
21.09.2018
National Judicial Academy

Presentation by Bharti Ali
Co-Director, HAQ: Centre for Child Rights

Email: bharti@haqcrc.org
Website: www.haqcrc.org
Who is a child?

International Law

• **Beijing Rules** – *flexibility* to fix the age-limit of juvenility according to a country’s peculiar economic, social, political, cultural and legal system [Rule 2.2].
• **CRC** – every human being *below the age of eighteen years* unless under the law applicable to the child, majority is attained earlier.” [Article 1]

National Policy and Legal Framework

• **Constitution of India** – Does not define a child but allows for special measures to be taken for protecting the rights of children [Article 15(3)]
• **National Policy for Children, 2013** – a child is any person *below the age of eighteen years*
• **Indian Majority Act, 1875** – Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before.
• **Juvenile Justice (Care and Protection of Children) Act, 2015** – a person who has not completed eighteen years of age
Juvenile Justice – is it about criminal justice or social justice?

The juvenile justice system in most countries of the world is an offshoot of the criminal justice system.

But...

The Ministry/Dept. responsible for making and implementing juvenile justice is the one that deals with social justice!

Result –

• Confusion in the law and its administration
• Tension between the protective and rehabilitative approach of juvenile justice and the traditional approach of dealing with crime
• Increased scope for populist voices favouring stricter sentencing and death penalty for juveniles, finding way into policy and law
• Scope for discrimination among juveniles on the basis of nature of offence at every stage
**Why apex court refused change in age of juvenility**

**RULING** Supreme Court said juvenile act provides for rehabilitation of children in conflict with society; age of 18 fixed after consultation with child psychologists.

---

**NO KID GLOVES**

<table>
<thead>
<tr>
<th>IN THE UK</th>
<th>IN THE US</th>
<th>IN FRANCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>➡️ Anybody who has attained the age of 17 is an adult. Separate ‘youth court’ without a jury for those under 18</td>
<td>➡️ Special juvenile courts to deal with under-18 delinquents</td>
<td>➡️ Anyone under 18 can only be tried by special courts</td>
</tr>
<tr>
<td>➡️ Person under 17 can be tried as an adult in some serious offences like sexual assault, child sex offences committed by children, sexual activity with a child family member</td>
<td>➡️ Around 20 states allow them to be tried and sentenced as adults to life imprisonment</td>
<td>➡️ A separate Juvenile Assize court tries minors aged 16-18 years who commit serious offences</td>
</tr>
<tr>
<td>➡️ Death penalty discontinued in 2005. In 2012, mandatory life sentence without parole barred</td>
<td>➡️ In 2002, law enacted to provide tougher criminal response to juvenile delinquency</td>
<td>➡️ Ministry proposes stricter punishment for juveniles</td>
</tr>
</tbody>
</table>

---

Young offenders above a certain age who commit violent crimes should be prosecuted as adults.

People wanted death for the juvenile too.
International Law and Guiding Principles on Juvenile Justice …

Conventions

• International Covenant on Civil and Political Rights (ICCPR)
• Convention on the Rights of the Child (CRC)
• Convention against Torture (CAT)

Rules and Guidelines

• UN Standard Minimum Rules for the Treatment of Prisoners, 1955
• UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), 1985
• UN Standard Minimum Rules for Non-custodial Measures (Tokyo Rules), 1990
• UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), 1990
• UN Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules), 1990
• Guidelines for Action on Children in the Criminal Justice System (the Vienna Guidelines), 1997
• United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), 2010

In addition there are several regional instruments and standards, E.g. –

• The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)
• The African Charter on Human and Peoples’ Rights (Banjul Charter)
• The African Charter on the Rights and Welfare of the Child
• The Arab Charter on Human Rights (Arab Charter)
• The American Convention on Human Rights (American Convention)
Convention on the Rights of the Child (CRC)

Article 40(1): All CICL to be treated in a manner that...

• promotes the child's sense of dignity and worth

• reinforces the child’s respect for the human rights and fundamental freedoms of others

• promotes his or her social reintegration, and his or her assumption of a constructive role in society
CRC-Article 40 (2) (b) – Minimum guarantees

(i) To be presumed innocent until proven guilty according to law;

(ii) ...

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
CRC-Article 40 (3) (b) – States Parties to promote measures “for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.”

