

Construction of Criminality and Children

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Abstract

A wide range of approaches to addressing criminal offences committed by children are found around the world. While some countries exclude all punishments for *any* offence committed by children on the assumption that they are vulnerable and innocent, other countries impose punishment to children ranging from imprisonment to death penalty. This paper examines the conceptual constructs of ‘crime’ and ‘childhood’ and investigates how commission of serious crime by a child eclipses the notions of childhood innocence and vulnerability. It questions the judgement of children’s behaviour by adult classification of wrongs into civil and criminal wrongs, while the child’s perception of the action may be limited to it being right or wrong. The article heavily relies on the personality theories of Carl Rogers and Abraham Maslow to argue that wrongful actions by children may be the result of the innate characteristics of all living beings to attain their full potential. It also delves into the question of why certain wrongs are constructed as wrongs against the whole society while some are seen only against individuals. The paper calls for deeper introspection in the way we think of children committing serious offences and ultimately aims to promote a care and protection approach to children in all circumstances.

1. Introduction

The origin of juvenile justice may be traced to the twin approaches of *mens rea*¹ and the doctrine of *parens patriae*.² Jurisdictions, like that of the United Kingdom, established a differential system of justice for children on the ground that children were mentally immature and, hence, entitled to a differential approach. Countries following this approach did not require any changes in the trial procedure but imposed lesser punishment on children compared to those imposed on adults. Other countries like the United States, that adopted the *parens patriae* approach, focused

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¹ The common law principle of *actus non facit reum, nisi mens sit rea* resulted in excluding criminal liability of children below a certain age in many jurisdictions, including India, on the presumption that children did not have sufficient maturity of mind to commit an offence. As per S. 82 of the Indian Penal Code, ‘[n]othing is an offence which is done by a child under seven years of age.’ Criminal liability may be excluded by proving that the child above the age of seven years but below the age of twelve years ‘has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion’, under S. 83 of the same Code.

² The *parens patriae* approach pervaded the American juvenile courts which did not permit the basic principles of fair trial such as the right to a lawyer, to notice, to cross-examination, on the ground that the juvenile court magistrates were to act as the father of the child and were there to protect the best interest of the children before them.

on the general immaturity and dependence of children on adults for their all round development and growth. Thus, a result of this approach, the juvenile court magistrate is appointed with the specific task of dealing with children committing offences as their father, securing the best interest of the child. There is no need to follow the principles of fair trial in this welfare approach. Constitutional validity of the welfare approach in the proceedings of the juvenile courts was challenged many times in the Supreme Court of the United States,³ but was finally upheld *In re Gault*,⁴ decided in 1967. Similarly, in India, the provision prohibiting the presence of a lawyer before the children courts was struck down as being unconstitutional in 1969.⁵

The rights approach, in contradistinction to the welfare approach, culminated in the adoption of the UN Convention on the Rights of the Child (CRC) in 1989, recognising children as right holders.⁶ In fact, the CRC recognises many more rights to children than are available to adults⁷ and it especially prohibits imposition of death penalty to persons who were below the age of eighteen years when they committed an offence.⁸ Despite the protective approach of juvenile justice initiated in late 19th Century that spread around the world in the 20th Century, and the prohibition of the death penalty to children for any offence by the CRC, executions of children who were below the age of eighteen years when they committed an offence was reported to have taken place in Iran, Nigeria, Pakistan, Saudi Arabia, China, Yemen, the Democratic Republic of Congo and the USA.⁹

A wide range of responses to serious crimes committed by children are found around the world. At one end are the countries like India that exclude all punishments for *any* offence committed by children on the assumption that children are vulnerable and innocent, and hence, entitled to care and protection in all circumstances. At the other spectrum are countries that exclude children committing serious offences from the juvenile justice system and impose punishment to them ranging from imprisonment to death penalty.

The differences in consequences for crimes committed by children require in depth analyses of why serious punishments are imposed on children when they commit serious offences, while they are given care and protection if the offence is less serious. This paper calls for a closer look at the way governments and societies address the problem of children committing criminal offences. It will be shown that a deeper examination of the legal, psychological, and social

³ For a detailed discussion, see V. Kumari, *Juvenile Justice System in India: From Welfare to Rights* (New Delhi: Oxford University Press, 2004), Chapter 2.

⁴ *In re Gault et al.*, Appeal from the Supreme Court of Arizona (no. 116), *In re Gault*, 387 U.S. 1 (1967), decided May 15, 1967, U.S. Supreme Court.. In this case, a child of fifteen years of age was sent to the reformatory school for five years for making obscene calls to a neighbour. For the same offence, an adult could have been sent to prison for a maximum period of three months.

⁵ *Kario @ Man Singh Malu v. State of Gujarat* (1969) 10 Cri, LJ 66, Gujarat High Court.

⁶ The CRC has been ratified by all countries of the world except Somalia and the United States. Both these countries have signed the CRC though. See Status of Ratification, as on 8 August 2010, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en, last access 8 August 2010.

⁷ For example, the right to survival and development (Art. 6) and the right to family (Preamble r/w Arts. 5, 9, 10, 22).

