'BAD' JUVENILES AND THE 'WORST' JUVENILE JUSTICE LAW? THE SECOND CHALLENGE TO JUVENILE JUSTICE LAW IN *DARGA RAM* v. *STATE OF RAJASTHAN*

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Abstract

For over eight decades the Indian juvenile justice (JJ) law followed the rhetoric of treatment and reform over that of punishment. But the Delhi gang rape incident reversed the trend. The reform oriented juvenile justice law was subjected to repeated challenges during 1913-14 that came mainly from 'outsiders'. However, the second round of challenge to JJ law appears to have come from within on account of the apex court ruling and JJ law reform proposal by the government. The paper focuses on the apex court's *Darga Ram* decision and the J.J. Bill 2014. The decision is critiqued for its seeming disregard of the existing JJ legality and the reform proposals are critiqued for their international child rights implications and the national constitutional commitments to the tender age citizens, particularly the unserved and unattended.

I Introduction

THE FIRST round of challenge to the liberal juvenile justice law came as a reaction to the Delhi gang rape incident of 16th December, 2012 in the form of seven petitions filed by concerned citizens who shared a common streak of strong disagreement with the 'unduly soft' juvenile justice law. But this challenge was set at rest by equally spirited defence of the law in *Salil Bali* v. *Union of India*[1] and *Subramanian Swamy* v. *Raju, through JJ Board, Delhi.*[2] The case under comment and a few other upcoming cases[3] can be seen as the second round of challenge, but unlike the first round this time the challenge appears to be coming from within, either from the legislature or the judiciary in the course of exercise of its appellate power.

The crime story in *Darga Ram* v. *State of Rajasthan*[4] was no different from many other heinous juvenile crime stories. The prosecution case is that the complainant had organised a "jaagran" outside the village somewhere in Rajasthan till late at night. Of the fifty odd men, women and children, the seven year old Kamla and the over seventeen year old Darga Ram were also present in the "jaagran". After the "jaagran"

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1 (2013) 9 SCC 705.

2 (2014) 8 SCC 390.

3 *Mumtaz* v. *State of U.P. (Now Uttarakhand)* (2015) 4 SCC 318 and *CBI* v. *Swapan Roy* (2015) 4 SCC 323.

4 (2015) 2 SCC 775; coram: Justices T.S. Thakur and R. Bhanumathi (hereinafter *Darga Ram*).

was over, Kamla, who fell asleep with other children, went missing and on search next day her deed body was found in a field with signs of premortal rape. Since Darga Ram's name did not figure anywhere in the FIR lodged by the father and the other relatives of the deceased and fellow villagers, the police proceeded on investigation and arrested Darga Ram, a deaf-dumb and illiterate adolescent, on the basis of multiple injuries to his person, including private parts, and discovery of blood stained clothes at his instance. The blood stains matched the blood group of the deceased victim. The fast track sessions court and the high court convicted the appellant for offences under sections 376 and 302 of the Indian Penal Code (IPC) and awarded ten years and life imprisonment sentences. By the time the matter came for final appeal the appellant had already served fourteen years of his sentence. In the final appeal the appellant raised the additional plea of juvenility on the date of the commission of the offence. The apex court speaking through Justice T.S. Thakur (Justice R. Bhanumathi concurring) had little difficulty in agreeing with the sessions and high court's appreciation of evidence, including discovery evidence, the appellants' inability to explain as many as thirteen injuries on his person and inferring that the "prosecution case is based entirely on circumstantial evidence", without any evidence of accused last seen together with the deceased. In the "jaagran" there were fifty persons, some of whom may have been cleverer than the "deaf and dumb". But presently we are mainly focusing on the apex court's views on plea of juvenility and the outright critique of the 'Act'.

Plea of juvenility at the apex court level

Before the apex court an additional plea of juvenility was for the first time raised. The court opined that there was enough justification for the determination of age, only on the basis of the medical opinion in terms of the section 7A of the Juvenile Justice Act, 2000 (J.J. Act) and rule 12(3)(*b*) of the Juvenile Justice Rules 2007, for want of any kind of school admission or other record. The court rightly fixed his age as thirty-three years by taking a mean of maximum age of thirty-six years and thirty years, as given by the medical board and recording a finding:[5]

In the totality of the circumstances, we have persuaded ourselves to go by the age estimate given by the Medical Board and to declare the appellant to be a juvenile as on the date of occurrence.

However, unlike the lower courts that did not care for the personal details of the appellant, the apex court categorically recorded: "The appellant is reported to be a

5 *Id.* at para 16. By doing so that court appears to have fallen in line with the catena of cases starting with the *Gopinath Ghose* v. *State of W.B.*, 1984 Supp. SCC 228 and ending up with the three-judge bench ruling in *Abuzar Hossain alias Gulam Hossain* v. *State of W.B.* (2012) 10 SCC 489.

deaf and dumb. He was never admitted to any school."[6] It is curious as to why the deafness ('speech impaired') and dumbness ('hearing impaired') did not earn the appellant protection under the section 2(b) of the Persons with Physical and Mental Disabilities Equal Protection Act, 1995 and why was he not seen as 'child in need of care and protection' in terms of the section 2(d) (iii) of the J.J. Act, 2000? Even if one is bound to think like the prosecution that the deaf, dumb and illiterate did indulge in sexual aggression, which could be a natural expression of human sexuality associated with the stage of his development. It is not implausible that his cognition level may be alright, but his ability to understand desire, sexual longing and boundaries that come with it may be seriously flawed.[7] With respect, one is bound to raise these issues, as to why deafness and dumbness and total lack of schooling till the age of seventeen/ eighteen was not considered for the mitigation of the blameworthiness of the appellant put on trial for heinous crimes?

