Juvenile Justice, Does It Need Review?

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Children have been an exploited class in India, not only on account of age but also on account of the way our economy functions in the informal sector, as also the caste system which discouraged education for a large sections of the community and virtually forced the children into the labour market at a very young age. There has been a strong reform movement which has tried to return to the child its childhood and in the forefront was Shiela Barse who dedicated her entire life to ensure that children were given protection, their rights were safeguarded and society gave them a fair chance to enjoy childhood. The question of children was important enough for inclusion of Article 39, 45 and 47 in Part IV of the Constitution, the Directive Principles of State Policy. Article 39 (f) reads, " The State shall, in particular, direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment". Article 45 makes it the duty of the State to provide for free and compulsory education for children and Article 47 generally calls for raising the level of nutrition, standard of living and health care for all citizens, especially children. Article 24 prohibits the employment of children below the age of fourteen in a factory, a mine or in any hazardous employment. In other words, the Constitution recognises the vulnerability of children and calls for special protection to be given to them by the State. This is very much in keeping with the provisions of the Convention of the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989. It is from this that the Juvenile Justice (Care and Protection) Act, 2000, as amended in 2006, emerged. Basically this Act states that a juvenile, that is, a person below the age of eighteen, cannot be accused of criminality nor, if a juvenile commits an offence, can he be tried in a normal criminal court. He cannot even be arrested or kept under police or judicial custody. A juvenile cannot be described as an offender or criminal but rather, as per the definition given in section 2 (l) of the Juvenile Justice Act, he has to be referred to as "juvenile in conflict with law". Under section 10 of the Act if a juvenile is in conflict with law (which means that he has committed an offence) the juvenile has to be immediately placed under the charge of a special juvenile police unit or a designated officer, or sent to an observation home. The idea is that by not keeping him under normal police or judicial custody the juvenile would not be exposed to known criminals or to any moral, physical or psychological danger.

When a juvenile is accused of an offence the power to inquire into the matter is transferred to the Juvenile Justice Board constituted for a district under section 4 of the Act. If the juvenile is brought before a Magistrate and the Magistrate is of the opinion that he is a juvenile, then the apprehended person shall be transferred to custody of the Juvenile Justice Board, which can take further necessary steps on how to deal with the juvenile. Notwithstanding the nature of the offence the enquiry against the juvenile will be conducted by the Juvenile Justice Board, which may make any order that it deems fit under section 15 of the Act, provided that the maximum period of custody which the Board may order is three years. Under section 19 an order under section 15 will not attract any disqualification which may attach to a conviction under law for the same act by a person who is not a juvenile. The above discussion became necessary because whereas not much attention was hitherto paid to the Juvenile Justice (Care and Protection of Children) Act, a rape took place in a moving bus in Delhi in December 2012 in which a young woman was raped by several young men and then severe internal injuries were inflicted on her which ultimately resulted in her death. This is certainly not the first incident of its kind in India, but because the rape took place in Delhi, the national capital, there was an uproar. Activists of every hue, groups of women, even antisocial elements took to the streets and for four days there was complete chaos and danger of complete breakdown of law and order in Delhi. Advice such as given by Sheila Dixit, then Chief Minister of Delhi, that young women should themselves take appropriate steps to avoid provocation or being in the open at late hours and in lonely localities led to strong condemnation by women's groups because they alleged that government was avoiding its own responsibility and placing the burden of self protection on women themselves. Almost with one voice women's groups were baying for blood, demanding stern action against antisocial elements who do not respect women and even calling for mandatory death penalty for rapists. Almost all of them forgot that under Indian law, regardless of the offence with which a person is charged, he is deemed to be innocent

till proved guilty, he has a legal right to be heard and the law demands that justice be done impartially and in an environment free of any kind of pressure on the court trying the case.

Anyway, government panicked, the law was amended to include death as a possible penalty for rape, the police was activated and suddenly throughout the country we had a spate of convictions in rape cases. The trials were speeded up to an extent where one even began to doubt whether the accused had a fair hearing and judges vied with each other in the matter of the rapidity with which trials were concluded, harsh sentences were handed down and when this happened in the Bombay rape case in which the judge awarded death sentence to some of the accused, it brought a rebuke from Mulayam Singh Yadav who felt that death was uncalled for in a rape case. But what really angered the activists was that, as in the Delhi rape case, because some of the accused were juvenile, they could not be tried for an IPC offence under the provisions of Cr.P.C, they were brought before the Juvenile Justice Board, the maximum period of custody was three years, the adverse order did not carry the taint of conviction and after three years the accused would walk free. The adult accused were sentenced to death, which meant that for the same offence which was committed collectively, some people would die and others escape with a rap on the knuckles. Now it was the turn of the very people who had supported the enactment of the Juvenile Justice Act demanding that for heinous offences juveniles should be treated as adults. Since then the pressure has mounted to bring about a suitable amendment in the Juvenile Justice Act.

