



# CRIMES BY CHILDREN IN CONFLICT WITH THE LAW— HEINOUSNESS, ACCEPTABILITY, AND AGE OF ADULTHOOD: A COMPREHENSIVE CRITIQUE OF THE PRESENT JUVENILE JUSTICE SYSTEM

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**Abstract** The underlying nature of the Juvenile Justice system has undergone a substantial change with the adoption of the Juvenile Justice (Care and Protection of Children) Act, 2015. The new Act has widespread implications on the manner in which children in conflict with the law are understood and treated before the law. Apart from theoretical shifts, provisions to try certain children in conflict with the law as adults have been adopted. Moreover, the Act is in conflict with India's international obligations, and several implementation-related issues still persist. In light of this, we propose several changes, both at the theoretical and the practical levels, to substantially reform the juvenile justice system as it stands today, such that the best interests of the children are secured.

## I. INTRODUCTION

In India, juvenile justice has become an area of vigorous public debate and legislative action. Following the shocking 2012 *Nirbhaya* rape case, wherein one of the accused was a child in conflict with the law,<sup>1</sup> there was renewed impetus to completely revamp the system. This was the result of many important developments, which resulted in the popular notion that there has been

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<sup>1</sup> The Hindu Net Desk, 'The 2012 Delhi Gang-Rape Case, A timeline' *The Hindu* (Mumbai, 9 July 2018) <<https://www.thehindu.com/news/national/the-2012-delhi-gang-rape-case-a-timeline/article24371216.ece>> accessed 18 October 2019.

a stark increase in the crimes committed by children in conflict with the law ('CCL').<sup>2</sup> This led to the idea that there is a need to 'get tough' on heinous crimes committed by CCL.<sup>3</sup> It was felt that the erstwhile Juvenile Justice Act, 2000 ('Old Act') was incapable of dealing with issues relating to youth crime.<sup>4</sup> Due to these factors, the Old Act was repealed and the Juvenile Justice Act, 2015<sup>5</sup> ('New Act') was enacted. The New Act has made comprehensive changes to the system, principally changing its underlying objectives from restorative to retributive.

While the New Act has been hailed as a long overdue enactment that is equipped to properly deal with juvenile crime, it suffers from several infirmities. At the heart of these issues lies the shift in the objective from a restorative and rehabilitative model to a retributive model. This paper seeks to comprehensively critique the new juvenile justice system in so far as it deals with CCL.<sup>6</sup> Section II of this paper seeks to explore the theoretical underpinnings of the juvenile justice system and identifies several infirmities with the New Act. Section III of this paper suggests several ways in which the present system can be reformed.

## II. SHORTCOMINGS OF THE PRESENT JUVENILE JUSTICE SYSTEM

The issues with the present system exist at theoretical levels as well as with ground-level implementation. Part A of this section will explore the competing theories that guide the establishment of a juvenile justice system. Part B will highlight key issues with shifting to a retributive model of juvenile justice. Part C will discuss why a rehabilitative and restorative model is the most appropriate system. Finally, Part D will analyse the New Act in light of the foregoing discussion regarding juvenile justice and highlight the aspects in which it falls short.

### A. Competing Theories of Justice

Social control is one of the primary goals of any system of criminal law.<sup>7</sup> Criminal law seeks to minimise crime in society and punish offenders. To achieve this, there are two main models – the retributive model and the

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<sup>2</sup> KP Asha Mukundan, 'The Real Story Behind Juvenile Crime Data' (2015) 50 (25) *Economic and Political Weekly* 31.

<sup>3</sup> Deepak Singh, 'An Analysis of Section 15 of the Juvenile Justice Act, 2015' (2019) 8 (2) *Christ University Law Journal* 2.

<sup>4</sup> *ibid.*

<sup>5</sup> The Juvenile Justice (Care and Protection of Children) Act 2015.

<sup>6</sup> The Juvenile Justice (Care and Protection of Children) Act 2015, s 2(13).

<sup>7</sup> Eric L Jensen and Jorgen Jepsen (eds), *Juvenile Law Violators, Human Rights and Development of New Juvenile Justice Systems* (Hart Publishing 2006) 3.

rehabilitative model. The model of criminal law followed in India is largely a retributive model.<sup>8</sup> At its core, this model is based on the theory that punishment should be meted out to those who have committed a wrongful act and are responsible for it.<sup>9</sup> In doing so, considerations, such as proportionality and reasonableness, play an important role in the determination of the appropriate punishment.<sup>10</sup> The retributive model has been described to be *backward-looking* as it determines the appropriate punishment for a crime based on an act that has already been committed.<sup>11</sup>

The aim of any criminal justice model is closely linked to the consequentialist idea of deterrence.<sup>12</sup> Deterrence operates on two levels – specific deterrence and general deterrence. Specific deterrence means that the individual who has committed an offence will be prevented from committing further offences by being taken into custody.<sup>13</sup> In contrast, general deterrence means that the stringent punishment meted out to individuals as a consequence of committing offences would prevent others from committing such acts due to fear of similar consequences.<sup>14</sup>

Unlike the retributive model, the rehabilitative model looks at a particular offence in context of the conditions in which it is committed.<sup>15</sup> In essence, this model treats crime as a manifestation of antisocial behaviour due to the inability of the society to properly integrate its members.<sup>16</sup> Therefore, the background of the offenders and their status within society are important considerations when determining appropriate sanctions. Any punishment that is meted out under this model has the ultimate objective of re-socialising an individual. Due to its focus on the future of the offender and the impact of punishment in resocialisation, the rehabilitative model has often been termed as *forward-looking*.<sup>17</sup>

Closely linked to this is the idea of restorative justice, which suggests that the ultimate aim of any sanction is to meaningfully reintegrate a person back

<sup>8</sup> Neetika Vishwanath, 'Criminal Justice and the Death Penalty in India: An Opinion Study with 60 Former Supreme Court Judges' (*Project 39A*, 14 February 2018) <<https://www.project39a.com/blog/2018/5/7/the-union-government-of-india-introduces-the-death-penalty-for-child-rape-mxhla>> accessed 29 March 2020.

<sup>9</sup> David O Brink, 'Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes' (2004) 82 *Texas Law Review* 1555, 1557-1558.

<sup>10</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (JH Burns and HLA Hart eds, Oxford University Press 1996) 143-74.

<sup>11</sup> Brink (n 9) 13.

<sup>12</sup> *ibid.*

<sup>13</sup> William C Bailey, 'Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment' (1998) 36(4) *Criminology* 711.

<sup>14</sup> S Singer and D McDowall, 'Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law' (1988) 22 (3) *Law & Society Review* 521.

<sup>15</sup> Brink (n 9) 12.

<sup>16</sup> *ibid.*

<sup>17</sup> Brink (n 9) 13.

into society through resolution between the offender and the victim, under the guidance of a facilitator.<sup>18</sup> In doing so, the rights of the victim need to be adequately protected, and the State must endeavour to include them in the process of restoration.<sup>19</sup> The restorative process must also account for power imbalances, such as minority.<sup>20</sup> The underlying rationale for this model is that crime causes harm which can be actively addressed by those who have propagated it and those who have suffered from it.<sup>21</sup>

Given that the juvenile justice system deals with children, any such system that seeks to be effective has to balance these competing theories of justice. As a result, two important considerations become relevant. The first consideration is based on the idea that children, that is, those who have not attained the age of majority, are more amenable to reform.<sup>22</sup> This is reflected in our own laws. According to our criminal law, there is a rebuttable presumption in favour of the lack of criminal capacity of children between the age of seven and twelve years.<sup>23</sup> However, this is not in compliance with international standards, which set the minimum age of criminal responsibility at fourteen years.<sup>24</sup> Further, the default rule under our juvenile justice system is to treat anyone below the age of eighteen differently from adults. Consequently, juvenile justice should follow a rehabilitative model within which the principal aim must be to restore the child back to society. The other consideration is that of public perception towards juvenile justice. Trends suggest that factors such as media influence and popular opinion often necessitate the need to take a strict approach to juvenile justice.<sup>25</sup> This consideration requires a retributive model wherein CCL are adequately punished according to the masses, for crimes of a particularly serious nature. Juvenile justice systems across the world have the task of balancing these competing approaches to juvenile justice such that the best interests of the child are preserved. The following two parts of this section will argue that the balance should be struck in favour of a rehabilitative and restorative model.