The second round of challenge from within

This round of challenge has two distinct aspects that seem to be converging of late. The first relates to legislative challenge to the traditionally understood liberal juvenile justice law. The second relates to the judicial challenge, which appears to be more implicit than explicit. We shall take up the judicial challenge in *Darga Ram* first. Justice T.S. Thakur (R. Bhanumathi, J. *concurring*) observed:[8]

We have persuaded ourselves to go by age estimate given by the Medical Board and to declare the appellant to be a juvenile as on the date of the occurrence *no matter the offence committed by him is heinous and but for the protection available to him under the Act the appellant may have deserved the severest punishment permissible under the law. The fact that the appellant has been in jail for nearly 14 years is the only cold comfort for us* to let out of jail one who has been found guilty of rape and murder of an innocent young child.

In the aforesaid lines the court has seemingly given relief to the appellant, but in the effect implicitly tried to demolish the edifice of legal relief itself. Three things that appear to be flowing from the above quoted apex court ruling which may be stated forthrightly, with due respect, are as follows:

First, heinousness of the offence and not the age of juvenility constitute the determining criterion;

Second, the 'law' is different and superior to the J.J. Act, 2000;

Third, concern for the victim to override even the concern for *legality*.

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6 *Id.* at para 14.

7 Nidhi Sinha, "Have I Told You Lately", *Indian Express*, Lucknow edn., magazine section (Feb., 22, 2015).

8 *Supra* note 4 at para 16 (emphasis supplied).

Instead of individually critiquing each of the above, the next part of the paper is a general critique in the form of re-stating the essential elements of the traditional juvenile justice law.

II Rationale of the traditional juvenile justice law

Perceiving children's different cognitive capacities and decisional abilities

Law and social custom have long taken cognizance of a fairly widely shared belief that the children and young persons are not yet wholly formed, they are in the process of developing. Therefore, their liability ought to be different and it is mainly inspired with a view to promoting to the maximum degree possible reintegration rather than permanent alienation from the society. Historically, child's diminished legal capacities are traced back to the writings of the thinkers of enlightenment era like Locke but there are researches that go on to establish that even in the earlier periods tender age was taken into account for varying the rules of liability. Locke described those as minors, who lacking a certain amount of reason and understanding can neither be free as adults or as their equals.

Even the ardent classicalists, who treated all human beings as rational calculating creatures, acknowledged that children were to be exempted from the demands of utilitarian principles and subjected to different standards of moral evaluation. Jeremy Bentham, in *An Introduction to the Principles of Morals and Legislation*, described infancy as a state during which an individual is not to be regarded as capable of calculating actions.

However, with the moralization of criminal liability and its increased dependence upon the mental element the thinking about the criminal liability of children underwent significant changes. Scholars such as Jerome Hall, writing in the context of culpability of children wrote in the mid twentieth century, thus:[9]

it is also pertinent to recall that the meaning of *mens rea* from its very inception to until the present time has changed in important ways…This insight has been clarified and greatly deepened to distinguish a child's "intending" from an adult's and the psychotic's and grossly intoxicated person's impaired "intention" from that of a normal and sober person.

The stock arguments for the lower cognitive abilities of children throughout the twentieth century came from the psychoanalytic and behaviourist theorists, two believed that children were mentally deficient, either because of insufficient socialization or lack of domestication, conditions arising on account of their tender age. According to these psychological and behaviorist theorizations the children by the age of 16 to

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9 Jerome Hall, *General Principles of Criminal Law* 102 (Bobbs Merrill Co., New York, 1960).

18 years develop their full cognitive abilities. However, the period of transition from childhood to adulthood proves problematic both to the children and to the community. However, a decisive breakthrough in the understanding about the cognitive and decision making abilities of children has come as a sequel to the neuro and brain science experiments and researches conducted in the early 21st century in the U.S. by the Schools of Law, Departments of Psychology and the foundations such as the Mac Arthur Foundation (Washington, D.C.). The research is based on the brain MRI of deviant children/adolescents that have made certain vital revelations about the human brain,[10] relationship of diverse regions of the brain with cognitively and decision making abilities[11] and implications of these insights for the juvenile justice policy and practice.[12]

Different capacities mature along different time table

Three important findings arrived on the basis of Mac Arthur Foundation Research Network on Adolescent Development, conducted by a team of scholars led by Laurence Steinberg,[13] are very relevant for the present inquiry:[14]

- Sensation seeking increases in early adolescence and then declines with age;
- Impulsivity declines with age;
- Presence of peers increases risky behaviour among adolescents and youth but not adults.

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10 That there are two different sets of brain systems, namely—(a) Socio-emotional system, and (b) Cognitive control system that, mature along different time table. The frontal brain matures by the age of 16 years, while as the hind brain may mature till the age of 22 years.

11 The socio-emotional system that is responsible for processing emotions, social information on maturation that sets on at early adolescence and puberty leads to:

- Increased sensation seeking
- Increased reward salience
- Increased attentiveness to social information
- Enhancement of emotive satisfaction in presence of peers.·

12 The policy implications of brain science studies are:

Competence related abilities mature by age 16· Capacities relevant to decisions about criminal capability continues to mature till young adulthood. Adolescents are responsible for their behaviour, but not as responsible as adults · Self-control is disrupted by emotionally and socially arousing situations· Adolescents need support, structures and adult supervision Adolescents are still works in progress.

13 Laurence Steinberg, Alex Piquero, Elizabeth Cauffman, and Michael A. Corriero, "Findings from the MacAurthur Foundation Research Network on Adolescent Development and Juvenile Justice", paper presented at the coalition for Juvenile Justice Annual Conference, Washington D.C. (June, 2007) (Unpublished paper).

14 The aforesaid findings have far reaching implications for a different kind of understanding of children/adolescent behaviour.

