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THE JUVENILE JUSTICE LAW IN INDIA: ARE YOU OLD ENOUGH TO COMMIT A CRIME?

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Abstract

Juvenile justice is a designated area of criminal law that is applicable to persons who are not old enough to be held responsible for criminal acts. One of the most difficult areas of criminal justice has been to provide a clear legal framework dealing with the transition from childhood to adulthood. Countries distinguish between the definition of a 'child' and an 'adult' in different ways with diverse factors being taken into consideration. The Indian Parliament has introduced the Juvenile Justice (Care and Protection) Act, 2015 which has brought in some controversial changes, one of them being that the 16 to 18 years age group are now tried as adults in certain circumstances. This paper seeks to address the anomalies in the language of the provisions providing for such transfer of children to the adult system in India and the consequent lack of a consistent law on the differential treatment of juvenile offenders. This discussion would facilitate a critical analysis and positive change in the juvenile justice systems of other countries including Vietnam.

Keywords: *juvenile, juvenile justice, child, age, heinous crimes, India, crime, offence*

1. Introduction

Old enough to do the crime, old enough to do the time.

Juvenile justice is a designated area of criminal law that is applicable to persons who are not old enough to be held responsible for criminal acts. With the increase in the rate of crime, the question veers around to who is actually committing the crime. In today's times it is not only the adults, but juveniles also, who have been committing several heinous crimes.[1] Sometimes due to the environment and societal influences, children come into conflict with the established laws of a country and this is known as juvenile deviant behaviour. In India as well as other countries, there exists a distinct juvenile justice system which is separate and different from the adult justice system. Under such a system, there are separate courts and separate detention facilities for such children.[2]

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1 Sharma, D. (2020), 'Juvenile Justice System in India: A critical analysis', *Indian Review of Advanced Legal Research Blog*. Retrieved from: https://www.iralr.in/post/juvenile-justice-system-in-india-a-critical-analysis [accessed 7 July 2021].

2 Mishra, N. (2019), 'Revisiting Juvenile Justice with Victim Lens', *Journal of Victimology and Victim Justice* 2(2), p. 166.

One of the most difficult areas of criminal justice has been to provide a clear legal framework dealing with the transition from childhood to adult.[3] The question which has been the subject of attention of various international jurisdictions is, 'who is a child?' Countries distinguish between the definition of a 'child' and an 'adult' in different ways with diverse factors being taken into consideration.[4] With teenagers committing a greater number of crimes as compared to young children, the effort has been to transfer a certain category of teenagers into the adult system. The Indian Parliament introduced the Juvenile Justice (Care and Protection) Act, 2015[5] which has brought in some controversial changes. One of them is that the 16 to 18 years age group are now tried as adults in certain circumstances. This paper seeks to address the anomalies in the language of the provisions providing for such transfer of children to the adult system in India and the consequent lack of a consistent law on differential treatment of juvenile offenders. This discussion would facilitate a critical analysis and positive change in the juvenile justice systems of other countries including Vietnam. The understanding of the context of standing of juvenile justice jurisdictions would enable relevant research, future policy-making and reforms that address the incongruities in the existing system.

2. The Age of Criminal Responsibility

There often arises a confusion between the 'age of criminal responsibility' and the 'age of juvenility'. The minimum age of criminal responsibility (MACR) refers to the youngest age at which a person can be formally processed under the justice system. The MACR is different in different countries and ranges from 6 years to 18 years of age. The average age of criminal responsibility is 12 years old. The use of chronological age is simple, but the actual determination of the number is more complex as it involves factors like brain development, competency, societal experiences etc.[6] It is indeed strange that on the one hand we speak of *juvenile justice* and on the other hand we feel the need to take up the issue of criminal responsibility of children. The reason for this probably lies in the fact that juvenile justice systems across the world depend on the regular/adult criminal justice system for questions of delinquency, trial process, adjudication and punishments.[7]

3 UNICEF (1997), 'Old enough to be a Criminal?', *Encyclopedia.com*. Retrieved from: https://www.encyclopedia.com/law/educational-magazines/old-enough-be-criminal [accessed 13 July 2021].

4 Morgan, R. (2010), 'Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective, By Don Cipriani', Ashgate, 2009, *British Journal of Criminology,* 50(5), pp. 990–991.