⁸ Art. 37(a) of the CRC.

⁹ Death penalty for persons who were children at the time of commission of the offence was abolished by the US Supreme Court in *Roper, Superintendent, Potosi Correctional Centre v. Simmons*, 543 U.S. 551 (2005) throwing out death sentences of 72 child offenders in as many as 19 states in the US in 2005.

understandings of the terms ‘childhood’ and ‘crime’ will favour a care and protection approach as opposed to judging children committing serious crimes based on the standards that apply in the adult world.

The Indian juvenile justice system (JJS) has sought to uphold a protective approach to children, statutorily prohibiting harsh punishment for children who commit criminal offenses. Nevertheless, as this paper will discuss, when the concepts of ‘childhood’ and ‘crime’ intersect when children commit crimes, traditional understandings of crime and criminality can limit the understanding of ‘childhood’ in these situations. The psychological, social and legal construction of ‘childhood’ can be lost, understated, ignored or overshadowed by the notion of ‘crime’. Because the Indian JJS has *de jure* embraced the protective approach but there still exists a tendency towards punishing children for serious offenses in some cases, the Indian system will provide a useful background for discussion of how a failure to reconcile the notions of ‘crime’ and ‘childhood’ can lead to conflicting approaches to juvenile justice.

First, some background to the current approaches to juvenile justice will be given, highlighting two major cases from the UK and India. Then, the theoretical and practical considerations of the construction of the notions of ‘childhood’ and ‘crime’ will be discussed, as well as the paradox that emerges when these two notions intersect. Finally, the Indian JJS system will be evaluated in light of the newly reconsidered notion of *childhood*.

2. Background: The cases of *Thompson & Venables* and *Ram Deo Chauhan*

In a training workshop for police, social workers, and personnel in children’s homes in Nepal,¹⁰ as well as in my LLM classes, participants produced the following list of characteristics of children: ‘physical and mental immaturity’, ‘innocence’, ‘forgiving and forgetful nature’, ‘playfulness’, ‘dependence’, ‘purity of heart’, ‘easily influenced’, ‘simple’, ‘unending energy’, ‘obedient’, ‘innovative’, ‘creative’, ‘imaginative’, and ‘easily satisfied’. In the first flux, people do not associate words such as ‘brutal’, ‘violent’, ‘cunning’, ‘revengeful’, or ‘devil’ with their conception of children. When challenged with scenarios like the one of a child torturing an ant or a bee, or the incidents of stabbings and murders by them reported in the newspapers, people brush them aside, as a result of their innocence and ignorance of the consequences of their actions, or the absence of guidance from adults. However, in an increasing number of instances of serious crime by children, there is a tendency in the media, legislative and judicial responses to overlook the child and focus on the crime. The commission of a crime by a child is seen as the end of childhood and the innocence with which it is associated.

In India, the first children’s court was established under the Madras Children Act in 1920, followed by similar legislation passed in other States. All the Children Acts were similar before independence, and applied to delinquent and neglected children. These Acts permitted imprisonment of children in cases of serious offence. After 1960, imprisonment of children was banned in all circumstances. However, because the law was applicable only to Union Territories, States had to enact their own legislation. The Juvenile Justice Act of 1986 which applied uniformly to the whole of India, except the states of Jammu and Kashmir resolved some of the inconsistencies in legislation among various States. With the passage of this law, no child could

¹⁰ I conducted this workshop with Shiva Paudel, who proposed this exercise as an icebreaker.

be sent to prison or kept in a police station under any circumstance. This is an example of the protective approach, which continues to be observed in the contemporary Juvenile Justice (Care and Protection of Children) Act 2000 (JJA 2000), amended in 2006.¹¹ Nevertheless, even in India, one comes across resistance to applying the protective approach to children who are found to have committed serious offences. As Indian law continues to observe an all-inclusive protective approach towards children who commit criminal offenses, the tension becomes palpable when a plea of juvenility is raised by a defendant charged with serious offences. This situation can be viewed as an attempt to take advantage of the JJS, and not as the exercise of a recognised right of the child. Ajmal Kasab, convicted recently by the Bombay High Court for his involvement in the terrorist attack on the Taj Hotel and other places in Mumbai, which killed hundreds of people, raised the defence of being a child on the date of offence. His plea was rejected, as he was not found to be a child. However, it did raise a crucial question: how many of us would have been comfortable if Kasab had indeed been a child on the date of the terrorist attack and had been dealt with under the provisions of the JJA 2000. Would the Indian government have passed a new legislation providing for the penalization of children who commit serious offences? These remain hypothetical questions for the time being.

