
THE FAILINGS OF JUVENILE JUSTICE IN INDIA

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I. INTRODUCTION

It has been fifteen years since the first Juvenile Justice Act has been in force in India. Inspired and formulated from the 1989 UN Convention on the Rights of the Child, it was aimed to be a progressive legislation in-line with the world philosophy of separating criminal from children.

But as the Delhi rape case of 2012 brought into light the obvious flaws of justice in the Act,¹ its provisions have been subject to debate. With Lashkar-e-Toiba asking its cadets to declare their age as under 18 to avoid prosecution under the Indian Penal Code,² the scope of this debate has spilled into something more than emotional public outrage- national security and efficacy of the Indian legal system. Under such circumstances it is essential that Act must be revisited not just from the societal perspective but also from a point of legal validation. And since such a scrutiny cannot be lopsided, this paper shall examine the Act from the dual perspective catering to both sides of argument.

The objective of this paper, hence, shall be to study the Juvenile Justice Act 2015 from the current legal perspective, its efficacy in establishing juvenile justice and fulfilling the larger role of child rights and development and finally, the recent amendments debated by the Parliament in this regard. It is essential to limit the scope of this study to the current day dynamics of the Act for a better analysis and understanding.

II. HISTORY

After the infamous Delhi gang rape incident, it was found that one of the accused was a few

¹ The Times of India, (2016). *Nirbhaya gang-rape case: Juvenile found guilty of rape and murder - Times of India*. [online] Available at: <http://timesofindia.indiatimes.com/city/delhi/Nirbhaya-gang-rape-case-Juvenile-found-guilty-of-rape-and-murder/articleshow/22183253.cms>

² The Indian Express, (2014). *Claim to be juvenile to escape law: LeT tells its cadre*. [online] Available at: <http://indianexpress.com/article/india/india-others/claim-to-be-juvenile-to-escape-law-let-tells-its-cadre/>

months away from being eighteen years of age. So, he was tried in a juvenile court.³ On 31 July 2013, Subramanian Swamy, a BJP politician filed a Public Interest Litigation in the Supreme Court of India seeking that the boy be tried as an adult in a court. The Court asked the juvenile court to delay its verdict.⁴

After the Supreme Court allowed the juvenile court to give its verdict, the boy was sentenced to 3 years in a reform home on 31 August 2013.⁵ The victim's mother criticised the verdict and said that by not punishing the juvenile the court was encouraging other teenagers to commit similar crimes.⁶

In July 2014, Minister of Women and Child Development, Maneka Gandhi said that they were preparing a new law which will allow 16-year-olds to be tried as adult. She said that 50% of juvenile crimes were committed by teens who know that they get away with it. She added that changing the law, which will allow them to be tried for murder and rape as adults, will scare them. The bill was introduced in the Parliament by Maneka Gandhi on 12 August 2014.⁷ On 22 April 2015, the Cabinet cleared the final version after some changes.

III. EXAMINING PROVISIONS

The bill will allow a Juvenile Justice Board, which would include psychologists and sociologists, to decide whether a juvenile criminal in the age group of 16–18 should be tried as an adult or not.⁸ The bill introduced concepts from the Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption, 1993 which were missing in

³ India, A., Prabhu, S. and Ghosh, D. (2016). *16-Year-Olds to be Tried as Adults in Extreme Crimes*, Says Lok Sabha. [online] NDTV.com. Available at: <http://www.ndtv.com/india-news/changes-to-juvenile-justice-act-spurred-by-gang-rape-outrage-passed-in-lok-sabha-761221>

⁴ Tehelka - Investigations, Latest News, Politics, Analysis, Blogs, Culture, Photos, Videos, Podcasts, (2016). *SC asks Swamy to inform JJB to defer verdict on juvenile* | Tehelka - Investigations, Latest News, Politics, Analysis, Blogs, Culture, Photos, Videos, Podcasts. [online] Available at: <http://www.tehelka.com/2013/07/sc-asks-swamy-to-inform-jjb-to-defer-verdict-on-juvenile/>

⁵ BBC News, (2016). *Delhi gang rape: Teenager found guilty* - BBC News. [online] Available at: <http://www.bbc.com/news/world-asia-india-23908176>

⁶ Sumnima Udas and Melissa Gray, C. (2016). *Teen sentenced in rape, death of Indian medical student* - CNN.com. [online] CNN. Available at: <http://edition.cnn.com/2013/08/31/world/asia/india-gang-rape-sentencing/>

