LOOPHOLES AND LACUNAE: THE DILEMMA OF CHILDREN AS OFFENDERS

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ABSTRACT

Society should be formulated keeping in mind the juvenile population so as to build a better foundation of a country. If the juveniles are themselves troubled, then the foundation on which society stands, breaks down. As a result, there is crime committed by the juvenile populace. Those juveniles already institutionalised should also be given effective treatment such that it prevents recidivism. Thus, it becomes essential to look into the legislations that direct and protect the juveniles for a better future generation.

Thereby, the aim is to identify the legal gaps within the legislations of Juvenile Justice (Care and Protection of Children) Act, 2015 whilst trying to understand what repercussions can be posed by criminality of children and whether they should be considered liable for their crimes.

With this paper, the benefits are dual-faced. First of all, we, ourselves as students would get a better understanding of the execution of the legislative process and also the psychological dimensions underlying juvenile behaviour, and secondly, the society would largely gain an advantage by gaining an insight on what changes could be brought into the legal process through the gaps or loopholes that we point out.

Keywords: Juvenile, Lacunae, Reformative Justice, Institutionalisation, Mental Health.

INTRODUCTION

Mental Health according to the World Health Organisation (WHO) "is a state of mental well-being that enables people to cope with the stresses of life, realize their abilities, learn well and work well, and contribute to their community".

This refers to the situation wherein one needs to not only have a full functioning life with the absence of infirmity and injury but also a stable state of mind and well-being; emotionally, physically and spiritually. A highly common circumstance within the juvenile populace is feeling mentally weak and being unable to function as a result of such mental instance. As can be seen by the NCRB Report wherein "A total of 31,365 cases were registered in the country against juveniles in 2023, marking a 2.7-per cent rise over 2022, with Delhi recording the highest crime rate at 41 per one-lakh children. Nationwide, the crime rate of juveniles increased from 6.9 in 2022 to 7.1 in 2023, according to the data from the National Crime Records Bureau (NCRB). Majority of juveniles in conflict with law apprehended under IPC and SLL crimes were in the age group of 16 years to 18 years (79 per cent) (31,610 out of 40,036) during 2023," the report said."[1]

Surveys by the NCRB have found that offenses committed by the juvenile population are maximum in number as far as the offenses affecting human body are concerned wherein cases including murders, rapes, and attempts to commit murder have topped the list.

PREVALENCE OF MENTAL DISORDERS AMONGST THE JUVENILES:

Jane Koppelman (2005)[2] has made a distinction as to why such commission of crime occurs. In one of the studies conducted in the year 2002, it was found that half of the males and females in the juvenile justice system were prone to substance abuse disorders, 11% of both the sexes also had attention deficit hyperactivity disorder (ADHD) and around 20% of females had major clinical depression.

All of the above-mentioned disorders can be categorised by anti-social behaviour, mismanagement of conflict resolution and disrespect for rules. These are also caused by a combination of genetic vulnerability, and environmental factors like parental neglect, marital discord or parental alcoholism.

Majority of adolescents have been found to have impairment in the frontal lobe of the brain

which is an area which affects a person's ability to plan, to avoid harm and to learn and take lessons from negative consequences.

It has also been found that about 20% of children in the juvenile justice system commit crimes owing to mental disorders, sometimes which could be one but usually a combination of mental disorders. For example, bipolar disorder, ADHD, schizophrenia, disruptive disorder which severely hinders and impairs their ability to function effectively in families, schools and communities. Also, in many cases child-abuse is one of the major reasons for their condition. An estimated 25-30% of youth in the juvenile justice system have either been physically or sexually abused.

Children with serious mental disorders resemble similarly diagnosed children in the public mental health system where there is a similar rate of committing minor crimes, being poor, suffering from family trauma, and being disruptive.

IMPLICATION OF THE DOCTRINE OF DOLI INCAPAX:

As an exemptive rule, the doctrine of doli incapax states that the younger the child, the lesser the chances are to be corrupt. The doctrine[3] hinges on whether the child is mature enough to comprehend the nature and consequences of the actions committed by them. This presumption is usually challenged with evidence showing the child's understanding of right and wrong. Evaluation of mental capacity of a child generally involves examining a child's intellectual and emotional development. Psychologists often collaborate with legal professionals in assessing the child's ability to differentiate between acceptable and unacceptable conduct.

