

# CRITICAL ANALYSIS OF JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015 - IN THE LIGHT OF REDUCED AGE OF CRIMINAL RESPONSIBILITY OF JUVENILE IN INDIA

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## Introduction

The frightful incident of '*Nirbhaya Rape Case*' raised many debates. And the prime issue among these was the involvement of the juvenile perpetrator, who was only six months short from becoming adult<sup>142</sup>. This attracts the law of Juvenile Justice (care and protection) Act, 2000<sup>143</sup> and the culprit was sentenced by the court only for three-year confinement<sup>144</sup>. Against this decision of Apex Court, several protests were made, which demanded amendment in the existing Juvenile Justice Law<sup>145</sup>.

However, this case is not only reason for the Government to introduce this bill. The Ministry of Women and Child Development justified the introduction of bill with several other reasons. The prime two reasons of all were, first, the Juvenile Justice Act, 2000 was facing implementation and procedural delays<sup>146</sup>. Secondly, the National Crime Records Bureau (NCRB) Reports indicate increase in the Juvenile Crime between the age group of 16-18 years (i.e.1% in 2003 to 1.2% in 2013)<sup>147</sup>. Along with the huge proponents, there were some child activists, who criticized this Act on many grounds: first, stating it to be retributive not reformatory. According to H.V.S. Murthy, the former president of the Mysuru Bar Association,

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<sup>142</sup> Abantika Ghosh, In Fact: New Juvenile Justice Act on the Way, but Debate Continues, THE INDIAN EXPRESS, Mar. 15, 2015, <http://indianexpress.com/article/explained/in-fact-new-juvenile-justice-act-on-the-way-but-debate-continues/>.

<sup>143</sup> Juvenile Justice (Care and Protection of Children) Act, 2000 § 2(k) "juvenile" or "child" means a person who has not completed eighteenth year of age"

<sup>144</sup> Juvenile Justice (Care and Protection of Children) Act, 2000 § 15

<sup>145</sup> Kiran Bedi, 'Amended Juvenile Justice Act is a Message for Society', HINDUSTAN TIMES, Dec. 24, 2015, <http://www.hindustantimes.com/punjab/amended-juvenile-justice-act-is-a-message-for-society/story-MJEUTpHKthryaLFkndJUpL.html>.

<sup>146</sup> TWO HUNDRED the Juvenile Justice (care and Protection of Children) PARLIAMENT OF INDIA RAJYA SABHA TWO HUNDRED SIXTY FOURTH REPORT Juvenile Justice (care and Protection of Children) Bill, 2014 (PARLIAMENT OF INDIA RAJYA SABHA).

<sup>147</sup> Apoorva Shankar, The juvenile justice bill, 2015: All you need to know, The official blogsite of PRS Legislative Research (2015), <http://www.prsindia.org/theprsblog/?p=3610>.

the New Juvenile justice bill “violates the very essence of juvenile justice Act”.<sup>148</sup> Secondly, it violated various Fundamental Rights. Third, this Act does not take consideration of other relevant factor like social background and psychological issues. It has been well established by many neuroscientist that in adolescence period, child faces tremendous physiological, hormonal, emotional and structural change in the human brain, which subjects the child to great vulnerability. Fourth, this Act can also open the flood-gate of cases by angry parents who wants to resist their children from getting into love relationship.

The prologue of The New Juvenile Justice (care and Protection of children), 2015, has introduced some of the remarkable changes in the existing Juvenile Law. One of such major changes is, juvenile of age group of 16 to 18 are to be tried like an adult. Also, the person who has attained the age of twenty one while in sentence will be send to the jail for rest of the time span. However, all these decisions will be taken by the Juvenile Justice Board. This paper has highlighted on various controversial issues relating to new Juvenile Justice Act with special reference to the views of different activists. Along with this, the paper has focused on the anticipated situation which may arise when the New Juvenile Justice Act, 2015 will be read with Protection of Children from Sexual Offences Act, 2012 and Prohibition of Child Marriage Act, 2006.

