A CRITICAL STUDY OF THE PLEA OF INFANCY AS A SPECIES OF EXCUSABLE EXCEPTION UNDER THE INDIAN PENAL CODE

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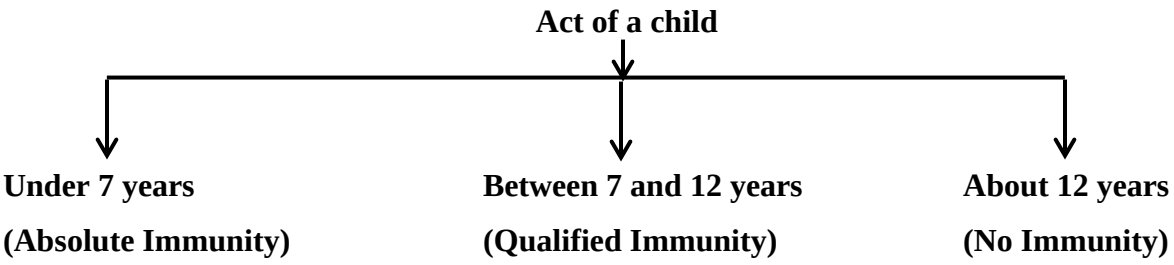
INTRODUCTION

In criminal law, children and juvenile delinquents are placed in a privileged position as they are exempted from criminal liability under certain conditions. This article deals with the defence of infancy which provides a child exemption from criminal liability. The word infancy means childhood. An infant is a child who has not attained the age of legal maturity, that is, eighteen years. Sections 82 and 83 of the Indian Penal Code 1860 confer immunity from criminal liability on child offenders. For instance, a child below the age of seven years is totally exempted from criminal liability, and the criminal liability of a child between the age of seven and twelve years is subject to the proof of mens rea. Further juvenile delinquents and child offenders are not tried in ordinary courts of law, but they are tried in juvenile courts which are specially designed for the trial of juvenile delinquents. This immunity is based on juvenile justice. The constitutional basis for juvenile justice. The constitutional basis for the protection of juveniles springs from Articles 15(3) and 39(e) and (f) of the Constitution of India[1].

The scope of immunity from criminal liability of child offenders under the Indian Penal Code can be represented as follows:



[1] Gopinath Ghosh v. State of West Bengal, AIR 1984 SC 237 : 1984 (1) SCR 803.

ACT OF A CHILD UNDER SEVEN YEARS OF AGE: *DOLI INCAPAX*

Section 82 of the Indian Penal Code is premised on the Latin legal maxim Doli Incapax which means incapability of doing any harm or committing a crime. Doli incapax is a presumption of law raised in favor of innocence of children in criminal jurisprudence in most countries. Initially, the age limit of twelve years was fixed as the age of criminal responsibility[2]. Later the law became stricter and fixed the age for termination of liability at seven years[3]. As per **Blackstone**, infants should be exempted from criminal liability because in his words:

"Infancy is a defect of understanding and infants under the age of discretion ought not to be punished by any criminal prosecution whatsoever[4].

Section 82 of the Indian Penal Code confers **absolute immunity** to an infant under a certain age from criminal liability. It states *"Nothing is an offence which is done by a child under seven years of age[5]".* The law presumes that a child below seven years of age is doli incapax. In other words, a child under this age lacks the adequate mental ability to understand the nature and the consequences of his deeds and thereby an ability to form the requisite mens rea to constitute a criminal act. A child of extremely tender years cannot be held to be endowed with discretion and sufficient maturity of understanding to be able to distinguish between a rightful act and a wrongful act. Hence, the law provides that criminal liability cannot be fastened to an infant for his deeds. This is a conclusive and irrebuttable presumption of law that cannot be whittled away by the prosecution by adducing evidence that the child indeed had the capacity of comprehending the illegality and the consequences of his acts. So, if a child under the age of seven years is charged for committing an offence, the very fact that he was at that time below seven years of age is ipso facto an answer to the prosecution. Thus, Section 82 of The Indian Penal Code absolutely exempts the act of a child from criminal responsibility, and he cannot be made guilty of any offense.

