

## EDITORIALS

# A million little pieces of broken trust

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In April 2015, the Union Cabinet approved the Juvenile Justice (Care and Protection of Children) Bill, 2014(1), which proposes to bring about regressive changes in the law, that would not only be unconstitutional but also unethical. In May 2015, the Ministry of Women and Child Development introduced the Bill in the Lok Sabha, where it was passed. If the Rajya Sabha, passes the Bill and the President gives his assent to it, the youth of this country will be harmed in a manner that could break the very fabric of the nation.

The Bill proposes that *"in case a heinous crime has been committed by a person between the ages of 16 and 18 years, it will be examined by the Juvenile Justice Board to assess if the crime was committed as a 'child' or as an 'adult'."* The Juvenile Justice Board shall consist of a magistrate and two social workers (from two reputed NGOs, one of the social workers being a woman) with experience in working with children and/or a child psychologist(2:Sec 5:2). Depending on the assessment, the offender will be tried either according to the juvenile system by the Juvenile Justice Board, or under the criminal system by the Children's Court. In the latter case, if the child is found guilty, he/she shall be punished as an adult (except that he/she will not be awarded the life sentence or death penalty)(2:Sec 18-22).

The Bill was proposed after the Delhi gang rape case, in which one of the accused was a juvenile. Similarly, juveniles were involved in the Shakti Mills rape case and other "heinous crimes" (offences punishable with seven years of imprisonment or more). Thus, there is an increasing misguided view that juveniles who commit heinous crimes are being "let off" under the juvenile justice system and should be severely punished. It is unfortunate that even in this day and age, people believe that punishment would act as a deterrent and would also give some relief to the victim of the crime. Studies on behavioural science show that harsh punishment does not have a deterrent effect (3). On the contrary, they suggest that potential offenders are impulsive, take risks, and are less inclined than others to think about the consequences of their conduct. When they commit crimes in a group, the threat of a potential jail term in the future does not deter them, and direct peer pressure and peer influence is a factor that pushes adolescents into committing crimes and making choices. The government failed to recognise that the juveniles involved in these cases did not act independently, and may have acted under the influence of "social conformity" which makes them adapt their behaviour to that of their peers and adults (4). It is precisely because they are at such a vulnerable age of influence that adolescents ought not to be pushed into the never-forgiving criminal justice system; they should, instead, be given a chance under the reformative juvenile justice system.

### Do not treat juvenile offenders as criminals

Ever since the Juvenile Justice Bill, 2014 has been introduced, the proposed changes have been opposed by organisations and people working with children<sup>1</sup>. Statistics have been provided showing that crimes involving juveniles constitute 1.2% of the total number of crimes in India (5, 6). Supreme Court judgments <sup>2</sup> (7, 8) upholding the treatment of persons as juveniles until the age of 18 years, on the basis of sound principles recognised in the Indian Constitution<sup>3</sup>, have been cited to oppose the change in the law on juvenile justice, as have international covenants and scientific justifications regarding the physical and psychological development of the child (9).

In fact, the Committee on the Rights of the Child has emphatically recommended in its General Comment 10 that "those States parties which limit the applicability of their juvenile justice rules to children under the age of 16 (or lower) years, or 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. The Committee also noted with appreciation that some States parties allow for the application of the rules and regulations of juvenile justice to persons aged 18 and older, usually till the age of 21, either as a general rule or by way of exception"(10). Some States have changed their laws to keep all children below 18 years of age under the juvenile justice system.

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## Global move towards reformative youth justice systems

In the USA, the state of Connecticut has increased the age of juvenility to 18 years and other states like Illinois, Missouri, North Carolina and Wisconsin, which had included children between the ages of 16 and 18 years in the adult system of criminal justice, are considering implementing the same measure (11). Australia has taken steps to keep as many youth as possible away from the formal justice system, put juveniles into rehabilitation programmes, and establish transitional support services for juveniles released from custody (12). Though the Youth Protection Act, 1994 in Belgium provided that serious offenders be tried in the criminal courts; in 2002 Belgium passed legislation which prohibited placing juveniles in adult prisons (13). The authorities in these countries have regretted pushing children below 18 years into the adult criminal system as it only pushes the child to a state of no return from the circle of criminality. The social integration of juvenile offenders is vital to the prevention of recidivism, and some states have increased funding for community-based programmes as an alternative to placement in institutions (11). A Human Rights Watch report mentions that international law recognises that children are fundamentally different from adults and should receive special protection during all proceedings. It goes on to say that children are uniquely capable of rehabilitation (14). The aim is to develop different methods of restorative justice that should make the youth take responsibility. It is also felt that collaborative efforts between juvenile offenders, their families, the victims, the community and government services have a constructive effect.