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<sup>18</sup> *Salil Bali v Union of India* (2013) 7 SCC 705; Council of Europe Committee of Ministers, *Recommendation CM/Rec (2018) 8 Concerning Restorative Justice in Criminal Matters* (CM/Rec 2018, 8) ('The Recommendation').

<sup>19</sup> United Nations Economic and Social Council, 'Basic Principles on the Use of Restorative Justice in Criminal Matters' (2000) ECOSOC Res 2000/14, UN Doc E/2000/INF/2/Add.2.

<sup>20</sup> The Recommendation (n 18).

<sup>21</sup> Howard Zehr, *The Little Book of Restorative Justice* (2nd edn, Good Books 2015).

<sup>22</sup> Brink (n 9) 6.

<sup>23</sup> The Indian Penal Code 1860, s 83.

<sup>24</sup> United Nations Committee on the Rights of the Child, 'General Comment No 24 (201x) replacing General Comment No 10 (2007) - Children's Rights in Juvenile Justice' CRC/C/GC/24, 9 ('UN General Comment').

<sup>25</sup> Mukundan (n 2) 31-2.

## B. Issues with Shifting to a Retributive Model

The shift to the retributive model in India is not an isolated phenomenon. Several countries across the world have experimented with a retribution oriented approach to juvenile justice.<sup>26</sup> For example, in the 1970s and 1980s, the United States of America ('USA') experienced a near identical shift towards a retributive model due to similar reasons such as public perception and skewed reporting by the media.<sup>27</sup> The USA experience under a retributive model, in general terms, has been labelled as the 'get tough'<sup>28</sup> approach to youth crime. Recent events in India, such as the *Nirbhaya* rape case and the sensationalisation of youth crime by the media,<sup>29</sup> have fuelled similar sentiments, and as a result, the New Act has more stringent provisions. For example, the New Act creates situations wherein a CCL can be tried as an adult.<sup>30</sup> However, a shift to the retributive model poses several concerns.

The first and foremost criticism of a shift to the retributive model is the manner in which it defines maturity. Under the present provisions, the Juvenile Justice Board ('JJB') may, based on a preliminary assessment, decide to try the accused as an adult.<sup>31</sup> However, empirical research in child psychology suggests that there is no clear manner in which the level of maturity of a CCL can be clearly determined.<sup>32</sup> Therefore, at the outset, there is no scientific basis on which the JJB can undertake its preliminary assessment. This necessarily means that the notion of trying CCL as adults is based on the incorrect premise that there are reliable ways of assessing the maturity of a CCL. This argument is discussed in greater detail in Section II of the paper.

Under the retributive model, an offender is punished to the extent he is responsible for the commission of the offence. Such responsibility must necessarily take into account the offender's capacity to clearly understand and appreciate the consequences of his actions.<sup>33</sup> This must be supplemented by the ability to clearly control one's emotions and actions based on one's normative knowledge of right and wrong.<sup>34</sup> Research into this area of psychology has clearly shown that children below the age of eighteen do not possess the same

<sup>26</sup> Jensen and Jepsen (n 7) (African Nations: 67, Scandinavian Nations: 163, and USA: 414).

<sup>27</sup> Tamara L Reno, 'The Rebuttable Presumption for Serious Juvenile Crimes: An Alternative to Determinate Sentencing in Texas' (1995) 26 Texas Tech Law Review 1424.

<sup>28</sup> *ibid.*

<sup>29</sup> Department-related Parliamentary Standing Committee on Human Resource Development, *The Juvenile Justice (Care and Protection of Children) Bill, 2014* (RS 2015, 264) 16 ('Rajya Sabha Report').

<sup>30</sup> The Juvenile Justice (Care and Protection of Children) Act 2015, s 15.

<sup>31</sup> *ibid.*

<sup>32</sup> Rajya Sabha Report (n 29) 21; Centre for Child and the Law, 'Critique of the Juvenile Justice (Care and Protection of Children) Bill, 2014' (6 May 2015) 22 ('CCL-NLS Report').

<sup>33</sup> Brink (n 9) 16.

<sup>34</sup> *ibid.*

ability to control their impulses that adults do.<sup>35</sup> Even in cases where children have formed the same cognitive abilities as adults, they are unable to completely understand the full consequences of their actions, and are susceptible to taking risks.<sup>36</sup> They lack the experience that adults have and do not share the same social and emotional maturity.<sup>37</sup> Moreover, they are more likely to experiment in a manner that may be criminal.<sup>38</sup> However, this does not mean that lack of experience by itself is a defence. This is relevant because these children do not have the requisite opportunities to gain these experiences that distinguish them from adults. This has been primarily attributed to the fact that the ability to contextualise decisions in the context of the larger picture and the ability to make decisions based on such considerations continues to develop until the age of nineteen.<sup>39</sup> Lastly, studies have shown that the impact of the same punishment can be disproportionately high for young offenders, as compared to adults.<sup>40</sup> Due to all of these reasons, even within the retributive model, CCL are less culpable for their acts due to their inability to fully understand and appreciate the consequences of their actions. Therefore, they do not share the same degree of responsibility that adults would for the same act.

Experiments with the retributive models in various jurisdictions have shown that there is no real deterrent value in making the shift. Data suggest that a shift to a retributive model does not have any real impact on reducing crimes rates among CCL.<sup>41</sup> Similarly, there has been no real impact in reducing the rates of recidivism.<sup>42</sup> To the contrary, it has been observed over a long period of time that over-institutionalisation, an inevitable consequence of a more penal retributive system, has proved to be counterproductive. Youths who, due to their sentences, have come in contact with harsh environments are much less likely to be properly reformed or restored to society.<sup>43</sup> This is so because the adversarial system coupled with the environment of the facilities where they serve their sentences creates an atmosphere that is not conducive to reform.<sup>44</sup> Further, those youths who are treated as adults within the criminal system are

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<sup>35</sup> Peter Arenella, 'Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability' (1992) 39 (6) *UCLA Law Review* 1511, 1614.

<sup>36</sup> Andrew Von Hirsch, 'Proportionate Sentences for Juveniles: How Different than for Adults?' (2001) 3 (2) *Punishment & Society* 221.

<sup>37</sup> *Rajya Sabha Report* (n 29) 21; *CCL-NLS Report* (n 32).

<sup>38</sup> Von Hirsch (n 36).

<sup>39</sup> Elizabeth Cauffman and Laurence Steinberg, '(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults' (2000) 18 *Behavioral Sciences & the Law* 741, 759.

<sup>40</sup> Von Hirsch (n 36).

<sup>41</sup> Josine Junger-Tas and Frieder Dünkel (eds), *Reforming Juvenile Justice* (Springer 2009) 21.

<sup>42</sup> Mukundan (n 2) 34.

<sup>43</sup> JA Fagan, A Kupchik, and A Liberman, 'The Comparative Impacts of Juvenile versus Criminal Court Sanctions on Recidivism among Adolescent Felony Offenders: A Replication and Extension' (Final Technical Report submitted to Office of Justice Programs, US Department of Justice, Washington, DC 2003).