Recently the present Minister for Women and Child Development, Maneka Gandhi, has called for a revision of the Act whereby a person above the age of sixteen, considering the heinousness of the offence, could be tried as an adult. This demand seems to be fairly common now in India. Our so called news channels whose programmes are often only shouting matches between contending invitees, had a series of debates on the issue. On one news channel the panelists included three eminent women activists whose forte is the rights of children. In December 2012 even such people supported draconian measures against rapists, but in the programme in question they vehemently opposed any review of the Juvenile Justice Act. These well-heeled, highly educated ladies, actually seemed to be arguing that because many of the juvenile offenders are from deprived homes, their background must be taken into account and if they commit offences they should be treated more as victims of circumstances rather than as aggressive criminals who have done an unlawful act. In other words, a juvenile committing a rape should be treated as wayward rather than a deliberate criminal. One can understand a child from a slum resenting a fat cat kid driving past in a chauffeured limousine and heaving a brickbat or two at the car's windscreen. A deprived child might be tempted into pick pocketing, petty theft or snatching a lady's hand bag. To such people certainly the Juvenile Justice Act must apply and in the course of rehabilitation the deprivation suffered by the child should be attempted to be ameliorated. But here we are talking about rape, murder, dacoity, etc., which do not fall within the definition of "letting off steam". These are acts in which violence is deliberately used against the victim to deprive him and her of dignity, property or even life. These offences are never off the cuff and call for a degree of planning or at least of a specific intention to cause harm. These are acts in which *mens rea*, or criminal intent is involved.

Mens rea means criminal intent or knowledge on the part of law breaker of the unlawfulness of his act. Under Anglo Saxon jurisprudence *mens rea* has to be a vital ingredient of an act to make it criminal. What the Juvenile Justice Act does is to begin with a premise that a juvenile cannot commit an act of criminality because he is not mature enough to have *mens rea*. The law defines juvenile as anyone below the age of eighteen. However, the Chambers Twenty-first Century Dictionary defines juvenile as "young, youthful, childish, immature". The legal definition of juvenile is unambiguous, which means that a person one day short of eighteen years is juvenile and cannot commit a crime, whereas the same person, had he committed the same crime two days later, would be liable to action under the normal law. The dictionary definition of juvenile leaves some flexibility in that whereas age and youth both are necessary ingredients of the state of being juvenile, maturity and immaturity, both of which are mental or psychological factors, are important. As per the legal definition, notwithstanding the fact that the person who is in conflict with law is mature enough to be able to understand the consequences of his deeds and thus meets all the parameters required for having of *mens rea*, he would still be deemed to be juvenile. However, if the person is mentally mature then he or she can certainly distinguish between right and wrong and if he or she deliberately opts for what is wrong, then mens rea should be presumed. That is not possible as the law stands

at present. In many countries a court of law before which a juvenile is brought would have the discretion, after suitable psychological, psychiatric and sociological advice, to determine whether the perpetrator of the offence understands what he has done and, therefore, is fit to stand trial. After all, if a plea of insanity is entered by an adult offender the court may rule that it accepts the plea and, therefore, whereas the accused would be subjected to be indefinite court custody, he cannot be tried and sent to jail, despite the fact that he is not a juvenile. In India, on the other hand, the Juvenile Justice Act arbitrarily prescribes an age limit and anyone below the age of eighteen is deemed to be a juvenile and, therefore, incapable of *mens rea*. Surely this is a situation which calls for some review.

In the Delhi rape case, as also the subsequent rape in Bombay, the groups which committed the rape consisted of both adults and those who were legally juvenile. In physical terms they performed the same deed, which means that they had attained puberty and were capable of committing sexual assault. There is no evidence to prove that both adults and juveniles were not equally enthusiastic about their wrongdoing. How, then, can one presume that the juveniles had no *mens rea* and, therefore, what they did was not a crime? It is to address this anomaly that the Minister for Women and Child Development has suggested that the Juvenile Justice (Care and Protection of Children) Act be revisited. No one is suggesting that the Juvenile Justice Act should be scrapped. It has many good points and certainly in a society in which exploitation of children is rampant we need to emphasise the provisions of the Directive Principles of State Policy. In a country in which a four-year old can be forced to become a rag picker in order to survive, society must immediately take steps to ensure a fair deal for the children. If under the constant goading of Prateep Umsongthan the Thai Government, with the blessings of the King, could launch a massive programme for quality schools in slums, backward areas and the rural hinterland which has transformed Thailand in one round of schooling, India needs to take giant steps in ensuring that no child sleeps hungry, every child goes to school and smiles return to the faces of children who today see no hope for themselves.

The Juvenile Justice Act protects children, who are not born criminals but are forced into petty thieving by social circumstances, who are thus given the special protection of law. But at the same time where those who are legally juvenile but are pubescent commit acts which call for specific violence against an individual, such as murder, dacoity, armed robbery, molestation of women and rape, we need to build into the law a position that in defined serious offences the court should have the authority to determine whether the apprehended person is capable of *mens rea*. If fifteen is taken as the age of puberty, then a court should be able to rule, after suitable psychological, psychiatric and sociological advice, whether the perpetrator of the act is capable of mens rea or not. Perhaps the Act needs amendment so that if a court finds a person above the age of fifteen capable of *mens rea* in the matter of defined serious offences, then the court may order that the juvenile be tried as an adult. However, taking his tender age into account the law may state that such a person cannot be given the death penalty and that the maximum period of imprisonment shall be fifteen years, with the court reviewing the situation after half the sentence has been served so that if there is sufficient evidence of penitence and reformation then the court may suitably reduce the term of punishment. What is more, the institution in which the juvenile is detained should be specially designated and designed for giving education and skill development training to the juvenile so that on release the person can earn a decent living. The place of detention should isolate the juvenile from hardened criminals and as far as possible should not be a part of the normal prison system. These provisions would provide adequate protection to juveniles whilst ensuring that there is a deterrent effect of punishment.

Serious papers should also have lighter moments so that they do not leave behind a macabre or ghoulish aftertaste. When Fredrick the Great of Prussia was the young Crown Prince he was spoilt and frail. When he joined school his personal tutor advised the class teacher, “When His Royal Highness is naughty punish the child sitting next to him. That will have a deterrent effect”. See how important is deterrence? We need to deter heinous crime, so let us not brush aside Maneka’s suggestion.

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