Accordingly, this paper is divided in different parts. The first part has focused on controversy, which was raised by many activists who called the new Juvenile Justice Act as retributive not reformative. In the second part of the paper, focus has been on the Juvenile Justice Act and the issues relating to the maturity of the juvenile and why it is necessary to take consideration of same. Third part of the paper highlights the provisions of juvenile justice Act, which can violates Fundamental Rights of the children. In the fourth part of the paper, various provisos<sup>7</sup> of Protection of children from Sexual Offences Act, 2012 and Prohibition of Child Marriage Act, 2006 has been discussed and how these law can become peril for the young delinquent, who are in love relationship.

### **Juvenile Justice Act, 2015- Retributive or Reformative**

The key purpose to legislate the Juvenile Justice Act, 2015 was the increased number of crimes (mainly rapes), by juveniles of 16 to 18 age groups. However, numerous questions were raised

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<sup>148</sup> Amendment to Juvenile Justice Act Criticised, THE HINDU, Apr. 25, 2015, <http://www.thehindu.com/news/national/karnataka/amendment-to-juvenile-justice-act-criticised/article7140406.ece>.

on the new Juvenile Justice Act, 2015, as being more retributive than reformatory. Retributive because it contains provisions for teenager who commits heinous crime (give punishment seven years or more<sup>149</sup>) shall be tried like an adult<sup>150</sup> but in the children's court.<sup>151</sup> The Children's Court shall make sure that the child who is found guilty of heinous crime shall be sent to a place of safety till the age of twenty-one years and afterward, the person shall be shift to jail.<sup>152</sup>It means once a juvenile is found guilty; he shall not get the benefit of being child and may be sent to jail if he commits a heinous crime.

According to P. Baburaj, former member of the Juvenile Justice Board, such act may result in adverse impact on the juveniles in conflict with law<sup>153</sup>. He also added inconsiderate punishment can be a deterrent and this in turn, could make the juveniles hardcore criminals and would result in retributive justice, not juvenile justice.<sup>154</sup>

### **Maturity level of the Juveniles**

Another important issue which needs special attention is parallel culpability of the Children (between the ages of 16 to 21 years) with that of adult. It has been discovered by many neuropsychologist that "*adolescent brains are far less developed than previously believed*"<sup>155</sup> According to Ruben C. Gur, the biological age of majority is close to 22 years and the pertinent parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable, develops after attaining the age of maturity.<sup>156</sup> In this respect to punish a juvenile, like an adult would result in excess punishment. According to Maharukh Adenwalla, "*The Juvenile Justice (Care and Protection of Children) Act, 2015 has reversed the well founded principle of juvenile justice by allowing Juvenile Justice Boards to waive the right of children above the age of 16 years who have committed a heinous offence into the criminal justice system. This means the treatment of a juvenile will depend upon the type of offence committed instead of his situation.*"<sup>157</sup> This,

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<sup>149</sup> Juvenile Justice (Care and Protection of Children) Act, 2015 § 2(33)

<sup>150</sup> Id. at § 18(3)

<sup>151</sup> Id.

<sup>152</sup> Id. at § 19(3)

<sup>153</sup> Amendment to Juvenile Justice Act Criticised, THE HINDU, Apr. 25, 2015, <http://www.thehindu.com/news/national/karnataka/amendment-to-juvenile-justice-act-criticised/article7140406.ece>.

<sup>154</sup> Id.

<sup>155</sup> Hybrid Medical Animation, Cruel and Unusual Punishment: The Juvenile Death Penalty, American Bar Association 1(2004).

<sup>156</sup> Ruben C. Gur, American Bar Association, DECLARATION OF RUBEN C. GUR, PH.D. 15 (2016).

