**Submission of Comments to the Committee on the Rights of the Child
Draft revised General Comment No. 10 (2007) on children’s rights in juvenile justice**

**By:** Swagata Raha[[1]](#footnote-1)and Arlene Manoharan[[2]](#footnote-2)

1. **Restorative Justice:** Many countries have adopted restorative justice to address harm cause by children, needs of victims and the community, and to help the child take responsibility for the same. Although restorative justice is mentioned in paras 12, 25, 112, and 115 and the Basic principles on the use of restorative justice programmes in criminal matters, adopted by ECOSOC resolution 2002/12 is cited, the General Comment will benefit richly from an expanded view on the use of restorative processes, distinct from diversion, in juvenile justice. Definition of and guidance on restorative justice, similar to that on diversion in para 27, is essential. The Committee may also consider citing evidence that proves the effectiveness of restorative justice approaches.[[3]](#footnote-3) Perspectives of the Committee on the extent to which agreements or outcomes of the restorative justice process can be relied upon in formal proceedings will be useful.
2. **Children in conflict with the law can also be victims and in need of care and protection:** It is appreciable that the Committee states in para 112, that States parties should treat children recruited and exploited by non-State armed groups, terrorist or violent extremist groups “primarily as victims and refrain from charging and prosecuting them for mere association with a non-State armed group or a terrorist or violent extremist organization.” Similar treatment should also be meted out to children who are recruited and exploited by an adult or a group of adults to commit illegal offences such as theft, murder, robbery, smuggling of drugs or psychotropic substances, trafficking of persons, etc.
3. **Specific reference to children engaging in sexual acts:** Para 10 recommends States parties to abolish status offences. It will be useful if a specific reference is made to sexual acts where both parties are minors, and where the age gap is not more than 2-3 years and the act is consensual. In India, for instance, penetrative sex or non-penetrative sexual behaviour among or with persons below 18 years constitutes an offence. This has resulted in the criminalization of many adolescent boys and the institutionalization of adolescent girls, based on complaints of rape by the girls’ family. The General Comment should explain adolescent sexuality, adolescent autonomy and the impact such provisions have on their privacy, dignity, and health, among other rights.
4. **Neuroscience findings on the adolescent brain may be acknowledged:** With the advances of neuroscience and studies by the Research Network on Adolescent Development and Juvenile Justice at the MacArthur Foundation, USA, it is now known that the human brain undergoes key physical changes during adolescence, and continues to evolve physically right until the mid-20s. These findings have been noticed by the US Supreme Court (*Roper v Simmons, Graham v. Florida),* as well as the Indian Supreme Court (*Subramanian Swamy v. Raju* (2014) 8 SCC 390). The Committee may consider acknowledging neuroscience findings in para 12, while differentiating the culpability of children.
5. **Use of mental maturity/capacity to determine if child in conflict with the law can be treated as an adult:** In the context of the treatment of children as adults based on the nature of offence, the Committee should also engage with the criteria of “mental capacity” used to determine if a child in conflict with the law can be tried and punished as an adult. This is the case in India where the Juvenile Justice Board (JJB), is meant to conduct a preliminary assessment to determine if the child between 16-18 years accused of a heinous offence had the physical and mental capacity to commit the offence, the child’s understanding of the consequences of the offence, and the circumstances in which the offence was committed.[[4]](#footnote-4)

In General Comment No.1 on Article 12: Equal recognition before the Law (UNCRPD), the Committee on the Rights of Persons with Disabilities has stated:

"The concept of mental capacity is highly controversial in and of itself. Mental capacity is not, as is commonly presented, an objective, scientific and naturally occurring phenomenon. Mental capacity is contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity."

Elizabeth S. Scott and Laurence Steinberg, former members of the John D. and Catherine T. MacArthur Foundation Research Network on Adolescent and Juvenile Justice have cautioned against a case-to-case approach in determining maturity:[[5]](#footnote-5)

**The problem with individualized assessments of immaturity is that practitioners lack diagnostic tools to evaluate psychosocial maturity and identity formation on an individualized basis.** Recently, courts in some areas have begun to use a psychopathy checklist, a variation of an instrument developed for adults, in an effort to identify adolescent psychopaths for transfer or sentencing purposes. This practice, however, is fraught with the potential for error; **it is simply not yet possible to distinguish incipient psychopaths from youths whose crimes reflect transient immaturity**. For this reason, the American Psychiatric Association restricts the diagnosis of psychopathy to individuals aged eighteen and older. **Evaluating antisocial traits and conduct in adolescence is just too uncertain.**

The Committee’s perspective on the compatibility with CRC of the use of such an arbitrary and subjective standard as mental capacity to determine adult treatment of children is crucial. We are aware that in India, IQ tests or response of the child to some arbitrary questions are often the basis for transfer to the court for trial as an adult.