5 The Juvenile Justice (Care and Protection of Children) Act, 2015. Retrieved from: http://cara.nic.in/PDF/JJ%20act%202015.pdf [accessed 9 July 2021].

6 Orts, K. (2020), 'An overview of recent national and international research on minimum age of criminal responsibility', *EBPSociety*. Retrieved from: https://www.ebpsociety.org/blog/education/402-an-overview-of-recent-national-and-international-research-on-the-minimum-age-of-criminal-responsibility [accessed 16 July 2021].

7 Pande, B. B. (2015), ''Bad' Juveniles and the 'Worst' Juvenile Justice Law? The Second Challenge to Juvenile Justice Law in "Darga Ram" v. "State of Rajasthan"', *Journal of Indian Law Institute,* 57(1), p. 36.

Concepts surrounding the age of criminal responsibility are pertinent to structure the juvenile justice system as they assist in assessing a person's mental wellness, cognitive ability, and developmental maturity.[8]

It is seen that despite a progressive change adopted by western nations, India and other countries in Asia, continue with the old perception where the minimum age is dependent on the principles of capacity usually determined by the adult criminal justice system.[9] Although the juvenile justice system has evolved over a period of time with the enactment of various laws, the position of age for the purpose of exemption from criminal liability remains more or less unchanged. Also seen is that the attention of claiming exclusion from the adult criminal justice system is largely focused on the teenagers of 16-18 years age group. The lack of a concerted effort to assess the concept of age of innocence and age of criminal responsibility in India has led to an inconsistent approach towards juvenile justice.

3. Who is a Child or a Juvenile Offender?

Justice systems have redefined juvenile offences as delinquent acts to be adjudicated under a separate juvenile justice system which recognises the special needs of the youth. Juvenile justice systems have been a subject of criticism not only because they try to accomplish goals like deterring delinquency but also because they establish appropriate retribution as well as rehabilitation and protection of the youth. Some critics advocate the abolition of juvenile courts, stating that they are not sufficiently punitive, while others criticise such courts for ignoring due process rights.[10] It therefore becomes significant to specifically define a 'child' or a 'juvenile offender' under the existing international instruments.

3.1. International Instruments

Children belong to a separate and distinct category especially for the purpose of crime, due to the stage of physical and mental development and immaturity. For the purpose of regulating juvenile delinquency under the law, it is imperative to possess a clear notion of a 'child'. The Universal Declaration on the Rights of the Child defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".[11] However, according to Van Bueren the term juvenile does not inevitably correlate with the notion of child.[12] The United

8 Abrams, L. S., Barnert, E. S., Mizel, M. L., Bedros, A., Webster, E., & Bryan, I. (2019), 'When Is a Child Too Young for Juvenile Court? A Comparative Case Study of State Law and Implementation in Six Major Metropolitan Areas', *Crime & Delinquency*.

9 Pande, *supra* note 7, p. 37.

10 Shoemaker, D. J. (2020), 'Juvenile Justice', *Britannica Encyclopaedia*. Retrieved from: https://www.britannica.com/topic/juvenile-justice/Continental-Europe [accessed 7 July 2021].

11 Art. 1 The Universal Declaration on the Rights of the Child.

12 Bueren, V. (1995), *International Law on the Rights of the Child,* The Hague, Kluwer Law International, p. 171.

Nations Standard Minimum Rules for the Administration of the Juvenile Justice (The Beijing Rules) define a juvenile as "a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult".[13] The Beijing Rules further state that a "juvenile offender is a child or young person who is alleged to have committed or who has been found to have committed an offence.".[14]

The Rules define 'juvenile' and 'offender' as components of 'juvenile offender'. However, the age limits are specifically made dependent on the jurisdictions respecting the economic, social, political, cultural and legal systems of the Member States. Childhood in different countries ends at different ages ranging from 7 years to 21 years.[15] The United Nations Rules for the Protection of Juveniles Deprived of their Liberty define a juvenile as "every person under the age of 18".[16]

4. Categorisation of Children on the Basis of Age in India: The Development of Law

Children or rather childhood could be sub-divided into infancy (0 to 7 years), early childhood (7 to 12 years), late childhood (12 to 16/18 years) and adolescents (16/18 to 21/22 years). The Indian Penal Code, 1860 (IPC) originally treated all children under 7 years as *doli incapax*[17] and children between 7 and 12 years were presumed innocent unless proved contrary.[18] Children between the ages of 7 to 15/16 years could be tried before the ordinary courts with the advantage of serving their imprisonment in reformatory schools.[19] A significant change relating to the categorization of children occurred with the shifting of 'juvenile justice' from the State List to the Concurrent List

13 Art. 2.2(a) United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). Adopted by General Assembly resolution 40/33 of 29 November 1985. Retrieved from: https://www.ohchr.org/documents/professionalinterest/beijingrules.pdf [accessed 8 July 2021].