The aforesaid brain science insights have lead Laurence Steinberg to sum up as follows:[15]

In sum, the consensus to emerge from recent research on adolescent brain is that teenagers are not as mature in either brain structure or function as adults. This does not mean that adolescent brains are "defective", just as no one would say that newborns muscular systems are defective because they are not capable or their language systems are defective because they can't yet carry conversation.

Age as a basis of categorization of children

Childhood as a social construct may permit further sub-division into infancy (zero to seven years), early childhood (seven to twelve years), late childhood (twelve to sixteen/eighteen years) and *adolescents*' (sixteen/eighteen to twenty-one/twenty-two years). During the 19th century for the purposes of criminal justice IPC treated all children under seven years as *doli incapax* (section 82) and children between seven and twelve years were presumed as innocent unless proven to the contrary (section 83). Even under such a scheme children between seven to fifteen/sixteen years could be tried by the ordinary courts, but could be extended the benefit of serving their imprisonment in the reformatory schools in terms of the provisions of Reformatory Schools Act, 1876 and 1897 or section 562 of the 1898 CrPC. Similarly, the adolescents could serve imprisonment in the borstal schools as per the Borstal Schools Acts enacted in different provinces. The position of children in matters of subjection to ordinary system of criminal liability underwent significant change in the light of Indian Jails Committee, 1919-20 recommendations. These required a distinct and different apprehension, adjudication and custodial system for child offenders. The recommendations led to the amendment leading to the addition of section 29-B in the CrPC 1898, that provided for a separate trial for all the offenders below the age of fifteen years. As a sequel to these recommendations an era of Provincial Children Act was ushered in with the enactment of the Madras Children Act, 1920, followed by the W.B. Children Act, 1922 and the Bombay Children Act, 1924 and so on. However, all the provincial and later the State Children Acts varied considerably in matters of age of children (in case of male children between fourteen and sixteen years and sixteen and eighteen in case of female child).

Yet another significant fact relating to categorization of children was the shifting of juvenile justice from the State List to the Concurrent List of the seventh schedule under the Constitution of India. This conferred competence on the Union Government

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15 Laurence Steinberg, "Should the Science of Adolescent Brain Development Inform Public Policy" *Issues in Science and Technology* 71 (Spring, 2012).

to enact uniform and standardized juvenile justice law, leading to the enactment of the Juvenile Justice Act, 1986, followed by the Juvenile Justice (Care and Protection of Children) Act, 2000. However, in the process of making special laws for children the 'adolescent' category got lost. Therefore, in the existing scheme of things all the persons below 18 are treated as 'child' and those above 18 are to be treated as adults.

Raising the age of male child from 16 to 18 years under the Juvenile Justice Act, 2000 is in consonance with article 1 of the Convention of the Rights of the Child (CRC) 1989 (ratified by the Government of India in 1992) and the recommendations of the U.N. Committee on the Rights of the Child.[16] On the basis of the neuro and brain science insights about the age of eighteen in CRC, Laurence Steinberg treats eighteen as "the presumptive age of majority".[17] According to Steinberg the human neurobiological maturity is reached at different ages, as different brain systems mature along different time tables, and different individuals mature at different ages and different rates. The lower bound of the age is probably somewhere around fifteen, but the upper bound may probably be somewhere around twenty-two. Steinberg opines that choosing either of the endpoints would be fraught with its own problems:[18]

If society were to choose either of these endpoints, it would be forced to accept many errors of classification, because granting adult status at age 15 would result in treating many immature individuals as adults, which is dangerous, whereas waiting until age 22 would result in treating many mature individuals as children, which is unjust.

According to Steinberg choosing the midpoint eighteen years is one option that is chosen by CRC and majority of the countries throughout the world, which is described as the "presumptive age of majority".[19]

The heinous offending fixation

Once the cognitive incapacities and the decisional inabilities of children are scientifically identified and recognised at the policy level, there does not remain much in quibbling about the 'heinousness' element that serves as the basis of inferring

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16 See B.B. Pande, "Stilling the Turbulent Juvenile Justice Waters: The Apex Court's Precedented Response to an Unprecedented Challenge in *Salil Bali* v. *Union of India*" 9 SCC J-25, J-30 (2013).

17 Laurence Steinberg, "Should the Science of Adolescent Brain Development Inform. Public Policy" *Issues in Science and Technology* (Spring, 2012).

18 *Id.* at 76.

19 Steinberg opines that there could be three other options: first, to fix no age and decide on as issue by issue basis; second, shift from binary classification system to three categories of child,-adolescent and adult, and third, not to have any categorical age boundary and assess culpability on a case to case basis.

blameworthiness in the case of adult offending. For child offending minor or major offending would be relevant only for determination of appropriate disposition that will suit a particular child. Even for adult offending, 'harm' or the externally manifested conduct constitutes only as an element of criminal liability and penal policy. According to Jerome Hall: "The principles of Criminal Law consist of seven ultimate notions: (1) *mens rea*, (2) act (effort), (3) the concurrence (fusion) of *mens rea* and act, (4) harm, (5) causation, (6) punishment, and (7) legality."[20] Regarding the fourth notion 'harm', Hall says: "[h]arm in sum, is the fulcrum between criminal conduct and punitive sanction; and the elucidation of these interrelationships is a principal task of penal theory".[21] Such a relegation of 'harm' to a subsidiary position was keenly contested by Lady Barbara Wootton in her Hymlyn Lectures in 1963 wherein she argues:[22]

I think not that presence or absence of guilty mind is unimportant, but that *mens rea* has so to speak — and this is the crux of the matter — got into the wrong place. Traditionally, the requirement of guilty mind is written into the actual definition of crime. No guilty intention no crime, is the rule. Obviously this makes sense if law's concern is with wickedness: where there is no guilty intention there can be no wickedness. But it is equally obvious, on the other hand, that an action does not become innocuous merely because who ever performed it meant no harm. If the object of criminal law is to prevent the occurrence of socially damaging actions, it would be absurd to turn a blind-eye to those which were due to carelessness, negligence or even accident. The question of motivation is in the first instance irrelevant.

