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Brain Science, Juvenile Delinquency and the Juvenile Justice (Care and Protection of Children) Act, 2015: A Critique

by
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I. PROLOGUE

That a nation's future lies with its children has become a cliché. It is more so in case of India, with around 42% population below the age of 18 years.

Children are tender and laws that deal with children, be it recognition of their rights, education and development must be far removed from the adult jurisprudence for this reason. One such aspect of child laws is the Minimum Age of Criminal Responsibility (MACR), which means determination of the minimum age under which a child shall not be amenable to the adult criminal justice system in both substantive and procedural forms.

The dastardly gang rape of a young girl by a group of five, including a juvenile aged around seventeen years, in New Delhi in December, 2012, shook the so called collective conscience of the society so much so that a fierce debate on women's security got started in this country, including in the Parliament. The debate was centered on the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter the JJ Act, 2000) which was enacted by the Indian Parliament in response to India's obligation under the Convention on the Rights of the Child (CRC).¹ The JJ Act, 2000 had fixed the MACR at 18 without any exception.

Curiously, the debate on women's security boiled down to the alleged inadequacy of law to severely punish juveniles who are found to have committed heinous crimes such as rape, murder, robbery etc. implying that the




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sole reason for consistent increase in crimes against women is the "encouragement" to juveniles with "criminal propensities" as the JJ Act, 2000 lacked "deterrent penal sanction". It was argued that juveniles in the age bracket of sixteen to eighteen years, who many assumed and believed, to have developed sufficient maturity as evidenced by their involvement in the heinous crimes, must be dealt like adults in all cases of heinous crimes as it was widely reported in the media that one of the accused persons in the Delhi Gang Rape case was a juvenile.

Consequently, the JJ Act, 2000 was replaced by the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter the JJ Act, 2015)² ironically prepared by the Ministry of Women and Child Development. The JJ Act, 2015 lays down different procedural rules for "petty offences"³, "serious offences"⁴ and "heinous offences"⁵ seeking to try delinquent juveniles (falling in the age group of sixteen to eighteen years) as adults⁶ if they have allegedly committed "heinous offences" with a possibility that a delinquent juvenile in this age group may be given any punishment except death penalty or non-remissive life imprisonment.²

It is interesting to note that the Juvenile Justice (Care and Protection of Children) Bill, 2015 (the JJ Bill) was subjected to insightful scrutiny by the Civil Society groups across the country and it was referred to the Parliamentary Standing Committee on

Human Resource Development (hereinafter PSC) for considering the draft of the new legislation and make recommendations. The PSC on the JJ Bill submitted its recommendations and the same was taken up by the Parliament in the Budget Session. The PSC had said that children below eighteen years are amenable and should be treated in the same manner and differential treatment for children above sixteen years of age should not arise. Such a move shall be in conflict with law and CRC.⁸ It also observed that the JJ Bill was 'based on misleading data regarding juvenile crimes and violated certain provisions of the Constitution'⁹.

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It seems that the archaic common law maxim *malitia supplet aetatem* (malice supplies defect of years) has been brought in the contemporary juvenile justice mechanism that if the circumstances disclose such a degree of criminal intent (malice) that is generally exhibited by the adults, the juvenile should be held liable in the same way.


This comment looks into the debate on lowering the age of differential treatment of juveniles in the age group of sixteen to eighteen from psycho-legal perspective and argues that the tinkering with the JJ Act, 2000, is not only against India's commitment towards the CRC but also counterproductive for its future. In so arguing, the author shall look into the psychological premise of juvenility and the accepted principles on the basis of which a child is treated differently from adult criminals.

II. JUVENILES ARE PSYCHOLOGICALLY DIFFERENT FROM ADULTS

Juvenility is that phase of one's life where proper care, education and counselling can help one in growing as a responsible citizen. The physical, psychological, emotional and educational needs of children are different from those of adults.

The principles underlying mental and physical development of children are not based on some irrational ideas rather based on scientific and psychological studies. According to the child psychologists, juveniles have their brains divided in two parts which help them in distinguishing between good and evil. The first is social-emotional part which is related to emotions and is controlled by punishments or rewards. This part of the brain undergoes a massive change during childhood and juvenility and therefore juveniles tend to commit certain acts which give them a high and a feeling of sensation. In order to feel the sensation, children in the age group of sixteen to eighteen have a high tendency to take risks without evaluating the pros and cons of the same. It has been seen that for this precise reason they commit such acts where there is high risk involved and there is no or very little reward.¹⁰

The second part of the brain is known as cognitive part and it is helpful in long-term planning, evaluation of pros and cons, and in controlling excitements and emotions. The interrelation between these two parts of the brain gets matured towards the last phase of juvenility or around the age of twenty years. Most of the juveniles learn to control their impulsive behaviour at this age and at the same age maturity in their behaviour becomes

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visible. All these changes in the brain take place between sixteen-twenty years and therefore, the age group sixteen to eighteen is most prone to criminality. This is the

reason why in order to decide a threshold, eighteen years is globally accepted as the age of juvenility and the same is also the reason why juveniles should be treated differently in the criminal justice system as against their adult counterparts. These psychological and scientific facts and principles justify the purely reformatory approaches towards delinquent juveniles.