This pragmatic working principle was an already established doctrine under the English and Roman Laws and in India; the drafters of the Indian Penal Code affirmatively included this

[2] Kenny's Oulines of Criminal Law, (1996) 17th Edn., pp. 78-79.
[3] 1 Hale, PC 27, 28.
[4] Commentaries, Vol. IV, pp. 20, 22.
[5] Section 82, Indian Penal Code 1860.

principle as a defence from criminal liability taking inspiration from the penal laws of other countries. The scope of the immunity under the doctrine of doli incapax or absolute immunity under Section 82 is so wide that it provides indemnity to children not only from prosecution for offences under the Indian Penal Code, but also from the offences under the special as well as local laws, as explained under Section 40 of the Code.

In the case of ***Shyam Bahadur Koeri v. State of Bihar***[6], a child under the age of seven years discovered a gold plate. The weight of the gold plate was 28 tolas. However, the child did not report the fact of this recovery to the Collector. When the fact came to the knowledge of the Collector, he prosecuted the child under the Indian Treasure Trone Act, 1878. The court held that since it was the act of a child below seven years of age, the child was entitled to the benefit of absolute immunity under Section 82 of the Penal Code, and acquitted him.

In ***Marsh V. Loader***[7], the defendant caught a child who was stealing a piece of wood from his premises and gave the child into custody. Since the child was under the age of criminal responsibility he was released.

ACT OF A CHILD ABOVE SEVEN BUT BELOW TWELVE YEARS OF AGE: *DOLI CAPAX*

As per Section 83 of the Indian Penal Code, a child above the age of seven years and under the age of twelve years is exempted from criminal liability, subject to the condition that such a child has not attained sufficient maturity of understanding. However, this presumption should be supported by producing evidence. The Code states that *"Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion*[8]". Section 83 of the Penal Code grants **qualified immunity** to a child above seven and under twelve years of age depending upon a variety of circumstances. If it is shown that a child within the age group of seven to twelve years has not attained the adequate degree of understanding and sufficient potential to judge the nature of his deed and the consequences of his conduct, he will

[6] AIR 1967, Pat 312.
[7] (1863) 14 CNBS 535.
[8] Section 83, Indian Penal Code, 1860.

be wholly absolved from criminal blameworthiness. But the presumption is rebuttable and it can be displaced by proof of mischievous discretion of the child. In other words, the prosecution must establish beyond an iota of doubt that the child offender caused an actus reus with the necessary mens rea and that he had the knowledge and foreseeability that his act was not merely mischievous but also illegal which, if proved, would attract penal liability. In such a scenario, the relevant factor for the determination of the child's liability is not one of his age but of the essential degree of his maturity of understanding at the time of the commission of the crime. When there is no such evidence, the court presumes that the child committed the act as he desired and with knowledge of its consequences. However, once the court reaches a definite conclusion, after appreciating the evidence on the sides of both the prosecution and defence, that the child has not attained sufficient maturity of understanding, then the immunity conferred by Section 83 is as absolute as that conferred by Section 82[9].

The presumption of innocence of a child is based on the principle of immaturity of intellect or defect of understanding. "*The younger the child in age, the lesser the possibility of being corrupt*", seems to be its premise. That is to say, malice makes up for age – ***malitia supplet aetatem***. Hence, as the age of the person advances, the force of the maxim diminishes.

In ***Hiralal Mallick v. State of Bihar***[10], the appellant aged twelve years participated in concerted action and used a sword for a murderous attack on the neck of the deceased to take revenge and fled from the scene along with others. No evidence was produced regarding the boy's weak understanding of his actions. Hence the defence seeking immunity from criminal liability failed and the accused was held liable for the offence.

In ***Ulla Mahapatra v. The King***[11], the accused, a boy of over eleven years but below 12 years picked up a knife and threatened to cut the deceased to pieces and killed him. It was held that his action could lead to only one inference, namely that he did what he intended to do, and that he knew, all along, that one below inflicted with a knife would effectuate his intention. He was sent to a Reformatory School for 5 years.

[9] Emperor v. Dhondya Dudya AIR 1919 Bom 173.
[10] AIR 1977 SC 2236: (1977) Cr LJ 1921 (SC).
[11] AIR 1950 Ori 261 : 16 (1950) CLT 102.

In ***R.V. Krishna***[12], a child of 9 years of age stole a necklace worth Rs. 280 and sold it to B the accused for five annas. Evidence at the trial showed that the child had attained sufficient maturity of understanding to judge the nature and consequences of his conduct. Therefore the child would be guilty of theft and B would be guilty of receiving stolen property under section 411 Indian Penal Code.

