

THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) AMENDMENT ACT, 2015: A FLAWED APPROACH

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Abstract

A juvenile can be defined as a person who has not reached mental maturity to comprehend the complexities of matter that come across his life, due to this our law has always been lenient while treating juvenile delinquency. The sustained public pressure and outcry led by Nirbhaya's parents compelled a stalled Rajya Sabha to debate and pass the law in a single day amending the Act. The juvenile in the age of 16-18 committing a heinous offence are now being tried for adult crime and send them to jail along with usual perpetrators. Harsh punishment cannot be a deterrent and this in turn could make juveniles hard core criminals. Thus this paper purports to analyze:

- The societal factors that contribute to the committing of offence by the juveniles.
- The possible solutions and the need for reforms at the grass root level to prevent the juveniles from committing crime rather than punishing them for the actions which will serve no good.
- The flaws of recent amendment made in Juvenile Justice Act and its impact on the society which was an outcome of political expedience rather than serving proper justice
- The measures which would provide adequate relief to the victims and also recognition of their rights.

Lastly, the authors attempt to put forth various suggestions for dealing with the juvenile delinquents rather than by means of punishment. The new approach should focus more on restitution and rehabilitation of the juveniles compared to retribution. Victims should not be forgotten entities in the justice delivery system. Hence any variation in the system should take this into consideration while adopting the same.

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Introduction

“Child is the father of the man” is a saying which means that man is the product of his habits and behavior developed in the childhood. These words aptly show the importance of the development of a child. But it is now a saddening fact that the crimes committed by the children are increasing at an alarming rate. The Juvenile Justice Act which deals with the juveniles in conflict with law has now amended. The public hue and cry during the release of the juvenile offender of the *Nirbhaya* case led to the amendment of the Act in a hastily manner without justice considerations. However, the Parliament in its wisdom under renewed public pressure has enacted a new JJ Act.¹

According to the recent amendment children between the ages of 16-18 can be tried as adults if they commit a heinous crime. The bill was passed by evoking a nationwide debate with people supporting as well as opposing the amendment. The amendment gives discretionary powers to Juvenile Justice Board to transfer child delinquents to criminal court for trial and punishment. In this context, the issues addressed through this paper are whether the amendment aids in arresting the crimes, whether it is at odds with the constitutional safeguards guaranteed to children and the ill effects of such an amendment which was an outcome of political expedience rather than serving proper justice.

The basic premise to enact such a law is public outcry over a recent crime pertaining to rape and murder. But such step obviously will lead to retributive justice, not juvenile justice.² Juveniles are often considered as the weaker section of the society and our constitution has always been lenient while handling child delinquents but the recent amendment is antithetic to the same.

International conventions and constitutional principles are violated

The provisions that are inserted in the bill blatantly violates Articles 14, 15(3) and 21 of the Constitution and International conventions which allows special laws for marginalized sections of society, including children.

¹ Harpal Singh, *New Juvenile Justice Act: A Setback for Child Rights*, The Blog, available at http://www.huffingtonpost.in/harpal-singh/new-juvenile-justice-act-_b_8893144.html, last seen on 10/2/2016.

² Amendment to Juvenile Justice Act Criticized, THE HINDU, available at <http://www.thehindu.com/news/national/karnataka/amendment-to-juvenile-justice-act-criticised/article7140406.ece>, last seen on February 11, 2016.