⁷ The Indian Express, (2014). *Juvenile Justice Bill introduced in Lok Sabha*. [online] Available at: <http://indianexpress.com/article/india/india-others/juvenile-justice-bill-introduced-in-lok-sabha/>

⁸ Business-standard.com, (2016). *Cabinet approves amendments to Juvenile Justice Bill*. [online] Available at: http://www.business-standard.com/article/news-ani/cabinet-approves-amendments-to-juvenile-justice-bill-115042201237_1.html

the previous act.⁹ The bill also seeks to make the adoption process of orphaned, abandoned and surrendered children more streamlined.¹⁰

The bill introduces foster care in India. Families will sign up for foster care and abandoned, orphaned children, or those in conflict with the law will be sent to them. Such families will be monitored and shall receive financial aid from the state. In adoption, disabled children and children of physically and financially incapable will be given priority. Parents giving up their child for adoption will get 3 months to reconsider, compared to the earlier provision of 1 month.¹¹

A person giving alcohol or drugs to a child shall be punished with 7 years imprisonment and/or ₹1,00,000 fine. Corporal punishment will be punishable by ₹10,000 or 3 months of imprisonment. A person selling a child will be fine with ₹1,00,000 and imprisoned for 5 years.¹²

Under Section 15, special provisions have been made to tackle child offenders committing heinous offences in the age group of 16-18 years. The Juvenile Justice Board is given the option to transfer cases of heinous offences by such children to a Children's Court (Court of Session) after conducting preliminary assessment. The provisions provide for placing children in a 'place of safety' both during and after the trial till they attain the age of 21 years after which an evaluation of the child shall be conducted by the Children's Court. After the evaluation, the child is either released on probation and if the child is not reformed then the child will be sent to a jail for remaining term. The law will act as a deterrent for child offenders committing heinous offences such as rape and murder and will protect the rights of victim.

Questions

To properly comprehend the intricacies of the debate over the Act, it is essential to understand

⁹ Malhotra, A. (2014). *Towards a comprehensive Juvenile Justice law*. [online] The Hindu. Available at: <http://www.thehindu.com/opinion/op-ed/towards-a-comprehensive-juvenile-justice-law/article6221909.ece>

¹⁰ Business-standard.com, (2016). *Cabinet approves amendments to Juvenile Justice Bill*. [online] Available at: http://www.business-standard.com/article/news-ani/cabinet-approves-amendments-to-juvenile-justice-bill-115042201237_1.html

¹¹ dna, (2015). *Juvenile Justice Bill passed; 16-18 years to face adult laws in heinous crimes* | Latest News & Updates at Daily News & Analysis. [online] Available at: <http://www.dnaindia.com/india/report-juvenile-justice-bill-passed-16-18-years-to-face-adult-laws-in-heinous-crimes-2084153>

¹² *Ibid*

that the questions of study involved here are:

- Does the Act properly address the problem of the juvenile delinquency?
- Does the Act require an alternating amendment from a legal perspective?

The paper shall make use of the two questions as guide for a detailed study of the subject matter. While the first question covers the appropriate provisions and their impact, the second question provides the drawbacks and suggestions for improvement.

IV. SURROUNDING DEBATES

The objective of the Act from the very beginning has been rehabilitation over retribution.¹³ In accordance with the UN conventions, the Act practically exempted the under 18 strata from any kind of punishment meted out under the IPC. While sec 2(1) defines a juvenile as any child who has not yet completed eighteen years of age, sec 15(1)(g) of the Act mandates that a juvenile convicted of any offence can be sentenced to be sent to a special home for a period of three years, maximum and thereafter be released on probation.¹⁴

To begin with the positives, the act provides streamline adoption procedures for orphan, abandoned and surrendered children, the existing Central Adoption Resource Authority (CARA) is given the status of a statutory body to enable it to perform its function more effectively. Separate chapter (VIII) on Adoption provides for detailed provisions relating to adoption and punishments for not complying with the laid down procedure. Processes have been streamlined with timelines for both in-country and inter-country adoption including declaring a child legally free for adoption.

Several rehabilitation and social reintegration measures have been provided for children in conflict with law and those in need of care and protection. Under the institutional care, children are provided with various services including education, health, nutrition, de-addiction, treatment of diseases, vocational training, skill development, life skill education, counselling, etc. to help them assume a constructive role in the society. The variety of non-institutional options include: sponsorship and foster care including group foster care for placing children in

¹³ Pal, R. (2011). *Psychological dimensions of juvenile delinquency*. New Delhi: Readworthy Publications.