- CRC-Article 40 (4) – Variety of dispositions and other alternatives to institutional care to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.
CRC- General Comment No. 10 - Children’s rights in juvenile justice

• Applicability of juvenile justice system “for all children who, at the time of commission of an offence (or act punishable under the criminal law), have not yet reached the age of 18 years” [Para 36]

• “States parties which limit the applicability of their juvenile justice rules to children under the age of 16 (or lower) years, or which allow by way of exception that 16 or 17-year-old children are treated as adult criminals, change their laws with a view to achieving a non-discriminatory full application of their juvenile justice rules to all persons under the age of 18 years.” [Para 38]

• “The best interest of the child means [...] that the traditional objectives of criminal justice, such as repression/retribution, must give way, to rehabilitation and restorative justice objectives.”[Para 10]
“... arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”
- Article 37 (b), CRC

“Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances”

- United Nations Rules for the Protection of Juveniles Deprived of their Liberty (R. 17, Havana Rules)

India’s Juvenile Justice Act of 2015 also makes it clear that apprehension is allowed if a heinous offence is alleged against a child and that too if it serves the interest of the child

Yet... Apprehension / arrest continues, leading to deprivation of liberty
The Beijing Rules

Stressed on Juvenile Justice to be ...

• conceived as an integral part of the national development process of each country
• within a comprehensive framework of social justice for all juveniles
• contributing to the protection of the young offenders and the maintenance of peaceful order in society.
UN Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules)

This set of Rules addresses fundamental principles such as:

- The fair and humane treatment of children who come into conflict with the law
- Conducting proceedings in the best interest of the child and ensuring their full participation in the proceedings
- The application of the principle of proportionality to the offender and the offence
- The application of community programmes for diversion from court procedures
- Detention as a measure of last resort and for the shortest possible time
- Deprivation of liberty only for serious offences
- The abolition of corporal and capital punishment
- Continuous and specialised training for law enforcement officers working with children
- The application of alternatives where possible
- The provision of educational and other social re-integrative services for those children who are institutionalised

Source: Ms. Razwana Begum Adbul Rahim, Senior lecturer, Restorative Justice, Singapore University of Social Sciences. Presentation on 10 April 2018 at University of Leiden.
The Beijing Rules

• Sufficient attention shall be given to **positive measures** that involve –
  
  • the **full mobilization of all possible resources**, including the family, volunteers and other community groups, as well as schools and other community institutions

  • for the purpose of **promoting the well-being of the juvenile**

  • with a view to **reducing the need for intervention** under the law

  • and for **dealing with the juvenile in conflict with the law** effectively, fairly and humanely
• **Prevent children** from becoming entangled in the justice system

• The holistic nature of child justice – **civil society plays an important role** in preventing all children from coming into contact with the law

• The need for a **multi-disciplinary approach** and for **proper recruitment and training of personnel** who work with children

Source: Ms. Razwana Begum Adbul Rahim, Senior lecturer, Restorative Justice, Singapore University of Social Sciences. Presentation on 10 April 2018 at University of Leiden.

Encourage the development of non-custodial measures at pre-trial, trial, sentencing stages such as:

• Verbal sanctions - admonition, reprimand and warning
• Conditional discharge
• Status penalties
• Economic sanctions and monetary penalties such as fines and day-fines
• Confiscation or an expropriation order
• Suspended or deferred sentence
• Probation and judicial supervision
• Counselling order
• Community service order
• Referral to an attendance centre
• House arrest
• Any other mode of non-institutional treatment
• Some combination of the measures listed above
The Mandate

• In 2002, the United Nations Economic and Social Council endorsed the United Nations Basic Principles on the **Use of Restorative Justice Programmes in Criminal Matter.**

• The UN states that: ‘Member States should consider the formulation of national strategies and policies aimed at the development of restorative justice and at the promotion of a culture favourable to the use of restorative justice among law enforcement, judicial and social authorities as well as local communities’

The Guiding Principle on Deprivation of Liberty ...

• It should not be unlawful or arbitrary
• It should be in conformity with law
• It should be used only as a Measure of Last Resort
• It should be for the shortest appropriate / necessary period of time
• It should be limited to exceptional cases

- Rule 17(1)(b) of the Beijing Rules;
- Rule (1), (2) and (17) of the Havanna Rules; and
- Article 37(b) of the United Nations Convention on the Rights of the Child
Detention should not be unlawful or arbitrary and should be in conformity with law ...