The traditional criminal liability thinkers like Jerome Hall, Glanville Williams and H.L.A. Hart strongly rejected Wootton's ideas and reiterated the centrality of guilty mind and mental blameworthiness as the cardinal principle, irrespective of the nature of harm. H.L.A. Hart observed in this context:[23]

In all advanced legal systems liability for conviction for serious crimes is made dependent, not only on the offender having done those outward acts which the law forbids, but on his having done so in certain frame of mind or with a certain will. These are the mental conditions or 'mental elements' in criminal responsibility and, inspite of much variation in detail and terminology, they are broadly similar in most legal systems. Even if you kill a man, this is not punishable as murder in most civilized jurisdictions if you do it unintentionally, accidentally or by mistake, or while suffering

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20 *Supra* note 7 at 18.

21 *Id.* at 213.

22 Barbara Wootton, *Crime and the Criminal Law: Reflection of a Magistrate and a Social Scientist* 47 (The Hymlyn Lectures, Fifteenth series, Stevens & Sons, II edn., London, 1981) (Chapter 2: The Functions of the Courts: Penal or Preventive).

23 H.L.A. Hart, *Punishment and Responsibility* 187 (II edn., 2008).

from certain forms of mental abnormality. Lawyers of Anglo-American tradition use the Latin phrase *mens rea* (a guilty mind) as a comprehensive name for these necessary elements in liability to be established *before* a verdict.

In the aforesaid quote Hart is emphasising the primacy of guilty mind for adult offending, but here we are considering the heinous offending behaviour of juveniles below eighteen years of age. Perhaps, some of these considerations lay at the back of the mind of the three judge bench of the Supreme Court in *Raghbir Singh* v. *State of Haryana*,[24] wherein the court was called upon to decide whether offences punishable with death or life imprisonment were barred from being tried by the Children's Court by virtue of section 27 of CrPC which must prevail over the state law. It is important to note that Justice Baharul Islam (for himself and D. Chinnappa Reddy and A.P. Sen JJ) had laid down in no uncertain term:[25]

The intention of Parliament was not to exclude delinquent children for offences punishable with death or imprisonment for life, in as much as Section 27 does not contain any expression "notwithstanding anything contained in any Children Acts passed by any State Legislature.

Even in the post Delhi gang rape context, the apex court refused to yield to the arguments that heinousness of conduct alone ought to justify a harsher treatment in these words:[26]

There are, of course; exceptions, where a child in the age group of sixteen to eighteen may have developed criminal propensities, which would make it virtually impossible for him/her to be re-integrated into mainstream society, but such examples are not of such proportion as to warrant a change in thinking, since it is probably better to try to reintegrate children with criminal propensities into mainstream society, rather than to allow them to develop into hardened criminals, which does not augur well for the future.

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24 (1981) 4 SCC 210.

25 *Id.* at 214, para 17; see *supra* note 14.

26 *Salil Bali case* (2013) 7 SCC 705 at 724. The apex court's perception of limited numbers of 'children with criminal propensities' is borne out by *Crime in India* statistics. Between 2008 and 2013 the number of juveniles (below 18) arrests increased marginally for 1.1 to 1.2 percent of the total IPC crimes. Of these 16 to 18 age group juveniles rose from 60.7 percent in 2005 to approx 67 percent in 2013. The contribution of 16 to 18 age group to heinous offences varied between 1.30 per cent for murder to 3.29 percent of total arrests for rape of the total number of arrested juveniles. In 2013, 50.24 percent juveniles belonged to families whose earning was below Rs 25,000 annually and 27.31 percent whose annual earning was between Rs 25,000 and 50,000. Thus, approximately 77.50 percent of arrested juveniles belonged to families whose annual earning was below Rs 50,000.

Furthermore, it may be worthwhile, at the time of reacting to the heinous offending of children, the caveat sounded by the findings of the recent Global Status Report on Violence Prevention 2014.[27] The report notes that violence affects the lives of millions, with long lasting consequences and the women, children and elderly bear the brunt of both fatal and non-fatal violence. Regarding the effect of non-fatal violence on children the above it is observed:[28]

Such violence contributes to life long ill health — particularly for women and children — and early death. Many leading causes of death such as heart disease, stroke, cancer and HIV/AIDS are the result of victims of violence adopting behaviour such as smoking, alcohol and drug misuse and unsafe sex in an effort to cope with the psychological impact of violence.

The criminal responsibility confusion

The age of juvenility issue is often confused with the 'age of criminal responsibility'. Perhaps owing to this confusion the Justice for Children Briefing No. 4, jointly issued by the Penal Reform International and U.K. Aid, observed:[29]

The minimum age of criminal responsibility set by different countries ranges hugely from as low as six up to 18 years of age. The median age of criminal responsibility world-wide is 12.

It is most paradoxical that, on the one hand, we speak of a distinct juvenile justice/ youth justice system, but, on the other hand, we continue to bring in the issue of criminal responsibility. Should the juvenile justice system not resolve the age issue as per the needs and standards of juvenile justice? Perhaps the reason for this paradox lies in the fact that world-over the juvenile justice system continues to be heavily dependent upon the adult criminal justice system in matters of definition of delinquency, pre-trial processes, adjudication and punitive responses. As a consequence, though every system claims that they render juvenile justice through distinct and exclusive system, but the reality is that the juvenile justice system, is, at best, an entailed system. It cannot be denied that over the period of last 100 years the minimum age of juvenile justice has progressively increased. For example, in Europe the minimum age has gone up from 7 to 14 years.[30]

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27 Joint Report by the WHO, UNODC and UNDP published by the WHO in December, 2014.

28 *Id.*at viii.

29 *Available at*: www.penalreform.org.

