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Child Delinquents – Are they really ‘Doli Incapax’?

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Abstract

Effective from March 2021, China decided to alter the existing legal framework of punishment, which earlier used to provide immunity to ‘adolescents’ for commission of ‘heinous’ crimes. Erstwhile, age of criminal culpability in China was 16 years, with those aged between 14 and 16 years being held liable only on the commission of ‘abominable’ crimes such as *homicide* and *rape*. With the proposed move being passed, China would have a lower age of criminal culpability i.e. from 14, the new age will be 12 years for gruesome crimes of exceptional cruelty.² The Chinese legal structure focuses on redemption of the minors, thus the amendment also proposes corrective measures for children who commit crimes, below or at the age of 16 years (provided the crime is not of a gruesome nature).

China - Situation hitherto.

These much-required and exigent alterations are anything but sudden and nothing but delayed. Modernisation and development in technology and its inexorable effects on the wiring of our brain and on our social behaviour has rendered the notion of minority to be essentially used as a stratagem by felons, lucky to be under-age, fortunate to be left scot-free by law even after commission of a crime with complete malice and contemplation of the ramifications which may follow up. In China, the graph of number of cases of minors committing crimes has been on a constant rise. According to the Supreme Procuratorate of China, there has been a noticeable rise in the crimes being committed by delinquents younger than 16 years of age, it

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² FRANK TANG ,China lowers age of criminal responsibility to 12 from 14, **SOUTH CHINA MORNING POST**; Published: 27 Dec, 2020 at 2:44pm,; <https://www.scmp.com/news/china/politics/article/3115458/china-lowers-age-criminal-responsibility-12-14>

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had risen to 9.6% in 2019 from 8.9% in 2018. The figures further escalated to 11.7% from January to September in 2020 (11.2% in the first 2 quarters and 12.6% in the third quarter.)³

To cite a few instances to underscore the exigency of amendments, in 2018, a child aged 12 years was reported to have stabbed his mother 20 times till she died. The mother, on discovery that her son had been stealing and smoking cigarettes decided to discipline her son which in turn, infuriated her son and he thereafter murdered her. The neighbours reported that when they tried to enquire, at midnight, regarding the hullabaloo being created in the apartment, the boy told them through the door that “everything is fine” and “mother is upset because the younger brother has soiled the bed”. The boy had also texted his teacher that he would not attend school that day, from his mother’s phone. Soon this boy was let scot-free unconditionally, after which he continued his school which vexed the parents of other students.⁴ Another instance that pushed Chinese law makers into an abyss of introspection was the controversy of a 13-year-old child delinquent killing a 10-year-old girl.⁵ The delinquent somehow tricked the girl into his house and then stabbed the girl **seven** times after **attempting to rape her**. The forensics reported the reason of death to be excessive blood loss caused by the stabbing. The delinquent was detained for “re-education” and was not punished because of the lacunae in the myopic penal law of the land.

These instances incited a huge uproar from both the intellectuals as well as the rank and file. Both the print as well as the digital media was deluged with “anti-leniency” sentiments against the minor delinquents who commit such crimes. Parents expressed great anxiety over their children made to attend schools with “criminals”. It was demanded that significant changes be made in the perspective of law towards adolescents who commit crimes and send shockwaves

³ Zhang Yangfe, Number of minors under 16 committing crimes in China on the rise, *Asiaone*, October 22, 2020 at 7:42 AM, <https://www.asiaone.com/china/number-minors-under-16-committing-crimes-china-rise>

⁴ Mandy Zuo, Chinese boy, 12, who stabbed mother to death after row over smoking escapes punishment, *South china morning post*, December 12, 2018 at 7:38 pm, <https://www.scmp.com/news/china/society/article/2177685/chinese-boy-12-who-stabbed-mother-death-after-row-over-smoking>

⁵ Ji Yuqiao, 13-year-old boy in NE China allegedly kills 10-year-old girl, sparking controversy about juvenile crimes, *Global Times*, 2019/10/27 at 20:58:4, <https://www.globaltimes.cn/content/1168108.shtml>

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of terror which ripple in the society. The only thing worse than commission of a crime is allowing the criminal to ramble freely without any punitive measure taken against him.

Global scenario.

