

# Reformatory Justice as a Framework for Juvenile Justice Reform

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## Abstract:

*The age old question and endless point of discussion and debate has been the age of the Child in conflict with law. Having said and read that, this paper endeavors to the shift further and forward towards the disposition alternatives when it comes to finally determining the Justice with reference to the child in conflict with law. The concerned Act provides an assortment of disposition alternatives. However, the usage of these has been the main point of concern and uncovers a need for further research and deliberation. Reformatory or not, what then is the true nature of Juvenile Justice system, this paper tries to overview the same.*

## Keywords

*Juvenile Justice, Disposition Alternatives, Reformatory Justice, Restorative Justice, Retributive Justice, Transfer Laws.*

## 1. Introduction

India with 1.32 billion people constitutes the second most populous Country in the World. According to the United Nation Report, India has world's largest Youth Population with nearly 39% of its population being Children. During 2014, a total of 60,539 Juveniles were apprehended and produced before various Juvenile Boards. The Juvenile Justice system in India can be traced back to a differential legal process which goes back to the Reformatory School Act 1876 making it clear that the focus is on Reforming the deviant youth or Child.

However, in the recent years beginning December 2012 when a helpless medical student was brutally gang raped and

beaten up leading to her death, there was a mass of public Opinion demanding lowering the age of Juveniles from 18 to 16 because one of the six alleged offenders (now convicts) happened to be a juvenile. Subsequently, the Juvenile Justice (Care and Protection of Children) Act 2015 was passed thereby including a provision for trial of a Child as an Adult under Criminal Procedure Code. In case of a heinous offence, who has completed or is above the age of 16 years.

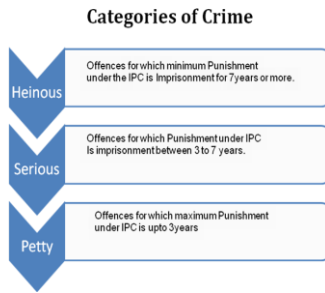
## Juvenile

According to the Merriam Webster's Dictionary, Juvenile relates to characteristic suitable for children or young people and a Juvenile Delinquent refers to a young person who has committed a Crime.

The Juvenile Justice Act which was passed in the year 1986 defined Juvenile as a boy who had not attained the age of 16years or a girl who had not attained the age of 18years.

Subsequently, the Juvenile Justice Amendment Acts were passed in the year 2000 and 2006 which removed this discrimination and stated that Juvenile means a person who has not completed the age of 18 years.

According to the Juvenile Justice (Care and Protection of Children) Act 2015 'Child in Conflict with' means a child who alleged or found to have committed an offence and who has not completed the 18<sup>th</sup> year of age on the date of Commission of such offence provided if, any a child in conflict with law under the age group 16-18 who alleged or found to have committed any heinous offences will be treated as an Adult.



**Figure 1**

This changing definition of Juvenile is not just restricted to the Juvenile Justice Act. Various other National Legislations define Child differently.

- Child Labour (Prohibition and Regulation) Act 1986 – *Sec2(ii)* “Child” means a person who has not completed the age of 14 years.
- Child Marriage Restraint Act 1929 – *Sec 2(a)* Child means a person who has not completed 21 years of age if male, and if a female has not completed 18 years of age.
- Immoral Traffic Prevention Act 1956 – *Sec 2(a)* Child means a person who has not completed the age of sixteen years.

#### Age threshold of Criminal Responsibility

The discrepancy does not just ends here, the age threshold for Criminal responsibility also varies in the Global arena.

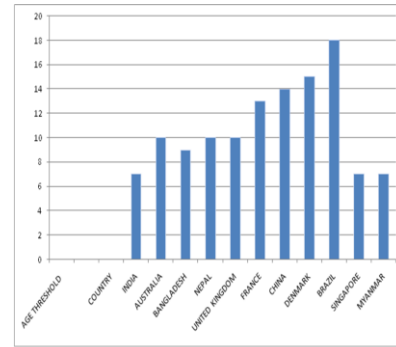
Ten years ago the UN Committee on Child Rights of the Child recommended an “absolute minimum” age for Criminal responsibility”.

The minimum age of Criminal Responsibility in Asia alone varies as in India – No person can be held criminally liable for an act committed while he or she was under the age of seven years (Sec 82) and no person can be held criminally responsible for an act committed while under 12 while of mature understanding.

In Bangladesh, the Minimum age of Criminal Responsibility is 9, China 14, Singapore and Myanmar at 7.

In Denmark, no one can be held criminally responsible for an action committed while under the age of 15. This age was lowered to 14 in July 2010 but subsequently raised to 15 in March 2012.