In India, children below the age of seven are entirely exempted from all kinds of criminal liability as it is generally regarded that such children lack the sufficient mental understanding to comprehend the consequences of their actions. Section 83 of the Indian Penal Code, 1860 provides partial immunity from criminal liability to children between the age group of 7-12 years only if it can be proven that at the time of commission of offence the child could not fully understand the severity of their actions.

This exemption however raises questions about the legitimacy and validity that this doctrine poses because why, even in cases of heinous crimes should a child be granted immunity if he had played an important role in the commission of the crime, the mens rea along with the

severity to which the crime has been committed by him. It evades accountability and breeds its misuse by not only the child, but their guardian and such a system that reinforces such blatant misemployment of this doctrine brings forth major social and ethical dilemmas.

LITERATURE REVIEW

Excerpt from "Mental Health and Juvenile Delinquency: A Study of Juvenile Offenders in India" by Aayushvi Singh & Dr. Harshita Thalwal from Chandigarh University, Mohali.

This excerpt provides provisions related to Juvenile Justice Act, 2015 and other provisions regarding mental health of juveniles.

"Section 15: Observation Homes and Special Homes covers the placement of young offenders in observation or special homes, centering on physical care and safety. However, the environments within these facilities critically influence mental health. While Section 15 does not explicitly address psychological well-being, the underlying mental health supports warrant examination. The quality of counseling services, staff's mental health training, and promoting emotional wellness despite confinement require consideration.13 A comprehensive analysis of Section 15 involves appraising institutional practices affecting juvenile mental health. Examining the Act's mental health implications for confined youth remains imperative.14 Though not expressly stated, robust mental health provision for institutionalized juveniles aligns with the Act's rehabilitative spirit. Assessing implementation gaps, strengthening supports and preventing re-traumatization of youth offenders should inform ongoing efforts to uphold children's welfare under the law.

Placement and Treatment in Observation and Special Homes:

The provisions governing the placement and treatment of juvenile offenders in observation homes or special homes, as outlined in Section 15, necessitate a holistic approach that encompasses mental health considerations. A critical analysis must delve into the conditions within these institutions, including the provision of mental health support, counselling services, and initiatives to mitigate the potential psychological impact of institutionalization on young minds. The application of legal provisions related to the mental health of juvenile offenders comes to life through the lens of case law. An exploration of relevant cases offers insights into the practical challenges, successes, and shortcomings in implementing the

statutory framework.

The case of M. Selvam v. State of Tamil Nadu brought to light the imperative of recognizing and addressing the mental health needs of young offenders within observation homes. The Madras High Court, in its ruling, emphasized the necessity for observation homes to integrate psychological counselling and therapy as crucial components in the rehabilitation process. Juvenile offenders often hail from challenging home environments, necessitating specialized mental health care and rehabilitation services. Recognizing the vulnerability of this demographic, the Madras High Court underscored the paramount importance of prioritizing juveniles' mental health within observation homes. In the verdict, the Madras High Court unequivocally advocated for the implementation of psychological counselling and therapy programs within observation homes. The ruling highlighted the need for observation homes to transition from mere custodial facilities to institutions actively engaged in addressing the mental health needs of juvenile offenders."[4]

Excerpt from 'Criminal Justice Reform and Human Rights' by Hardik Verma from Chandigarh University, Mohali.

