

## JUVENILE DELINQUENCY AND PROVISION OF GENERAL DEFENCE

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### 1.1 Introduction

Infancy is generally understood as the earliest period of childhood, especially the period in which the person does not have an ability to work. It is also the period of being under legal age, of the period of life between birth and the acquisition of language usually one to two years later. At common law, infancy indicates the condition of an individual who is legally unable to do certain acts such as entering into contracts. Infants are generally considered to be immature. In such sense, infants are those who are in the stage of primary and secondary growth, who are not in the condition to analyze or realize things deeply, and not able to determine the future in deep manner.

It is simply the age that differentiates between the juvenile and an adult. The categorization of the offence is also on the basis of the age. The offence done by the juvenile is known as juvenile delinquency whereas if the same offence is done by an adult it is a crime. In such case, juveniles have the ground of general defence to protect themselves from the criminal liability. In Nepal also juveniles are given with the provisions of the general defence for the offence they have committed.

The legal provision in Nepal basically deals with what should be done to those children who have such delinquent behavior. Also the law provides with some provisions in order to support the child. Children's Act, 2048 (1992) has explicitly defined the child as "every human beings below the age of 16 years". So the ground for the general defence is allowed only for those who are under the age of 16 years.

### 2.1 Basic concept of Juvenile Delinquency

In general, whenever any person does any work the person has some expectation in regard to the consequences of the work. When doing any type of offence which has criminal liability, the matter of doing work and its consequences becomes more important. The *mens rea* (intention) and *actus reus* (the act) are seen with much attention to decide whether the person has criminal liability or not. But in case of the juveniles, it is accepted that the juveniles though does the crime has no capacity of having *mens rea*. It is accepted that, the juveniles are not able to frame the consequence of the act done. So the juveniles are not held liable for any criminal liability.

If a child below the legal age of the respective country does any offence then s/he is believed of not having *mens rea* of doing so and is not held liable of the criminal liability. Though the act has been done, there is no criminal liability of the child and this condition is said to be the condition of 'General Defence'. Scholars like Blackstone, Coke, and Hawkins<sup>1</sup> also agree with the point that juveniles have very

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<sup>1</sup> Surendra Bhandari, *Criminal Law*, 3<sup>rd</sup> Ed; 2055, pg.239

low power of framing the consequences and building *mens rea* in doing act and therefore they should not be held criminally liable.

Naughtiness among children is a universal phenomenon; however, when naughtiness develops into such a behavior, which is against the norms and laws of the society, it comes in the category of delinquency. The understanding of “delinquency” is that the offences committed by the juveniles, whose age conforms to the age group specified by the law as juvenile law of the state.

Juvenile delinquency is a legal term first defined in 1899 by Illinois.<sup>2</sup> Juvenile delinquency is a relatively new legal concept that selects a certain age range for special consideration of misconduct and treatment. It is any behavior that is prohibited by the juvenile law of state. The legal concept of delinquency simply states the type of conduct forbidden by law, which does not include the larger connotation. The offences done by the juvenile are therefore the juvenile delinquency.

Section 82 and 83 of Indian Penal Code says juvenile delinquency is a behavior performed by child under seven or seven to twelve who has not attend sufficient maturity of understanding to judge of the nature and consequences conduct on the occasion.<sup>3</sup>

In France, the child below the age of 1 year is not held criminally liable whereas in Britain, the age is 10 years.<sup>4</sup> Similarly, the age in which a child is not held criminally liable in German is 14 years and in Denmark is 15 years.<sup>5</sup>

## 2.2 Legal Framework in Nepal

Children’s Act is the basic law that particularly looks after the matters of children. The following are the provisions which provide the condition of General Defence for the child:

1. Section 11(1) says, “If the child below the age of 10 years commits an act which is a offence under law, he shall not be liable to any type of punishment”
2. Section 11(2) says’ “If the age of the child is 10 years or above 10 years and below 14 years and he commits an offence which is punishable with fine under law, he shall be warned and explained and if the offence is punishable with imprisonment, he shall be punished with imprisonment for a term which may extend to six months depending on the offence.”
3. Section 11(3) says, “If the child who is 14 years or above 14 years and below 16 years commits an offence he shall be punished with half of the penalty of the penalty to be imposed under law on a person who has attained maturity.”