Unfortunately, the government in India failed to recognise the experiences of other countries. The government set aside the recommendations of the international Committee on the Rights of the Child, did not consider the well-reasoned judgments of the Supreme Court and the detailed report of the Department-related Parliamentary Standing Committee on Human Resource Development (15), which opposes the move to bring children between the ages of 16 and 18 years within the criminal system as unconstitutional, discriminatory and one that would be a psychological drain on the child.

## Psychological assessment and ethical issues

A key question that arises is: can the age of 16–18 years be the determining factor in deciding whether a juvenile charged with a serious crime be treated as an adult? Are psychologists and social scientists, who are supposed to be part of the juvenile justice board, in a position to assess whether the crime was committed as a child or as an adult? There are so many factors that may influence children to commit a crime, including socio-economic status, ethnicity, IQ, and cultural, intellectual and social disadvantages. Childhood experiences of rejection and abuse, living in a patriarchal family or broken family, complex family relationships and peer influence are other important factors, all of which affect the adolescent's decision-making and level of maturity, rendering him/her unable to make appropriate assessments when it comes to risk, risky behaviour, responsibility and understanding the consequences of the crime (4). Can any of these factors and influences be linked to age? It is different for each person and depends on a host of factors and the environment that children live in. It is not a matter that can be determined so simply, with one stroke of the gavel.

Under the Bill, psychologists are expected to predict which of the children of 16–18 years of age, charged with (and not yet found guilty of) a crime are dangerous, have committed a crime as an adult, and will be delinquent in the future. How will such an assessment be made? What is the degree of reliability and validity of the assessments or tests, if any, that the child is made to undergo, and the interpretation thereof? What are the factors that the juvenile board will consider? Is it just the cognitive ability of the adolescent to determine whether he/she committed a crime as an adult? What about the psychosocial variables? The Bill contains no provision that would protect the child's rights when an assessment is being made to determine his/her "calibre" as an adult or a juvenile. Further, does every district of the country have enough qualified psychologists who would be capable of making such an assessment? The Parliamentary Standing Committee has already pointed out that "there is a severe shortage of competent psychologists, psychosocial workers and other experts and this will adversely affect the quality of the inquiry and timely disposal of cases." (15)

Privacy and confidentiality of the client lie at the heart of psychological practice. Any disclosure ought to be made only after obtaining the consent of the child and his/her legal representatives (16). How would the presumption of innocence and the child's right against self-incrimination and right to remain silent be ensured? Will parental autonomy to give consent be respected or will the assessment be coercive? Young children are unable to comprehend legal principles and universality of rights. Even for forensic evaluation, clinical psychologists are required to provide for a comprehensive informed consent or disclosure prior to evaluation (16). Under the ethical code, clinical psychologists should ensure that the examinee is fully aware of the limits of confidentiality and privilege, and whether he/she has a right to refuse to be evaluated (16). The Bill does not lay down the role of forensic examiners' in educating the juvenile justice board and the courts on the development of the child and his/her competency to understand court and trial procedures. Would forensic psychologists assist the police and use lie detection (polygraph) tests or narco-analysis on children? Would the child be allowed to have his lawyer present during the assessment made by the psychologist? How would the psychologists carrying out such an evaluation maintain their integrity and not break the confidence of the child? There would be a danger of the children being labelled, stigmatised and discriminated against. Would it be ethical for a psychologist to pass a judgment that pushes a child into the criminal legal system? Labelling children

thus and pushing them into a system not meant for them is as good as assuming that they are guilty and is similar to sentencing them. These ethical problems are compounded by the high degree of discretionary powers granted to the juvenile justice board. How would one ensure that the procedure is not arbitrary?

### **Can the severity of the crime determine maturity?**

N Dickon Reppucci asked a very pertinent question: "Do children's crimes make them adults?" (4). According to him, what needs to be assessed is "risk perception", which is different in the case of adults and adolescents. Adults calculate and perceive of risks differently, and look for opportunities for gain, unlike adolescents (4). Even though adolescents may know right from wrong, medical science also tells us that the adolescent's ability to control his/her impulses is less developed than that of adults (14), and this is among the factors that make adolescents more prone to take risks. Adolescence is a phase of life characterised by breaking rules, unlike adulthood, when a person ordinarily begins to conform and adhere to the rules. Parliamentarians have not even tried to understand these aspects of adolescents.