The Juvenile Justice Act, 2015 believes in upholding the principle that all children deserve protection, a chance at rehabilitation and guidance over punishment and criminalisation. Thus, it states that -

"As per the principle of presumption of innocence given under JJ act of 2015 "Any child shall be presumed to be an innocent of any mala fide or criminal intent up to the age of eighteen years"2 . Keeping all these juveniles with adult offenders would make them criminals rather than to help them live a normal life after their punishment is over. Children are a valuable resource for any country who help a country grow. They are asset for a community or a country and thus it is necessary to ensure that they emerge as responsible adults who are sharp, physically strong as well as mentally sound so that they are able to contribute for the advancement of the country."[5]

Wallace, 2015, in the paper - "Children, Crime, and Accountability: The Evolving Landscape of Doli Incapax." States legal reforms recently made affecting Doli incapax and their impact on the accountability of children for criminal actions.[6]

After having been debated and widely studied across the world, the concept of juvenile justice focuses on the balance between rehabilitation and societal protection. The same can be supplemented by the following excerpt from "Juvenile justice and human rights: Reforming India's juvenile justice act" by Kumari Sukriti of Ram Kumari Ayodhya Singh College, Begusarai, Bihar, India.

"The field of juvenile justice has generated extensive scholarship, both in India and internationally, reflecting ongoing debates about the appropriate balance between child welfare and public safety. Much of the global academic consensus emphasizes that juvenile justice systems must be rehabilitative in nature, recognizing the developmental immaturity of children and their heightened potential for reform. Scholars such as Cipriani (2009) argue that the very foundation of juvenile justice lies in the recognition that children differ from adults in their psychological, emotional, and cognitive development."[7]

The following case law of 'Marimuthu v. State, the Madras' from the Journal of Juris Centre Review states the question regarding the rigidity of absolute immunity granted to minors under the criminal law has been subjected to various judicial interpretations.

"High Court observed that a child above seven could be held liable if it is proved that they had sufficient maturity to understand the nature and consequences of their act. However, the absolute immunity granted under Section 82 and its successor clause in the BNS is not subject to judicial examination or rebuttal, regardless of the nature or gravity of the offence. This rigid presumption fails to account for contemporary realities in which children are often cognitively aware, socially exposed, and capable of intentional harm even at younger ages." [8]

DISCUSSION

THE MENTAL HEALTHCARE ACT, 2017 ; INCEPTION & PURPOSE

The MHCA of 2017 came into effect on the 28th of May, 2018 with the purpose to provide for mental healthcare services for people with mental illness and to protect the rights of such individuals while ensuring proper delivery of the services under this act.

The Government of India took the initiative of defining mental health and mental illness under the Mental Healthcare Act of 2017, while adhering to the medical standards which are recognised both nationally and

internationally especially, in the international classification of disease of the WHO.[9]

MHCA of 2017 defines mental healthcare inclusive of evaluation and diagnosis of an individual's mental state along with providing treatment, care and rehabilitation for the suspected mental illness.

As per the Mental Healthcare Act, mental illness can be defined as a disruption in mood, perception, or behaviours that could severely impair judgement, or one's ability to manage the daily life chores.

It defines the rights and duties of persons with mental illness, the admission and treatment process of a mentally ill individual, procedure for advance directives and nominated representatives, the establishment of mental health authorities such as Mental Health Review Boards(MHRBs) and lastly penalties for noncompliance.

CRITICISM AND LOOPHOLES:

1. LACK OF PROVISIONS FOR JUVENILES:

There exists negligible provisions for the juvenile population and the one provision that does exist i.e. Section 87 merely pronounces the admission of a minor rather than focusing on the applicability of therapy towards a minor or juvenile. Further, no coordination can be found between the Juvenile Justice (Care and Protection of Children) Act, 2015 and the Mental Healthcare Act, 2017 when there should be an establishment of relation between the two since the act aims at protecting the rights of 'all mentally ill' persons. Lastly, there is absence of access of forensic psychiatric evaluation for children who are in conflict with the law when determining their rehabilitation, culpability and maturity.

2. THE CONCEPT OF MENTAL AGE HAS NOT BEEN ELABORATED:

While the act prescribes the concept of decision-making capacity of an individual, it is beyond the purview of this act since it fails to include mental age of a person especially when it is an integral part of determining criminal liability. The infamous doctrine of doli incapax also proves to be non-existent within the limits of this act.