When a 16-year old commits an offence that attracts a minimum seven year sentence, he will be produced before the Juvenile Justice Board comprising a magistrate and two social workers who will decide on the physical and mental capacity of the child to commit the offence as well as his ability to understand the consequence of the offence and the circumstances in which he committed the offence.³ This is a very subjective process which creates scope for an enormous amount of arbitrariness and the “latest research shows that individualized assessments of adolescent mental capacity are not possible.” Hence, the preliminary assessment by the Juvenile Justice Board providing for procedural arbitrariness violates Articles 14 and 21 because an accurate assessment of mental capacity for the purpose is just not possible and will result in subjective and arbitrary transfers into the adult criminal system. The assessment also violates the principle of presumption of innocence as it operates on the assumption that the child has committed the offence.⁴

By treating adolescents as adults, the proposed system will incorrectly treat two distinct categories equally. This strikes at the very core of Article 14. The Supreme Court has repeatedly upheld the principle that injustice arises not only when equals are treated unequally, but when unequals are treated equally.⁵ The Bill creates a distinction between two juvenile offenders committing the same offence on the basis of the date of apprehension. It is unclear what public purpose is being achieved by differentiating between two individuals, committing the same offence, on the basis of date of apprehension Article 21 states that no person can be deprived of their right to life or personal liberty, except according to procedure established by law. Courts have interpreted this to say that any law or procedure established should be fair and reasonable; the differentiation based on the date of apprehension may fail this standard. In 2005, a Constitution Bench of the Supreme Court, while determining the age of a juvenile and the resulting penalty (under the 2000 Act and an earlier 1986 Act) decided that the date on which the offence is committed matters, and not the date of apprehension.⁶

³ *Very Basis of Juvenile Justice Amendment Is Unconstitutional*, THE WIRE, available at <http://thewire.in/2015/05/12/very-basis-of-juvenile-justice-amendment-is-unconstitutional-1534/>, last seen on February 11, 2016.

⁴ Transfer system, mental capacity assessment in juvenile justice bill violate equality rights, available at <http://blog.mylaw.net/tag/juvenile-justice-act/#sthash.JWjFxDIN.dpuf>, last seen on February 11, 2016.

⁵ *M. Nagaraj v. Union of India*, A.I.R. 1975 S.C.; *Joginder Nath v. Union of India* A.I.R. 1975 S.C. 511.

⁶ *Pratap Singh v. State of Jharkhand & Anr.*, Appeal (Crl.) 210 of 2005.

The provision of the Bill mentioned above contradicts this ruling of the Constitution Bench, and considers the date of apprehension when deciding the penalty given to a juvenile.⁷

Further the provision in the JJ bill stipulating that if a juvenile between the ages of 16–18 commits an offence and is apprehended at a later date he will be subjected to a higher penalty than what would be applicable to him if he had been apprehended at the time of commission of the offence is inconsistent with Art. 20(1) of our constitution which lays down that a person should not get a penalty higher than what would be applicable at the time of commission of the offence.

The UN Convention on the Rights of the Child is a human rights treaty which was enacted to safeguard the civil, political and cultural rights of the children; it acts a watch dog for protecting the interest of the children. India is a signatory to the UNCRC which mandates the age of a child to be below 18 years. Countries all over the world use this definition. India too, defines a child between the ages of 0-18 years. By law, he/she is not allowed to vote, sign a contract or engage a lawyer because he /she is not considered mature enough to make such decisions.⁸By enacting this law our country has gone against the spirit of the International convention. Article 19 of the Convention states that state parties must:

"Take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence."

When children are pushed into this complex legal system they are administered with mental and physical torture which results in manufacturing hardened criminals.

Flaws in the Amendment

Sending juveniles who allegedly commit 'serious' crimes to jail on the excuse of public safety is not in the interest of children, families, or the wider community. Placing adolescents who are at a difficult transitional phase in their lives along with adult

⁷ Legislative Brief The Juvenile Justice (Care & Protection of Children) Bill, 2014, *available at* <http://www.prsindia.org/uploads/media/Juvenile%20Justice/Legislative%20Brief%20Juvenile%20Justice%20Bill.pdf>, last seen on February 14, 2016.