This implies...

- The law allows apprehension – MACR is clearly established and is not too low [Sec. 82 and 83, IPC and Sec. 2(12) and 2(13), JJA 2015]
- The person detained is informed about the reason for apprehension and detention [Rule 8(3)(iii), JJMR 2016]
- Production before the appropriate authority soon after arrest, without delay [Sec. 10 (1), JJA 2015]
- There is possibility of release – both at pre-trial and post trial stage [Secs. 12, 18(1), 20(2) and 21, JJA 2015]
- Police are trained to assess age of the person at the time of apprehension of children and young people [Sec. 107, JJA 2015 and Judgement of Delhi High Court in WP (C) 8889 of 2011]
- Children are not kept in police lock-up / jail [Proviso to Sec. 10(1), JJA 2015]
Detention as a Measure of Last Resort implies...

Other possible measures have been considered and rejected as unsafe by the concerned authority
• In relation to juvenile; and
• In relation to public safety considerations

Questions:
• What are these other possible measures and alternatives available in law for consideration? [Sec 12 (1), 18 (1) (a) to (e), 18 (2) and Sec. 45 on Sponsorship, JJA 2015]
• Consideration by whom – Police, Prosecution, or Judicial Authority?
• What are the indicators to determine whether release is safe or unsafe for the juvenile and/or the society? – Role of SIRs
• What processes are put in place to arrive at such conclusion? – interaction with the child, SIRs by trained persons, a report on circumstances of offence, child’s physical and mental capacity
• What are the timelines? – Timelines are clearly down for production before concerned authority, for SIRs, for completion of inquiry/trial
• Where is the child to be kept till such decision is taken – jail or special places? [Sec. 18, 19 (3), JJA, 2015]
• Are orders made by concerned authority documented? Do these orders provide reasons in writing – E.g. Grounds for rejecting or allowing bail? [All orders are to be recoded in writing, with reasons and in the manner as may be prescribed]
For shortest appropriate / necessary period of time means ...

• The length of the sanction is determined by a legal / judicial authority as per law
• There is possibility of early release

Questions:
• Is there a basis in law to determine the length of sanction?
• Is that basis guided by principles of juvenile justice or criminal justice?
• Are any assessments conducted to assist the judicial authority in deciding on the length of detention?
• Are trained professionals available to carry out such assessments?
• Should the aggravating and mitigating factors to be taken into consideration by a judicial authority while deciding on the period of detention be any different in juvenile justice matters? - history of abuse / dysfunctional family / addiction / education level etc.
• Should victim impact assessments play a role in deciding the sentence in juvenile justice matters? – what is it that cannot be achieved for the juvenile and the victim and public at large without using VIAs for deciding on the sentence?
Limited to exceptional cases implies ...

- Exceptions created in law

Questions?
- Should an offender centric law create exceptions?
- What should be the basis?
- Why should there be a separate and distinct juvenile justice system if exceptions have to be created?

- Should it be the nature of offence alleged or proven against the child, or should it be factors that promote the child’s rehabilitation and also address public safety concerns?
- Are some children beyond repair? Who decides and how? Is the number good enough to create exceptions in law? Is there any other treatment required for children declared as “beyond repair?”

Art. 14 and Art. 21 of the Constitution of India, which guarantee equality before the law and the right to justice in accordance with procedure established by law
More Questions to ask...

- Can incarceration achieve deterrence and the goal of public safety?
- Does it help in juvenile crime prevention?
- Has it reduced recidivism?
Can Detention achieve any of this?

Right of every child alleged / accused of / 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,
• which takes into account the child’s age, and
• depends on the desirability to promote the child’s reintegration and allow the child to assume a constructive role in society.

- Article 40(1) of the Convention on the Rights of the Child
Alternatives to Detention

Ignorance about alternative measures has given way to extensive use of detention.

Investing in nuclear energy, defence and business have been national priorities in the wake of political and economic crisis across the world.

In such situations, children’s rights get severely compromised.
In India...

• Contrary to popular belief, children who offend don’t walk away free.

• In 2006, 91% were held guilty despite the law being lenient in public perception.