30 See in this context Frieder Dunkel, "Juvenile Justice Systems and Crime Policy in Europe" (Unpublished draft article). He observes: "The minimum age of criminal responsibility in Europe varies between 10 (England and Wales, Northern Ireland and Switzerland), 12 (Netherland, Scotland and Turkey), 13 (France), 14 (Austria, Germany, Italy, Spain and numerous Central and Eastern European countries), 15 (Greece and the Scandinavian countries)

In India and other Asian countries the minimum age remains that which must have been fixed by the principles of capacity determined by the adult criminal justice system. The position of age in respect of total and partial exemption from criminal liability has remained unchanged over a period of nine decades during which the system of juvenile justice has slowly evolved on account of the enactment of the Provincial Children Acts, the State Children Acts, the Juvenile Justice Act, 1986 and Juvenile Justice Act, 2000. In none of the aforesaid statutory measures the lower age bar for instituting juvenile justice proceedings or the concept of 'age of innocence' was ever debated. The entire focus remained on the upper age of sixteen or eighteen years for claiming exclusion from the adult criminal justice system. In the context of our comprehensive juvenile justice law that relates to both the 'juveniles in conflict with law' and 'children in need of care and protection', the minimum age becomes all the more important, because the age for care and protection is bound to be lower than the age of 'justicing' proceedings that involves fair amount of interference with the liberty of the child.

The essence of distinct and different juvenile justice law[31]

The essence of different or 'distinct' system of justicing for juveniles lies in providing and dealing with children in accordance with a system that gives due regard to their abilities or mental capacities. Therefore, to treat children as adults either on the basis of their adult like behaviour or adult looks alone is disregarding their childhood and thus unfair and unjust. Again, "justicing" in respect of children may be understood in two senses, namely caring and 'protection' of children or subjecting them to a kind of accountability system for their harmful/law breaking behaviour with a view to their ultimate reform and rehabilitation. Thus, when we are referring to accountability of sixteen to eighteen age group juveniles involved in serious offending, we are essentially speaking of justicing system in the latter sense. This kind of justice system is premised on two basic assumptions, namely: (a) children below the age of eighteen years (as per article 1 of CRC) have lower cognitive capacities and decisional abilities; (b) children are more amenable to reform and corrective actions. The aforesaid assumptions are integrally interrelated, but they relate to two different aspects of justice, namely the moral basis for creating children's accountability and utilitarian justifications of the juvenile justice system.

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and even 16 (for specific offences in Russia and other eastern Europea n countries) or 18 (Belgium). After the recent reforms in Central and Eastern Europe, the most common age of criminal responsibility is 14."

31 In the common parlance 'justice' system in this sense is described as 'juvenile justice System' that focuses mainly on all forms of deviations by children of all the age group under 18 years.

In contrast to the adult criminal justice premised on a belief that the unlawful behaviour is the result of individual's malicious free-will the juvenile justice jurisprudence de-emphasizes a child defendant's moral responsibility for the unlawful behaviour. The latter is seen more as a product of antecedent forces- biological, social, psychological and environmental— that need to be attended to in a system of individualized justice, aimed at rehabilitation rather than punishment. Such an individualized and rehabilitative system is premised on the following four elements:

(a) That the needs and circumstances of each individual juvenile may differ, that is why, the judging of juvenile cases and imposing sanctions requires vast degree of discretion for the J.J. Board;

(b) That the proceedings before the J.J. Board may not be conducted in the spirit of an open court in order to spare the juvenile of the stigma associated with the criminal charges;

(c) The J.J. Board adjudication may not be conducted strictly on adversarial lines and the adherence to rules of evidence needs to be relaxed considerably;

(d) The juvenile proceedings, being more of civil nature of inquiry, do not lead to any kind of defendant's criminal record.

The essence of the traditional juvenile justice law has been very succinctly summed up by Justice Altamas Kabir in the following words:[32]

The very scheme of the aforesaid Act is rehabilitatory in nature and not adversarial which the Courts are generally used to. The implementation of the said law, therefore, requires a complete change in the mind-set of those who are vested with the authority of enforcing the same, without which it will be impossible to achieve the objective of the *Juvenile Justice Act, 2000*.

III Trust deficit and impaired 'legality' of the J.J. Act, 2000

The apex court was honest in not being able to hide its distrust for the J.J. Act, 2000, when it observed that the "the offence committed by him is heinous and but for the protection available to him under the Act the appellant may have deserved the severest punishment permissible under the law."[33] Such sentiments of the court are very similar to what the American society and law makers faced in the mid and late 1990s, when half of those arrested for seven FBI index offences were of eighteen years and under, when school shootouts involving children had created a strong revulsion to child crime trend and thrown the society in a state of moral panic.

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32 *Hari Ram* v. *State of Rajasthan* (2009) 13 SCC 211 at 213.

33 *Supra* note 4 at para 18.

Adverting to the definite shift away from the pro-child policy, Juan Alberto Arteaga observes:[34]

No longer content with waging their war on Drugs and violent street gangs against criminal-defendants, federal law makers have set their sights on the institutions of juvenile justice. Having adopted a "take no prisoners" to fight this war, members of the House and senate have begun to undertake efforts to implement severely retributive reforms within the federal juvenile justice system. Federal law makers describing American children as "hardened criminals" and the "large (st) threat to public safety" rather than as "our future, our greatest resource and our hope for a better tomorrow" have sought to enact legislation that would facilitate prosecuting juvenile in criminal courts ... House Bill 1501 proposed granting federal prosecutors the discretion to determine whether a juvenile offender should be charged and prosecuted in a criminal court rather than in the juvenile justice system. (Citations within the quote omitted).