⁸ What are the consequences of the juvenile justice bill in India?, *available at* <https://www.quora.com/What-are-the-consequences-of-the-juvenile-justice-bill-in-India>, last seen on February 11, 2015.

criminals will only serve to place these young people at risk of being physically, sexually and emotionally abused and being further criminalized. This regressive outcome is in stark contrast to our constitutional mandate and the rehabilitative aims outlined even in the preamble of this Bill⁹. Neuroscience proves in more ways than one, that an adolescent is at an age where he/she is not mature enough to understand the consequences of his/her actions. He/she is still vulnerable and can live a normal healthy adult life if allowed to undergo reformation through corrective measures. Our reluctance to acknowledge and prevent issues that cause children to turn to crime is a detriment to society.

Moreover when a juvenile is send to an adult court he will probably leave the court premises when he turns the age of 26 or 28 and at this prime age he will be accompanied with social stigmatization and ostracization which in turns defeat the very purpose of juvenile law. The amendment reinforces the deceitful idea that sending juveniles to jail who commits ghastly crimes can maintain social order and tranquility.

According to the Article 40(1) of the UNCRC, all children in conflict with the law must be treated in a manner that is consistent with their sense of dignity and worth and reinforces their respect for human rights and fundamental freedoms. The treatment must ensure promotion of their reintegration into society. The JJ Bill, 2014 blatantly disregards the aims of reintegration and restoration of a child in conflict with the law, by providing for a highly arbitrary determination of their competence to make 'meaningful contributions' to society when they reach the age of 21 years. A failure to pass this test would result in an automatic transfer to an adult jail. Even if a child is found to have undergone reformative changes at the end of this assessment process however, she or he will incur the disqualifications attached to the conviction, making it difficult to secure gainful employment or stand for elections in short the idea of reintegration would be nearly impossible. Putting children with adult criminals is self-destructive and self-defeating. Adolescents in conflict with law need adult guidance not the company of hardened criminals.¹⁰

⁹ *Supra* 3.

¹⁰ *Supra* 2.

Delving into the real cause: The much needed change in approach

The concern of the society has always been on the offender rather than the cause of offence. It is high time that the society should analyze “what is it that is causing the child to adopt a path of criminality”.¹¹ It also becomes vital to study the genesis of crime amongst children at the age eighteen, sixteen or even fourteen or twelve. There is enough evidence to suggest that there is a complete collapse in the social order and therefore, it become all the more important to identify the reasons for the same.¹² It should not be an overlooked factor that majority of the children in conflict with law come from illiterate families, poor homes or are even homeless.¹³ This clearly suggests that the poor and the marginalized sections of the society fall prey to such illegal ways,¹⁴ thus it can be concluded that most of the juveniles who commits heinous crimes are victims of violence, neglect, emotional deprivation, sexual abuse, broken families, poverty, substance abuse and so on and by sending them to jail without giving any chance to reform we are doing a grave injustice to the children as well as to society as whole. Most of the child offenders are dogged with post-traumatic stress and mental agony for years and transferring them to the adult criminal justice system and incarcerating them in adult prisons will only lead to a situation where these youngsters will come out of jail a few years later – thoroughly groomed and trained as career criminals.

Rather than understanding the more complex background that breeds such dreadful acts of crime and violence in our legal systems, we often, take recourse to fixing individual blame.

Law should be a system that should be reformative in its character rather than being strictly retributive. The use of punishment alone cannot be the only premise to reinstate clarity to the social order. It is necessary to probe into a welfare analysis, to recognize why and how criminal situations and behaviors occur- without justifying the crime of course. A welfare analysis should involve the discerning of a social chain, a chain to trace

¹¹ Juvenile Justice Act: In Lok Sabha, Sashi tharoor says amended bill will embarrass govt., First post. Available at <http://www.m.firstpost.com/>, last seen on Feb. 10, 2016.

¹² Miguel Queah, *The argument over the Juvenile Justice Act India*, Miguel and children, available at <http://miguelandchildren.blogspot.in/>, last seen on Feb. 11, 2016.

¹³ Juvenile Justice Bill 2015, available at <http://www.shashitharoor.in> last seen on Feb 11, 2016.