In ***R v. Mariamutha***[13]**,** a girl aged about 10 years picked up a silver button and gave it to her mother. The girl was not held liable for theft because the circumstances did not disclose that she had attained sufficient maturity of understanding to judge the nature of her act.

In ***Heeralal v. State of Bihar***[14]**,** the accused, a child of eleven years old, threatened the deceased that he would cut him to pieces. Accordingly, the accused killed him with a knife. During the trial, the accused pleaded qualified immunity under Section 83 of the Code. The Trial Court convicted the child and held that the boy was not entitled to get immunity under Section 83 because his words, gesture, assault, keeping a knife in his pocket, stabbing the deceased showed that the child had attained sufficient maturity of understanding to judge the wrongful act and also to apprehend the consequences of his act. The Supreme Court upheld the conviction by the lower Court on the ground that the accused child had sufficient maturity of mind to understand the nature and consequences of the act while stabbing the deceased.

ACT OF A CHILD ABOVE TWELVE YEARS OF AGE: NO IMMUNITY UNDER THE INDIAN PENAL CODE

Beyond the age of twelve years, there is **no immunity** from criminal liability even if the offender is a person of immature intelligence and incapable of comprehending the nature and consequences of his act[15]. However, the question of youth and maturity of understanding will be taken under consideration in the context of the sentence to be passed against him in case of his conviction[16].

[12] (1883) 6 Mad. 373.
[13] [9 Cr LJ 392 (Mad.)].
[14] AIR 1977 SC 2236.
[15] Kalka Prasad v. State of Uttar Pradesh, AIR 1959 All 698 : 1959 Cr LJ 1264.
[16] Hiralal Mallick v. State of Bihar, AIR 1977 SC 2236 : (1977) Cr LJ 1921 (SC).

PROOF OF MATURITY OF UNDERSTANDING

Where a criminal charge against a child who is over seven years but under twelve years is proved, then, before passing a sentence of conviction against him, the Judge must ensure whether or not the child had attained sufficient maturity of understanding to apprehend the quality of his acts and its consequences. To this end, the judge should conduct an inquiry and record a finding of fact. The proof of attainment of sufficient maturity of understanding can be inferred from the nature of his act, his subsequent conduct and other allied factors such as his demeanor and appearance in court. It need not be proved by the prosecution by positive evidence[17].

THE DEFENCE OF DOLI INCAPAX - ABOLISHED IN ENGLAND

Under the English Law, the presumption of doli incapax operated as a defense from criminal liability for children falling within the age group of ten to fourteen years until it suffered abolition vide Section 34 of Crime and Disorder Act, 1998. In R v. JTB[18] (2009), the defendant was charged and convicted on 4th October 2007 with offenses of inciting a child under the age of thirteen years to engage in sexual activity[19] in violation of Section 13(1)[20] of the Sexual Offences Act, 2003. At the time of committing the said activity, he was twelve years old. He admitted the activity but at the same time, he pleaded the defense of doli incapax by contending that he did not have the maturity of rational understanding that he was engaging in illegal and offensive activity. He considered that Section 34 of the 1998 Act had only done away with the presumption and that a child aged between ten and fourteen years could still avail the defense. However, the House of Lords dismissed the appeal and clarified that section 34 of the 1998 Act abolished both the presumption and the defense of doli incapax[21]. Although the defense of doli

[17] Adul Sattar v. Crown, AIR 1949 Lah 51.
[18] (2009) 3 All ER: [2009] UKHL 20
[19] The victims of this activity were young boys and the activity included penetration with penis, oral sex and masturbation.
[20] Sexual Offences Act, 2003, section 13(1) states that:
Rape of a child under 13:
(1) A person commits an offence if-
(a) he intentionally penetrates the vagina, anus or mouth of another person with his penis, and
(b) the other person is under 13,
(2) A person guilty of an offence under this section is liable, on conviction or indictment, to imprisonment for life.
[21] Section 34 of the Crime and Disorder Act, 1998 (section 50) states:
The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished.

incapax and the rebuttable presumption had distinct connotations, in recent times, it had become conventional to talk of the presumption of doli incapax as embracing both the presumption and the defense.