<sup>44</sup> *ibid.*

much more susceptible to recidivism.<sup>45</sup> On the other hand, several countries that have experimented with community-based solutions having diversion and minimum institutionalisation as the principal aim, have seen positive outcomes as far as rehabilitation is concerned. This is explored in Section II of the paper. Naturally, the success of such initiatives depends upon the nature of the crime and the scope of reform of the offender, and a balance must be struck in this regard between the competing objectives of juvenile justice. It must be noted that the New Act continues to acknowledge that all of the provisions set out therein are to protect the best interests of the child.<sup>46</sup> This means that restoration, rehabilitation, and re-integration must form the primary objectives of the system.<sup>47</sup> The importance of these principles is also echoed in the United Nations Conventions on the Rights of the Child ('CRC').<sup>48</sup> A retributive system, however, detracts from this ideal. Therefore, the next part of this section will argue that rehabilitation should be the primary objective of the juvenile justice system in India.

### C. Why do we Need a Rehabilitative Model?

The notion of a rehabilitative model stems from the paternalistic role of a State, which is based on the *parens patriae* doctrine.<sup>49</sup> The role of the State is to act as parent to the child<sup>50</sup> who needs to be rehabilitated and all of its actions must be in the best interest of the child. This doctrine is also similar to the idea of the welfare state model that India followed.<sup>51</sup> However, the same has been displaced by a rights-based approach to juvenile justice, which emphasises on the agency of CCL.<sup>52</sup> This comes in the wake of the CRC, and accordingly, it ensures that children have legally enforceable rights that they can assert when accused of a crime.<sup>53</sup> Therefore, these rights put the State under a positive obligation to give proper effect to them. Further, the State must promote to develop the fullest potential of its children and all of its actions must be tailored in a manner in which ensures that CCL are reformed and restored back to society. These objectives are echoed in India's domestic legislations as well as its international commitments.

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<sup>45</sup> *ibid.*

<sup>46</sup> The Juvenile Justice (Care and Protection of Children) Act 2015, Object and Purpose.

<sup>47</sup> Rajya Sabha Report (n 29) 33; UN General Comment (n 24).

<sup>48</sup> Convention on the Rights of the Child (adopted 30 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 3.

<sup>49</sup> Jensen and Jepsen (n 7) 2.

<sup>50</sup> *ibid.*

<sup>51</sup> *STO v Ajit Mills Ltd* (1977) 4 SCC 98, 117; *Nagaland Senior Government Employees Welfare Association & Ors v State of Nagaland & Ors* (2010) 7 SCC 643, 36.

<sup>52</sup> Paromita Shastri and Enakshi Ganguly Thukral, *Blind Alley: Juvenile Justice in India* (HAQ Centre for Child Rights 2015) 7.

<sup>53</sup> Ved Kumari, *The Juvenile Justice System in India: From Welfare to Rights* (2nd edn, Oxford University Press 2010) 75.

The object and purpose of the New Act is to promote the best interests of the child.<sup>54</sup> In making any determination, the JJB must strictly ensure that all its measures are in furtherance of the reformation and the eventual rehabilitation of CCL. The requirement of following a rehabilitative model is also echoed in India's international commitments. India has ratified the CRC, and the same is acknowledged in the New Act.<sup>55</sup> The CRC is a comprehensive international instrument that is in the nature of a human rights treaty. It covers all aspects of the lives of a child and requires all its signatories to ensure that their domestic legislations are brought in line with the requirements under the CRC. The CRC requires that States shall take all the appropriate steps necessary to promote the well being of a child and reintegrate them back into society.<sup>56</sup> Imprisonment and detention of a child shall only be used as a matter of last resort and for the shortest period of time.<sup>57</sup> Further, there is an obligation to deal with children, as far as possible, without resorting to judicial mechanisms.<sup>58</sup> There have been instances where the Supreme Court of India, in its consideration of juvenile justice, has directly applied the CRC.<sup>59</sup> On a thorough appreciation of the objectives of our own domestic laws and international obligations, it is abundantly clear that the juvenile justice system in our country must necessarily be based on the rehabilitative model.

A rights-based model widens the scope of the manner in which juvenile justice can be approached. It opens the door to several informal mechanisms that can be used in place of the formal judicial process. Experience and research indicate that community-based solutions prove to be highly effective in reforming CCL.<sup>60</sup> The approach to developing such solutions can benefit from a multi-disciplinary approach as well. Community-based informal mechanisms offer a scope of flexibility and innovation that is simply absent within the confines of the formal judicial process. For example, solutions can include participation from a wide-range of people, including social workers with expertise in the field and trained child psychologists and counsellors, who can effectively contribute to the mental well being and reformation of the child.<sup>61</sup> Research into indicators of youth crime suggests that the social, economic, and familial

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<sup>54</sup> Rajya Sabha Report (n 29) 29.

<sup>55</sup> CRC, art 3; The Juvenile Justice (Care and Protection of Children) Act 2015, Object and Purpose.

<sup>56</sup> CRC, art 39.

<sup>57</sup> CRC, art 37.

<sup>58</sup> CRC, art 40.

<sup>59</sup> UN Committee on the Rights of the Child, 'Concluding Observations on the Combined Third and Fourth Periodic Reports of India' (7 July 2014) CRC/C/IND/CO/3-4 ('UN Committee') 2-3.

<sup>60</sup> Jensen and Jepsen (n 7) 43.

<sup>61</sup> Deepshikha Agarwal, 'Juvenile Delinquency in India- Latest Trends and Entailing Amendments in Juvenile Justice Act' (2018) 3 (3) International Journal of Social Sciences 1365, 1367-69.

backgrounds of CCL are important factors that affect delinquent behaviour.<sup>62</sup> Thus, an added advantage of following an interdisciplinary approach is that the informal mechanisms can make use of an entire spectrum of the child's background and history to devise specific modes in which reformation and rehabilitation can be approached on a case-by-case basis. All of these taken together would provide impetus for innovative models, such as the Polish model of positive general prevention,<sup>63</sup> which combines the retributive and rehabilitative purposes of punishment, and community-based solutions, which have found great success in countries like Nepal and Malawi.<sup>64</sup>

#### **D. Flaws in the Present Juvenile Justice System**

The shift of India's juvenile justice system towards a retributive model is fraught with problems. The most effective manner of acting in the child's best interests can only be achieved through a rehabilitative model. In light of the foregoing argument, this part of the section will point out the many flaws that exist in our present model of juvenile justice.

*First*, the very idea that there is an alarming rate at which CCL are committing crimes is fallacious. There are two discrepancies here: (i) the collected data does not show that the juvenile crime is high enough for us to consider a shift to a retributive model, and (ii) the collected data is itself fraught with irregularities.<sup>65</sup> In the 264<sup>th</sup> report of the Department-related Parliament Standing Committee on Human Resource Development of the Rajya Sabha, it has been clearly acknowledged that there is a mismatch between the popular public perception of juvenile crime and the actual position.<sup>66</sup> This is majorly influenced by sensational and irresponsible reporting by the media and misguided notions regarding the frequency of heinous crimes committed by CCL. The data, collected in 2015, suggests that only 1.2% of reported crimes are committed by CCL, which is exceedingly low when compared to global trends of juvenile crime.<sup>67</sup> Out of these, heinous crimes only form a miniscule number, and are often sexual crimes where consensual sexual activities between CCL are passed off as offences.<sup>68</sup> From 2016 to 2018, crimes com-

<sup>62</sup> Archit Gupta and others, 'Sociodemographic Characteristics and Aggression Quotient Among Children in Conflict with the Law in India: A Case-Control study' (2015) 28 (4) *The National Medical Journal of India* 174.

<sup>63</sup> Jensen and Jepsen (n 7) 157 (The Juvenile Justice System in Poland).

<sup>64</sup> Jensen and Jepsen (n 7) 39-50 (Support for the Implementation of Humane Responses to Children in Conflict with the Law in Danish Institute of Human Rights Partner Countries).

<sup>65</sup> An objective threshold for the shift cannot be established. However, we have relied on global statistics to provide a comparative perspective. Further, we have relied on the specific classifications between such crimes to show that the kind of stringent measures that the New Act calls for cannot be justified purely on popular sentiment alone.

<sup>66</sup> Rajya Sabha Report (n 29) 10, 12-13.