Similarities apart, but when the court is applying a particular duly enacted statute, even the most 'distrusted' J.J. Act, it has to remember that the Parliament or legislature makes the 'bad' or good law and the judiciary only performs a secondary role in applying it to a fact situation. With due respect, it should never appear that the court is trying to make a duly passed Act as something inferior to some 'law' that they have in their minds. It is submitted that the court could have rightly given specific suggestions for the appropriate reforms in the juvenile justice law, including effective measures for the sentencing of heinous offending juveniles. The present comment on *Darga Ram* could conclude by addressing the three identified 'fall-outs', but without touching upon the significant features of the upcoming new juvenile justice law, the second limb of the second round of challenge to the traditional juvenile justice law would be incomplete, therefore, we briefly touch upon these as well.

IV The second round of challenge from within: The legislative challenge

Like the American society in the 1990s, acting under moral panic, the Indian society too came under tremendous moral pressure post Delhi gang rape which led not only to the record time enactment of the Criminal Law (Amendment) Act 2013, but also a Juvenile Justice Bill, 2014 (Bill 14), as originally introduced and approved by the cabinet 'App. Bill ', that envisages to enact a 'tough' juvenile justice law to replace the liberal traditional juvenile justice law. In the following paragraphs, the paper propose to critique the four primary areas of the new juvenile justice law:

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34 Juan Alberto Arteaga, "Juvenile (In) Justice: Congressional Attempts to Abrogate, the Procedural Rights of Juvenile Defendants" 102 *Columbia Law Review* 1051, 1-51-53 (2002).

Unlimited powers of child apprehension/arrest

Apprehension/arrest of children constitutes the most serious encroachment with the liberties of the child citizens, including the 'children in conflict with law'. This is because apprehension/arrest means the end to the protective custody of the parents, on the one hand, and complete submission to an impersonal and stranger's custody, on the other. Such an impersonal custody of a 'stranger' is fraught with grave risks of torture, sexual abuse and indefinite incarceration. It is this fear of 'stranger's custody' that compels the parents of apprehended children to initiate bail proceeding for the release by paying excessive fees to the lawyers or wait for the termination of the inquiry proceedings for long periods.

The new juvenile justice law, in its zeal to teach every child coming in conflict with law a lesson, has turned a blind eye to the woes of an arrested child by conferring a blanket power to apprehend/arrest every erring child under clause 9(1) of the Bill, endorsed in clause 11(1) of the App. Bill..Both clauses 9 and 11 try to give safeguards of some kind by providing that after the arrest the child will be placed in the charge of the special juvenile police unit/designated child welfare police officer, in no case children should be put up in police lock-ups/jail and the arrested child should be produced before the juvenile justice board within 24 hours of arrest. But once the child is weaned away from his social context he tends to become a 'fish outside water'. Keeping this ground level reality in mind the J.J. Model Rules, 2007 had put a legal limitation on police power to apprehend juveniles by specifically enacting rule 11(7) that laid down that the police shall have no power to apprehend the juvenile if the case relates to an offence that is punishable with less than seven years imprisonment. It is significant that the three-judge bench of the Supreme Court has read rule 11(7) as the first point of difference between adult justice system and juvenile justice system in the *Subramanian Swamy case.*[35]

Implications of extensive powers of apprehension

(i) Child/juvenile apprehensions are likely to increase substantially by the addition of juveniles excluded from the total number of 43,506 arrested in 2013, because of the deletion of rule 11(7) limitation;

(ii) The apprehending agency— the police— will assume key role in the administration of juvenile justice;

(iii) More the power to the police, greater the possibilities of abuse of the power;

(iv) Instead of wider powers to apprehend, the police could be given a bigger role in diversion of juveniles even before they come in conflict with the law by conferring on them powers to pass:

35 *Supra* note 3.

(a) Compulsory education and training orders
(b) Orders in respect of compulsory training in sports/adventure
(c) Orders for the involvement of juveniles/children in community service, etc.

Singling out the sixteen-eighteen age group juveniles involved in serious/ heinous offending

The most talked about and the most controversial issue of the proposed law is the targeting of sixteen-eighteen age group juveniles involved in serious/ heinous offending. The issue has two aspects, namely; (a) the age aspect and (b) the conduct or serious/ heinous offending aspect.

Age Aspect

The Bill 14 and App. Bill 14 in clause 2(*h*), (*l*) and sections 2(12) and (13) define a 'child' or 'child in conflict with law' as any child alleged to be involved in offending when he was below eighteen years of age. As mentioned earlier, such a raising of age was a consequence of the Government of India ratifying the CRC and the U.N. Committee on the Rights of the Child, which in its 23rd Sessions (on Feb. 23, 2000) making certain "concluding observations" regarding India in paragraphs 79 and 80 which obligated the state to "ensure that persons under 18 are not tried as adults. In accordance with the principle of non-discrimination contained in Article 2 of the Convention"[36] Again under article 45 of the Convention, the U.N. Committee in the year 2007 at Geneva, made certain general comments which constitute authoritative interpretations addressed to all the state parties in paragraphs 36, 37 and 38 of the report. The relevant portion of paragraph 38 is important for the present context: "The committee, therefore, recommends that those state parties… which allow by way of exception that 16 or 17 year old children are treated as adult criminals, change their laws with a view to achieving a non discriminatory full application of their juvenile justice rules to all persons under the age of 18 years."