The age group of sixteen to eighteen is that period of juvenility when the child is passing through the most crucial phase of his physical, emotional and psychological development. This is the most critical period of transition in his/her life and therefore the period from sixteen to eighteen years in his/her life cannot be viewed in isolation or in separation from the childhood. We have in our country the age of eighteen years as the minimum age for taking many an important decisions or even for conferring certain rights.¹¹

In sum, although by age sixteen, adolescents reach adult levels of intellectual maturity; psychosocial maturity continues to develop into early adulthood. Adolescents do not "put facts together and draw conclusions the way adults do."¹²

Those who argue that the juveniles in the age group of sixteen to eighteen should be treated as adults for their criminality, argue that in the present era of information explosion, children mature early and *know everything* even before they turn sixteen and therefore when they commit crimes they *know* the consequences of their conduct and hence must be answerable to the criminal justice system like adults. This argument is fallacious in so much so that there is a sea gap between mental maturity and having information. Children may have a lot of information today about *everything* but that does not in any way suggest that they are also mature. If the children of today are using the information that they have for doing acts without understanding consequences thereof, it only shows their mental immaturity.

Brain development is hardly complete at age of eighteen years. Instead, brain development continues into adulthood and sometimes is not complete until the age of twenty-five years. "As a result, although today's teens mature physically at younger ages than their parents, and although they take



on many of the behavioural trappings of adulthood, 'that does not mean that they understand the full implications of their behaviour."¹³

It has been acknowledged by the United States Supreme Court that teenagers don't have fully developed brains and that youths are less mature and not fully developed, and thus are less culpable.¹⁴ It has also been observed by the United States Supreme Court that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."¹⁵

In an interview, Dr. Shekhar P. Seshadri and Dr. Preeti Jacob of the Department of Child and Adolescent Psychiatry at the National Institute of Mental Health and Neuro Sciences (NIMHANS), Bengaluru, said that the brain of a child cannot be judges in the same way in which an adult's brain is judges. It has been scientifically proved that while 90% of brain development in terms of volume occurs by the age of six years, the fine tuning of the brain continues even into the third decade of life. The brain scientist duo elaborated that the physical maturity is different from mental or cognitive maturity and while one may be physically mature and capable of committing crimes of serious nature, he may not completely understand the consequences of such acts.¹⁶

Importantly, almost all the civil society organizations working to make the world

safer for women were opposed to any changes in the MACR. Justice J.S. Verma Committee formed after the Delhi Gang Rape to suggest amendments in Criminal Law was also not in favour of any change in MACR¹⁷. Evidently, security of women is not related to the issue of juvenile delinquency alone and many other factors are responsible for the same.

III. STATISTICS ON JUVENILE DELINQUENCY-MYTHS AND REALITY:

Unfortunately, in the aftermath of Delhi Gang Rape, the media not only demonised the juvenile who was one of the accused in the case, but also presented a distorted picture of prevalence of juvenile delinquency in this country. It is being reported that there has been a steep rise in the rate of



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crimes committed by children between the age group of sixteen to eighteen. These claims are factually incorrect.

The share of IPC crimes committed by juveniles to total Indian Penal Code (IPC) crimes reported in the country during 2004-2005 remained static at 1.0% which marginally increased to 1.1% in 2006 and remained static in 2007. This share increased marginally to 1.2% in 2008 thereafter decreased to 1.1% in 2009. This share further decreased to 1.0% in 2010 and thereafter marginally increased to 1.1% in 2011 and 1.2% in 2012 and remained static at 1.2% in 2013-2014. However, juvenile crime rate has shown a mixed trend during 2004-2014¹⁸

It is important to note that the share of crimes committed by children is a meager 1% of the total crimes. Comparative data reveals that in the last decade (2004-2014) there has been an increase of only 0.2 % in the crime rate of children. Therefore, it is only a myth that criminality amongst children has witnessed a steep rise in the recent years.