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<sup>2</sup> Ruth Shonle Cavan, Theodore N. Ferdinand, *Juvenile Delinquency*, 4<sup>th</sup> Ed. Pg. 27

<sup>3</sup> P.S. ATCHUTHEN PILLAI, *Criminal Law*, 8<sup>th</sup> Ed; 1995, pg.85

<sup>4</sup> *Supra note 1*

<sup>5</sup> *Ibid*

4. Section 11(4) says, “If any one induce any minor to commit any offence, the person who induces the minor shall be held fully liable as if he himself have committed the offence.”

Further, the Act provides with the following provision for the support of the child with the view that s/he has no *mens rea* of doing so act:

1. Section 12 says that if the child is recidivist then his past conviction during his infancy can't be counted in his childhood and shall not be liable to any additional punishment on the basis of continuation of such offence. Further, if he is disqualified to hold any office or enjoy facility under the law for the reason of committing an offence, such disqualification shall not be applicable with regard to a child committing an offence during his childhood.
2. Section 15 prohibits on imposing rigorous punishment, prohibits putting handcuffs and fetters, solitary confinement or living together in prison with an adult matured prisoner in case a child is convicted for any offence.
3. Section 16(3) says, “No child be made involved in the sale or distribution of, and trafficking ii alcoholic drinks, narcotic drugs or any other drugs”.
4. Section 42(2) (a) (b) says that the child who are to be imprisoned (either for investigation or punishment) shall be kept in Children's Rehabilitation Home established either by government or non-government organizations.

### 2.3 Cases

Some of the cases which are related to juveniles are as follows:

- a) Advocate Mr. Ashish Adhikari on behalf of Mr. Bablu Godia, a permanent resident of ward No. 1 of Nepalgunj Municipality, Banke District Court, and currently having been imprisonment at the central Prisons section, Banke

#### Versus

Banke District Court, Nepalgunj, Appellate Court, Nepalgunj , His Majesty's Government, Ministry of Home Affairs, District Administration Office, Nepalgunj, Central Prison Section, Banke Nepalgunj.....Respondents

The writ was filed in Supreme Court subjected Habeas Corpus. Petitioner Mr. Bablu Godia, of 14 years, was held liable for 6 years of imprisonment as according to No. 6 of Chapter on Theft and therefore was kept in prison. Advocate Mr. Ashish Adhikari on behalf of Mr. Bablu Godia had filed the writ petition because the punishment given to Mr. Bablu Godia was equivalent to the punishment given to be given to the adults. Bablu Godia was of 14 years and according to the Section 11(3) and section 42 (2) (a) of Children's Act, 2048 (1992) he is liable only for the half punishment and should be kept in Juvenile Reform Home. The writ petition was filed against the respondents asking for the release of Mr. Bablu Godia from the prison.

Supreme Court pursued Mandamus in name of the respondents to build the Juvenile Reform Home as according to the Section 42(3) of Children's Act, 2048.

Also the Supreme Court asked the respondents to release the petitioner (Mr. Bablu Godia) from the prison and to keep him in the Juvenile Reform Home.

The decision made by the Supreme Court seems to be progressive and in support of the child. But, the decision made by Banke District Court, Nepalgunj and Appellate Court, Nepalgunj was not according to provision mentioned in the Children's Act, 2048. On this part, it is seen that though there is law its implementation and enforcement seems to be very poor.