In U.K. Children can be held liable for criminal offences from the age of 10.



Age Threshold for Criminal Responsibility

**Figure2**

There is no clear International standard regarding the age of which criminal responsibility should be set. The U.N. Convention on the rights of the Child simply requires State parties to establish a ‘minimum age below which children shall be presumed not to have the capacity to infringe the penal law.

#### Principles of Care and Protection of Children

In order to understand our current Juvenile Justice system, we have to understand the principles underlying the concerned Act.

Section 3 of the Juvenile Justice Act 2015 enumerates the general principles of Care and Protection of Children. The Central Government, the State Governments, the Boards and other agencies while implementing the provision of this Act shall be guided by the following principles –

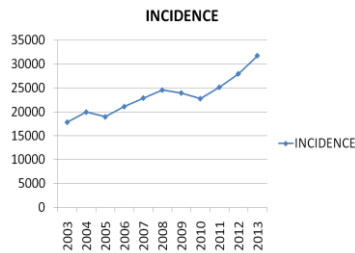
- Principle of Presumption of Innocence.
- Principle of Dignity and Worth
- Principle of Participation
- Principle of Best Interest
- Principle of Family Responsibility
- Principle of Safety
- Positive measures
- Principle of non- stigmatizing Semantics
- Principle of non-waiver of rights
- Principle of Equality and Non-Discrimination
- Principle of Right to Privacy and Confidentiality

- Principle of Institutionalization as the measure of last resort
- Principle of Repatriation and restoration
- Principle of Fresh Start
- Principle of Diversion
- Principles of Natural Justice

#### Crime Incidence

As per the National Crime Records Bureau, the incidents of Juvenile Crime have constantly increased during the last five (2010-2014) years.

According to the Government 2010 saw 22,740 cases of Juvenile Crime while the number rose successively over the years and in 2014 a total of 33,526 such crimes were admitted.



**Source :** Crime in India Publications, 2003-2013, National Crime Records Bureau, Ministry of Home Affairs, Govt. of India

**Figure 3**

Not just with the rise in the numbers, the nature of offences too and specifically with the 2012 Nirbhaya case- the public and perhaps even more so policy makers demanded action. There was a rough consensus among legislature that the Juvenile Court was too lenient, that serious offences were beyond rehabilitation and must be incarcerated to ensure public safety and the Juvenile were as culpable for their crimes as adults. Thus Juvenile Justice Act 2015 was passed to “get tough” on Juvenile Crimes.

### Transfer Laws

This similar translation of Juvenile Justice into the State’s revision of their transfer laws was also noticed in the United States with the passage of the Violent Control & Law Enforcement Act 1994 which allowed the transfer of 13year olds who committed Crimes with firearms on federal property.

“Transfer laws which transfer Juvenile from the Juvenile Court to adult Criminal Court for trial and Sentencing exist in every State”(Griffin, 2003; Redding 1997)

During the last 20years, states revised their transfer laws to lower the minimum age for transfer, incase the number of transferable offences expand prosecutorial discretion while reducing judicial discretion in transfer decision-making and expand the each of laws requiring that certain Juvenile Offenders be automatically tried as

adults.(Redding 2003; Pagan & Zimring 2000)

In the year 1999, 5600 youth were committed to state adult prisons in representing 2% of all new prison commitments.

With respect to sentences, several methodologically sophisticated studies confirm that, in recent years, transferred Juveniles did receive tougher sentences.<sup>1</sup>

Data from some states indicates that they may even receive more severe sentences than adults convicted of the same crime.<sup>2</sup>

### Do Transfer Laws Deter Juvenile Crime?

Two well-designed studies conducted in the 1990s find that transfer laws did not reduce Juvenile Crimes. On the Contrary Jensen & Metsger’s 1994 time series analysis found a 13% increase in arrest rates for violent Juvenile Crime in Idaho after the state implemented the automatic transfer laws.

Only a few studies have interviewed Juvenile Offenders. However, before the widespread expansion of transfer laws, Glassner, Ksander, Berg and Johnson (1983) reported the results of interviews with a small number of juvenile offenders in New York, who said they had decided to stop offending once they reached the age at which they knew could be tried as adults. A recent small scale study interviewed 37 juvenile offenders who had been transferred to criminal court, for armed robbery or murder, I Georgia. The study examined their knowledge, and perceptions of transfer laws and criminal sanctions (Redding & Fuller 2004). Georgia had taken a public awareness campaign to inform juveniles about the state’s new automatic transfer law. Nonetheless, juveniles reported being unaware of the transfer laws; only 30 % knew that juveniles who committed serious crimes could be tried as adults. Even among those who knew about the law, none expected that it would be enforced against them for the serious crime they committed. On the contrary, many thought they would only get slap on the wrist sentences from the juvenile court. These results are consistent with those in a Canadian study finding that many juvenile offenders did not think that they would receive a serious punishment if caught. (Peterson-Badali, Ruck & Koegl, 2001)