The other myth that is being deliberately perpetuated is that there has been a sharp rise in the number of rapes being committed by juveniles in the age group of sixteen to eighteen years. Nothing could be farther from truth than this mischievous inference. In the year 2014 out of the total number of crimes committed by juveniles i.e. 33526 only 5.9% (1989) crimes of rape were committed by juveniles in the age group of sixteen to eighteen. Though it is true that the incidence of rape have risen in the age group of sixteen to eighteen years but this rise is being presented in such a distorted manner that the society is compelled to believe that the main culprit of all the rapes in India are juveniles in the age group of sixteen to eighteen. True that the number of rapes reported against juveniles in the age group of sixteen to eighteen was 568 in 2004 which rose to 1989 in 2014 but presenting this figure to imply that "250% rise in rapes being committed by juveniles from 2004 to 2014" will only be misleading. The truth is that from 2004 to 2014 the number of rapes has risen from 568 to 1989 i.e. by 1421. The incidence of rape rose by 60% from 2012 to 2013 but even this rise is not alarming if the percentage is translated into the figures.¹⁹ This figure decreased to 5.5% from 2013 to 2014.²⁰

Also, there has not been much extensive research into the impact of laws which make it easier to try juveniles as adults. Few studies that are in



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existence indicate that the stricter approach has had little or no effect on the rate of

juvenile crime. Moreover, these studies show that 'trying juveniles in adult criminal court may actually result in higher rates of reoffending'²¹. The NCRB data indicate that recidivism among juveniles is very low in comparison to many foreign countries. It means that in spite of several pitfall, the JJ Act, 2000 was able to keep a check on recidivism or reoffending amongst juvenile delinquents. One reason for this was that under the JJ Act, 2000 a delinquent juvenile could have never been placed in adult prison. The JJ Act, 2015 has done away with this and now it is possible to transfer a juvenile in the adult prison if he or she has completed the age of twenty one and still has a remaining term of stay in a place of safety.²² If it is assumed that a person at the age of 16 is sent to life imprisonment, then he would be released sometimes in his/her mid-30s. There is very less assurance that the convict would emerge as a reformed person, who will not commit the same crime for that he was imprisoned or for that matter, any other crime.²³

IV. THE SUPREME COURT'S DILLY-DALLYING APPROACH TO THE MACR

The Supreme Court of India in *Salil Bali v. Union of India*²⁴ (hereinafter *Salil Bali case*), dismissed a petition for issuance of writ of mandamus to the Union of India in the form of a direction that in offences like rape and murder, juveniles should be tried under the normal law and not under the JJ Act and protection granted to persons up to the age of eighteen years under the aforesaid JJ Act may be removed and that the investigating agency should be permitted to keep the record of the juvenile offenders to take preventive measures to enable them to detect repeat offenders and to bring them to justice. In dismissing the petition, the Supreme Court observed that:

"The Juvenile Justice (Care and Protection of Children) Act, 2000, is in tune with the provisions of the Constitution and the various Declarations and Conventions adopted by the world community represented by the United Nations. The basis of fixing of the age till when a person could be treated as a child at eighteen years in the Juvenile Justice (Care and Protection of Children) Act, 2000, was Article 1 of the Convention of the Rights of the Child, while generally treating eighteen to be the age till which a person could be treated to be a child, it also



indicates that the same was variable where national laws recognize the age of majority earlier. In this regard, one of the other considerations which weighed with the legislation in fixing the age of understanding at eighteen years is on account of the scientific data that indicates that the brain continues to develop and the growth of a child continues till he reaches at least the age of eighteen years and that it is at that point of time that he can be held fully responsible for his actions. Along with physical growth, mental growth is equally important, in assessing the maturity of a person below the age of eighteen years. In the Juvenile Justice (Care and Protection of Children) Act, 2000, a conscious decision was taken by Parliament to raise the age of male juveniles/children to eighteen years."²⁵

The Supreme Court acknowledged that there might be exceptional cases where a child in the age group of sixteen to eighteen years has developed criminal propensities which would make it virtually impossible for him/her to be reintegrated in the mainstream of the society, but such examples are not of such proportions as to warrant any change in thinking, since it is probably better to try and reintegrate children with criminal propensities in to the main stream of the society, rather than to allow them to develop into hardened criminals, which does not augur well for the future.²⁶

Prof. B.B. Pande has commented²⁷ that the juvenile justice philosophy is strongly premised on non-discrimination between different categories of children, rather than creating a new category “children with criminal propensities”. He also says that apart from being legally unsustainable such a new categorization is scientifically untenable. On an analogy, it can very well be argued that creating a sub-category of children in the age group of sixteen to eighteen years is not in sync with the philosophy of juvenile justice.