- b) Pleader, Tara Devi Khanal on behalf of Sarita Tamang, a resident of Ward. No. 9 of Syang VDC of Illam District, presently imprisoned in Prison Branch Illam,

**Versus**

Illam District Court, Illam, His Majesty's Government, Ministry of Home, Singhdurbar, District Administration Office, Illam, District Prison Branch, Illam

The writ was filed in Supreme Court subjected Habeas Corpus. Sarita Tamang of 14 years of age was awarded a sentence of 10 years imprisonment pursuant to section 11(3) of Children's Act, 2048 under the No. 13(3) of chapter on Homicide by Illam District Court. She was kept in prison not in Juvenile Reform Home. According to the Section 42(1) and (3) of the Children's Act, 2048 the children are subjected to be kept in the Juvenile Reform home either for investigation or even for punishment. The writ petition was filed against respondents asking for the release of Ms. Sarita Tamang from the prison.

Supreme Court gave an order of Mandamus to the respondents Ministry of Home, Singhdurbar, District Administration Office, Illam, District Prison Branch, Illam to release the petitioner Sarita Tamang from the prison and to keep her in a Juvenile Reform Home as according to the Section 42 (1) of the Children's Act.

As in the case of Mr. Bablu Godia in this case also the Supreme Court seems to be progressive and in support of the child. But on the part of District Court, Illam, the implementation and enforcement of the law seems to be very poor.

- c) Mr. Ashish Adhikari **Versus** His Majesty's Government Cabinet Secretariat, Singhdurbar Kathmandu, His Majesty's Government, Ministry of woman, children and social welfare, Singhdurbar Kathmandu, His Majesty's Government, Ministry of Home, Singhdurbar Kathmandu

The writ was filed in Supreme Court subjected Mandamus. The writ reads that the Children's Act, 2048 came into force for providing timely legal order for children's physical, mental and intellectual development by protecting their rights and interests. This Act came into force for incorporating the universal principles of the reformatory system of punishment. But the respondents have failed to establish and operative Juvenile Reform Home stipulated by Section 42 of the Act and the children such as Bablu Godia of 14/15 years age are compelled to live with cruel and habitual natured, adult and matured prisoners and detainees. The writ petition was filed asking the respondents to build the Juvenile Reform Home as necessary and as possible.

Supreme Court issued a directive order in name of His Majesty's Government Cabinet Secretariat to make necessary arrangements towards establishment and

operation of Juvenile Welfare institution like orphanage and mentally retard children's center under Section 42, Juvenile welfare Home under Section 34 and Juvenile Reform Home under Section 43 according to capacity.

Though the state have expressed commitment in international level by ratifying Child Rights Convention, 1989, and has enacted Children's Act, 2048, it has failed to make necessary arrangements for providing enough necessities for the development of children and to protect the rights of the children. So, the Supreme Court's order seems to be a progressive step towards the protection of the rights of children.

### **3.1 Conclusion**

Crime is an act against the norms of the society, and law of the state. The person whoever commits the crime, is held liable for either monetary punishment or imprisonment. Two factors, *mens rea* and *actus reus* are given prime importance to decide whether the person has criminal liability or not. It is believed that the person while doing act foresees the consequence. But, in case of juveniles it is accepted that the child cannot frame the consequences and does the act without having any *mens rea*. Therefore, the children who commit the offence are not held criminally liable and the offence is termed as 'delinquency'.

In Nepal, the child under 16 years if commits the offence then s/he is not criminally liable. The juvenile law of Nepal has this provision. The child under 10 years is completely immune from criminal liability and child between 10-14 years s/he shall be warned if necessary can be imprisoned for 6 months. And if the child between 14-16 years commits any offence then s/he is liable for half of the punishment than to be given to the adults. Further, the law has other provisions so as support the children and provide the enough space for development of the child.

Supreme Court in regard to the decisions made by the juveniles also seems to be progressive with the universally accepted principle about the juvenile reform. The Supreme Court of Nepal has also taken necessary steps to provide the space for the children for their physical, mental and intellectual developments. But, in case of the other district and appellate courts of Nepal (from the above cases) like Illam, Banke, the courts does not seem to be progressive though there are provisions regarding the juveniles to send them to reform home rather than in the prisons, the juveniles are sent to the prisons. The law is there but its enforcement and implementation is not seen.

However, the Supreme Court has been as according to the law, to provide support for the children. And Nepalese law also seems progressive and has provided with the laws which are supportive, reformatory to the children.

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