14 *ibid* Art. 2.2(c).

15 Todorovic, M. (2017), 'International Instruments on Juvenile Delinquency, Reactions to Juvenile Offences, and Harmonisation with National Legislations: The Case Studies of Serbia and Slovenia', European Master's Degree in Human Rights and Democratisation. Retrieved from: https://repository.gchumanrights.org/bitstream/handle/20.500.11825/595/Todorovic.pdf?sequence=1&isAllowed=y [accessed 18 July 2021].

16 Rule 11 (a) The United Nations Rules for the Protection of Juveniles Deprived of their Liberty. Retrieved from: https://www.ohchr.org/en/professionalinterest/pages/juvenilesdeprivedofliberty.aspx#:~:text=The%20Rules%20are%20intended%20to,of%20detention%20and%20to%20fostering [accessed 17 July 2021].

17 Section 82 Indian Penal Code, 1860 (hereinafter IPC). Under the principle of doli incapax it is assumed that a child below the age of 7 "lacks the ability to understand the nature and consequence of his act" and thus lacks the required mens rea. Only child between the age of 7-12 can be convicted, provided that, the act they have committed is a heinous crime and they have knowledge and has attained the sufficient knowledge to understand the consequences of their act.

18 Section 83, IPC. Only children between the ages of 7-12 years can be convicted, provided that, the act they have committed is a heinous crime and they have knowledge and have attained sufficient knowledge to understand the consequences of their act.

19 In terms of the provisions of Reformatory Schools Act, 1876 and 1897 or Section 562 of the 1898 CrPC.

under the Seventh Schedule of the Constitution of India, 1950.[20] The now empowered central government enacted a national juvenile justice law, the Juvenile Justice Act, 1986 followed by the Juvenile Justice (Care and Protection of Children) Act, 2000 (JJA 2000). This resulted in raising the age of the male "child" from 16 to 18 years under the JJA 2000 which was in accordance with Article 1 of the Convention of the Rights of the Child, 1989 (CRC) and the recommendations of the U.N. Committee on the Rights of the Child.[21]

The Parliament enacted the Children Act, 1960 on the subject, introducing a sex-based definition of 'child', wherein girls till 18 years and boys till 16 years were brought within its protection. It prohibited the use of police stations or jail for children. Despite this protection, a journalist Sheela Barse found that there were 1400 children lodged in different jails in India. This was brought to the notice of the Supreme Court in *Sheela Barse v. Union of India*[22] where the court held that different definitions of 'child' under different Acts in force in various parts of India was violative of the fundamental right to equality. It accordingly suggested that a uniform legislation be passed on the subject so as to avoid confusion and bring about equality in treatment of juveniles. The Parliament, thereafter passed the first national juvenile justice law, the Juvenile Justice Act, 1986 (JJA, 1986). Amongst the significant changes brought about by the legislation was the substitution of the term 'child' for 'juvenile'; and it was made illegal to keep girls below 18 years and boys below 16 years in police stations or jails.

After India ratified the CRC in 1992, it became mandatory to adopt a uniform cut off age of 18 years for both boys and girls as provided under the CRC. Under the JJA 2000 the ban on use of prisons or police stations at any stage of proceedings and under any circumstances was extended for children below the age of 18 years. According to Steinberg, although the human neurobiological maturity is reached at different ages ranging from 15 years to 22 years, but 18 years is treated as the "presumptive age of maturity".[23] This midpoint age of 18 years is the option chosen by CRC and majority of the

20 The subjects of legislation are divided between the centre and states under the Indian Constitution. The Constitution provides for three lists under the Seventh Schedule. List I or the Union List contains subjects on which only the centre (Parliament) can legislate. List II or the State List contains on which only the states (State Legislatures) legislate. List III is the Concurrent List which contains subjects on which both centre and states can make laws, with primacy being given to the centre in the matter of making laws. The shifting of the subject of 'juvenile justice' from the State list to the Concurrent List, the centre could now make laws on a subject on which previously only the states had the right to do so.