1. **Application of presumption of innocence at every stage:** In light of the transfer system in India, it is suggested that the Committee emphasize that the presumption of innocence is respected at every stage, including the pre-trial phase. The Committee may examine whether assessments like these, which require a judicial authority to determine before trial whether the child between 16-18 years accused of a heinous offence had the physical and mental capacity to commit the offence, an understanding of the consequences of the offences, and the circumstances of the offence, can be carried out without offending the presumption of innocence.
2. **Presence and examination of witnesses:** Para 73 elaborates on the right of the child to examine witnesses during trial. However, there are pre-trial processes in which substantive decisions may be made based on the reports of experts. For instance, the JJBs in India may rely on the reports of psycho-social experts during a preliminary assessment and decide to transfer the child for trial as an adult, based on such report. Many JJBs deny children the right to cross-examine the expert/s who prepared the report because the preliminary assessment is not a trial. The procedural fairness guarantees should also apply to pre-trial processes and this may be emphasized in GC 24.
3. **Quality of legal representation:** The socio-economic profile of children in conflict with the law and their families who enter the juvenile justice system in India makes them vulnerable to exploitation by lawyers. They are rarely able to afford good lawyers and are often unaware of their right to free legal aid, and how to access it. Para 61 should emphasize the quality of legal representation as well as the need for oversight by a governmental or judicial authority on the services being provided by State lawyers. A safe system should also be recommended to enable children and their families to register grievances regarding legal representation. Free legal aid should be available from the time of arrest or apprehension right through the proceedings, including appeal. Finally, the Committee may consider recommending multi-disciplinary legal aid services to children in conflict with law. The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, emphasizes that ‘Legal aid provided to children should be prioritized, in the best interests of the child, and be accessible, age‑appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children. Guideline 11 specifically recommends that ‘States should take appropriate measures to establish child‑friendly and child-sensitive legal aid systems’, while explaining the term “Child‑friendly legal aid.”
4. **Right to privacy cannot be used to deny child access:**  In practice, children in conflict with the law are being denied records and orders in their own case, under an erroneous interpretation of the guarantee of privacy and confidentiality. In para 81, the following addition may be considered: “Furthermore, the right to privacy also means that the court files and records of child offenders should be kept strictly confidential and closed to third parties except for those directly involved in the investigation and adjudication of, and the ruling on, the case. Children in conflict with the law cannot, however, be denied access to the reports, records and orders in their case.”
5. **Interpretation of margin of error:** In para 45, can the Committee also indicate that margins of error should be interpreted in favour of the child in conflict with the law?
6. **Right to be heard and protection against self-incrimination:** Though paras 54-56 deal with the participation principle, and paras 70-72 deal with the right against self-incrimination, guidance is required on how to differentiate between the right to be heard and freedom from compulsory self-incrimination and how to strike a balance.
7. **Multi-Disciplinary Approach (MDA) to adjudicate matters relating to children in conflict with law**: Para 49 emphasizes inter-disciplinarity for a fair trial. The Committee may consider drawing insight from juvenile justice law in India, which provides for JJBs to be comprised of a Judicial Magistrate and two Social Workers who may hail from disciplines such as child psychology, psychiatry, sociology, or law,[[6]](#footnote-6) -vested with the powers of a judicial magistrate of the first class while sitting as a bench. This unique feature is progressive, given that the JJB is required to not only determine whether or not the child has committed an offence (competencies generally found in persons trained in law), but to also pass rehabilitative orders based on a best interest determination, along with an Individual Care Plan (requiring competencies that generally develop in persons hailing from disciplines such as psychology, education, health, etc.). The Committee itself, in General Comment No. 14[[7]](#footnote-7), recognizes the value of a MDA in informing the assessment and determination of the child’s best interests in order to arrive at a decision concerning the child. Additionally, Guideline 3.12 of the Guidelines on Children in Contact with the Justice System brought out by the International Working Group of the International Association of Youth and Family Judges and Magistrates,[[8]](#footnote-8) focuses specifically on the value that the MDA brings to adjudication on matters concerning children. Finally, the Council of Europe’s Guidelines of the Committee of Ministers on Child-friendly Justice also highlights the need for a MDA to ensure that the best interests of children are met.[[9]](#footnote-9)