¹⁴ Juvenile Justice Act. 2000

a family environment which is other than child's biological family, which is to be selected, qualified, approved and supervised for providing care to children.

Several new offences committed against children, which are so far not adequately covered under any other law, are included in the Act. These include: sale and procurement of children for any purpose including illegal adoption, corporal punishment in child care institutions, use of child by militant groups, offences against disabled children and, kidnapping and abduction of children.

All child care institutions, whether run by State Government or by voluntary or non-governmental organisations, which are meant, either wholly or partially for housing children, regardless of whether they receive grants from the Government, are to be mandatorily registered under the Act within 6 months from the date of commencement of the Act. Stringent penalty is provided in the law in case of non-compliance.

The point of contention on the Act has been the age limit. Ever since the early release of the Delhi rape case convict, public perception vouched for reducing the age limit to 16 years. The legal arguments in support of this have been of that England where the age of criminal responsibility has been set at 10 years¹⁵, or the United States which draws a clear distinction between victims of an unresponsive society and those fully aware of their crimes.¹⁶ The alternative argument is that of India being a signatory to UNCRC where 'every child below the age of 18 must be able to fully realise their rights'. In a country where a third of population lives below the poverty line, the duty of the state is exemplified in terms of stepping in and ensuring every child access to these set of rights. This is backed by certain neuroscience studies and is accepted by a majority of the world's nations.¹⁷

The Indian legislature on the 7th of May, 2015 passed a new bill lowering the upper age limit to 16 years for heinous crimes. This decision, however, has been critiqued by scholars who deem to be a hasty and populist by the upper house.¹⁸

¹⁵ James Bulger Case, 1993

¹⁶ LII / Legal Information Institute, (2016). *Kent v. United States*

¹⁷ Childlineindia.org.in, (2016). *Must we or must we not reduce the age of a juvenile (in India) to 16 years?*. [online] Available at: <http://www.childlineindia.org.in/Must-we-or-must-we%20not-reduce-the-age-of-a-juvenile-in-India-to-16-years.htm>

¹⁸ Malhotra, A. (2014). *Towards a comprehensive Juvenile Justice law*. [online] The Hindu. Available at: <http://www.thehindu.com/opinion/op-ed/towards-a-comprehensive-juvenile-justice-law/article6221909.ece>

One of the most scathing criticism among them is introduction of "Judicial Waiver System" which allows treatment of juveniles, in certain conditions, in the adult criminal justice system and to punish them as adults. This is for the first time in India's history that such a provision has been prescribed. Given to the severe criticism, Bill was referred to a Standing Committee of Parliament which also rejected such provisions. Since recommendations of Parliament's Standing Committee are not binding, Government has moved ahead and introduced the Bill in Lok Sabha, where it stands passed.

Bill is also criticized for prescribing an opaque Age Determination System and its poor draft. The bill now stands Passed in Rajya Sabha on Tuesday 22 December 2015, after the Nirbhaya case accused juvenile was released.¹⁹

On the second point of contention, which is the development of appropriate facilities for rehabilitation of the juvenile delinquents, the report has been a unanimous negative. The provision of the Act relating to registration of juvenile homes by private bodies who subsequently receive grants from the government has been widely abused. While more than 700 juvenile justice homes in India receive grants from the Union government, they do not include homes run by state governments and NGOs. In a survey conducted in January 2014, the Tamil Nadu government found that 40 per cent homes managed by non-governmental organisations, housing more than 31,000 children, were unregistered.

A similar report by the Kerala State Human Rights Commission states 87 illegal orphanages functioning in the state. The state crime records bureau has registered 66 criminal cases of sexual abuse in orphanages and charitable homes in the last 10 years, according to the report.

Apart from the rampant abuse in terms of regulation, a report published by the union ministry of women and child development reveals that in the last four years, enquiries have been initiated in 36 cases of sexual abuse in the rehabilitation facilities across 13 states.