<sup>67</sup> Rajya Sabha Report (n 29) 16.

<sup>68</sup> *ibid.*

mitted by CCL declined in metropolitan cities<sup>69</sup> as well as in States and Union territories.<sup>70</sup> The data itself is unreliable due to the manner in which it is calculated and segregated. Notably, though, the National Crime Records Bureau ('NCRB'), which compiles data on crimes committed in India, counts instances of crime on the basis of First Information Reports ('FIRs') lodged.<sup>71</sup> This can paint a distorted picture of the actual crime rate as it is possible that many of these FIRs do not lead to convictions. Further, the data itself is aggregated and expressed in a manner that sensationalises the impact, even when purely statistically, they are well within manageable levels.<sup>72</sup>

*Second*, the New Act severely lacks when it comes to affording procedural safeguards to CCL within the age of sixteen to eighteen years. Apart from the lack of scientific basis for a preliminary assessment of maturity, there are no procedural safeguards in the Act that require a higher threshold of proof to try CCL as adults. This is an absolute necessity within the current framework due to the normative differences that exist between CCL and adults.<sup>73</sup> Further, some academic scholarship suggests that JJBs, in parts of the country, have trouble in seamlessly transferring the child to the Children's Court, which may be located at a distance from the JJB. This is because, in practice, there is no real difference between a child court and a regular criminal court,<sup>74</sup> and the purely adversarial nature of such proceedings coupled with harsher sentences and the retention of a criminal record can drastically reduce the scope of reformation and rehabilitation. This is indicative of a larger problem of the New Act's inability to meaningfully engage with the plethora of crimes committed by CCL.

*Lastly*, the phase of after care and rehabilitation is entirely unsatisfactory. Most institutions that are supposed to provide rehabilitation services are severely ill-equipped.<sup>75</sup> Apart from the lack of necessary

<sup>69</sup> National Crime Records Bureau, *Crime Committed by Juveniles (IPC+SLL) in Metropolitan Cities – 2016-2018* (2018) <[http://ncrb.gov.in/sites/default/files/crime\\_in\\_india\\_table\\_additional\\_table\\_chapter\\_reports/Table%205B.1\\_1.pdf](http://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%205B.1_1.pdf)> accessed 28 March 2020.

<sup>70</sup> National Crime Records Bureau, *Crime Committed by Juveniles (IPC+SLL) - 2016-2018* (2018) <[http://ncrb.gov.in/sites/default/files/crime\\_in\\_india\\_table\\_additional\\_table\\_chapter\\_reports/Table%205A.1\\_0.pdf](http://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%205A.1_0.pdf)> accessed 28 March 2020.

<sup>71</sup> Mukundan (n 2) 31.

<sup>72</sup> Mukundan (n 2) 33-5.

<sup>73</sup> Brink (n 9) 4.

<sup>74</sup> UN Committee (n 59) 20, 21.

<sup>75</sup> Shruti Mahajan, 'Juvenile Justice Act a Good Legislation but not Implemented Effectively, Justice (ret'd) Madan Lokur' (*Bar and Bench*, 15 December 2019) <<https://www.barandbench.com/news/juvenile-justice-act-a-good-legislation-but-not-implemented-effectively-justice-ret'd-madan-lokur>> accessed 18 March 2020; PTI, 'Juvenile Justice Committee Submits Report to HC' *The Economic Times* (Chennai, 19 November 2015) <<https://economictimes.indiatimes.com/news/politics-and-nation/juvenile-justice-committee-submits-report-to-hc/articleshow/49849743.cms?from=mdr>> accessed 28 March 2020; Murali Krishnan, 'Alleged Detention of Children in Kashmir: Supreme Courts Seeks Report from Juvenile Justice Committee' (*Bar and Bench*, 20 September 2019) <<https://www.barandbench.com/news/>

training,<sup>76</sup> there is a stark dearth of resources available with these institutions. Further, there are significant disparities between the facilities available in different states.<sup>77</sup> Many institutions have not been registered under the New Act.<sup>78</sup> Reports of wide-spread abuse and lack of proper gender and age segregation at such institutions are still prevalent in many states.<sup>79</sup> Moreover, the proper grievance redressal mechanisms, which are supposed to be established, have not come up adequately.<sup>80</sup> The safety of those who work at these institutions continues to be a concern.<sup>81</sup> The budgetary allocation for these services also continues to be unsatisfactory.<sup>82</sup> In light of these issues, Section III of this paper will offer various recommendations that should be adopted to meaningfully change the juvenile justice system and ensure that it is restored to a rehabilitative model where the best interests of the child are of paramount importance.

### III. SUGGESTED REFORMS TO THE INDIAN JUVENILE JUSTICE SYSTEM

Currently, children younger than seven cannot be criminally responsible.<sup>83</sup> Children between the ages of seven and twelve can be made criminally responsible, subject to their maturity. Those who understand the nature and consequences of their crime are held criminally responsible.<sup>84</sup> The JJB conducts inquiries regarding CCL, and such inquiries are not in the nature of trials.<sup>85</sup> The inquiry must be completed within four months, with a maximum extension of an additional two months. While proceedings for petty offences are terminated after six months, the Chief Judicial Magistrate may grant the JJB additional time for other offences.<sup>86</sup> If found guilty, the JJB may fine the child or his parents, deliver admonitions, prohibit his presence at particular venues, or direct the child to group counselling, probation, community service, or a

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alleged-detention-of-children-in-kashmir-supreme-court-seeks-report-from-juvenile-justice-committee> accessed 28 March 2020.

<sup>76</sup> *ibid.*

<sup>77</sup> Ministry of Women and Child Development, *The Report of the Committee for Analysing Data of Mapping and Review Exercise of Child Care Institutions Under the Juvenile Justice (Care and Protection Act), 2015*, vol 1 (September 2018) 4 <<https://wcd.nic.in/sites/default/files/CIF%20Report%201.pdf>> accessed 28 March 2020 ('Ministry Report').

<sup>78</sup> *ibid.* 5.

<sup>79</sup> Ministry Report (n 77) 6.

<sup>80</sup> Ministry Report (n 77) 8.

<sup>81</sup> Ministry Report (n 77) 10.

<sup>82</sup> CJP Team, 'Children in the 'Trillion Dollar Economy' Budget for Children 2019-20' (*The Citizens for Justice and Peace*, 19 October 2018) <<https://cjp.org.in/an-introduction-to-khoj/>> accessed 28 March 2020.

<sup>83</sup> The Indian Penal Code 1873, s 82.

<sup>84</sup> The Indian Penal Code 1873, s 83.

<sup>85</sup> The Code of Criminal Procedure 1860, s 14.

<sup>86</sup> The Juvenile Justice (Care and Protection of Children) Act 2015, s 14.

special home. The child may also be directed to attend school, vocational training centres, de-addiction programmes, or therapeutic centres.<sup>87</sup>

A person aged between sixteen and eighteen, if alleged to have committed a heinous offence, can be tried as an adult. The JJB conducts a preliminary assessment into these CCL to determine their understanding and capacity to commit a crime. This inquiry is required to be completed within three months.<sup>88</sup> If the JJB decides that the CCL should be tried as an adult, the case is transferred to a Children's Court, along with the JJB's report. The Children's Court must, before commencing the trial, satisfy itself that the CCL ought to be tried as an adult. After trial, if the child is held guilty, he or she may be directed to a place of safety to undergo the sentence.<sup>89</sup> At the age of twenty-one, children, who are yet to complete their sentence, are evaluated on their reformation and are then either freed or transferred to adult prisons.<sup>90</sup>

The New Act must work in the best interests of children. However, several of its provisions are retributive in nature. These provisions are detrimental not just to the children but also to the society. This section will suggest reformative modifications to the current justice system. As public safety is a primary concern while creating a juvenile justice system,<sup>91</sup> there may be circumstances where it overrides the rehabilitative motives of the New Act. Moreover, following the *Nirbhaya* rape case, youth crime has become a media sensation, thereby pressuring political parties to provide immediate solutions to cater to public demand. Thus, as it appears that the absolute elimination of some provisions may not be feasible, a middle ground, which also benefits CCL, is suggested. Part A of this section will discuss the shortcomings of the minimum age of criminal responsibility ('MACR'). Part B will debate upon the current provisions which allow certain CCL to be tried as adults. Part C will advocate for providing statutory recognition to diversion of juvenile cases. Areas requiring judicial reform will be deliberated in Part D.