21 India ratified the CRC in 1992. See Pande, B. B. (2013), 'Stilling the Turbulent Juvenile Justice Waters: The Apex Court's Precedented Response to an Unprecedented Challenge in Salil Bali v. Union of India' *Supreme Court Cases Journal,* 9, p. J-30.

22 (1991) 1 SCC 57.

23 Steinberg, L. (2012), 'Should the Science of Adolescent Brain Development Inform Public Policy', *Issues in Science and Technology*, 28(3), p. 71.

countries around the world.[24]

On 16 December 2012, in a heinous incident, a 23-year-old girl student was brutally gang-raped and assaulted by six men in a moving bus in New Delhi, India. She was later thrown out of the bus and eventually succumbed to the injuries. The case came to be known as the *Nirbhaya case*.[25] There were five men who were arrested in the case, out of which one of them was below 18 years of age. He was a few months short of 18 years (the majority age under JJA 2000) on the date of commission of the crime. Accordingly, as per the provisions of the law, he was referred for inquiry to the Juvenile Justice Board (JJB) while the other accused were tried before a regular sessions court and punished with imprisonment and death penalty.[26] Up until now the law had tried to increasingly protect children and move towards establishing juvenile justice. However, after this Delhi gang-rape case, and the increasing media frenzy surrounding the case, the focus shifted to the involvement of a 17-year-old in the 2012 gang-rape. The public demanded an amendment in the existing law so that juveniles between 16 to 18 years who had committed 'heinous' offences would be treated as adult offenders. The reasoning behind the desired change being that age should not be used as an excuse to wriggle out of harsh punishments especially in cases of crimes like rape and murder.[27]

The JJB delivered its verdict in the 2012 gang-rape case on 31 August 2013,[28] ordering a three-year stay in a special home for reformation and

24 Pande, *supra* note 7, p. 33.

25 The matter eventually came up before the Supreme Court and was decided by a constitutional bench of three judges, Dipak Mishra, R. Banumathi & Ashok Bhushan, JJ. on 5 May, 2017. *Mukesh and Anrs. v. NCT Delhi* (*Nirbhaya case*) (2017) 6 SCC 1. See case comment on: https://legaldesire.com/mukesh-and-anrs-vs-nct-delhi-nirbhaya-case2017-6-scc-1-case-comment/ [accessed 15 July 2021].

26 The other accused were tried in a regular sessions court and were found guilty of the offences under Sections 376 (2)(g) and 302 of the Indian Penal Code, 1860. They were sentenced to death by the trial court. Their appeal against the aforesaid conviction and the sentence imposed has since been dismissed, and the death penalty was confirmed by the High Court of Delhi. The Supreme Court has upheld the death sentence for the accused, calling it a rarest of rare case. See, *Subramanian Swamy v. Raju through Member, Juvenile Justice Board and Anr.* (2014) 8 SCC 390. Read more at: Rautray, S. (6 May 2017), 'Supreme Court confirms death sentence for four convicts in Nirbhaya gang rape case', *The Economic Times*. Retrieved from: https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-confirms-death-sentence-for-four-convicts-in-nirbhaya-gang-rape-case/articleshow/58531130.cms [accessed 17 July 2021].

27 News (8 December 2014), 'Delhi gang rape: What happened on December 16, 2012 and status of the case', *News18*. Retrieved from: https://www.news18.com/news/india/delhi-gangrape-what-happened-on-december-16-2012-and-status-of-the-case-730141.html [accessed 17 July 2021].

28 The Delhi High Court turned down the plea of Dr Subramanian Swamy not to release Nirbhaya's rapist, who was set to be released from the Special Home, holding that the maximum stay that could be directed in the Special Home under Section 15(1) of JJ Act 2000 had been served. Also see, Ajith, S. (18 December 2015), 'Nirbhaya Case: Delhi HC declines Swamy's plea not to release Juvenile Convict until ascertaining the extent of his reformation', *Livelaw*. Retrieved from: https://www.livelaw.in/nirbhaya-case-delhi-hc-declines-swamys-plea-not-to-release-juvenile-convict-until-ascertaining-the-extent-of-his-reformation/ [accessed 17 July 2021]. Also see, National (31 August 2013), 'Delhi gang rape case: chronology of events' *The Hindu*. Retrieved from: https://www.thehindu.com/news/national/delhi-gang-rape-chronology-of-events/article11862316.ece#:~:text=★Aug%2019%3A%20JJB%20again%20defers,Sep%203%3A%20FTC%20concludes%20trial [accessed 17 July 2021].