<sup>157</sup> Maharukh Adenwalla, A dislocation of the juvenile justice system, THE WIRE (The Wire May 23, 2015), <http://thewire.in/2015/05/23/a-dislocation-of-the-juvenile-justice-system-2282/>.

according to the author, violates the very principle laid down in Article 14 of Indian Constitution that, 'equality among equal'.<sup>158</sup>

### Constitution and Juvenile Justice Act

The new Juvenile Justice Act, 2015 was also criticized by many protestors as being unconstitutional. It violates Article 14, 15(3) and 20 of Indian Constitution<sup>159</sup>. Constitution of India enumerated every person is equal before law<sup>160</sup> but if we read this article with 15(3) then it is very much clear to us that Government can make special provision for the benefit of children<sup>161</sup>. It is also enumerated in the United Nations Standard Minimum Rules for the Administration of Juvenile, 1985 that the prime important should be given to the juvenile Justice and while considering a juvenile in conflict with law. That means one must give importance to "circumstances of both the offenders and the offence"<sup>162</sup>, but in the current Act only the type of crime is given importance. In **Pratap Singh v. State of Jharkhand**<sup>163</sup>, it was observed by Court that in Rule 4 of United Nations Standard Minimum Rules for the Administration of Juvenile Justice, while defining a juvenile criminality or criminal responsibility, the moral and the psychological components must be given prime importance.<sup>164</sup> However, in the present law, this psychological component has been given least importance.

According to Prof. Ved Kumari, if a sixteen years old juvenile commits a heinous crime and his or her offence is punishable with seven year sentence, then he/she need to be produce before the Juvenile Justice Board comprising a magistrate and two social workers<sup>165</sup> who will decide on the physical and mental capacity of the child; whether that juvenile has committed such offence has the ability to understand the consequence of the offence and in what circumstances the offence has been committed.<sup>166</sup> This work of Juvenile Justice Board is quite challenging. In this process, there is huge chance of uncertainty. It was also argued by her that many researches confirmed that individualized assessments of adolescent mental capability are

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<sup>158</sup> See INDIAN CONST., § 14

<sup>159</sup> The Wire Staff, 'Very basis of juvenile justice amendment is unconstitutional', The Wire (May 12, 2015), <http://thewire.in/2015/05/12/very-basis-of-juvenile-justice-amendment-is-unconstitutional-1534/>.

<sup>160</sup> INDIAN CONST.art. 14

<sup>161</sup> Id. at 15(3) "Nothing in this article shall prevent the State from making any special provision for women and children."

<sup>162</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), art. 5, , U.N. Doc A/RES/40/33 entered into force 9 November 1985

<sup>163</sup> Pratap Singh v. State of Jharkhand, 3 SCC 551 (2005)

<sup>164</sup> Id at ¶ 78

<sup>165</sup> See., Juvenile Justice (Care and Protection of Children) Act, 2015 § 4

<sup>166</sup> Id. at § 15

impracticable. Thus, the method of so-called introductory assessment by the Juvenile Justice Board may result in procedural arbitrariness and may cause arbitrary transfer of juvenile cases to adult criminal system it may cause violation of very foundation of Constitution. Mr. P. Baburaj condemn the act of transferring case by saying that, as Chief Judicial Magistrate of the district is the presiding officer of Juvenile Justice Board there is a huge chance of transferring large number of cases to adult courts.<sup>167</sup>

Another issue, which is pointed out by many activists, that the 2015 Act violates the spirit of Article 20(1)<sup>168</sup>, where a person cannot be subjected to greater punishment than what would have been applicable to him under the law of land. Under new Act, if a juvenile who has completed the age of twenty-one but has not completed the full period of his sentence may be sent to the jail if it is considered so proper.<sup>169</sup> This Act undermines the very spirit of Article 20(1)<sup>170</sup>. According to this provision, one may not be subjected to greater penalty, which may be inflicted at the time of committing offence. Here, if a juvenile commits a heinous crime on certain circumstance losing his self control. It basically lacks at young age, but after attaining majority maybe he can realize the actual circumstance and may change. However, if such juvenile is send to jail on his previous record of heinous contend, then it might be extra-deterrent on him.