3. ONE-SIZE-FITS-ALL APPROACH:

The MHCA prescribes treatments based on the opinions of the patients whether it be services or therapies, however in India, people from all walks of life come under the purview of this act so there is a chance that they may not be aware of the intricacies of the treatment process which may lead to premature and early release of a patient whose consequences can be prolonged commission of crime and mental illness. The childspecific framework also acts as a lacuna. The act mostly targets the needs of an adult, mentioning children only occasionally and lacks a distinct legal category that meets separate care protocols. This gap ignores the fact that minors have different developmental, psychological and legal needs compared to adults. This oversight makes the act unsuitable for children in observation homes, reform schools or psychiatric institutions who may experience undiagnosed and untreated mental illness.

4. BUREAUCRATIC METHOD:

Debdutta Nayak and others [10] has also pointed out that "This act gives more emphasis on the legal aspects like maintaining paperwork, uploading documents, and multisectoral communications compromising important clinical time. Also, to maintain these hospitals must appoint trained and dedicated staffs which is impractical to implement with the little allotted resources for health sectors". The act thus, majorly focuses on a rather bureaucratic methodology, only pivoting on paperwork and lacking in execution. Degeneracy of effectiveness has resulted in this act lacking on validity but, as new legislations come into place, they end up overshadowing older ones. This results in a weaker enforcement and such was the pattern followed by this act. Such an inconsistency does not remain at par with the principle of justice, equity and good conscience.

Thus, its execution, now, is merely in theory.

JUVENILE JUSTICE (Care and Protection of Children) ACT, 2015:

The Juvenile Justice (Care and Protection of Children) Act, 2015, is an important law in India that focuses on the care, protection, and rehabilitation of children who are in conflict with the law and need protection. It replaced the Juvenile Justice Act, 2000, and introduced major changes after the 2012 Delhi gang-rape case, which raised national discussions about juvenile responsibilities. The act allows those aged 16-18 to be tried as adults for serious crimes if assessed by the Juvenile Justice Board. It also sets up child welfare committees (CWCs) to meet the needs of vulnerable children.

The Act prioritises rehabilitation, social integration, and adoption processes, supporting both institutional and non-institutional care. Based on the principle of justice, fairness, and the best interest of the child, the 2015 Act supports India's commitment under the UN Convention on the Rights of the Child (UNCRC). It aims to balance child welfare with accountability.

CRITICISM:

1. CONTRADICTORY NATURE OF DOLI INCAPAX:

The doctrine states that minors or children under the age of 18 cannot form criminal intent, i.e., Mens Rea; however, the Act aims to treat minors as adults by trying them in cases of heinous crimes as adults themselves. This is a rather contradictory presumption that undermines the rehabilitative idea of this Act or of the Juvenile Justice System.

2. LACK OF CLARITY:

The Act has failed to specify the minimum age of criminal responsibility, which makes it difficult for a layman or the people in the judiciary to understand the basis on which criminal liability is to be determined. The Act does not set clear guidelines or standardised procedures for the assessment of mental and physical capacity to commit a heinous offence and understand its consequences. This results in subjective and inconsistent decisions and no general consensus regarding the rules that are to be followed while trying a juvenile in cases of crimes falling under the category of "Rarest of the Rare Cases."

3. ABSENCE OF STANDARDISATION:

"For the determination of age first, the class 10th mark sheet, then the juvenile's name in the family list and Mukhiya's list in his/her respective area, then the birth certificate, and finally, medical tools are used. But this process is so ambiguous, instead of looking so clear. The reasons behind its ambiguity are the unavailability of these documents, delay in medical determination, forged reports and documents, and finally lawyer's misconduct, which results in delay in the justice."[11]

Juvenile homes in India often lack proper nutrition, hygiene, and emotional care. This leads to illness and poor rehabilitation. Abuse by staff and influence of the older inmates, along with the insufficient infrastructure, like the poor sanitation, water, and education facilities,

make conditions worse and increase chances of recidivism, especially those aged 16-18.

SHOULD A JUVENILE BE EXEMPTED FROM PUNISHMENT?

While this topic may seem vague at first, what this question poses is whether a child, a minor, should be liable for the crime which they have committed and whether the doctrine of doli incapax should be followed rigidly. This has rather far-reaching implications since it's heavily a moral and ethical dilemma focusing on the culpability of a child through a retributive approach.

The infamous Delhi gang-rape case of 2012 led to reforms in the Juvenile Justice system, and led to the inclusion of mental age while determining liability in a crime.