rehabilitation of the juvenile accused, in accordance with the provisions of the original JJA 2000. This again generated criticism and anger amongst the public as to the existence of the juvenile justice laws and the easy release of the juvenile offender. In response to the public outrage, the government set up a three-member committee to recommend modifications to the anti-rape laws and gender-based violence laws in India. Consequently, the Juvenile Justice (Care and Protection of Children) Bill 2014 was introduced in the Lok Sabha on 12 August 2014.[29] Despite objections, the Bill was passed and the JJA 2015 was ultimately enforced in January 2016.[30]

4.1. 'Child' under Juvenile Justice Act 2015

The Preamble of the JJA 2015 states that the law is aimed at protecting children by "catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established." Section 2(12), JJA 2015 states that a 'child' means a person who has not completed 18 years of age. Under the Act, the term 'child' is classified into two categories: (i) 'child in conflict with law' (CCL)[31] and (ii) 'child in need of care and protection' (CNCP).[32]

A child who commits an offence and is under 18 years of age on the date of commission of the offence is a 'child in conflict with law' (CCL).[33] A 'child in need of care and protection' (CNCP) is defined under section 2(14) of the Act as a child who is without a home, or is vulnerable in any manner or is in need of some kind of care. This piece analyses the status of a child in conflict with law under the JJA 2015 focussing on juveniles in the 16-18 age group.

4.2. Juveniles in the 16-18 age group

Although there is no change in the definition of 'child' as compared to the previous laws, those children between the age of 16 to 18 years who are alleged to have committed a heinous offence (CCL) may now be transferred to a criminal court, known as the Children's Court.[34] This is the most

29 Department-related Parliamentary Standing Committee on Human Resource Development, Rajya Sabha, 264th Report on The Juvenile Justice (Care and Protection of Children) Bill 2014, 2015. The report was presented to the Rajya Sabha on 25 February 2015 and laid on the table of the Lok Sabha on 25 February 2015.

30 Ministry of Women and Child Development Notification, (12th January, 2016, New Delhi), *The Gazette of India*. Retrieved from: https://wcd.nic.in/sites/default/files/gazette%20notification_0.pdf [accessed 15 July 2021]

31 Section 2(13) JJA 2015.

32 Section 2(14) JJA 2015.

33 Section 2(13) JJA 2015.

34 Section 2(20) JJA 2015. "Children's Court" means a court established under the Commissions for Protection of Child Rights Act, 2005 or a Special Court under the Protection of Children from Sexual Offences Act, 2012, wherever existing and where such courts have not been designated, the Court of Sessions having jurisdiction to try offences under the Act.

significant change brought about by the JJA 2015 where these children can now be tried as adults under certain circumstances.

The Act imposes a mandatory duty on the JJB in case of heinous offences like murder, grievous hurt by acid and rape, including gang rape, "alleged to have been committed by a child, who has completed or is above the age of sixteen years", to conduct a "preliminary assessment".[35] This assessment is to be made with respect to the child's "mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence."[36] After the completion of the inquiry, if the Board feels that there is a "need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences."[37] In case of offences like attempted murder, use of criminal force with intent to disrobe a woman, categories of kidnapping offences, selling and buying minors for prostitution, and robbery, the Children's Court may transfer the case to a regular court to be tried as an adult under the Code of Criminal Procedure, 1973 (CrPC).[38]

Resultantly, such a child is tried by the ordinary criminal courts and is liable to face sentences prescribed under the IPC, except death penalty and imprisonment for life without release.[39] They are then required to undergo imprisonment in jails which ordinarily house adult offenders.[40] The most controversial aspect of the new JJA 2015 is the targeting of children in the age group of 16 to 18 years on account of serious/heinous offences committed by them. This issue can be analysed both from the aspect of age and the classification of offences committed by the juvenile.