After having defined 'child in conflict with law' as every child below the age of 18 years in line with JJ Act, 2000 and the definition clause and the Section of the Bill 14 and App. Bill 14 the proposed law begins with the discriminatory design in Clause 3(*l*), it creates an exception in the principle of presumption of innocence by adding "unless proved otherwise for children between the age group of sixteen to eighteen

36 As a member of the JJ Act 2000 Drafting Committee, I am a witness to the concern of the then Minister of the Ministry of Woman and Child Development (who happens to be the present Minister of the same Ministry) to raise the age to 18 years with a view to complying with the UN Committee's concluding observation in Para 80.

years." Similarly, the App. Bill 14 discriminates the sixteen-eighteen age group child involved in heinous offending in matters of the time taken for inquiry (clause 15(5)(*f*)(*ii*)), preliminary inquiry (clauses 16(1) and 19(3)), review by the children's court (clauses 20(1)(*i*) and (*ii*)), and punishment (clause 22). Therefore, the first hurdle would be how to circumvent the selective lowering of age to sixteen years? Such a lowering of age will fall foul not only of article 2 but article 1 of the CRC as well which treats all persons below the age of eighteen as 'child'. Because the ordinary principle of interpretation is what cannot be done directly may also be prohibited if done indirectly.[37]

Implications of targeting 16-18 age group

(i) Limit the relevance of the juvenile justice law for the large majority of offending children of sixteen-eighteen age category;

(ii) This will mean that the age of juvenility both for boys and girls, will be in substance reduced to below sixteen years;

(iii) This will render the age determination proceedings much more crucial and be complicated.

The conduct/serious or heinous offending aspect

The Bill 14 in clauses 14(*i*) and (2) has enumerated twenty two categories of offences that were described as serious/heinous offending. But the App. Bill 14 has dropped the specific enumeration of offences and classified in the definition section all the offences into three broad categories namely: petty offences, serious offences and heinous offences, as those entailing punishment up to three years imprisonment, punishment up to seven years imprisonment and punishment above seven years imprisonment, respectively. The App. Bill 14 has envisaged transfer of proceedings only in respect to 'heinous offending', thus, leaving 'serious offending' for trial before the Juvenile Justice Board, along with petty offending. Even the proposed move to single out only sixteen-eighteen age group involved in heinous offending may not be scientifically justifiable in the light of the findings of the brain science researches and studies.[36]

Furthermore, adverse treatment for heinous offending juveniles may also fall foul of article 15(3) of the Constitution that enables the state to make "any special provision for women and children". Whether the state would be justified in making any special

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37 The U.N. Committee on Child Rights has been persistently exhorting the member States to comply with the age and non-discrimination clauses in 2000 and 2007, it may be difficult for it to condone the reversal back by one state alone. Therefore, if India goes ahead with the change in the age position, the 'political misadventure' may prove difficult to defend.

36 *Supra* notes 8 to 12.

provision 'against' children under article 15(3)? The answer to this question would be in the negative, because this protective discrimination measure has already been interpreted by the courts in respect to women as being prohibitive of any unfavourable discrimination that is hit by the non-discrimination principle enshrined in article 15(1) of the Constitution.

Implications of categorization of children on the basis of seriousness of the offence

(*i*) To divide child offenders into categories more vicious and less vicious, is constitutionally impermissible and socially undesirable;

(*ii*) It requires different kinds of child custody, adjudication and rehabilitatory institutions;

(*iii*) It reduces the possibilities of re-socialization of children who go astray during childhood and adolescence.

Over-burdening the Juvenile Justice Board with multiple tasks

The idea of a Juvenile Justice Board (JJB) replacing the Juvenile Court under the J,J. Act, 2000 was rated as a major step in the direction of evolving a distinct adjudicatory agency concept. Since the board was constituted by one judicial member (to be designated as the principal magistrate) and two social work members; out of whom at least one to be a woman, the collective decision aim of the JJB still remains to be achieved.

A perusal of the Bill 14 and App. Bill 14 shows that the JJB is envisaged to perform multiple tasks in the proposed scheme. Clause 9(1) lays down that the JJB "shall have the power to deal exclusively with all the proceedings under this Act." This would mean the following proceedings:

(*a*) Review of apprehension of every child;

(*b*) Passing appropriate order in respect to pre-adjudication custody;

(*c*) Conduct age proceedings of two types: (*i*) Below 18 years, and (*ii*) Above 16 years;

(*d*) Bail proceedings;

(*e*) Inquiry in respect to child involved in petty offences and serious offences;

(*f*) Inquiry in respect of sixteen-eighteen year child involved in heinous offending and transfer the case to adult court.

Apart from the aforesaid six proceedings under section 9(2) of the App. Bill 14 has also assigned twelve/thirteen functions to the JJB. Here, the focus will be on the two most vital, functions/proceedings, assigned to the JJB, namely (*i*) age determination, and (*ii*) inquiry (preliminary and final) in respect of sixteen-eighteen age group and transfer to adult court.

Age determination inquiry/proceedings had even earlier constituted one of the most contested matters in juvenile justice, because unless the person is shown to be below eighteen years of age he does not have any entitlement to juvenile justice benefits. Now with the introduction of sixteen-eighteen age categorization or above sixteen age, the things are likely to be even more keenly contested. The prosecution/and the victim/complainant would try to establish that the child is above sixteen years, while the child's side would like to establish that he is below sixteen years. Both these age determinations will require reliance on determinable and clear evidence to prove the age issue.

Similarly, the Bill 14 and App. Bill 14 have made the JJB the key agency for handling the sixteen-eighteen age heinous offence cases, that will require not only looking at the age, but also the nature of crime and the level of maturity of the concerned child. Again this will require the JJB to make categorical findings and clear rulings that are likely to be appealed against in the sessions court and the high court. All this is likely to seriously impact the non-adversarial, child-friendly and non-court like image of the JJB. Furthermore, the growing technical nature of JJB proceedings is likely to go against the collective and social work oriented character of the JJB, which was an achievement of the J.J. Act, 2000.

Implications of overloading JJ B with multiple tasks

(*i*) JJB will increasingly assume adversarial character, which is likely to decrease the social work input that may prove to be a regression;

(*ii*) JJB proceedings would take much longer time, thereby increase the pendency in juvenile justice matters;

(*iii*) Transfer to adult court would ultimately pass the proceedings out of JJB would lead to the demise of the JJB idea itself;

(*iv*) JJB will turn into another power centre after the police, thereby increase considerably chances of corruption and abuse of power.