An analysis of inquiry reports filed by government appointed committees and independent investigators found that these juvenile delinquents have been raped inside homes, made to live in inhuman conditions and even sold. At Apna Ghar, a juvenile care institution in Rohtak,

¹⁹ The Times of India, (2016). *Rajya Sabha passes Juvenile Justice Bill, Nirbhaya's mother 'satisfied'* - *The Times of India*. [online] Available at: http://timesofindia.indiatimes.com/india/Rajya-Sabha-passes-Juvenile-Justice-Bill-Nirbhayas-mother-satisfied/articleshow/50285328.cms?utm_source=facebook.com&utm_medium=referral&utm_campaign=TOI

which grabbed headlines in early 2012, more than 100 female residents said they were raped by caretakers and outsiders for more than a year.²⁰ The report of the committee appointed by the Punjab and Haryana High Court, immediately after the rampant sexual abuse in the institute was highlighted, observed that the younger delinquents were filmed for pornographic purposes and more than a dozen minor inmates were sold.

V. A FRESH START

The principle of fresh start, which espouses that the criminal records of a juvenile offender be expunged, is premised on the objective of reintegrating juvenile offenders into society. It flows from the right to privacy of juveniles, embodied under the Convention on the Rights of the Child (CRC),²¹ which guarantees to all juvenile offenders, without distinction, this right during all stages. It is meant to avoid the labeling and stigmatisation of the juvenile offender, prejudicing his access to future education, employment, or housing.

The principle of fresh start seeks to liberate juvenile offenders from the stain of a criminal conviction and offers them a second chance, a fresh start free of the social and economic disabilities which often accompany a conviction.²² Highlighting the need for a system of expungement, the court in *United States v. Dancy*²³ remarked that “the stigma of a criminal conviction may itself be a greater handicap in later life than an entire misspent youth”. Expunging records of a juvenile is also in sync with rehabilitative ideals of the juvenile justice system, which aims to ensure re-integration of juvenile offenders into society.²⁴

The 2015 Act espouses the principle of fresh start by requiring that the records of juvenile offenders be erased. However, this provision is accompanied by a caveat which allows deviation from the rule in “special circumstances”.²⁵ The nature of these special circumstances has however not been specified, leaving an aspect so sensitive completely open-ended. It is

²⁰ <http://www.hindustantimes.com/>, (2015). ‘*Children were on sale at Rohtak's Apna Ghar*’. [online] Available at: <http://www.hindustantimes.com/punjab/children-were-on-sale-at-rohtak-s-apna-ghar/story-olltNtmt0m7e5set34FgOP.html>

²¹ United Nations Convention on the Rights of Child, Art. 1, U.N. Doc. A/RES/44/25 (September 2, 1990).

²² *John Doe v. William H. Webster*, 606 F 2d 1226 (DC Cir 1979); *Mestre Morera v. United States Immigration and Naturalization Service*, 462 F 2d 1030 (1st Cir 1972).

²³ *United States v. Dancy*, 640 F 3d 455 (1st Cir 2011)

²⁴ *United States v. Moore*, 1975 SCC OnLine US SC 191 : 46 L Ed 2d 333 : 423 US 122 (1975)

²⁵ The Juvenile Justice (Care and Protection of Children) Act, 2015, §3(xiv).

feared that the open ended nature of the provision could lead to “racial profiling” of the offender, on the basis of his family background, caste, community, and religion.²⁶

Further, the 2015 Act exempts juvenile offenders from any disqualification which could be incurred under similarly placed statutes for commission of an offence under the law.²⁷ However, children above the age of sixteen who have committed heinous offences are not given protection under this clause.²⁸ This implies that disqualifications under the law would apply to them, thereby casting a permanent stain on their future lives. Such exclusion is contrary to the principle of fresh start and the rehabilitative ideals underlying juvenile policy

VI. WHAT PSYCHOLOGY SAYS

Research in neuroscience clearly demonstrates that children are intrinsically different from adults in terms of their psychological development and thus are less culpable as well.²⁹ Their level of mental and emotional development also means that children demonstrate a greater potential for rehabilitation in comparison to adults and thereby are more likely to respond positively to rehabilitation interventions.³⁰ Acknowledging this crucial distinction, juvenile justice programs around the world place maximum emphasis on rehabilitation. The failure of the “get tough” approach adopted in the United States is resounding proof of the positive effect of rehabilitation on juvenile offenders. Fearing the onset of a “new breed” of juvenile offenders, termed the “super predators”, a number of states in the United States tightened their juvenile policy, transferring a number of young offenders to the adult criminal system. The framers of this approach hoped that it would lead to lower rates of crime, due to increased deterrence.³¹ However, studies conducted demonstrated that incarceration of juveniles merely led to an increase in the rate of recidivism, thereby defeating the object of the policy.³² This resulted in