4.2.1 The Age Aspect

These provisions of the amended JJA 2015 have turned the reformative philosophy on its head resulting in serious legal defects. The JJA 2015 did not change the cut off age of 18 years for defining children but added a new provision for the transfer of children between 16 to 18 years of age, alleged to have committed a heinous offence to be tried as adults. This provision directly breaches the General Comment 24 of the UN CRC Committee which specifically prohibits children below 18 years to be tried as adults.[41]

35 Section 15(1) JJA 2015.
36 *ibid*.
37 Section 18(3) JJA 2015.
38 Section 19(1)(i) JJA 2015.
39 Section 21 JJA 2015.
40 Mehta, D. (2014), 'An Iron Fist in a Velvet Glove: Draft Juvenile Justice Bill' *Economic & Political Weekly,* 49(31), p. 13.
41 United Nations Convention on the Rights of the Child (2007), 'General Comment No. 24 (2019), replacing General Comment No. 10 (2007): Children's rights in juvenile justice' Committee on the Rights of the Child. Retrieved from: https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf [accessed 10 July 2021].

It may be said that general comments are not binding on India, however, discrimination is generally and specifically prohibited under the Indian Constitution. Article 14 of the Constitution provides the fundamental right to 'equality before the law and the equal protection of the laws within the territory of India' to all persons which is inclusive of children.

As per the Preamble, the aim and object of the Act is not to subject the children to any 'punishment' but the goal is to ensure care, protection, development, treatment and social integration of the children. The provisions pertaining to the transfer of a category of children based on their age, offence committed by them and the circumstances of the commission etc., does not further the objective of the law. It, in fact, punishes them by providing for long term incarceration which will ultimately result in greater prison-time. This will further impact their future lives as they will be subjected to long-term disqualifications stemming from their convictions, despite undergoing reform and release on attaining 21 years of age.[42]

In *Subramanian Swamy v. Raju*[43], one of the contentions against the JJA 2000 was that the grouping of all children below 18 years irrespective of their mental capacities and the nature of offence committed by them was an "overclassification of all juveniles"[44] and thus was a "classification beyond what would be permissible under Article 14" of the Constitution.[45] The constitution bench of the Supreme Court however refused to read down the JJA 2000 as India could not afford to violate its international obligations,

All persons below the age of 18 are put in one class/group by the Act to provide a separate scheme of investigation, trial and punishment for offences committed by them. A class of persons is sought to be created who are treated differently. This is being done to further/effectuate the views of the international community which India has shared by being a signatory to the several conventions and treaties already referred to.[46]

By defining a 'child' as a person below 18 years of age, the government has created a classification with the objective of providing for their care and protection. Consequently, any further sub-classification must give meaning to the objective of JJA 2015. The sub-classification of children of the age group 16–18 years under JJA 2015, will result in their arbitrary transfer on account of lack of any scientific knowledge or technology to determine whether the offence was committed by a child-minded or an adult-minded individual.[47] This

42 See Section 20 JJA 2015.
43 Subramanian Swamy, *supra* note 26.
44 *ibid.*, para 59.
45 *ibid.*, para 60.
46 *ibid.*, para 62.
47 Kumari, V. (2016), 'The Juvenile Justice Act 2015: Critical Understanding', *Journal of the Indian Law Institute*, 58(1), p. 93.

sub-classification would also be violative of Article 15(3)[48] of the Constitution which permits the enactment of special legislations only *in favour of children* and not to their detriment. The impact of this age aspect is that the age of juvenility has effectively been reduced to 16 years and consequently the relevance of the juvenile justice law has been limited for this 16 to 18 years age group.[49]

4.2.2. Classification of offences

The JJA 2015 further introduces another set of classification which divides the offences envisaged under the Act into petty, serious and heinous. A 'Petty Offence' includes offences for which the punishment is imprisonment up to three years.[50] 'Serious Offences' include those having punishments of between three to seven years.[51] 'Heinous Offences' include those where the minimum punishment is seven years or more.[52] There are a few challenges which give rise to interpretive questions on the issue of classification of offences.

Firstly, the three definitions use the term 'includes' which leaves the question open as to what else do these offences include. As Sekhri explains that "an inclusive definition means that it is not exclusive to the terms of the definition. It can go beyond the text if the context so demands."[53] Under criminal jurisprudence the accepted principle of interpretation is "strict and narrow interpretation" which "does not extend criminal liability to the accused."[54] Consequently, an offence which provides for greater criminal liability than which is provided under it may be included within these categories.