## A. India's MACR Should be Increased to Twelve Years

In India, the age of criminal responsibility is dependent on the maturity of the child. The way in which the JJB deals with individual cases depends upon the child's understanding of the crime and its consequences. This is a truly abysmal state of affairs. Instead of protecting young children, this provision seeks to punish those who cannot truly be held responsible for their actions

<sup>87</sup> The Code of Criminal Procedure 1860, s 18.

<sup>88</sup> The Code of Criminal Procedure 1860, s 15.

<sup>89</sup> The Code of Criminal Procedure 1860, s 19.

<sup>90</sup> The Code of Criminal Procedure 1860, s 20.

<sup>91</sup> United Nations Office on Drugs and Crime, 'Criteria for the Design and Evaluation of Juvenile Justice Reform Programmes' (August 2010) <[https://www.unodc.org/pdf/criminal\\_justice/Criteria\\_for\\_the\\_Design\\_and\\_Evaluation\\_of\\_Juvenile\\_Justice\\_Reform\\_Programmes.pdf](https://www.unodc.org/pdf/criminal_justice/Criteria_for_the_Design_and_Evaluation_of_Juvenile_Justice_Reform_Programmes.pdf)> accessed 18 October 2019, 6.

yet. Not only is India's MACR dishearteningly low as compared to international standards, but attaching criminal responsibility from the ages of seven to twelve on the basis of maturity, is severely flawed.

*First*, India does not live up to its international commitments. The CRC does not mandate a specific MACR.<sup>92</sup> The Beijing Rules recommend that the MACR should be set bearing in mind the emotional and intellectual maturity of children.<sup>93</sup> However, in General Comment No. 24, the Committee on the Rights of the Child ('the Committee'), which is responsible for overseeing the implementation of the CRC, has recommended that that MACR should be raised to fifteen to sixteen years.<sup>94</sup> The Committee has often expressed concern over India's MACR and urged it to honour its international commitments.<sup>95</sup> Across the globe, the average MACR is seven years more than what is followed in India.<sup>96</sup> India has one of the youngest ages of criminal responsibility not only in the Southeast Asia region<sup>97</sup> but also in the world.<sup>98</sup> Even conservative countries with protectionist tendencies towards juvenile justice, such as Switzerland,<sup>99</sup> have a higher MACR. Thus, India has not fulfilled its international commitments in respect of the MACR.

*Second*, it is unfair and arbitrary to distinguish amongst children aged between seven and twelve on the basis of whether they apparently have sufficient maturity for criminal acts. Science has not yet arrived at an accurate measure of such maturity.<sup>100</sup> Psychologists and social workers may not be consulted during this process. Even if they are consulted, it is very common that the mental needs and understanding of a young child are misdiagnosed. Consequently, the defence maybe unable to prove 'immaturity' of the child.<sup>101</sup> Notably, this distinction is more significant while discussing the trial of CCL

<sup>92</sup> CRC, art 40 (3)(a).

<sup>93</sup> UN General Comment (n 24).

<sup>94</sup> *ibid* 11.

<sup>95</sup> UN Committee (n 59) 20, 21, and 87 onwards; United Nations Committee on the Rights of the Child, 'Consideration of Reports Submitted by States Parties Under Article 44 of the Convention - Concluding Observations: India' (26 February 2004) CRC/C/15/Add.228, 19, 20, and 78 onwards.

<sup>96</sup> Carolyn Hamilton, 'Guidance on Legislative Reforms in Juvenile Justice' (2011) UNICEF Guidance Paper, 16 <[https://www.unicef.org/policyanalysis/files/Juvenile\\_justice\\_16052011\\_final.pdf](https://www.unicef.org/policyanalysis/files/Juvenile_justice_16052011_final.pdf)> accessed 18 October 2019.

<sup>97</sup> United Nations Children's Fund Regional Office in South Asia, 'Juvenile Justice in South Asia' (2006) <<https://www.unicef.org/tdad/unicefjssouthasia06.pdf>> 18 October 2019 ('UN South Asia Report') 3.

<sup>98</sup> Child Rights International Network, 'Minimum Ages of Criminal Responsibility' <<https://archive.crin.org/en/home/ages.html>> accessed 18 October 2019.

<sup>99</sup> Cauffman and Steinberg (n 39); Donna M Bishop and others, *International Handbook of Juvenile Justice* (Josine Junger and Scott Decker (eds), 1st edn, Springer 2008) 309.

<sup>100</sup> Gauri Pillai and Shrikrishna Upadhyay, 'Juvenile Maturity and Heinous Crimes: A Re-Look at Juvenile Justice Policy in India' (2017) 10 NUJS Law Review 49, 53.

<sup>101</sup> Paul Sigalas, 'Underdiagnosis of Depression in Young People' (2014) 348 (7942) *BMJ* 20; Jagan K Chilakamarri, Megan M Filkowski, and SN Ghaemi, 'Misdiagnosis of Bipolar Disorder in Children and Adolescents: A Comparison with ADHD and Major Depressive

as adults because very few children aged between seven and twelve enter the justice system.<sup>102</sup> A constitutionally valid classification requires that so long as the broad features are distinguishable and enjoy a reasonable nexus to the object, mathematical accuracy is not needed.<sup>103</sup> Here, however, there is neither an accurate classification nor a reasonable nexus to the objective of the New Act, that is, rehabilitation and reformation.<sup>104</sup> The classification is not based on scientific accuracy as there is no clear objective distinction between the broad classes. The absence of an objective distinction, especially in respect of matters included in the Indian Penal Code, is not in the better interests of the child and thus, falls foul of the objective of the New Act. Therefore, this distinction is inconsistent with the Indian Constitution as it is manifestly arbitrary,<sup>105</sup> and not based on any intelligible differentia.

Adducing criminal responsibility to the intent and understanding of a child, a practice followed by the Supreme Court of India,<sup>106</sup> ignores other significant factors affecting the child's maturity. Considering this failure to account for other factors, various countries which followed similar models (such as, Ghana and Kenya)<sup>107</sup> have done away with this practice.<sup>108</sup> By allowing children of twelve years and below to take the defence of infancy, India acknowledges that children of this age group may lack criminal responsibility for their actions. India should, therefore, do away with its arbitrary practice for children aged between seven and twelve, and increase the MACR to twelve in honour of its international commitments.

However, in the interests of justice and public safety, children aged below twelve may require reformatory actions in certain circumstances. This requires the development of a framework which aims to act in the best interest of children and not place any criminal responsibility on them. This norm has been followed in Japan<sup>109</sup> and South Africa.<sup>110</sup> In India, children may be referred

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Disorder' (2011) 23 (1) *Analysis of Clinical Psychiatry* 25 <<https://www.ncbi.nlm.nih.gov/pubmed/21318193>> accessed 18 October 2019.

<sup>102</sup> National Crime Records Bureau, 'Table 5A.4: Juveniles Apprehended-IPC Crimes (Crime Head, Age Group & Gender-wise)- 2018' (2018) <[http://ncrb.gov.in/sites/default/files/crime\\_in\\_india\\_table\\_additional\\_table\\_chapter\\_reports/Table%205A.4\\_0.pdf](http://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%205A.4_0.pdf)> accessed 28 March 2020 ('NCRB Table A'); National Crime Records Bureau, 'Table 5B.4: Juveniles Apprehended-IPC Crimes in Metropolitan Cities (Crime Head, Age / Gender-wise) – 2018' (2018) <[http://ncrb.gov.in/sites/default/files/crime\\_in\\_india\\_table\\_additional\\_table\\_chapter\\_reports/Table%205B.4\\_1.pdf](http://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%205B.4_1.pdf)> accessed 28 March 2020 ('NCRB Table B').