The perspective towards minority has changed with time and development. In fact, China was one of the only countries to have an age of criminal culpability that high. In England, children are deemed to be completely liable for their criminal misdemeanour at the age of 10. Japan had lowered its penalisation age from 16 to 14 in 2001 after mass outcry of the public. India, Singapore, New York and Massachusetts among other nations and states have an even lower age of criminal responsibility, 7. New Zealand, Pennsylvania, Switzerland, Texas among others have 10 as the minimum age to be held criminally responsible. United States is said to have a minimum age of penalisation for federal crimes of 11; however, this might differ from state to state. North Carolina has the youngest age of 6, and Wisconsin has the oldest age of criminal responsibility of 10 years with no exceptions. More typical to United States, 33 of its total states do not have a minimum age criterion, thus allowing them to penalise a person of any age whatsoever. The Scottish law commission in 2002 proposed the minimum age of criminality (then 8 now 12) to be abolished *in toto*.⁶ Even though the *status quo ante* has changed in Scotland, in the light of events mentioned above, it is important to study the arguments adduced by the commission to abolish the minimum age. First, the commission stated that the contemporary generation has a far greater understanding of the world as compared to the children of the same age in the previous generations. Second, the commission argued that if there is a concrete reason behind a minimum age of criminality, which is backed by developmental psychology, then why does a disparity exist among nations when it comes to age of penalisation. Finally, the commission cited the findings of Kilbrandon Committee (Committee, 1964, at 73) that said that there is no empirical backing of the principle that children below the age of 8 cannot be held criminally responsible.⁷

⁶ (Scottish Law Commission 2002)

⁷ Scottish Law commission, **Discussion Paper Of Criminal Responsibility**, at page 20.

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Netherlands with the minimum age of culpability as 12 years has devised special mechanism for the restoration of minor delinquents who have committed minor offences. HALT is one such measure, where the child who commits a *minor* crime agrees on working on a project that involves 20 hours of working and learning and/or compensation in the form of fine.⁸ Even though the Dutch Penal Code also recognises such principles, what makes HALT stand apart is that all the charges are formally dropped and no prosecution stage is reached. A minor aged between 12 and 18 can avail a maximum of 2 HALTs for minor instances like shop-lifting, destruction to property etc. According to the data of 2003, 62 HALT offices had been established across Netherlands. While these breakthrough measures have been successful in curbing minor crimes by delinquents, it is important to mention that HALT excludes those crimes which are of grave nature. Protection against punishment is conferred only against minor offences, thus subliminally HALT itself recognises that “grave” crimes must invite punishment.

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, also known as “The Beijing Rules” was adopted by the General assembly in 1985 with the sole purpose of protecting the interests and rights of minor delinquents who have somehow acted in discordance with the law that they are subject to. It further aims to minimise the intervention of law, by fostering a strong social framework, family institution and re-education policies. The covenant recognises that adolescent delinquents are in need of institutional help and that they form an integral part of national development. Different nations are bound to have different minimum age of culpability depending on their social, cultural and economic milieu but this age of culpability must not be so low that it jeopardizes the interest of the minor and defenestrates all scope of re-education by punishing a mentally immature kid.⁹ The focal point of juvenile justice should be the well-being of the juvenile along with the welfare of society.¹⁰

⁸ HALT: an alternative and successful approach to juvenile crime in the Netherlands., May 7th 2003, www.efus.eu

⁹ Rule 4 Beijing Rules.

¹⁰ Rule 5.1 Beijing Rules.

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Thus, the reactionary proceedings must be in proportion to the age, nature of crime and other factors such as social status, family institution and economic conditions.¹¹ Another important set of rules is that a minor should never be subject to capital punishment notwithstanding any crime committed by him¹² and avoidance to institutionalisation must be exercised to the greatest extent by resorting to probation, community service orders, care or guidance or supervision orders or any set of relevant orders.¹³

