raped a 12-year-old minor girl, by dragging her to an abandoned place and raping her through the night. These boys were neighbours with the victim minor girl.

<sup>23</sup> In November 2013, a gang of five minors allegedly murdered a jeweller’s wife in Delhi’s Mayur Vihar and fled with gold and cash.

<sup>24</sup> In April 2015, Chandigarh Police arrested a juvenile for the kidnapping and murder of a minor girl.

<sup>25</sup> Astha Mishra (January 31, 2018), ‘Adult Time For Adult Crime- The Road To Juvenile Justice’, SCC Online Blog, available at, < [https://www.sconline.com/blog/post/2018/01/31/adult-time-adult-crime-road-juvenile-justice/#\\_ftn13](https://www.sconline.com/blog/post/2018/01/31/adult-time-adult-crime-road-juvenile-justice/#_ftn13) > (last visited 22.01.23).

<sup>26</sup> AIR 1986 SC 177

not only reintegrate them in the society but will also save them from the treacherous life of being and spending their life in the cell with an adult. If they have to undergo imprisonment; they should then have a separate facility housing the children in conflict with law who commit heinous crimes.

"Give me a child and I will make him a thief, a lawyer or a doctor," pertinent words by British behavioural psychologist J.B. Watson, who stressed nurture moulds nature. He also was of the opinion that when a child is born, his mind is a blank slate and what we write on it depends upon what the child will be.<sup>27</sup>

We can see that our Juvenile Justice System's focus on the children is only when they come in conflict with the law. Preventing a crime should be more paramount than punishing or waiting for rehabilitation when the child is thrown into the system. Public opinion and reactions seem to be the basis on which law is interpreted and changed. The belligerent atmosphere of the prison will only nip any further mental growth of the child and throw him further in the dark recess of crime world.

The psychological assessment of the child is a very specialised field and unfortunately the parameter of assessment that we in India follow is meant for children in foreign countries. "The process of assessing a child's mental capacity is something that neither the judges can overtake nor can any psychiatrist."<sup>28</sup>

One cannot deny that the Juvenile Justice goal is to rehabilitate the child and make it a conscious citizen, then incarcerating them is not the interpretation or answer. Children are important human resource and we cannot deplete this resource with faulty laws.



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<sup>27</sup> More and more children show worrisome violent trait in everyday behavior, <<https://www.indiatoday.in/magazine/society-and-the-arts/story/20020812-more-and-more-children-show-worrisome-violent-trait-in-everyday-behaviour-794615-2002-08-11>> (last Visited 22.01.23).

<sup>28</sup> Ankita Kumari , 'The Need To Reassess Section 15 of The Juvenile Justice (Care and Protection )Act 2015, Legal Services India, E Journal, available at <<https://www.legalserviceindia.com/legal/article-6232-the-need-to-reassess-section-15-of-the-juvenile-justice-care-protection-act-2015.html#:~:text=Section%2015%20of%20the%20JJA,other%20is%20above%20this%20age>>.