¹⁴ *Id.*

social injustices that give birth to criminal behavior amongst children.¹⁵ The thorough study of social welfare chain of the incidents of child crimes would provide ample evidence of the failure, on the part of the state, to secure social justice for those many children who have accidentally brushed themselves against the law.¹⁶

Punishment alone cannot realize the idea of justice and welfare in any legal system. Moreover there is no evidence available to support the claim that subjecting juveniles who commit serious crimes as adults will deter crime.¹⁷ Social welfare should promote efforts at reconciliation and social reconstruction and should not solely be aimed at revenge. A condemning criminal justice system would only silence the human suffering, not cure it. Banishing juveniles to adult prisons will expose them to hardened criminals who will feed on their vulnerability and initiate them into serious crime. This will put society at a higher risk and increase the supply to organized crime.¹⁸ By tracing the reasons for juveniles in conflict with law, a rehabilitation process for the problem of child crimes can be put in the already existing institutions and systems.¹⁹ This would thus ensure social development.

The concern/emphasis of the system should be more in creating preventive systems of care and protection that would dissuade criminal practices amongst children at the source rather than focusing on the stigmatization of children from the age group of sixteen to eighteen. Large scale public delivery and social work interventions should be put in place to make sure that children grow up in an environment of care and support.²⁰ Various studies establish that juveniles involved in crimes need educational and reformatory measures to rehabilitate them and punitive strategies are not as effective as reformatory measures.²¹

In fact, another component of the Juvenile Justice (Care and Protection of Children) Act clearly sets out the progressive measures that are to be undertaken for “Children who are in need

¹⁵ *Supra* 2.

¹⁶ *Supra* 7.

¹⁷ Swagata Raha, *Busting misconceptions on juvenile justice*, THE HINDU (26/8/2013), available at <http://www.thehindu.com/opinion/op-ed/busting-misconceptions-on-juvenile-justice/article5061398.ece>, last seen on Feb. 12, 2016.

¹⁸ *Id.*

¹⁹ *Supra* 7.

²⁰ *Supra* 2.

²¹ *Need to re-enact Juvenile Justice Act-Myths and Realities*, Kafila, available at <http://kafila.org/2014/08/04/need-to-re-enact-juvenile-justice-act-myths-and-realities-kishore/>, last seen on Feb 11, 2016.

of care and protection".²² If Juveniles committing crimes, from the age group of sixteen, are aware of the protection, the actualization of the other part of the same Act, by the State and the civil society, in the first place could be used as an effective deterrent machinery to prevent criminal behavior amongst those very children.²³ The most urgent and critical area of reform therefore, is not of the law, but of the way it is being implemented. If the law is implemented in letter and spirit, and services are designed and delivered by dedicated professionals from various disciplines, juveniles alleged to or found to have committed serious crime can indeed be rehabilitated, reformed and re-socialized.²⁴

The need of the hour is to increase investment into education, developing infrastructure, restoration, recruiting qualified staff and rehabilitation.²⁵ Evidence clearly shows that given chance young offenders, even those who commit heinous crimes, are able to change and can be rehabilitated and reintegrated into the society.²⁶ What is needed is proper implementation of multi-systematic interventions including working with families, mentorship, the use of positive role models and cognitive behavior therapy.²⁷

The balancing act of justice system

The existing juvenile justice system does not reflect an understanding of the plight or the rights of victims of juvenile crime.²⁸ Victims are often seen as forgotten entities in the adversarial criminal justice system. They have been met with denial and disbelief, with society failing to develop an adequate response to a crime which shows that criminal justice system which is expected to deliver a sense of justice has failed in its current response to satisfy the large majority of the victims. Restorative Justice programs that enable victim-offender

²² *Supra* 2.

²³ *Supra* 7.

²⁴ *Id.*

²⁵ *Supra* 2.

²⁶ *Supra* 2.