As far as Recidivism rates are concerned, seven large-scale studies indicate that youth tried in Adult Criminal Court for violent

<sup>1</sup> Kurleychek & Johnson 2004

<sup>2</sup> Virginia Department of Criminal Justice Services 1996

crimes have greater recidivism rates after release than those tied in Juvenile Court. Fagan (1996) examined the recidivism rates of 800 randomly selected 15 and 16 year old juvenile offenders charged with robbery or burglary. Youths who had committed robbery and sentenced in adult criminal Court had a higher post-release recidivism rates than those tried in Juvenile Court.

**Maturity Level of Juveniles**

The issue which needs special attention is the parallel culpability of the children between the ages 16 to 18 with that of the adults.

According to Ruben C. Gur American Bar Association 2016, the Biological age of majority is close to 22 years and the pertinent parts that govern impulsivity, judgment, planning for the future; foresight of consequences and other characteristics that make morally culpable develops after attaining the age of majority.

70.3% of the Children who were serving in the Detention Centers were quite unaware about the consequences of their acts.<sup>3</sup>

Mental & Physical Capacity to commit such offences are vague criteria and would always be judged from the heinousness of the act committed by the child. In practice, mental maturity of the child would never get assessed.

The level of mental maturity cannot be determined with any degree of accuracy and precision and results are prone to vary.

According to Maharullah Adenwalla – The Juvenile Justice (Care & Protection) Act 2015 has reversed the well founded principle of Juvenile Justice by allowing Juvenile Justice Boards to waive the right of Children above the age of 16years who have committed a heinous offence into the criminal justice system. This means that the treatment of the Juvenile will depend upon the offence committed instead of his situation.<sup>4</sup>

Although the Act provides on paper the assistance of experienced psychologists or other experts in this exercise, it is a matter of common knowledge that our country does not have sufficient number of experts.

**Disposition Alternatives**

There are disposition alternatives available under the Juvenile Justice Act. Sec 15 Orders that may be passed against a Juvenile:

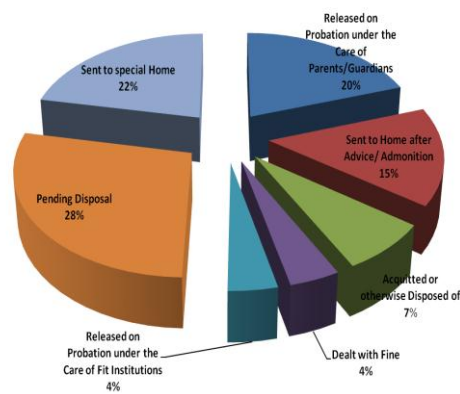
- Allow to go home after Admonition.
- Participate in group Counseling.
- Perform Community Service.
- Pay fine.
- Release him/her under Probation of good conduct.
- Detention for a maximum period of three years.

Other Orders (in addition to above) –

- attend School
- attend Vocational Training Centre
- attend therapeutic Centre
- undergo de-addiction programme.

However, when we take a glance at the chart in the following figure, which shows disposal of Juveniles apprehended during the 2013, it shows the poor use of dispositional alternatives.

**Disposal of Juveniles Apprehended in 2013**



Source : Centre for Child Rights 2013

**Figure 4**

**THE CHART SHOWS:**

- Disposition Alternatives poorly used.
- No Information available on the use of the Counseling, de-addiction programmes, orders for community service.
- No information on the follow-up post release.

Here, it is worthy to mention that these programmes incur money and the average Expenditure of the Central Government on Child Protection has been under 3 paise Out of every 100 Rupees it spent in the last ten years.

This covers Juvenile Justice System, Child Labour, and provision for Orphan and street Children.<sup>5</sup>

<sup>3</sup>A study done by Delhi Commission for Protection of Child Rights

<sup>4</sup>Maharullah Adenwalla – A dislocation of the Juvenile Justice system, The Wire May 23, 2015

<sup>5</sup> Dept.-Related Parliamentary Standing Committee on Human Resource Development, 26<sup>th</sup> Report para 3.44)



**Indian Juvenile Justice System resonates Restorative Justice?**

Restorative practices are now rapidly growing acceptance in many countries around the world. In many countries, Social workers have been adopting different kinds of restorative practices in a number of settings such as a family mediation, neighborhood disputes settlement, post-court victim offender mediation etc.