<sup>103</sup> *Subramanian Swamy v Raju* (2014) 8 SCC 390, 421.

<sup>104</sup> The Juvenile Justice (Care and Protection of Children) Act 2015.

<sup>105</sup> Pillai and Upadhyay (n 100) 53, 54, 55.

<sup>106</sup> *Hiralal Mallick v State of Bihar* (1977) 4 SCC 44, 48.

<sup>107</sup> Mensa-Bonsou and others, *International Handbook of Juvenile Justice* (Scott Decker and Nerea Marteache (eds), 2nd edn, Springer 2017).

<sup>108</sup> Hamilton (n 96) 19.

<sup>109</sup> Mensa-Bonsou (n 107) 199.

<sup>110</sup> John Winterdyk, *Juvenile Justice: International Perspectives, Models, and Trends* (CRC Press 2014) 326.

to the Child Welfare Committee by the JJB,<sup>111</sup> however, the country lacks a system as comprehensive as in Japan and South Africa. In Japan, this provision was brought about due to the commission of horrific crimes by children, which were broadcast by the media. The police have the power to investigate such cases.<sup>112</sup> These cases are referred to child guidance centres. The placement of children in these centres is usually done with parental consent. The centre refers cases to the Family Court if it believes that the child is in need of protective measures.<sup>113</sup> In South Africa, children below twelve cannot be held criminally responsible. However, they can be referred to Children's Court for care and protection proceedings to be initiated. They can also be sent for therapy or an established reformatory program.<sup>114</sup> In these systems, a child below twelve years is never held criminally responsible.

However, such systems sometimes allow the direct interaction between children and investigative agencies and judicial bodies. This provides ample opportunity for the police to abuse their power<sup>115</sup> and for the exposure of children to judicial and investigative processes, which are proven to increase the chances of reoffending. In effect, this provision should be used only in dire need. Therefore, the prosecution of children under twelve years of age should be limited to cases where they have allegedly committed heinous crimes, as defined by the New Act.<sup>116</sup> Additionally, the non-uniformed child friendly units, as provided by the New Act, should be trained in child psychology so as to make them well-equipped during investigations and evidence collection. The collected evidence should be forwarded to the State Prosecutor, who then must be satisfied that there exists a strong *prima facie* case for the guilt of the minor. Then, the minor should be empowered to forward this to the Child Welfare Committee, who will look into the care and rehabilitation of the minor. Any measure imposed upon the child should require parental consent, unless the child has been neglected or abused such that their parents will probably not act in their best interests. The views of the child must also be taken into account, as is recommended under the *principle of participation*<sup>117</sup> and the CRC<sup>118</sup> as well. The use of prosecutor's discretion can be checked by requiring the prosecutor to record his or her reasons in writing and privately forward them to the JJB, analogous to the method followed for grant of remand by magistrates.<sup>119</sup> Such a holistic change in the executive will require a dedication of funds and

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<sup>111</sup> The Juvenile Justice (Care and Protection of Children) Act 2015, s 17(2).

<sup>112</sup> Winterdyk (n 110) 186.

<sup>113</sup> Mensa-Bonsou (n 107) 199.

<sup>114</sup> Winterdyk (n 110) 326.

<sup>115</sup> Marvin Krohnand Jodi Lane, *The Handbook of Juvenile Delinquency and Juvenile Justice* (Wiley Blackwell 2015) 59, 60.

<sup>116</sup> The Juvenile Justice (Care and Protection of Children) Act 2015, s 2(33).

<sup>117</sup> The Juvenile Justice (Care and Protection of Children) Act 2015, s 3.

<sup>118</sup> CRC, art 12.

<sup>119</sup> The Code of Criminal Procedure 1860, s 167.

attention by the Cabinet. As the juvenile justice system plays a major role in shaping the future of India, such attention is warranted.

Hence, it is vital that India increases the MACR in line with its global commitments and establishes a reformatory system for CCL.

## B. Suggested Reforms for the Process of Trial of CCL as Adults

The New Act provides that, for heinous offences, CCL between the ages of sixteen and eighteen may be tried as adults. Not only is this provision erroneous, but also a blot on the progressive objectives of the Act. There is ample research regarding the detrimental effects of such provisions on reformation of CCL. Due to their lack of impulse control and resistance to peer pressure, CCL are distinguishable from adults on the basis of their emotional and intellectual maturity.<sup>120</sup> This indicates that even if CCL are aware of this law, they may not make rational and logical decisions in provocative situations. Therefore, the deterrent aim of this provision stands defeated. While reporting the success of the retributive model in reducing crimes, short-term statistics fail to notice that crime rates decrease not because these offenders are reformed, but because they are locked out of society.<sup>121</sup> For these reasons, this clause was criticised by the UNICEF,<sup>122</sup> Justice Verma Committee,<sup>123</sup> the Committee,<sup>124</sup> and the Rajya Sabha Standing Committee on Human Resource Development.<sup>125</sup>

The New Act and the Juvenile Justice Model Rules, 2016 provide that both the Children's Court and the JJB should proceed with a presumption of innocence.<sup>126</sup> However, this presumption is undermined by the fact that the JJB, in order to decide the method of trial, has to assess the understanding and capacity of the child to commit the crime.<sup>127</sup> The JJB is also required to consider the "alleged circumstances" in which the offence was committed.<sup>128</sup> It is impossible to judge such capacity without going into the merits of the crime. The capacity and understanding of a child cannot be judged unless such decision is based on the premise of commission of the crime. This preliminary assessment is examined by the Children's Court so as to decide whether such a trial

<sup>120</sup> Elizabeth Scott and Lawrence Steinberg, *Rethinking Juvenile Justice* (Harvard University Press 2008) 222.

<sup>121</sup> *ibid.*

<sup>122</sup> Hamilton (n 96) 16.

<sup>123</sup> Justice JS Verma Committee, *Report of the Committee on Amendments to Criminal Law* (23 January 2013) 254-5.

<sup>124</sup> Hamilton (n 96) 16.

<sup>125</sup> Rajya Sabha Report (n 29) 22.

<sup>126</sup> The Juvenile Justice rules, 2016, rr 16, 17, 18, 19, and 21; The Juvenile Justice (Care and Protection of Children) Act 2015, s 3.

<sup>127</sup> Department-related Parliamentary Standing Committee on Human Resource Development, *Submission on the Juvenile Justice (Care and Protection of Children) Bill, 2014 by the Centre for Child and the Law* (21 October 2014).

<sup>128</sup> The Juvenile Justice (Care and Protection of Children) Act 2015, s 15.

is justified.<sup>129</sup> This does not bode well for the presumption of innocence, which forms the bedrock of every trial. It must also be noted that there is a severe backlog of cases in the JJB,<sup>130</sup> and a lack of qualified psychologists. This effectively ensures that the child's fate is left in the hands of untrained and inexperienced people, who may later influence the Children's Court. Notably, the Children's Court can refer to independent experts, if it is satisfied.<sup>131</sup>

This classification, which is not based on any accurate neuroscientific or psychosocial research, does not further the rehabilitative and reformatory objectives of the New Act.<sup>132</sup> Moreover, as pointed out earlier, it detracts from the established neuroscience evidence that there are cognitive and psychological differences between CCL and adults.<sup>133</sup> Further, the court, in making its assessment, is not bound to do so with scientific accuracy, thereby leaving room for arbitrariness in the assessment process. Therefore, the classification is not constitutionally valid.<sup>134</sup> It also infringes on the right to a fresh start as the records are not expunged.<sup>135</sup> For instance, the offenders can be disqualified from certain jobs on this basis.<sup>136</sup>

However, and rather regrettably, even those who strongly advocate against such provisions agree that there may be certain situations where CCL ought to be treated differently.<sup>137</sup> Therefore, the authors recommend that the current system be replaced by one that allows such trials only in situations which call for such extreme measures.