IMMUNITY OF A JUVENILE UPTO THE AGE OF EIGHTEEN YEARS

As per the Indian Penal Code, a child above the age of twelve years attains complete liability for his actions and he or she is liable under criminal law to the same extent as an adult criminal. However, for the purposes of contractual obligation, a child attains majority at the age of eighteen years as per the Indian Majority Act. So to protect the interest of neglected and delinquent juveniles and to provide for their care, education, upbringing, and maintenance, several social and welfare legislations have been enacted so that these children may not stray away into undesirable channels by associating with the anti-social elements of the society. To safeguard the interest of children against social exploitation and child abuse, the Parliament enacted the Juvenile Justice (Care and Protection) of Children Act 56 of 2000 which came into force on 30th December 2000.

The Act 56 of 2000 is a comprehensive piece of legislation that deals not only with juveniles in conflict with law but also provides for the care, protection treatment, and rehabilitation of both juveniles in conflict with law and children in need of care and protection.

DETERMINATION OF THE AGE OF JUVENILE

One of the major questions that are confronted by the courts regarding juveniles is the determination of the age of a juvenile accused of a crime. Section 2(12) and Section 2(35) of the Juvenile Justice Act 2015 have defined child and juvenile respectively as a person who has not yet completed eighteen years of age. This definition is much wider than Sections 82 and 83 of the Indian Penal Code which accords immunity to a child only upto the age of twelve years.Three major issues have been constantly raised before the court for its consideration. The first is the relevant date, that is, the date of commission of the offence or the date when the child accused is first produced before the competent authority or the court, for reckoning the age of the child. The second is the nature of the evidence that must be led before the court to prove the age of the juvenile delinquent and the third is the stage at which the plea of being a juvenile can be taken.

In ***Pratap Singh v. State of Jharkhand***[22], a five-judge Constitutional Bench of the Supreme Court laid down the correct law for determining the age of the juvenile accused. It held that the reckoning date for the determination of the age of the juvenile is the date of the offence committed by him and not the date when he first appears or is brought before the juvenile board or the court. It accordingly opined that the same observation of the law as was previously laid down in ***Umesh Chandra v. State of Rajasthan***[23] is the correct law and not the conflicting ruling in ***Arnit Das v. State of Bihar***[24]**.**

Section 2(i) of the Juvenile Justice Act, 2000 was amended in 2006 to give effect to the ***Pratap Singh*** dictum. The relevant age of the delinquent for the purpose of the Act is the date of the offence committed by him. However, in the case of a continuing offence, the age of the juvenile in conflict with law is to be determined concerning the date on which the offence is said to have been committed by him[25].

Generally proof of age is a finding of fact. Therefore material evidence regarding proof of age must be produced before the trial court[26]. The trial court is under an obligation to ascertain the age of the juvenile before pronouncing judgment. While determining the age of the accused for finding out whether he is a juvenile or not, the courts should not adopt a hyper-technical approach in appreciating the evidence. If two contrary views are possible upon the said evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases[27]. However, this is not always strictly followed.

In ***Bhoop Ram v. State of Uttar Pradesh***[28], there was a conflict in respect of the age of the accused between the school certificate produced by the accused and the medical certificate. According to the school certificate, the accused was below sixteen years on the date of the commission of the offence, but the medical certificate given by the Chief Medical Officer certified that the accused had completed sixteen years on the date of occurrence. The accused faced a charge of murder and was awarded a sentence of life imprisonment by the trial court. The

[22] (2005) 3 SCC 551 : AIR 2005 SC 2731.
[23] (1982) 2 SCC 202 : AIR 1982 SC 1057.
[24] (2000) 5 SCC 488 : AIR 2000 SC 2264.
[25] Vimal Chadha v. Vikas Choudhury, (2008) 15 SCC 216: 2008 (8) Scale 608.
[26] Rajinder Chandra v. State of Chhattisgarh, AIR 2002 SC 748 : (2002) 2 SCC 287.
[27] Section 49, Juvenile Justice Act 2000.
[28]AIR 1989 SC 1329 : (1989) 3 SCC 1.

Supreme Court held that a medical certificate is based on an estimate and hence a possibility of an inadvertent error creeping into the medical certificate cannot be ruled out. Since there was no material to cast doubt on the entries in the school certificate, the court accepted the age mentioned in the school certificate. The court treated the accused as a child, quashed the sentence of imprisonment awarded to him and directed his release. However, if school admission certificate and academic records indicating the age of the child accused are doubtful and offer speculations about his real age, medical evidence based on scientific investigation receives precedence over the school record[29].