### **Age of Consent and Juvenile Justice Act**

The amendment of Juvenile Justice Act, 2015 has created controversy in regard to the Age of Consent, when it read with the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and the Prohibition of Child Marriage Act (PCM Act). First of all the POCSO Act states the age of Consent is 18 years<sup>171</sup> and if any crime committed by a Juvenile under the POCSO Act then as per the section 23 of the POCSO Act it will be dealt as per the provision of Juvenile Justice Act, 2000 (Now as per the new amended Act)<sup>172</sup>. Again, the PCM Act states that the

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<sup>167</sup> Amendment to Juvenile Justice Act Criticised, THE HINDU, Apr. 25, 2015, <http://www.thehindu.com/news/national/karnataka/amendment-to-juvenile-justice-act-criticised/article7140406.ece>.

<sup>168</sup> The juvenile justice (care and protection of children) bill, 2014, PRS Legislative Research (2016), <http://www.prsindia.org/billtrack/the-juvenile-justice-care-and-protection-of-children-bill-2014-3362/>.

<sup>169</sup> Juvenile Justice (Care and Protection of Children) Act, 2015 § 20

<sup>170</sup> PRS Legislative Research, Supra.

<sup>171</sup> The Protection of The Children from Sexual Offences Act, 2012 § 2 (d)

<sup>172</sup> “..The stakeholder opined that this provision was worrying as it needed to be looked at in relation to section 23 of POCSO Act” see HUNDRED the Juvenile Justice (care and Protection of Children) PARLIAMENT OF INDIA RAJYA SABHA TWO HUNDRED SIXTY FOURTH REPORT, supra., at 16

child marriages are voidable but not void.<sup>173</sup> In such a situation, many Juvenile who are involved in a love relation can marry each other and can enter in ‘consensual’ sexual act. In such situation the consented sexual act may attract the provision of POCSO Act and Juvenile Justice Act, 2015 and they may be tried as adult offender. In a hypothetical situation, when both the guy and girl are involved in a consensual sexual relation, then the male child shall be treated Children in Conflict with Law and the female will be treated as Children in need of care and protection<sup>174</sup>. This situation may arise because in section 3, ‘Penetrative sexual assault’ starts with ‘he’, and it excludes the women from its periphery. It utters a girl can only be abettor in the penetrative sexual assault not an active criminal.<sup>175</sup>

Such a harsh law against Juveniles can be a weapon in hand of angry parents in child elopement cases. If we look into the crime report of 2013, we can observe about 1388 cases are reported of rape which is only 4.18% of the total crimes committed by the juvenile between the age group of 16-18 years<sup>176</sup> and from them many cases are relating to elopements where the parents come complaining to police that their children were sexually abused or kidnapped and lodge FIR against boy<sup>177</sup>. One of the famous cases in this regard was **Court on its own motion v. State**<sup>178</sup>. This case dealt with the issue of ‘Child Marriage’ and the situation was raised when the marriage is against the wish of parents. Here the petitioner Lajja Devi wrote a letter to the court. The court took the letter as a writ petition and holds similar other cases of elopement and dealt with the same.<sup>179</sup> In this case, the parents of the girl filed a complaint of sexual assault and kidnapping against the boy, but in reality the girl elope with the boy with her own consent as she doesn’t want to stay with her parents. Understanding the gravity of situation, the Court protected the marriage ties of the young couple by sending the girl to *nari niketan* and sentencing the young boy to stay at juvenile home for three years.<sup>180</sup> Now after the amendment of Juvenile Justice Act when read with POCSO Act, in similar situation there is a doubt whether

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<sup>173</sup> The Prohibition of Child Marriage Act, 2006 § 3

<sup>174</sup> Srishti Agnihotri and Minakshi Das, Rehabilitation not retribution should be the focus of juvenile justice, The Wire (Dec. 30, 2015), <http://thewire.in/2015/12/30/rehabilitation-not-retribution-should-be-the-focus-of-juvenile-justice-18262/>.