²⁷ Nikhil Roy, *How should we treat juveniles who commit the most serious crimes? A view from India*, Penal Reform International, available at <http://www.penalreform.org/blog/juvenile-juvenile-view-india/>, last seen on Feb 12, 2016.

²⁸ A. Manoharan & S. Raha, *The Juvenile Justice System in India and children who commit serious offences-Reflections on the way forward*, The International Juvenile Justice Observatory, available at <https://www.nls.ac.in/ccl/justicetochildren/intl.pdf>, last seen on Feb 12, 2016.

reconciliation is increasingly gaining ground around the world (even in cases of juveniles who commit serious/violent crime), attempting to balance 'competency development, public safety goals and accountability in an effort to restore victims, communities and offenders, and restore broken relationships.'²⁹ There are little or no services or systems in the current system to ensure that the needs and rights of victims of juvenile offences are valued and realized.³⁰ However, the interest in protection of juveniles has to be stable with the interest of protecting particularly vulnerable members of society from violent crimes committed by persons less than 18 years of age and amending the law when societal conditions radically change over time.³¹

The perception of justice has undergone a radical change and the society has now awakened to realize that the punitive options under the current system are neither in the society's long term interest nor do they serve as an effective deterrent. Some victims demand for a benefit in the long run by restitution or restorative method. However, this 'justice deadlock' can be overcome by adopting a rehabilitative/ reformatory method— one that incorporates both compassion and condemnation, both healing and justice.³² Hence there should be balance of justice.

Conclusion and recommendations

Punishment alone via the formal criminal justice system is not the right way of dealing with juvenile delinquency. Concerted efforts by the society, the government and the functionaries can only help solve this problem. The response to juvenile crime has to be fair, age-appropriate and reflective of an understanding of developmental psychology. Any amendment to existing law needs to be facilitated through intense participatory, consultative and deliberative processes. Altering the position with respect to age of a juvenile without much study will be an inappropriate and regressive response. The amendment of the JJ Act, as a reaction to the countrywide outrage against one juvenile will set a

²⁹ Balanced and Restorative Justice for Juveniles, A Framework for Juvenile Justice in the 21st Century, Office of Juvenile Justice and Delinquency Prevention, Balanced and Restorative Justice Project, University of Minnesota, 1997, p. ii.

³⁰ *Supra* 12.

³¹ Aparna Vishwanathan, *Balancing the juvenile act*, THE HINDU (9/9/2013), available at <http://www.thehindu.com/opinion/lead/balancing-the-juvenile-act/article5107620.ece>, last seen on Feb. 12, 2016.

³² K. Daly, *Sexual Assault and Restorative Justice* (2013), available at http://www.griffith.edu.au/_data/assets/pdf_file/0006/50289/kdpaper11.pdf, last seen on Dec. 13, 2015.

dangerous trend and may affect hundreds of adolescents. It will also violate the legal obligations arising from the Constitution, the recommendations of the Justice J.S. Verma Committee and the universal standards enshrined in the UN Convention on the Rights of the Child. The nation needs to re-dedicate itself to investing in such juveniles, to reform and rehabilitate them into the community with dignity.

A few recommendations to improve the situation rather than punishment are as follows:

- Proper education as a means to address the juvenile crimes.
- Conduct awareness programs.
- Developing and establishing Specialized Juvenile Offender Rehabilitation Programmes for juvenile sex offenders
- A Special Committee consisting of professional social workers, counselors, psychiatrists, advocates, child rights experts, etc., should be established in order to provide specialized services to juveniles residing in Observation Homes/special Homes.
- Establishment of Integrated Treatment Centers for juveniles in conflict with law.
- Enhancing effectiveness of rehabilitation programs.
- Proper training to the functionaries dealing with juveniles.

Hence by strengthening the existing juvenile justice system – where they still have a chance to reform themselves and helping them take responsibility for their actions, teaching them to make amends to their victims and to society in appropriate ways – is the way to help prevent further crime and actually bring about some measure of healing and justice for all concerned.