NIRBHAYA GANG-RAPE CASE

The case occurred on 16th December, 2012, wherein Jyoti Singh, a 22-year-old intern, was beaten, gangraped, and tortured by six people, including the driver of a private bus. When rushed for treatment to the Safdarjung Hospital, she was soon transferred to Singapore. Eleven days after the assault, she succumbed to her injuries two days later. Amongst the six convicted, one was a juvenile who was given the maximum sentence of three years of rigorous imprisonment in the reform facility under the Juvenile Justice Act.

Due to this, the public pressure mounted against the release of the juvenile, wherein the Minister of Women and Child development, Maneka Gandhi, hastily passed a bill which was not inclusive of the concept of mental age; rather, it only encompassed the reduction of the age of culpability from 18 to 16. This bill has now become an act - the Juvenile Justice Act, 2015. [12]

The question that now arises is whether the mere lowering of the age of culpability of juvenile offenders will really help in preventing heinous offences committed by the juvenile.[13]

In order to understand the concept of criminal liability, it is rather essential to consider mental age since it would aid in determining mental resilience and cognitive ability which in turn would help in ascertaining ability to formulate intent.

In terms of criminal law and the behaviour associated with crime, mental age refers to an

individuals' intellect and the level of psychological development with respect to the degree of understanding, reasoning, or the maturity that they possess regardless of one's biological age. A person may be 10 years of age chronologically but could have the mental capacity of an 18-year-old and vice versa, a 40-year-old may have the mental age of a 10–11-year-old due to certain factors like psychological conditions, socio- economic factors and lack of parental guidance.

The chronological age of the child should not be the sole criteria to punish them who is in conflict with law. Courts should consider whether a child is mature enough to understand the consequences of the act committed by them. The age should never have been lowered from 18 to 16, rather it should have been 18 itself as mentioned in JJA, 2000. Children nowadays are evolving day by day so it becomes difficult to determine the age of criminal responsibility.

In such ruthless cases, if it has been proven beyond reasonable doubt with substantial evidence that the minor committed an offence in a cruel manner given the vulnerabilities of the victim which falls under the rarest of the rare cases, then that child should be punished gravely.

The minor accused in the Nirbhaya case should have received more than 3 years of punishment. If he was capable of assaulting and raping her, he should be equally capable to endure rigorous imprisonment with hard labour.

Besides the mental age, quite a few aspects need to be deliberated upon such that it would enable a comprehensive look into the case.

Forensic tests and assessments refer to a broad range of procedures for identifying and evaluating aspects of personality, intelligence, aptitude and individual differences. These tests are instruments for the measurement of emotional, motivational, interpersonal, and attitudinal characteristics. Such assessments involve projective techniques included but not limited to Rorschach Inkblot test, Thematic Apperception test where such questioning regarding the crime committed should ensue. Other techniques include intelligence tests such as the Standford-Binet test and Raven's Progressive Matrices that help measure the IQ.

By using these techniques and tests, we can assess a child's maturity, cognitive and emotional intelligence, decision-making ability, and behavioural responses. These evaluations help determine the child's intent which acts as substantial evidence in the case. They also allow the

justice system to decide the right level of accountability and the degree of punishment, making sure that minors are treated according to their mental and emotional development.

1990S AJMER GANG RAPE BLACKMAILING CASE

After a long period of 37 years, a 53-year-old man had been referred to the Juvenile Justice Board of having raped an 11-year-old girl since he was a juvenile at the time of the incident by the Supreme Court of India. The convict's claim of him being a juvenile when the incident had occurred was found to be rightful and correct by the court. Since the incident had taken place in Rajasthan, the government there, raised serious objections to the convict's claim of seeking relief as a juvenile, the Supreme Court judges "categorically held that the plea of juvenility can be raised before any court and has to be recognised at any stage, even after disposal of the case."[14]

The JJB sentenced the accused to a special home for a maximum punishment of 3 years under the Juvenile Justice (Care and Protection of Children) Act, 2015.

Accordingly, it becomes pertinent to ask when should a juvenile be tried as an adult and whether this judgement was apt or not.