Again in *Subramanian Swamy v. Raju*²⁸ the Supreme Court rejected the plea for treating juveniles accused of heinous crimes as adults observing that the provisions of the JJ Act, 2000 clearly indicate the legislative intent in the light of country's international obligations and the same is in conformity with the constitutional requirements.



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But in *Gaurav Kumar v. State of Haryana*²⁹, the Supreme Court soon changed its stand on MACR observing that there can be a situation where commission of an offence may be totally innocuous or emerging from a circumstance where a young boy is not aware of the consequences but in cases of rape, dacoity, murder which are heinous crimes, it is extremely difficult to conceive that the juvenile was not aware of the consequences. The Supreme Court said that a time has come to think of an effective law to deal with the situation, and urged the Attorney General to bring it to the notice of the concerned authorities so that the relevant provisions under the JJ Act (of 2000) can be re-looked, re-scrutinised and re-visited, at least in respect of offences which are heinous in nature.

It is submitted that the JJ Act, 2000 was premised on reformatory justice and not on reactionary violence by the State. It echoed the belief that in almost all cases of juvenile delinquency there is always a possibility of reform and that possibility must be explored. Alas, the JJ Act, 2015 belies the hope that children even if accused of heinous crimes shall be given another chance in life.

V. SLOPPY IMPLEMENTATION OF JJ Act, 2000

Many researches have underlined the importance of educational and counselling programmes for children in conflict with law so that they are able to understand the implications of their delinquency. A harsh punishment is less preferred and least effective in preventing juvenile offending in comparison to professionally managed educational programmes. It is equally important in case of juveniles to see what were the circumstances driving the juveniles to the verge of criminality.

The case of the juvenile delinquent in the unfortunate Delhi Gang Rape may be used as an illustration to highlight the problem of non-implementation or half-hearted implementation of the JJ Act, 2000. This juvenile delinquent was separated from his family at thirteen and spent his after-life on streets. Probably, during this period while he was a street child, he came in contact with adult criminals. This child was exposed to all the dangers which all the street children face. Just imagine how difficult it is to live without a family and without parental guidance.

When this child was sleeping on pavements and needed care, protection and sympathy of the society, no one was there to stand by him. The JJ Act, 2000 was enforced only when this poor child committed a heinous crime. It is a case where a child who was a “child in need of care and protection”³⁰

became a “juvenile in conflict with law”³¹ as the juvenile justice system did not respond when it was needed most.

The State is under an obligation under the CRC to extend its protection and security to all the children who are in need of care and protection. The principal object of the CRC is to prevent children from offending and if they do, to offer them another chance in life so that they are brought back in the mainstream of the society. However, the provisions of the JJ Act, 2000 were never implemented in their letter and spirit for mainstreaming the delinquent child into the society. Evidently, the State did not discharge its obligation of providing care and protection to this child and left him in lurch to fend for himself and to grow up as a juvenile in conflict with law. The State, the society and the voluntary organizations were all missing from the scene when this child was being physically and emotionally exploited during the most crucial phase of his juvenility i.e. 13-17 years. Unfortunately, the State, the media and the civil society primarily focus on the juveniles in conflict with law and children in need of care and protection become victims of selective amnesia. This type of approach generally forbids efforts to stimulate proper behaviour, focusing instead on preventing unwanted behaviour.

VI. EPILOGUE

The epoch-making JJ Act, 2000 was passed and enforced to meet India's obligation under the CRC. During the period of its existence for one and a half decade, the JJ Act, 2000 appeared to be more concerned about the “juvenile in conflict with law” whereas the “child in need of care and protection” did not get his due. The law was only implemented half-heartedly and in such a scenario any tinkering with the juvenile justice jurisprudence especially MACR should have been avoided. The rate of incidence of juvenile offending is still very low and with proper implementation of the provisions of juvenile justice laws, it can be brought even lower. There is insufficient data to show that juvenile delinquency or even the incidence of commission of heinous crime is on an alarming rise. The creation of a sub-category of children falling in the age group of sixteen-eighteen years is also violative of Article 14 of the Constitution. It is also against the fundamental *principle of innocence* as contained in Section 3(i) of the JJ Act, 2015 itself: Any child shall be presumed to be an innocent of any *mala fide* or criminal intent up to the age of eighteen years.³²