Now, bearing I mind the abovementioned facts and data, can we say that our Juvenile Justice system resonates Restorative Justice system? If not can developing the Restorative Justice system be sound to Juvenile Justice system in India.

**What is Restorative Justice?**

Restorative Justice is the theory of justice that emphasizes in repairing the harm caused by criminal behavior. It involves the cooperative process that involves all stake holders. It thereby can lead to transforming the traditional relationship between communities and their Governments in responding to Crime.

Therefore, Restorative Justice involves the following three important elements:

- REPAIR - Theory of Justice that emphasizes repairing the harm caused by criminal behavior.
- ENCOUNTER- It involves Cooperative process that includes all stake holders.
- TRANSFORMATION- This can lead to transforming the traditional relationship between communities and their Governments in responding to Crime.

Before we look into the differences in the traditional Retributive system and the restorative justice system, lets try to understand what the victims seek.

The victims put forward four demands:

- action against the offender,
- protection against offender,
- psychological recovery, and
- emotional and physical rehabilitation

The Retributive System sees Crime as an act against the State, a violation of a law or an abstract idea whereas in the restorative Justice system Crime is an act against another person and the Community.

The focus under the Retributive system is on punishing or treating the offender whereas, the focus under the restorative

justice is on repairing the harm between the offender and the victim.

The following table shows the difference between the two :

Retributive Justice	Restorative Justice
- Crime is an act against the State, a violation of a law or an abstract idea.	- Crime is an act against another person and the Community
- The focus is on punishing or treating the Offender	- The focus is on repairing the harm between an offender and victim, and perhaps also the offender and the wider community
- Focus on establishing blame or guilt, on the past (did he do it?)	- Focus on the problem solving, on liabilities, obligations, on the future (what should be done?)
- Emphasis on adversarial relationship	- Emphasis on dialogue and negotiation.
- Dependence on proxy professionals	- Direct involvement by participants
- Community on sideline, represented abstractly by state.	- Community as facilitator as restorative process.

**Figure 5**

**Restorative Justice under the Indian Law**

Although the Indian Criminal system has the elements of Retributive system of justice however, we do see some elements of Restorative Justice in the Indian Law as well. Some such elements can be enumerated as under :

- **Privacy & Confidentiality** – Sec 21 Prohibition of Publication of name etc. of Juvenile in Conflict with law or child in need of care and Protection involved in any proceeding under the Act
- **Terminology Used** – e.g. Sec 10 *Apprehension* of juvenile in Conflict with law. Instead of *arrest*. Sec 14. *Inquiry* by Board regarding Juvenile. Instead of *Trial*
- **No Joint Proceeding of a Juvenile and an Adult** – Sec 18 No Juvenile shall be

charged with or tried for any offence together with a person who is not a juvenile.

- **Removal of Records** – Relevant records of conviction shall be removed after the expiry of the period of appeal or reasonable period.

#### The need for Restorative Justice

Restorative practices cover a much wider spectrum of Intervention strategies which relate to restore relationships between people in Conflicts.

This is a new initiative other than the existing Community based treatment methods. It fits to the overall policy of expanding community-based treatment suggested by Central fight Crime Committee in Hongkong.

Retributive Justice aims at punishing the offender. The use of restorative justice provides chances to restore relationships with their family members.

The advantage of restorative justice rests on its contrast with retributive justice system. In restorative Justice, offenders are being reintegrated into the Society through repentance and reparation. Victims are also given opportunities to forgive offenders for their wrong doings.

An early settlement for these offences saves money and therefore is more cost-effective

It eases out the problem of overcrowding of the prisons.

#### CONCLUSION:

“To apply restorative practice in treating Juvenile Delinquent, we do need to strike a balance between care and Punishment. We all know that not just by using different models of mediation can delinquent be treated effectively. Thus, I would like to draw your attention to the concept of ‘reintegrative shaming’ suggested by John Braithwaite (1989) and the use of “family Group Conference”(FGC) to replace Juvenile Prosecution. Braithwaite’s theory combines several contemporary Sociological theories in crime. He believes that theory of reintegrative shaming as well as recent innovation in criminal and particularly restorative justice have focus attention upon the role of positive shaming and “shame” might play in reducing crime.<sup>6</sup> There have been studies comparing the effectiveness of normal Court processing with the restorative alternative. Scholars (Strong 1999, Harris 1998) found that those

offenders who had gone to Court in normal way tended to be angrier, some feel that the process has not been fair and that their respect for police, the justice system and law had gone down.

In comparing the official re-offending by School Crime offenders (Strong 1999) found that the rate of repeat offenders per offender is 6.5% times higher for court than for Conference. Thus the FGC & victim-offender mediation programs seem to be an effective mechanism for preventing recidivism.

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