Certain changes are required to prevent the presumption of innocence from being undermined and to protect the child from being exposed to unfriendly processes. *First*, while conducting its assessment, if the JJB believes that the CCL ought to be tried as an adult, it should be empowered to conduct the trial. It must be noted that under S. 19 of the New Act, the Children's Court is permitted to act as the Board when it believes that trial as an adult is not justified. Allowing for the converse would not only ensure child friendly practices and a presumption of innocence, but also eliminate unnecessary preliminary enquiries. Admittedly, the JJBs are not criminal courts and thus, will require comprehensive structural changes. Currently, the JJBs do not have the authority to conduct 'trials' or impose imprisonment. To ensure that this policy can be

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<sup>129</sup> The Juvenile Justice (Care and Protection of Children) Act 2015, s 19.

<sup>130</sup> NCRB Table A (n 102); NCRB Table B (n 102); Elsie Mishra and Ramakrishna Biswalat, 'Reducing the Age of Criminal Responsibility of Juvenile- A Necessary or Un-Necessary Step?' (2018) 3 (3) International Journal of Legal Research and Studies 31, 38.

<sup>131</sup> The Juvenile Justice Rules 2016, r 10(A)2.

<sup>132</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015.

<sup>133</sup> See Section II, Part D of this article.

<sup>134</sup> *Subramanian Swamy v Raju* (2014) 8 SCC 390.

<sup>135</sup> The Juvenile Justice (Care and Protection of Children) Act 2015, s 24.

<sup>136</sup> The Juvenile Justice (Care and Protection of Children) Act 2015, s 24 (Proviso).

<sup>137</sup> Pillai and Upadhyay (n 100); Rajya Sabha Report (n 29) 37, 38.

effectively implemented, it would be imperative to give the JJBs the power to work like a criminal court in some aspects, providing qualifications and limitations to the same. *Second*, the threshold for such trials should be analogous to the conception of death penalty, that is, they should only be resorted to in the *rarest of the rare* cases. Whenever the trial is so determined, the relevant High Court must confirm it. This is necessary as both juvenile justice trials and death penalty demand utmost caution. Most CCL are unsuccessfully rehabilitated and almost always reoffend after trial, ensuring that the rest of their lives are spent in and out of prisons.<sup>138</sup> This is in stark contrast to the reformed lives their similarly-aged counterparts enjoy abroad. As in South Africa,<sup>139</sup> the matter may be reviewed by the High Court judge in his chambers, while the court may call the parties for more complex arguments. This procedure may be useful if the courts are, despite enforcing the aforementioned measures, overburdened with such cases.

Additionally, it is suggested that records of such offenders be sealed, if not destroyed. A warrant to unseal records should be given only when it is necessary for the proper dispensation of justice. Further, after a certain number of years of no criminal activity, the records should be destroyed, a method prevalent in South Africa.<sup>140</sup> Admittedly, South Africa does not destroy records for certain crimes, however, this method is detrimental to the reformatory ideals of the juvenile justice system. Hence, the qualification on destruction of records should not be adopted by India. The disqualification of the offender for certain jobs should also be revoked with the destruction of the records.

### C. Diversion of Cases Regarding CCL

Diversion of cases regarding CCL from the judiciary to the law enforcement agencies is a global norm.<sup>141</sup> It involves police discretion in directing such cases away from the justice system. Typically, they may choose to drop charges, informally caution or counsel the offenders, or direct them to other reformatory agencies. Since arrest is understood to be the last resort, such diversion is heavily encouraged by the CRC,<sup>142</sup> the Committee, and UNICEF.<sup>143</sup> Southeast Asian countries have been criticised for the lack of such diversion.<sup>144</sup> It is arguable that such discretion is undertaken by the police regardless,<sup>145</sup> yet it does not enjoy statutory backing. The Justice Verma Committee has also

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<sup>138</sup> CCL-NLS Report (n 32).

<sup>139</sup> Winterdyk (n 110) 334.

<sup>140</sup> Winterdyk (n 110) 335.

<sup>141</sup> Jensen and Jepsen (n 7); Bishop (n 99); Krohnan Lane (n 115); Mensa-Bonsou (n 107).

<sup>142</sup> CRC, arts 37(b), 40.1, 40.3(b), and 40.4.

<sup>143</sup> UN South Asia Report (n 97) 4; Hamilton (n 96) 52.

<sup>144</sup> UN South Asia Report (n 97) 5.

<sup>145</sup> UN South Asia Report (n 97) 17.

emphasised on the need to allow the police, prosecutors, and judges to divert cases upon “first contact”.<sup>146</sup>

But these methods are also criticised for police abuse and corruption.<sup>147</sup> For example, Germany does not allow such discretion due to the history of police abuse during Hitler’s reign.<sup>148</sup> However, instead of denying them this discretion, there must be an effort to effectively tackle the root of the problem, that is, lack of accountability and transparency. There are widespread reports of torture and violence to elicit confessions from children and adults.<sup>149</sup> Such abuse and corruption is not limited to the police as there are instances of connivance of magistrates.<sup>150</sup> Consequently, by denying police these powers, one cannot ensure that they will not be abused by another authority. The police, enjoying a far wider reach, can help alleviate the overburdened prosecutor and JJB.<sup>151</sup> For example, in Northern Ireland, due to widespread diversion, the courts only prosecute 10% of the total youth offences.<sup>152</sup>

It cannot be emphasized enough that diversion laws must be made in consultation with the police. In doing so, the following suggestions maybe useful. Methods of diversion must only be used when there is compelling evidence as to the guilt of the CCL.<sup>153</sup> The police should not have the power to decide the guilt of the offender.<sup>154</sup> While diversion need not be limited<sup>155</sup> to petty offences, it is also advisable that police not play a judicial role and impose reformative sanctions, a practice common in other countries. As in Northern Ireland, the police should be allowed an exhaustive list of warnings for cautioning the CCL.<sup>156</sup> There ought to be automatic budgetary allocations for improving the system and encourage diversion. Proper training must be given to the non-uniformed child friendly units to whom petty offences can be forwarded. While it should be a matter of principle that social workers and psychologists are consulted, a framework should be designed for areas lacking such trained personnel. Reasons for warnings, which result in a juvenile record, should be recorded in writing.

The practice of diversion has been immensely helpful in several countries. A proper implementation of diversion could significantly improve the Indian juvenile justice system. Significantly, data suggests that the police practices

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<sup>146</sup> Hamilton (n 96) 37.

<sup>147</sup> Krohnand Lane (n 115) 59, 60; UN South Asia Report (n 97) 5.

<sup>148</sup> Bishop (n 99) 242.

<sup>149</sup> Hamilton (n 96) 5.

<sup>150</sup> *Khatri (II) v State of Bihar* (1981) 1 SCC 627.

<sup>151</sup> Mishra and Biswalat (n 130) 38.

<sup>152</sup> Bishop (n 99) 95, 96.

<sup>153</sup> UN South Asia Report (n 97) 4.

<sup>154</sup> UN General Comment (n 24) 13.

<sup>155</sup> UN General Comment (n 24) 24.

<sup>156</sup> *ibid.*

diversion despite the lack of legislative acceptance of the same.<sup>157</sup> A structural framework to build upon such diversion should be highly encouraged.

#### D. Suggested Changes in the System

Imprisonment of CCL is damaging not only to them and their families but also to the State's coffers.<sup>158</sup> Alternative measures to custody are highly encouraged.<sup>159</sup> Unfortunately, India lacks the comprehensive system of alternatives employed by other countries. After a thorough assessment of various national models, this Part will recommend the best international practices that could be adapted to the Indian scenario. Significantly, the Supreme Court has recently asked the Centre to demarcate a fourth category of offences, aside from petty, serious, and heinous offences<sup>160</sup> but that is beyond the scope of this paper.