The need of the hour is to give the “child in need of care and protection” his due under the mandate of CRC by making the law fully operational in letter and spirit. The JJ Act, 2015 is regressive and takes away whatever was good about the juvenile justice mechanism vis-à-vis MACR in India. The ugly face of the JJ Act, 2015 is already making its presence felt where juveniles in conflict with law are being sent to adult prisons in flagrant disregard to prohibition against such transfers and without complying with the necessary procedure. Irony of the matter is that the police now believes that under the JJ Act, 2015, a juvenile in the age bracket of sixteen to eighteen years can be treated as an adult for “all purposes” including lodging in adult prison on mere complaint against such a juvenile alleging commission of heinous crime.³³ In a country like India where the fifteen years of progressive JJ Act, 2000

were mired in shoddy implementation in dealing with “child in need of care and protection”, the undue haste and enthusiasm in treating a delinquent juvenile as an adult is intriguing and inexplicable.

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¹ See the preamble to the JJ Act, 2000.

² The JJ Act, 2015 came into force from January 15, 2016.

³ See Section 2(45), JJ Act, 2015: Offences punishable with imprisonment up to three years.

⁴ See Section 2(54), JJ Act, 2015: Offences punishable with imprisonment between three to seven years.

⁵ See Section 2(33), JJ Act, 2015: Offences punishable with minimum imprisonment of seven years or more.

⁶ Id. Sections 15 and 19.

⁷ Id. Section 21.

⁸ See <http://indiatoday.intoday.in/story/juvenile-justice-parliamentary-committee-centre-crimes-delhi-gangrape-case-maneka-gandhi/1/420999.html> (accessed on April, 20, 2016).

⁹ See <http://www.prsindia.org/uploads/media/Juvenile%20Justice/Legislative%20Brief%20Juvenile%20Justice%20Bill.pdf> (accessed on March 11, 2016).

¹⁰ MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice. (2006, September), Less guilty by reason of adolescence (Issue Brief No. 3). Philadelphia.

¹¹ Minimum age for being eligible to exercise the right to vote is eighteen years. Even to enter into a valid civil contract, the minimum age is eighteen years.

¹² MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice. (2006, September), Network overview: A century of change in juvenile justice (p. 2), Philadelphia.

¹³ Beyer, “Recognizing the Child in the Delinquent”, Kentucky Children’s Rights Journal, Vol. VII, No. 1, Spring 1999, 45, 55.

¹⁴ *Graham v. Florida*, 176 L Ed 2d 825 : 130 SCt 2011 : 560 US 48 (2010); *Roper v. Simmons*, 161 L Ed 2d 1 : 543 US 551 (2005).

¹⁵ *Graham v. Florida*, 176 L Ed 2d 825 : 130 SCt 2011 : 560 US 48 (2010).

¹⁶ “Cover Story”, Frontline (January 22, 2016) at 29-30.

¹⁷ Justice Verma Committee on Amendments to Criminal Law, Government of India, at p. 259.

¹⁸ Juvenile in Conflict with law, Chapter 10, Crime in India-2014 at p. 343 available at <http://ncrb.gov.in/> (accessed on March 30, 2016).

¹⁹ <http://ncrb.nic.in/CD-CII2013/CII13-TABLES/Table%2010.2.pdf> (accessed on March 30, 2016).

²⁰ http://ncrb.gov.in/CD-CII2014/CII_2014_Tables/FILES/Table%2010.2.pdf (Accessed on March 30, 2016).

²¹ See <http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/stats/kidlikeadults.html> (accessed April 11, 2016).

²² Section 19(3), JJ Act, 2015.

²³ Justice Verma Committee on Amendments to Criminal Law, Government of India, at p. 253.

²⁴ (2013) 7 SCC 705 : AIR 2013 SC 3743.

²⁵ Id. at paras 44-45.

²⁶ Id. at para 48.

²⁷ B.B. Pande, “Stilling the Turbulent Juvenile Justice Waters: The Supreme Court’s Precedented Response to an

Unprecedented Challenge in *Salil Bali v. Union of India*", (2013) 9 SCC J-25 at 33.

²⁸ (2014) 8 SCC 390.

²⁹ 2015 SCC OnLine SC 287.

³⁰ See Section 2(d), JJ Act, 2000.

³¹ See Section 2(l), JJ Act, 2000.

³² See also, Section 3(2)(I) of the Juvenile Justice (Care and Protection of Children) Rules, 2007.

³³ See "UP: 16-yr-old rape accused to be tried as'adult", the Indian Express (February 7, 2016), available at <http://indianexpress.com/article/india/india-news-india/up-16-yr-old-rape-accused-to-be-tried-as-adult/> (accessed on April 13, 2016).

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