### **Can we trust the system with juvenile offenders?**

Would pushing children into an adult system not permanently scar and damage them? According to a report in the *New York Times*, "The practice of confining young people to adult jails and prisons is both counterproductive and inhumane. Adolescents who are locked up with adults are more likely to be raped, battered or driven to suicide than young people who are handled through the juvenile justice system. After the trauma of doing hard, adult time, young people often return home as damaged individuals who are more likely to commit violent crimes and end up back inside." (17). The victims of crimes committed by children deserve justice, but children found guilty can be held accountable without giving them harsh treatment, by instead putting them through a process of reformation. It may be the duty of the police and officers working with children in conflict with the law to prevent crime. However, it is also their duty not to harm these children as they are not fully developed individuals when they are taken into the custody of the police or the system. It is well known that police atrocities are common. With little or no legal representation, and given the judgmental outlook of the police and magistrates, who should these children, who are in need of direction, trust?

We simply cannot put the burden of a crippled, judgmental criminal justice system on the young shoulders of our adolescents. No legal or social purpose is served by meting out the same level of punishment to adolescents of 16–18 years of age as to adults. The policy with regard to the criminal behaviour of adolescents cannot and should not be in conflict with the other policies and programmes for the youth. The differences between adolescents and adults will continue to exist and will not disappear because an adolescent commits a heinous crime (4). If the Juvenile Justice Bill is passed by Parliament, it would amount to letting down the children who have already lost faith; it would be a dereliction of duty on the part of the government; and it would be a failure on our part as citizens.

The current Juvenile Justice Act, 2000 is a good law. It may be revisited, and some sections amended, to at most keep a child in the said age group in the juvenile facility until he/she shows signs of reformation. The maximum term of three years may be extended, depending on the need of the child as regards being helped into adulthood. If the current Bill were to become law, it would mean we were pushing children out of a neglected and understaffed juvenile system into a harmful criminal one. It is time to re-build the lost trust of millions of children who live in adversarial situations and not push them, yet again, into a situation of no return.

#### **Notes:**

- <sup>1</sup> Organisations such as ProChild Coalition, Mumbai Working Group on Juvenile Justice, Centre for Child and the Law, National Law School of India University, Bangalore, and many others have written letters to Members of Parliament, protested and voiced their opinions against the proposed changes in the law on Juvenile Justice. See: <http://www.noprisonforchildren.com/>
- <sup>2</sup> The Supreme Court has held that the Juvenile Justice (Care and Protection of Children) Act, 2000, is a beneficial legislation and is in conformity with India's international commitment and the Convention of the Rights of the Child. It was held that the age of criminal responsibility for juveniles should not be fixed at too low an age level, keeping in mind the emotional, mental and intellectual maturity of children; also that the essence of the Act is restorative and not retributive and aims to reintegrate children with criminal propensities into mainstream society, rather than to allow them to develop as hardened criminals.
- <sup>3</sup> Article 20 guarantees protection in respect of conviction of offences, where no person shall be convicted of an offence except in violation of law; shall not be prosecuted and punished for the same offence more than once; and shall not be compelled to be a witness against himself. Article 21 offers protection of life and personal liberty, in which no person shall be deprived of his life or personal liberty except according to procedures established by law; and Article 22 guarantees protection against arrest and detention in certain cases.

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## Trust, trustworthiness and health

ANGUS DAWSON

Trust is an essential component of good healthcare. If patients trust their physicians, then the relationship between them can be a richer and more meaningful one. The patient is more likely to feel confident and able to disclose symptoms, helping diagnosis and future care. If public health and community workers are trusted, not only is it likely that their work will be easier, in that their actions will be respected and accepted, but their advice will also be sought spontaneously. Trust, can, therefore, be thought of as something that is of benefit to all: healthcare workers, individuals and communities. Trust is, generally, something to be prized and we need to do anything we can to strengthen it.

However, trust can also be misplaced (1) Individuals may be trusted because of their social position and role, rather than because they necessarily deserve it. A doctor's advice may be followed, because the patient trusts her/him, even though the doctor stands to gain personally from the transaction. For example, a corrupt physician may refer a patient for an unnecessary test, knowing that the patient's trust will lead them to go for that procedure. In this case the intervention is not because it is beneficial to the patient, but because the doctor will receive a payment from a colleague at the clinic as a reward for the referral. Healthcare workers need to be aware of the potential problem of misplaced trust, and guard against it in all their actions. Those with responsibility for the education and the registration of healthcare workers need to ensure that healthcare workers are aware of the dangers of such trust and take action where trust is abused. Another example of possible abuse of trust is in certain cases of conflict of interest. For example, physicians working in occupational health may be perceived by employees as acting in their interests as patients, as that is the way that they understand the nature of being a doctor. However, even though the physicians may be aware of this, they may have chosen to put the interests of the company above those of the employees, dismissing symptoms of an occupational disease or even suggesting an alternative diagnosis.

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