Doli-Incapax

In Roman law, it was held that children below the age of 7 cannot be held criminally responsible for their acts. To be held responsible for an act, two requisites must be met i.e. *actus reus* which stands for the act which is in discordance with law, and *mens rea* which refers to the malice with which the act is committed, with complete comprehension of the consequences which might follow and the preponderance of the act being a wrongful one. Thus, the act must be done deliberately or with *dolus*. Roman law presumed that children below the age of 7 were *dolus incapax* i.e. unable to form a structured intention to commit a crime, and thus cannot be held liable for their unethical actions. With the course of time, this principle mutated and it was settled that there are two age groups for criminal incapacity. First was the age of absolute pardon from criminal punishment also called the “age of discretion”. Generally, this age remained 7, thus under the age of 7 no child, whatsoever, was punished by courts. A child of the next age group, usually 7-14, could be held criminally responsible if it was proved that that child possessed the intent and mental maturity to commit and be held responsible for the impugned unethical act. The latter principle came to be known as the “principle of discernment” and had a huge impact on the European Penal Law.¹⁴ A new principle evolved as a branch of the previous one, asserting that children could be prosecuted in a special youth

¹¹ Rule 5.2 Beijing Rules.

¹² Rule 17.2 Beijing Rules.

¹³ Rule 18 Beijing Rules.

¹⁴ **Ido Weijers & Thomas Grisso, *Criminal responsibility of adolescents***

Youth as junior citizenship, Chapter in J. Junger-Tas & F. Duenkel (eds.) *Reforming Juvenile Justice*, Dordrecht: Springer, 45-67, (2009).

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court, according to special youth procedures with special youth sanctions. Under English law, a child under the age of 10 was ‘considered’ *doli incapax*, and a child between 10 and 14 was ‘presumed’ *doli incapax*.¹⁵ The prosecution was required to rebut this presumption. A significant case worthy of citing is *C v DPP*¹⁶ where a minor was caught tampering with a motorbike. These actions of the minor (12-year-old) were held to be lacking innocence. Lord Lowry in the House of Lords stated that “the presumption has in recent years been the object of some logical and forceful criticisms” and that the presumption “is not, and never has been, completely logical”. Lord Jauncey described the presumption as “an affront to common sense”.¹⁷ Though this judgement was subsequently overruled¹⁸ but the grounds of such action were not its merits but the fact that, change in a legal position must be done by the parliament. A study conducted in 2011 by Youth Research Forum concluded that by the age of 7, children can successfully differentiate between right and wrong and have sufficient understanding of the criminal implications of their acts.¹⁹

India.

It must be kept in mind at all times that India has a restitutive and not retributive form of justice delivery system i.e. our legal system makes active endeavours towards rehabilitation of the offender so that he becomes an asset to our society. It is understood that multiple factors contribute in the delinquency of minors. Minors in conflict with law usually are victims of poverty, emotional abuse, physical abuse, child labour, broken homes, lack of education, etc.

Section 82 of the IPC exempts the children under the age of seven from any criminal responsibility. Section 83 exempts those children aged between seven to twelve years who have

¹⁵ Dr Raymond Arthur, Rethinking the Criminal Responsibility of Young People in England and Wales, School of Social Sciences & Law, Teesside University, Middlesbrough, England

¹⁶ [1994] 3 All ER 190.

¹⁷ Dr Raymond Arthur, Rethinking the Criminal Responsibility of Young People in England and Wales, School of Social Sciences & Law, Teesside University, Middlesbrough, England

¹⁸ [1995] 1 AC 1

¹⁹ G. Smith, N. Winkfield, The development of the moral compass: A study among children aged 7 to 16 in the UK, (Surrey, Youth Research Forum, 2011).

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not attained sufficient maturity or understanding to judge the nature and consequences of their conduct, from criminal responsibility. Our sacrosanct constitution also has several articles dedicated to minors. Article 15(3) permits the state to make special provisions for children and women, Article 23 prohibits trafficking and forced labour, Article 24 forestalls children below the age of 14 from being employed in hazardous factories and mines. The state, as per Article 45, is required to provide free and compulsory education to all children up to the age of 14 years.

The sub-section 12 of section 2 of Juvenile (care and protection) Act, 2015 classifies child into two categories.

- i. Child in conflict with law.
- ii. Child in need of special protection.

The Juvenile Justice Act, 2000 was replaced in 2015 by The Juvenile Justice (Care and Protection) Act, 2015. The major reason for this change was the “*Delhi gang rape case*” which emanated shockwaves of discomfort in society and provoked debates in the nation as one of the accused in the said case was just six months from attaining the age of 18. In India, Juvenile Justice System is premised on three assumptions:

- i. Young offenders should be corrected in the best possible manner rather than being tried in courts.
- ii. A chance of reform must be given to young offenders rather than punishment.
- iii. Non-penal treatment should be conferred via social control agencies like Special homes, Observation homes, etc.