Secondly, although the definition of 'petty offences' is clear as it only includes offences punishable with maximum three years imprisonment, the definition of 'serious offences' is confusing. Serious offences also include offences where the punishment is three years. This overlap could have been duly avoided by limiting this particular category to offences punishable with 'more than three years'.

48 Art. 15(3) Constitution of India, 1950 - Nothing in this article shall prevent the State from making any special provision for women and children.

49 Pande, *supra* note 7, p. 42.

50 Section 2(45) JJA 2015 - "petty offences" includes the offences for which the maximum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment up to three years.

51 Section 2(54) JJA 2015 - "serious offences" includes the offences for which the punishment under the Indian Penal Code or any other law for the time being in force, is imprisonment between three to seven years.

52 Section 2(33) JJA 2015 - "heinous offences" includes the offences for which the minimum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment for seven years or more.

53 Sekhri, A. (2016), 'The Juvenile Justice Act 2015: More questions than answers', *The Proof of Guilt Blog*. Retrieved from: https://theproofofguilt.blogspot.com/2016/05/the-juvenile-justice-act-2015-more.html [accessed 12 July 2021].

54 Kumari, *supra* note 47, p. 95.

Thirdly, the misunderstanding is also generated by the limitation of the period of imprisonment to seven years in case of a serious offence. The definition of 'heinous offences' includes offences where minimum punishment is seven years or more. Consequently, offences that are punishable with more than seven years of imprisonment are not covered either under 'serious offences' nor under 'heinous offences'. The offences under the IPC and other laws, like attempt to murder etc. are punishable with imprisonment for more than seven years but they do not offer a minimum punishment of seven years and therefore, they cannot be classified as a heinous offence. There are only four offences which have a *minimum* punishment of seven years.[55] Therefore, there are all these offences that are punishable with more than seven years, but without a *minimum* punishment of seven years, that fall under this wide chasm left in the legislative machinery.[56] Under which definition would such offences be included? Serious or heinous?

It is accordingly submitted that there exists a fourth category of offences which are not covered under the 'petty', 'serious' or 'heinous' offences under JJA 2015. This is that category of offences where there is no minimum punishment prescribed and the maximum punishment is more than seven years. This includes offences such as those under Sections 121-A, 122 IPC, offences relating to counterfeiting of currency, homicide not amounting to murder, abetment to suicide of child or innocent person and many others. This particular issue arose in a recent case before the apex court, *Shilpa Mittal v. State (NCT of Delhi)*[57] where a juvenile had committed an offence punishable under section 304, IPC (fatal motor vehicle accident). The offence under section 304 IPC (homicide not amounting to murder) is punishable with a maximum punishment of up to ten years or fine or both. No minimum punishment is prescribed. The High Court in the matter held that since no minimum punishment has been prescribed for an offence under section 304 IPC, the offence would not fall in the category of a 'heinous offence' under JJA 2015.[58] The Supreme Court faced with this dilemma observed,

"… there appears to be a gross mistake committed by the framers of the legislation. The legislation does not take into consideration the 4th category of offences. How and in what manner a juvenile who commits such offences

55 The four offences under IPC with a minimum punishment of seven years are: Section 304-B (Dowry Death), Section 376 (Rape), Section 397 (Robbery/Dacoity with attempt to cause death/grievous hurt), and Section 398 (attempt to commit an offence u/s 397). Section 302, IPC, provides for punishment of murder with a minimum sentence of life imprisonment and thus includes a minimum of seven years.

56 Sekhri, *supra* note 53.

57 (2020) 2 SCC 787.

58 *ibid*., para 3.

should be dealt with was something that the legislature should have clearly spelt out in the Act. There is an unfortunate gap. We cannot fill the gap by saying that these offences should be treated as heinous offences."[59]

Accordingly, to overcome the complications created by the 2015 Act, the court directed that from the date of enforcement of the Act, "all children who have committed offences falling in the 4th category shall be dealt with in the same manner as children who have committed "serious offences"."[60] It is pertinent to point out that the lack of clarity is generated on account of wrong classification of offences. Offences under JJA 2015 are classified on the basis of time duration of the punishment, rather than on the basis of the nature and character of an offence.[61] Further, the categorisation of child offenders into more vicious and less vicious is constitutionally impermissible and is violative of their rights. It also reduces the ability of such children who have gone astray, to re-socialise and rehabilitate them.[62]

The age group of 16-18 years is an extremely sensitive phase where the minds of such adolescents are easily influenced. Treating 16–18-year-olds as adults after a mere preliminary assessment[63] is violative of the constitutional provisions, international standards and judgments of the Supreme Court.[64] Being subjected to the adult judicial system breaches the principles of Article 14[65] and Article 15(3)[66] of the Indian Constitution. Consequently, the classification of offences in this manner should be reconsidered, as simply imposing a threshold of punishment in terms of years doesn't reflect the offender's mindset.