<sup>175</sup> GOVERNMENT OF INDIA Monitoring Guidelines for NCPCR/SCPCR for Roles and Functions of Various Stakeholders Child Welfare Committees/support Persons and Health Professionals NCPCR (2013).

<sup>176</sup> National Crime Records Bureau, Crime in India 2013 Statistics 513 (MINISTRY OF HOME AFFAIR, GOVERNMENT OF INDIA 2015).

<sup>177</sup> Rukmini S, The Many Shades of Rape Cases in Delhi, THE HINDU, <http://www.thehindu.com/data/the-many-shades-of-rape-cases-in-delhi/article6261042.ece>.

<sup>178</sup> Cri LJ 345(2013)

<sup>179</sup> Id.

<sup>180</sup> Id at ¶ 14, 15

court can give similar decision or not. This doubt was also raised by the stake holders of the Rajya Sabha.<sup>181</sup>

### Conclusion

Before concluding, it is necessary to discuss some theories which may help in understanding the reason behind the delinquent behavior of juveniles. Among them two popular theories are Psychodynamic theory and Social Learning theory. Psychodynamic Theory was formally proposed by Sigmund Freud<sup>182</sup>, which states that a child is born with Id (animal instinct) and ego is the realization of real life and helps to control Id. Superego is developed through interaction with the parents. But when a child doesn't get such guidance, then ego and superego cannot control the animal instinct and the juvenile become delinquent.<sup>183</sup> Another theory is Social learning theory, which states that a child is good when born but surrounding environment influence his or her nature because child always learns from imitating elders.<sup>184</sup> However, in both the cases, the role of parents, society and environment are pivotal. Many Neuroscientists confirmed that the prefrontal lobe in the human brain, which is conscientious for planning, reasoning, judgment, and impulse control, does not develop before twenty five.<sup>185</sup> Also, the reason of delinquency can be the environment where such juvenile lives. It is well evident from the National Crime Bureau Statistics. It states more or less 80 per cent of juveniles delinquent, who committed crime are mostly from poor families with annual income of less than Rs. 50,000 and among them, more than 50 per cent did not even complete their primary school<sup>186</sup>

The reasons behind a Juvenile to become criminal can be many. This may be beyond the control of the immature youngster. In all these cases, giving punishment to the juvenile, who is in conflict with law not always a solution, as pointed out by Prof. Faizan Mustafa, Vice-Chancellor, NALSAR University of Law, Hyderabad. He said "*Adolescents in conflict with*

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<sup>181</sup> “ ..The stakeholder opined that this provision was worrying as it needed to be looked at in relation to section 23 of POCSO Act” see HUNDRED the Juvenile Justice (care and Protection of Children) PARLIAMENT

<sup>182</sup> Saul McLeod, Psychodynamic approach , SimplyPsychology, <http://www.simplypsychology.org/psychodynamic.html> (2007)

<sup>183</sup> Gregory J. Feist and Jess Feist, Theories of Personality 27 (University of California at Davis, 7th ed. 2009).

<sup>184</sup> Saul McLeod, Bandura - social learning theory, SimplyPsychology <http://www.simplypsychology.org/bandura.html>. (last Updated 2016)

<sup>185</sup> Kanimozhi Karunanidhi, A Bill for Juvenile Injustice, Comment, Apr. THE HINDU, 27, 2015, <http://www.thehindu.com/opinion/op-ed/juvenile-justice-bill-a-bill-for-juvenile-injustice/article7143729.ece>.

<sup>186</sup> id



*law need adult guidance not the company of hardened criminals.*”<sup>187</sup> Thus, considering all these things in mind, author thinks that it is necessary for the Government to rethink and peruse child-friendly amendments in the new Juvenile Justice Act, 2015 so that injustice in Juvenile Justice Act can be curved.

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<sup>187</sup> The Wire Staff, ‘Very Basis of Juvenile Justice Amendment is Unconstitutional’, The Wire, May 12, 2015.