²⁶ The Hindu, Crime and Commensurate Punishment, July 22, 2015, available at <http://www.thehindu.com/opinion/op-ed/the-juvenile-justice-bill-and-rights-of-children/article7448576.ece>

²⁷ The Juvenile Justice (Care and Protection of Children) Act, 2015, §24

²⁸ The Juvenile Justice (Care and Protection of Children) Act, 2015, §24(1)

²⁹ Salil Bali v. Union of India, (2013) 7 SCC 705; Subramanian Swamy v. CBI, (2014) 8 SCC 682

³⁰ Laurence Steinberg, Adolescent Development and Juvenile Justice, 5 Annual Review of Clinical Psychology 47 (2009) (Criminologists in their findings have relied on ‘Age-crime curve’ which shows that criminal activity in juveniles peaks at the age of seventeen and reduces drastically thereafter. This finding illustrates that only a handful of juvenile offenders are chronic offenders while the rest are adolescence-limited).

³¹ Steven E. Barkan & George J. Bryjak, Myths and Realities of Crime and Justice 180 (2014); Larry Siegel & Brandon Welsh, Juvenile Delinquency: The Core 66 (2014).

³² Centre for Disease Control and Prevention, Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services, November 30, 2007, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm>

a return to the rehabilitation ideal espoused by traditional juvenile justice law, indicating that rehabilitative programs are crucial for the treatment of juvenile offenders, irrespective of the severity of the offence. The 2015 Act, by sanctioning the prosecution and punishment of children as adults, is regressive by nature, and in contravention of the principles of reformatory justice, thereby defeating the “intent and purpose of the juvenile justice system”.

Taking into account this backdrop, juveniles who commit heinous crimes ought to be treated differently from offenders committing petty offences, as the former require more intensive treatment than the latter. Therefore, for such children, we propose a juvenile justice model hinging on rehabilitative ideals. While it does treat offenders committing heinous crimes differently, such differential treatment is envisaged solely within the juvenile justice system, without a subsequent transfer to the adult prisons. The rehabilitation model we propose is premised on the “what works” approach to juvenile offender rehabilitation, followed in Australia.³³ This approach has yielded highly optimistic results with respect to rehabilitation and reformation of juvenile offenders, with a significant reduction in rates of recidivism.³⁴ The “what works” approach is characterised by three predominant principles, which dictate its functioning: the risk principle, the needs principle and the responsivity principle.³⁵ The model being suggested, would be a viable alternative to the approach adopted by the 2015 Act, and would reflect the aforementioned principles.

VII. THE WAY FORWARD

The new Juvenile Justice Act tends to continue the imported US system of deterrence to deal with current problem at hand. But as the same story has shown, US is now closing down its prisons and is looking for other ways like ‘community based treatment programs.’³⁶ A look at the background of the juveniles against whom the complaints are filed shows the anomaly where 55% of the delinquents are from well-to-do families while the other 45% are so poor that they cannot afford an education.³⁷

³³ Andrew Day & Kevin Howells, Victorian Juvenile Justice Rehabilitation Review, 3, January, 2003, available at http://www.aic.gov.au/media_library/archive/publications-2000s/victorian-juvenile-justice-rehabilitation-reveiw.pdf

³⁴ The National Reentry Resource Centre, Reducing Recidivism, 4, June, 2014, available at <https://www.bja.gov/Publications/CSG-ReducingRecidivism.pdf>

³⁵ Andrew Day, Kevin Howells & Debra Rickwood, Current Trends in Rehabilitation of Juvenile Offenders, 284 Trends & Issues in Crime and Criminal Justice 4 (2004)

³⁶ Ross, R. (2012). *Juvenile in justice*. Santa Barbara, CA: Richard Ross.

³⁷ Just Juvenile Foundation, *Analysis of Juvenile Crimes*: 11-12, 2011

A proper analysis of the circumstances that the Act was supposed to prevent, gives us an insight about the efficacy of the Act. It is essential to state that the problems highlighted have not been simply due to lack of proper implementation, as is the common criticism for most government initiatives. It is the absence of a holistic mechanism and a comprehensive policy on child rights and justice that is at the crux of the matter.

The need of the hour is to focus on such issues that provoke them to commit crimes instead of targeting these juveniles with stringent punishment without any logical base. An exhaustive policy that encompasses child rights, primary education, juvenile delinquency and exception handling laws needs to be framed. An inclusive mechanism that involves the societal factors affecting the lives of juveniles- parents, teachers, schools, community- is a better solution than leaving the onus on government agencies and NGOs.