Trial and sentencing of the sixteen-eighteen age group children by the adult courts

The very fact of the transfer of children after elaborate transfer proceedings is premised on an assumption that child is to be equated with any adult criminal in matters of liability determination and sentencing. In this respect clause 22 of the proposed juvenile justice law, that lays down that "[n]o child in conflict with law shall be sentenced to death or life imprisonment without the possibility of release, for any such offence, either under the provisions of this Act or under the provisions of the Indian Penal Code", appears to be slightly paradoxical. First, the child is transferred to an adult court, then is continued to be treated as a 'child' in matters of sentence.

Perhaps clause 22 was inspired by article 37(*a*) of CRC or was merely meant to hoodwink the Convention? But even such a sentencing concession to sixteen-eighteen age child is limited to offences under the IPC and not under special laws such as the NDPS Act. Sentencing issues in respect to transferred child cases is likely to create greater complications in view of the judicially and legislatively determined term of the life imprisonment.

In the matters of sentencing of ordinary juveniles the proposed law by repeating the sentences in the earlier law under clause 19, particularly clause 19(1)(*g*) that provides for only three years custodial sentence, has belied the hopes for a meaningful rationalization of the juvenile sentencing.

Implications of guilt-determination and sentencing in transferred cases

(*i*) Guilt determination in the adult court by the standards of children's impaired capacity and mental abilities would lead to greater chances of acquittal in transferred cases that may prove contrary to the retributive objective of the transfer;

(*ii*) Merely enhancement of severity or length of sentence without any individual reform programme[37] would lead to greater brutalization of the juvenile and increase in the rate of recidivism.

V Changing the philosophical premise of juvenile justice

Though the new law does contain a few child friendly and protection measures, such as incorporating 'Principles of Child Care and Protection' as a distinct chapter II and carving out a comprehensive 'Offences Against Children' chapter IX, but all that is not enough to offset the antichild nature of several provisions and the politically projected pretentions underlying the new law. That may be the reason for one section of society and media hailing the introduction and the cabinet approval for the Bill 14,[38] while the other calling it a retrograde step.[39] There appears to be a head-on clash between the two philosophical positions in respect to the deviating children.

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37 See Aisha K. Gill and Harrison Karen, "Sentencing Sex-offender Treatment Programmes and Restorative Justice Approaches" 8(2) *Int. Jour. of Criminal Justice Sciences* (Jun-Dec., 2013).'

38 Editorial, "Judging Juveniles" *The Times of India*, Delhi edn. (Aug., 8, 2014). It states: "The new juvenile justice Bill seeks to improve understandings of vulnerability and offence. This is a brave new step towards protecting the helpless and punishing those old enough to know than to commit appallingly violent crimes." Also see Ved Kumari, "Juvenile Justice Bill 2014- A Regressive Step" 56(3) *Journal of the Indian Law Institute* 303 (2014).

39 Editorial, "Amending Juvenile Law" *The Hindu*, Delhi edn. (Aug., 9, 2014) It states: "The idea of carving out an exception in the Juvenile Justice Act for Children between ages 16 and 18 when they are accused of rape, murder, and other serious offences is completely retrograde."

The first position sees children and childhood as nothing more than miniature adulthood, full of nasty, brutish and beastly attributes, who need to be handled as any adult criminal through a system that is only a sub-set of the adult criminal justice, with a few selective concessions here and there for children involved in minor offending of non-vicious nature. The first position is premised on the argument that the true test of "juvenility" lies not so much in the 'age', but on the level of mental maturity as reflected in the serious/heinous nature of the conduct indulged into. As against this philosophical position the other pro-child position is premised on an understanding that children constitute a distinct social entity that lack mental capacities and decisional abilities, till the age of majority. Such children's offending requires to be addressed through a distinct and exclusive justicing system that is traditionally described as the juvenile justice system. The second position is premised on a thinking that believes in treating childhood as essentially different from adulthood.

It is perfectly legitimate for the government of the day to legislate and make any law, particularly the kind of law that people are clamouring for. But in doing so, at least three things need to be kept in mind. First, the *feasibility aspect* of the law that will include its scientific tenability and social implementability. The example of the failure or near failure of the Criminal Law (Amendment) Act, 2013 is very relevant in this respect. Second, the *normative fidelity aspect* of the proposed law that will include its consonance or dissonance with the international and national norms of juvenile justice. The most important sources of international norms are the U.N. Conventions and rules ratified by the Government of India. The constitutional rights, directive principles and fundamental duties relating to children would constitute the fundamental national norms. Third, the social *rootedness aspect* of the proposed law that concerns India's ancient heterogeneous traditions and culture. The Indian cultural ethos is dominated by the tradition of non-violence, preached by Gautam Buddha and Mohandas Karamchand Gandhi, who taught us to "hate the sin and not the sinner". Will the proposed law that is premised mainly on hating the sixteen-eighteen age group sinner more, not constitute a clear deviation from this non-violent tradition? Will the proposed law not ultimately lead to an environment against all categories of children, including those who dare to report ragging at the hands of the senior toughies and growing incidents of canning and spanking in schools?

VI Post-script

It is a happy augury that after this comment went to the press the Parliamentary Standing Committee of the Human Resource Development laid on the table of the Lok Sabha on 25th February, 2015 the 264th Report concerning, the J.J. Bill, 2014. It is again very coincidental that the views of the JPC are in concurrence with the views expressed in the aforesaid paper relating to the judicial as well as the legislative challenges

reflected in *Darga Ram* and the J.J. Bill, 2014. In particular the strong endorsement for the existing juvenile justice law (Finding 3.21 at p. 30), age on the date of commission of the offence as the sole basis for J.J. system (Finding 7.4 at p. 54), greater need to tone-up the implementation of the law rather than going for a new one (Finding 3.45 at p. 41) etc.