Conclusion

The JJA 2015 is a regressive step as opposed to the initial progressive philosophy followed towards juvenile justice. While many countries have now adopted the concept of restorative justice even for heinous crimes like murder and rape committed by adults, India seems to have chosen to

59 *ibid*., para 31. Also see *Saurabh Jalinder Nangre v. State of Maharashtra*, 2018 SCC OnLine Bom 6295; *Rajiv Kumar v. State of Bihar*, 2018 SCC OnLine Pat 5443; and *Bijender v. State of Haryana*, 2018 SCC OnLine P&H 6722.

60 *ibid*, para 35.

61 See Sharma, *supra* note 1.

62 Pande, *supra* note 7, p. 43.

63 The Juvenile Justice Board conducts a preliminary inquiry into crimes committed by a child, to decide whether the child should be sent to a rehabilitation centre or to a children's court to be tried as an adult. See Section 15(1) JJA 2015.

64 See, *Subramanian Swamy, supra* note 26; *Rohtas v State of Haryana,* AIR 1979 SC 1839; *Raghbir v State of Haryana,* AIR 1981 SC 2037; *Abuzar Hossain v State of West Bengal,* (2012) 10 SCC 489; *Salil Bali v Union of India,* (2013) 7 SCC 70. In all these judgements, it was provided that *all children* should be dealt with under the juvenile justice system (italics added).

65 Treating 16–18-year-olds unequally is violative of the fundamental right to equality under Article 14 of the Indian Constitution.

66 Article 15(3) of the Indian Constitution provides for special treatment for women and children.

ignore the knowledge generated by new research.[67] The Indian Parliament, burdened by the political and public pressure generated by the barbaric gang-rape case (*Nirbhaya case*), chose to introduce a regressive step towards young teenagers, under JJA 2015. Viewing children through the lens of adulthood results in them being treated as adult criminals that is a sub-set of the adult criminal justice system. Culpability is not necessarily the fallout of age but depends largely on the maturity of mind of the offender which is reflected in the nature of the crime committed by him.[68] It is the nature of the offence committed and the circumstances of the case that should be used as a parameter to determine whether the juvenile was capable of understanding his act. It is indeed unfortunate that the public hunger for justice which is based on revenge, has overpowered the established constitutional and international norms of juvenile justice.

The established philosophy under international law for juvenile jurisprudence which lays emphasis on rehabilitation, reform and restoration of juveniles provides the guiding light. Establishing correct parameters of application of the juvenile justice system is vital for determining the future of the youth. Maintaining a "separate system" in addition to "establishing age-appropriate services for juveniles" is significant in separating children from the adult criminal justice systems.[69] It is imperative to focus on diversion, restoration and rehabilitation rather than punishment.[70]

In the current times, the need for protection and guidance of children is increasingly being recognised, where there is a move towards legislation on the legal rights of children.[71] Many countries have chosen to adopt meaningful policies on this issue. The author consequently believes that the knowledge of different juvenile justice systems of different countries will pave the way for the conduct of critical research and positive change based on a comparative perspective. The juvenile justice system of India provides valuable lessons for other jurisdictions on the issue of 'age of criminal responsibility'. The article highlights the lacunae in the law on juvenile justice (JJA 2015) that has led to inconsistencies and incongruities, especially on the issue of treatment of adolescent offenders. A law on juvenile justice in any country should ultimately reflect an attitude of reformation and rehabilitation of all children. ●

67 Kumari, *supra* note 47, p. 103.

68 Pande, *supra* note 7, p. 46.

69 Orts, *supra* note 6.

70 Bajpai, A. (2018), 'The Juvenile Justice (Care and Protection of Children) Act 2015: An Analysis', *Indian Law Review*, 2(2), p. 202.

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[8] *Saurabh Jalinder Nangre v. State of Maharashtra,* 2018 SCC OnLine Bom 6295

[9] *Sheela Barse v. Union of India.* (1991) 1 SCC 57

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