• In 2016, 86% are held guilty and pendency has increased.
DISPOSAL OF JUVENILES ARRESTED AND SENT TO COURTS – 2016
INDIA

- Sent To Home After Advice Or Admonition: 38%
- Released on Probation and Placed Under Care of Parents / Guardians: 15%
- Released on Probation and Placed Under Care of Child Care Institution: 15%
- Dealt With Fine: 4%
- Sent To Special Homes: 4%
- Acquitted: 3%
- Pending Disposal: 9%

India
What does the chart show?

- Poor use of dispositional alternatives

- No information available on use of counselling, de-addiction programmes, community service etc.

- Indeed no information is maintained on follow-up post release.

- Care Plans that include a plan for preparation for release, release and post release become important – Another Non-Negotiable
Moreover...

When the system fails children, quick fix solutions are sought in regressive measures such as harsher sentences, death penalty and increased use of the retributive approach in juvenile justice matters.
Think about this...

• While the xyz % increase in serious offending by children may become the headlines in national dailies and part of common man’s dinner table discussion, how many talk about

  • What a NATION INVESTS in juvenile justice?

  • And what does investing in juvenile justice mean?
What does Evidence tell us?

In Toronto, Canada, PACT (Participation, Acknowledgement, Commitment and Transformation), a Life Plan Coaching Programme showed that for an investment of $5,000 (Canadian) for turning around the life of one habitual offender it can save society $2 million (Canadian) over the course of the offender’s lifetime.

In Estonia, the cost of probation supervision is €30 per month, while the cost of a prisoner is about €300 per month.

In Romania, the cost for one probation client is estimated at €143 per year, while the average cost of one prisoner is € 1,685 per year, meaning that probation is at least ten times cheaper than prison.

In the USA, the Washington State Institute for Public Policy (WSIPP) found that:

- every dollar invested in aggression replacement training was estimated to yield almost $45 in total benefits.
- every dollar invested in multi-systemic therapy is estimated to yield almost $28 in total benefits.
- Functional family therapy (FFT), with estimated net cost of $2,161 per participant, yielded benefits of $59,067 per participant.
- Multidimensional treatment foster care (MTFC) with an estimated net cost of $2,052 per participant, yielded benefits of $87,622.

Clearly, it is only prudent to invest in prevention of juvenile delinquency, review spending on youth criminal justice systems, and target resources away from detention.

Yet...

Retributive measures find place in law and are justified.

All evidence to the contrary is overlooked.

Research too is diverted in directions that suit public morality.

Even the best of democracies fail the most poor and the vulnerable, especially children who have no political vote.
It may be worth asking - Who are the children who get detained?

- Their socio-economic background
- Offence alleged against them
- Age
- Mental Health Status
- History of abuse
- Addiction
- Living conditions

It may also be worth tracking –

- Frequency of serious offending by juveniles offences in different age categories
- Serious offending by juveniles as a proportion of other scheduled offences
- Increase in trend, if any
Crime in India 2016 does not provide the economic status of the families of CICLs

<table>
<thead>
<tr>
<th>Family Background</th>
<th>Number of CICLs (2016)</th>
<th>CICLs (in per cent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Living with Parents</td>
<td>38061</td>
<td>86.2</td>
</tr>
<tr>
<td>Living with Guardians</td>
<td>4550</td>
<td>10.3</td>
</tr>
<tr>
<td>Homeless</td>
<td>1560</td>
<td>3.5</td>
</tr>
</tbody>
</table>

In 2015...

- 42.4% CICL belonged to the families whose annual income was up to ₹25,000
- 28.2% CICL were from families with income between ₹25,000 and ₹50,000
- 25.9% CICL were from families with an income of ₹50,000 - ₹2,00,000
Key Questions...

What is the vision of outcomes that need to be achieved for children and society?

Are we informed by evidence? What is the data telling us about crimes alleged or proven against children and current practices?

How do we wish to measure the improvements we want for children, the level of security felt by the population and the level of youth crime?

Do the existing measures deliver value for money to the public?

How do we establish where we want to concentrate our resources?

In case of children, the irony of deprivation of liberty lies in the fact that it is about ...

- Preparing for freedom by taking away their freedom
- Preparing for responsibility by giving them no responsibilities
- Preparing for reintegration in society by cutting them off from society!

• **Prof. Ved Kumari**, *Faculty of Law, Delhi University*


Thank You!