8. **Prevention:** Para 21 should also make a reference to teachers and school counselors as key actors, emphasizing the positive influence they can have over young children, the large amount of time a school going child spends in school, and the fact that they can alert other actors when a child is vulnerable and at risk of getting into delinquency.
9. **Probation Services:** Though the draft makes numerous references to probation, it fails to assert that this service should be one that children in conflict with law are entitled to. Given the rights language used in Art. 40(3) UNCRC, and the vital role that probation services plays in juvenile justice, the Committee should indeed consider emphasizing that every child in conflict with law has the ***right to*** quality probation services. Reference to specialized Probation Services should also be included in para 118 and emphasized in this para, particularly given that this is one of the key pillars of a rehabilitatory juvenile justice system, and is being compromised by budget cuts and the dearth of trained human resources. In India for example, lawyers are being appointed as Legal cum Probation Officers who are being compelled to provide probation services without any training or exposure to social work and probation skills.
10. **Other suggestions**:
	1. Para 8: Reference to **discrimination** based on sexual orientation and gender identity should be included. Further, **compensation** should also be paid to children who have been wrongly confined or wrongly tried and sentenced as adults.
	2. Para 16: The Committee should consider underscoring the fact that the objective of preserving **public safety is indeed best served by the full respect for and implementation of the leading and overarching principles of juvenile justice** as enshrined in the CRC, and to provide **concrete evidence** to demonstrate the same. This is particularly, given the alarming global trends in public policy to move away from rehabilitation towards retributive justice, and to reduce the age of juvenility. Our research tells us that the Committee has recommended to at least 59 States to change their laws to ensure that all persons below 18 years are dealt with under the juvenile justice system irrespective of the offence they commit.
	3. Para 24: “The **diversion** of matters away from the criminal/juvenile justice processing to a range of appropriate programmes should be the preferred manner of dealing with child offenders in the majority of cases. States parties should continually extend the range of offences for which diversion is possible, including serious offences where appropriate.” Are there any **indicators to determine appropriateness**?
	4. Para 86: Please consider deletion of this line as an exception to the maximum renders the threshold meaningless. “Any exceptions to the maximum period should be kept to an absolute minimum, and must abide by the principle of proportionality.”
	5. Para 105: Where should the **child who attains the age of 18 years** be moved if it is in the best interest of the child to stay in the facility, but not in the best interest of other children?
	6. Para 124: **Data should also be disaggregated** based on identity such as race, religion, disability, indigenous community, caste, etc., to help examine whether some groups are disproportionately affected.
	7. **Grammatical Errors:**
		1. Para 45: The term “gender-sensitive” appears twice.
		2. Paras 94 and 125: This line appears twice in the document “Research, as for example on the disparities in the administration of juvenile justice which may amount to discrimination, and developments in the field of juvenile delinquency, such as effective diversion programmes or newly emerging juvenile delinquency activities, will indicate critical points of success and concern.”
1. Legal Researcher and Consultant on Laws relating to Children, with over 13 years experience. Mst in International Human Rights Law, Oxford University, B.A.LLB (Hons), W.B.National University of Juridical Sciences, Kolkata, India. Authored several articles and books on juvenile justice and trainer on laws relating to children for judges, police, and functionaries of India’s child protection system. Contact: swagataraha@gmail.com [↑](#footnote-ref-1)
2. Consultant on Child Rights with specialization in child protection and juvenile justice, having almost 3 decades of experience. Master of Social Work from Tata Institute of Social Sciences, Mumbai. Contact: arlene.manoharan3@gmail.com [↑](#footnote-ref-2)
3. Lawrence W Sherman & Heather Strang, *restorative justice: the evidence,* The Smith Institute (2007). [↑](#footnote-ref-3)
4. Juvenile Justice (Care and Protection of Children) Act, 2015, Section 15. [↑](#footnote-ref-4)
5. Elizabeth S. Scott and Laurence Steinberg, “Adolescent Development and the Regulation of Youth Crime”, *The Future of Children,* VOL. 18 NO. 2, FALL 2008, p.15 at 24-25. [↑](#footnote-ref-5)
6. Section 4(3), JJ Act, 2015. [↑](#footnote-ref-6)
7. UN General Comment No. 14, on the right of the child to have his or her best interests taken as a primary consideration, (2013), para 47. [↑](#footnote-ref-7)
8. Guidelines on Children in Contact with the Justice System, Prepared by an International Working Group of the International Association of Youth and Family Judges and Magistrates, adopted by the Council of the IAYFJM London, October 21st, 2016, and ratified by the members of the IAYFJM, April 26th 2017, pp. 46 & 47, available at http://www.aimjf.org/download/Documentation\_EN/AIMJF/Guidelines\_-\_ENG\_-\_Ratified\_17.04.26.pdf [↑](#footnote-ref-8)
9. Guideline B(4), <https://rm.coe.int/16804b2cf3>, p.18 [↑](#footnote-ref-9)