It is our conviction that this case could have been handled in a more expeditious manner wherein the trial took nearly 26 years and the verdict was announced only when the accused has reached the age of 53. This long delay clearly violates the principle of fiat justitia ruat caelum (let justice be served, though the heavens fall). It, not only prevents the victims from receiving timely justice but also weakens the credibility and trust in the justice system.

Even though the accused was a minor, aged 16 at the time of the crime, the nature of the offence which was a brutal act of rape shows the high degree of awareness, intent and understanding of the consequences. The fact that the accused avoided trial by appeal to Supreme Court for years further proves that he has the mental maturity and the criminal intent required to understand the gravity of his actions and to deliberately evade the law. Such behaviour undermines the assumption, that juveniles act without full understanding or capacity.

Thus, granting protection under the Juvenile Justice (Care and Protection of Children) Act, 2015, in this case undermines the very role of justice. The law aims to reform, not provide

immunity to those who knowingly commit serious crimes by shaming age of minority by the misuse of such provisions through taking advantage of one's own wrong whereby applying leniency in this situation becomes unfair.

In our view, this is one such case that falls under the 'rarest of the rare' doctrine, where such a question about a juvenile being tried as an adult is raised. The case was prolonged for 26 long years where the accused was allowed to reach an age of 53 before being convicted, even as 16-year-old, he knew the consequences of his act, if the court would have pronounced the judgment in the 1990s itself, the punishment, then as well should have been of the nature that is more severe than the one prescribed in the JJA, 2015.

Similar to adult based trials, punishment should be prescribed based on the severity, the atrocity and the heinous nature of the crime, the juveniles should face a rigorous imprisonment with hard labour. If such a punishment had been prescribed then, the same should have been prescribed now and rather an additional punishment should be decreed for delaying filing of appeal.

ANALYSIS AND INTERPRETATION

In order to get a better understanding of the aforementioned content, let us take into consideration a situation wherein,

1. A 15-year-old starts engaging in aggressive acts. Eventually, he wilfully and in a premeditated manner carry out a school shooting. In case such a situation arises, the punishment should be such that it matches the heinous nature of the crime. Also, to ensure fairness, a standardised set of provisions should be put into place under the Juvenile Justice Act, 2015, after conducting mental age tests and forensic assessments. Further, efforts should be made to place the accused minor in a special home as per their age and the nature of the offence committed, along with rigorous imprisonment with hard labour, shall be given to such a child in conflict with the law so that he has the opportunity to repent for the offence committed by him. The child should also be provided with education in the special home as well.

2. A seventeen-year, eleven month, eight-day, old boy who, fully understands the weight of his actions, takes part in a violent assault, such as terrorism, that claims not one but

multiple lives. Placing him in the same rehabilitative setting as another child who steals food out of desperation fails both reason and justice. Further, a severe punishment under the Juvenile Justice Act, 2015 would not suffice for such a grave offence. There should instead exist a distinct category of special correctional institutions characterised by supervised labour and structured education that serve both punitive and reformative ends.The adult-like intent of the Juvenile would help in facing stronger accountability while still helping the minor receive proper psychological attention.

CONCLUSION

By enacting the Juvenile Justice (Care and Protection of Children) Act, 2015, the main goal, which is rehabilitation, has been overlooked by our country's legislature. Simply lowering the age of juvenility from

18 to 16 years is not a convincing solution. This significant change to the JJA, 2015, followed the tragic Nirbhaya case. We do not argue that a minor involved in a gang-rape should be let off, instead, they should face punishment in a different way. However, reducing the age of juvenility is not the right answer. If a thirteen-year-old commits a crime like rape, along with murder, will we then drop the age of juvenility from 16 to 13? In other countries, the age of criminal responsibility is much lower than compared to India because those countries face higher crime rates. The Juvenile Justice(Care and Protection of Children) Act, 2015, ignored international standards for children's rights and fundamental rights guaranteed by the Constitution of India. When this act was introduced, many NGOs and social workers fought for children's rights and criticised it. Children are the future of our nation, and it's our responsibility to protect their rights and create opportunities for their overall development.

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