*First*, for petty offences, dialogue between the victim and the offender should be endorsed. For serious and heinous crimes, however, the legislature must consult certain experts before deeming the offence worthy of dialogue. In any case, such a dialogue should be subject to the discretion of the victim. English Youth Offender Panels have proven that interaction with the victim ensures accountability of the offender.<sup>161</sup> In the restorative justice framework, representation of community members in creating an action plan guarantees that the offender repairs harm caused not only to the victim but also to the community.<sup>162</sup> Therefore, such conciliation has higher chances of fair and reformative conclusions. Further, economic depression and developing economies are two factors which often take a toll on family ties. Parents are unable to give time to their children in the midst of financial problems, a situation which has been observed in Croatia.<sup>163</sup> A shift to community-based measures alleviates some responsibility from the parents and still ensures the correction of the offender.

In the context of civil disputes, services are provided by Lok Adalats, whose members act as conciliators for the plaintiff and the defendant.<sup>164</sup> For criminal matters, the Lok Adalat members should include community leaders

<sup>157</sup> NCRB Table A (n 102); NCRB Table B (n 102).

<sup>158</sup> Mishra and Biswalat (n 130) 38.

<sup>159</sup> UN South Asia Report (n 97) 4; Hamilton (n 96) 52.

<sup>160</sup> Ashish Tripathi, 'SC Asks Parliament to Fill Gap in Juvenile Justice Law' *Deccan Herald* (10 January 2020) <<https://www.deccanherald.com/national/sc-asks-parliament-to-fill-gap-in-juvenile-justice-law-793046.html>> accessed 28 March 2020.

<sup>161</sup> Bishop (n 99) 111.

<sup>162</sup> United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (United Nations, 2006) 27.

<sup>163</sup> Elaine Arnall and Darell Fox, *Cultural Perspectives on Youth Justice: Connecting Theory, Policy, and International Practice* (Palgrave Macmillan 2017) 106.

<sup>164</sup> The Legal Services Authorities Act 1987, ch VI.

and elders, psychologists, and social workers. After a fair trial by the Lok Adalats, the punitive measures imposed by it should be restricted to those benefitting the community. Such terms ensure that the best interests of the victim, offender, and community are represented and protected. Due to reverence for elders in Indian culture, the inclusion of community elders and leaders will provide wider acceptance for the imposed measures. In Philippines, the Barangay approach is founded on this principle.<sup>165</sup> Community leaders provide an action plan for CCL and offer three-month programmes based on community needs. The three-month programme provides offenders with training in first aid and fire fighting, among other vocations required by the community. This connects the offenders to the community. Community-based centres ensure that family ties are unaffected. This approach has found widespread acceptance and success due to community-based efforts and the acknowledgment of the respect that community leaders and elders command.<sup>166</sup> However, certain distinctions from the civil Lok Adalats are proposed. *First*, this alternative should be available to the offender through three methods: court orders, personal 'walk-in' systems, or as an alternative judicial method, for certain offences in which cooperation of the offender leads to dropping of formal charges. *Second*, to ensure resources for development, a portion of the local municipality's budget should be automatically allocated to these Adalats. This provides proper infrastructure which, in turn, ensures the operation of community-based solutions. Both these recommendations have achieved success in the Philippines.<sup>167</sup> Again, such a momentous change in the system will require dedication of attention and funds from the Centre.

*Second*, standardised measures for frequent problems are advised. Currently, the system only provides for plans based on individual needs. While this is ideal, it is imperative to remember that many areas do not enjoy access to child welfare experts. Thus, it is crucial to develop a list of customizable measures for frequent difficulties, such as drug abuse. This ensures that, in absence of experts, judges can resort to a tested solution. India can take assistance from other countries, like Belgium, in formulating a system of standardised measures. In Belgium, standardised measures include the 'coping with drugs' programme, which treats varying levels of drug use; the 'coping with aggression' programme, for defiant and violent offenders; and the 'context' project, a long-term programme in case of a loss of link to society.<sup>168</sup>

*Third*, certain amount of money should be allocated for long-term scholarships, either through Central grants or automatic allocations, for promising at-risk students. By signing a bond, these students can, in turn, serve in a government job. Not only will this ensure a better life for many potential

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<sup>165</sup> Arnall and Fox (n 163) 170.

<sup>166</sup> *ibid.*

<sup>167</sup> Arnall and Fox (n 163) 167.

<sup>168</sup> Bishop (n 99) 224.

CCL, but also provide a guaranteed job placement after completing their education. Notably, provisions for sponsorships, to be implemented by the State Governments, exist under the New Act. This particular suggestion for scholarships can be implemented under such rules and provisions. Unfortunately, with many literate children being in conflict with law, data suggests that education may not have an impact on crime.<sup>169</sup> This policy should be further explored for its fallacies and potential.

#### IV. CONCLUSION

Children are universally acknowledged as instrumental to the growth and development of a nation. Due to this, proper care and protection of children are crucial tasks that the State must perform. Further, it is especially important to treat CCL in a manner that is tailored for reformation and to ensure that they are able to meaningfully contribute to society. Therefore, the role of a juvenile justice system is crucial in the modern State. In this paper, we have attempted to show that the recent changes brought by the New Act are unwarranted and indicative of a conceptual misunderstanding of the objectives of a juvenile justice system. These changes show that we are moving towards a model that further alienates children and punishes them based on a flawed understanding of their culpability. Instead, we must ensure that the provisions of our system reflect an approach that is in the best interest of the child, as much in practice as in theory.

A rehabilitative juvenile justice system requires money and man-power. The State will have to devote considerable energy in the process. However, this is a wise investment. Most CCL are not prone to crime, and hence, correctional measures have a huge impact on the developing adolescent brain. This is a crucial period where CCL form family ties, moral codes, social and educational development, etc. Correctional measures which are rehabilitative and reformative show a marked decrease in recidivism rates. Thus, while this shift does require resources, it ultimately benefits the society, the children, and all potential victims.<sup>170</sup> It will also eventually reduce the cost incurred by State in CCL prosecution and the transfer and transportation of CCL. A decrease in offending rates as well as in the imprisonment of CCL could also allow the states to reduce the number of juvenile rehabilitative homes. The investment of the State in its children is long overdue.

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<sup>169</sup> Aneesh Bedi, ‘‘Educated’’ Juveniles Committed Crimes More Than the ‘‘Illiterate’’ Ones in 2017, Says NCRB’ *The Print* (New Delhi, 24 October 2019) <<https://theprint.in/india/educated-juveniles-crimes-more-illiterate-ones-2017-ncrb/310527/>> accessed 28 March 2020; TNN, ‘‘Only 5% Juvenile Criminals Illiterate in Karnataka: NCRB’’ *The Times of India* (Bengaluru, 30 October 2019) <<https://timesofindia.indiatimes.com/city/bengaluru/only-5-of-jvenile-criminals-illiterate-in-karnataka-ncrb/articleshow/71811349.cms>> accessed 28 March 2020.

<sup>170</sup> Scott and Steinberg (n 120) 20.

There are cogent reasons to suggest that we do not need to ‘get tough’ on youth crime. To the contrary, we must ensure that all our provisions are made in a way that is conducive to the restoration of CCL back into society. In keeping with this objective, we have suggested several changes to the system, both formal and informal, that will bring meaningful reform. While implementing these changes, utmost importance must be accorded to more efficient means of enforcement. The government must ensure that juvenile justice is given the importance that it deserves, both in terms of proactiveness in implementation and allocation of resources. We must acknowledge the flaws in our present system and consult professionals from various disciplines and simultaneously sensitise the actors within our formal judicial system. If we do so, we can continue to honour our international commitments while creating a system that truly serves the best interests of children.