The Juvenile Justice (Care and Protection) Act, 2015 provides for a board for the enquiry and hearing in the matters of juveniles in conflict with law. The section 4(2) of the said act provides the composition of the board of enquiry, which shall comprise of a principal Magistrate and two social workers out of which one must be a woman.

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In the case of *Kakoo v. State of Himachal Pradesh*²⁰, the Supreme Court reduced the punishment of a 13-year-old boy who had raped a 2-year-old girl. The court took into consideration sec. 83 and 84 of the IPC that Juveniles can't be treated the same as that as adults. Thus, it is a very well-settled law that while dealing with the Juveniles the court should consider reformative and humanitarian approaches, but in the case of *Hiralal v. State of Bihar*²¹, a child aged 12 years threatened an adult that he'll chop him into pieces and subsequently the child stabbed a person till his death. He was sentenced by the trial court with a reasoning that the child was mature enough to understand the ramifications of his act. The Supreme Court also dismissed the petition.

Conclusive Remarks

Even though Chinese law makers have started to see the picture clearly, applying a straitjacket formula to every minor delinquent regarding his capacity to be held responsible for crime would essentially be a practice of laxity. Incapacity is a matter of fact and thus it must be proven in every case of a minor delinquent above the age of 7 (the age of complete immunity in china is 12). The arguments raised by the proponents of raising the minimum age of criminal culpability ignores the side of the victim and his/her family *in toto*. It must also be noted that cases of such sort receive a huge media coverage, thus leaving the minor essentially scot-free with a minimal rehabilitative incarceration of a couple of years would set a wrong precedent and may also provide fillip by imbibing a sense of invincibility in the heads of 12-year olds. The mode of commission of the crime itself must be conclusive proof of the rebuttal of the presumption of *doli incapax*. If a minor strategically plans for the commission of the crime, it cannot and must not be said that he is not mature enough to understand the consequence of the impugned act. Lawyers who deal with such crimes state that minor delinquents committing grave crimes possess more mental maturity as compared to other children of their age. Scientific studies have been iterating that a human brain functions at full capacity only after

²⁰ *Kakoo vs The State Of Himachal Pradesh*, AIR 1976 SC 1991.

²¹ *Hiralal V. State of Bihar* ,1977 AIR 2236.

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the age of 16 and thus minors shouldn't be held mature enough to ponder on the ramifications of their act. Though this may sound as a valid argument *prima facie*, it is logically flawed and highly demeaning to the most complex part of the human body i.e. the brain. It is highly unlikely that a full-grown child of 10 years does not understand the simple differentiation between wrong and right and that he was oblivious that his act (take for example: stabbing someone) was wrong and detrimental to the person of someone. It shall also be kept in mind that "full capacity" of brain is not *sine qua non* for making daily decisions of life. Today, young children are receiving education of subjects like coding and AI, these are complex study areas and require certain level of logical reasoning. Thus, if a minor can make a computer app, he surely can ponder on the consequences of a wrongful act. The presumption of *doli incapax* becomes extremely unbearable rather doltish in cases of rape. It must be understood that maturity of brain has less to do with age and more to do with exposure and the milieu of child. Akbar, the famous Mughal ruler started ruling at the age of 13 despite him practically being illiterate. Young children today excel in every field stretching from sports to computer science, they shall not be viewed at with the same archaic perspective.

While deciding on matters dealing with a minor delinquent, the presumption must be limited at the age of 7. For the age of 7-15, the case (of heinous crimes) must be decided by a special tribunal consisting of judges and psychiatrists who can successfully determine on the maturity of the accused. The proceedings must be kept off the record. If the delinquent is found guilty, he shall be given half of the punishment usually given in the said crime and that too shall be divided into two parts, first one for the incarceration in special institutions for adolescent offenders and the next half for re-education where the children must be made to do community work. Their demeanour must be constantly overseen and regular consultation sessions must be held with a psychiatrist. Throughout these periods, their education must not be jeopardized. ***Edification and not immunity must be conferred to juvenile delinquents.***