In ***Bhola Bhagat v. State of Bihar***[30], the Supreme Court observed that whenever a plea of infancy is raised, the court is under an obligation to examine that plea with care and it cannot fold its hands without returning a positive finding in that regard. The Apex Court also issued directions to the high courts to issue administrative directions to the subordinate courts that whenever such a plea is raised before them and if they entertain any doubt about the correctness of the plea, they must, as a rule, conduct an inquiry regarding the determination of age by giving both the sides to establish their respective claims and return a finding regarding the age of the concerned abused and then to deal with the case in the manner provided by law.

ARREST OF A JUVENILE OFFENDER

Since Section 82 of the Indian Penal Code grants absolute immunity to a child below seven years of age from criminal prosecution, it is, therefore, illegal for a police officer to arrest an infant below that age[31]. As per Section 12 of the Juvenile Justice Act, any juvenile accused of a bailable or non-bailable offense may be released on bail unless his release is likely to bring into connection with any known criminal or expose him to any moral, physical or psychological danger. He cannot be lodged up in a police station or jail. If in the best interest of the juvenile he is not released on bail, then he should be kept in an observation home or a safe place. His parents or guardian must be immediately informed[32].

[29] Om Prakash v. State of Rajasthan 2012 (4) Scale 348 : (2012) 5 SCC 201.
[30] AIR 1998 SC 236 : (1997) 8 SCC 720.
[31] AIR 1916 MAD 642.
[32] Section 13, Juvenile Justice Act, 2015.

TRIAL OF A JUVENILE IN CONFLICT WITH LAW

As per Section 10 of the Juvenile Justice Act, every juvenile in conflict with law who is accused of committing an offense should be placed under the charge of the special juvenile police unit and the designated police officer must report the fact immediately to the Juvenile Justice Board constituted under the Act. The Board shall then conduct an inquiry to satisfy itself whether the juvenile has committed an offense or not[33]. No juvenile shall be charged with or tried for any offense together with an adult, notwithstanding the provisions of the Criminal Procedure Code. A provision for separate trials of the juveniles have been incorporated under Section 23 of the Juvenile Justice Act, 2015, and the provisions of Chapter VIII of the Criminal Procedure Code, 1973 dealing with Security for keeping the Peace and Good Behavior will not be applicable in case of juveniles. This is to maintain the spirit of the Act, which has been enacted for the benefit of juveniles. Where a child has committed a heinous crime and there is a need to try him as an adult, the court may do so keeping in consideration the needs of the child, the principles of fair trial and, maintaining a child congenial atmosphere[34]. A child who has attained the age of twenty-one years and is yet to complete the prescribed term of stay in a place of safety may, on the direction of the court, be released to complete the remainder of his sentence in a jail[35]

NO EXECUTION OF JUVENILES BELOW 18 YEARS

Before the enactment of the Juvenile Justice Act, courts tended to award a lenient sentence to juveniles, keeping into consideration their tender age and the possibility of rehabilitation into society. But now the Act provides that no delinquent juvenile shall be sentenced to death or imprisonment for life[36].

[33] Section 14, Juvenile Justice Act, 2015.
[34] Section 19, Juvenile Justice Act, 2015.
[35] Section 20, Juvenile Justice Act, 2015.
[36] Section 21, Juvenile Justice Act, 2015.

CONCLUSION

The above study shows that both the Legislature and the Judiciary has adopted a tolerant approach towards child offenders in India. Since an infant does not have sufficient understanding of the quality and consequences of his deeds he is completely immune from prosecution by the state because he does not have the requisite mens rea for a crime. But a juvenile offender is subjected to penal liability if the prosecution can establish beyond doubt the offender intended what he did with full knowledge of the natural consequences of his acts. At the same time, the law is prudent enough to devise a special procedure for the trial, sentencing, and rehabilitation of juveniles in conflict with law. Every effort is made by the state not to impose harsh sanctions on a juvenile offender. The success of every legislation depends on its effective implementation and the goals envisaged by the Constitution of India, the Indian Penal Code and the Juvenile Justice Act shall be deemed to be fulfilled when a convicted child or juvenile delinquent is successfully rehabilitated and reclaimed as a responsible member of the society without the stigmatization of a criminal.