The juvenile justice system in the UK faced a national challenge of this sort when two children, both ten years old, were found guilty of brutally murdering a two year old toddler. The brutality of the children's actions left the nation aghast. The trial judge sentenced each of them to be detained at Her Majesty's pleasure. Detention was mandated by law to be given in the case of young offenders convicted of murder but the judge had to determine the appropriate length of the sentence. The trial judge recommended to the Chief Secretary that eight years of imprisonment would be appropriate and would meet the requirements of retribution and general deterrence against murder. He mentioned that eight years is a long time in the life of ten year old children. The Home Secretary increased the sentence to fifteen years. The sentence was later reduced to eight years by the House of Lords, in 1997.¹² A complaint was filed before the European Court of Human Rights challenging the ruling in the Thompson and Venables case.¹³ In December 1999 the Court ruled that the applicants' rights to a fair trial had been violated. It also ruled that the fixing of their sentences by a politician rather than by an independent judicial body was a breach of their human rights. There was a 'thinly veiled attempt to mobilise lynch mobs, the press gleefully report[ing] calls for the two to be hunted down and punished.'¹⁴

¹¹ The Juvenile Justice (care and protection of Children) Act, 2000 (Act No. 56 of 2000), of 30 December 2000 and The Juvenile Justice (care and protection of Children) Amendment Act, 2006 (Act No. 33 of 2006), of 22 August 2006. Hereinafter JJA 2000.

¹² *Regina v. Secretary of State for the Home Department* (original appellant and cross-respondent), *Ex parte v.* (original respondent and cross-appellant) *Regina v. Secretary of State for the Home Department* (original appellant and cross-respondent), *Ex Parte T.* (original respondent and cross-appellant) (conjoined appeals) (12 June 1997), House of Lords,, available at <http://www.parliament.the-stationery-office.co.uk/pa/ld199798/ldjudgmt/jd970612/vandt01.htm>, last visited on 7 August 2010.

¹³ *V. v. United Kingdom*, Application No. 24888/94 (16 December 1999), European Commission of Human Rights.

¹⁴ B. Slaughter, 'The Jamie Bulger case: Release of Thompson and Venables sparks rightwing media backlash', *World Socialist Website*, 27 June 2001, available at <http://www.wsws.org/articles/2001/jun2001/bulg-j27.shtml>, last visited on 7 August 2010. The murder took place on 12 February 1993. 'The letter dated 16 June 1994 referred in particular to a petition, signed by some 278,300 members of the public (with some 4,400 letters in support) urging that the two boys should remain in detention for life; a petition, signed by nearly 6,000 members of the public, asking for a minimum period of detention of 25 years; and over 20,000 coupons, cut out of a popular newspaper, together with over 1,000 letters, demanding a life tariff. There were only 33 letters agreeing with the judiciary, or asking for a lower tariff.' Quoted in *Regina v. Secretary of State for the Home Department, Ex parte v. Regina v. Secretary of State for the Home Department, Ex Parte T.* See above, fn.12.

The *Ram Deo Chauhan @ Raj Deo Chauhan*'s case in India¹⁵ was a case of multiple murders, and the accused was sentenced to death by the Sessions Court after the Children's Court determined that he was not a child on the date of offence.¹⁶ The death penalty was confirmed by the High Court. The Supreme Court did not ask any questions regarding his age and upheld the death penalty. A review was admitted on the question of whether the accused was a child as per the provisions of the Juvenile Justice Act 1986, and not on his conviction for the murders.¹⁷

The review petition was heard by full bench of three judges. Justice Sethi upheld the death penalty approving the age determination by the session judge. Justice Thomas substituted the death penalty with life imprisonment on the grounds that neither the prosecution nor the defence had proven his age beyond reasonable doubt. The third judge, Justice Phukan, expressed no opinion on the question of age, as according to him, in view of the agreement on the scope of a review petition between the other two judges,¹⁸ the question of age was not open for determination. If the other two judges were in agreement on the scope of review, the review should not have been admitted in the first place. Even more curiously, Justice Phukan stated that the accused could approach the Governor or President for mercy, and, in such an event, the Governor or the President should take into consideration the reasons given by Justice Thomas for his commutation of the death penalty. This seems to suggest that, although he did also feel that there was doubt about the age of the accused, he did not express any opinion because of his technical understanding that there was no error on the face of record and, hence, the question of age could not be reopened at this stage. Justice Sethi, on the other hand, despite holding that no grounds were made for a review, decided to look into the evidence of age because it was a death penalty case, even though he was sceptical that the plea of child status was raised to avoid the death penalty rather than for the application of the Juvenile Justice Act.

The saga of this matter continues. The Governor of Assam commuted Ram Deo Chauhan's death penalty to life imprisonment.¹⁹ The commutation order of the Governor was set aside by the Supreme Court in a writ filed by the victim's family.²⁰ A review petition against this judgment is currently pending before the Supreme Court.²¹

¹⁵ *Ram Deo Chauhan @ Rajnath Chauhan v. State of Assam* (2001) 5 SCC 714, Supreme Court of India.

¹⁶ Ram Deo Chauhan did not have a birth certificate. The Medical Board constituted by the Court opined that he was a child on the date of the offence.

¹⁷ Order dated 20 February 2001.

¹⁸ It may be noted, however, that the other two judges held divergent and opposite views on the scope of a review petition. At page 729, Justice Sethi said: 'Under Order 40 Rule 1 of the Supreme Court Rules, no review lies except on the ground of error on the face of the record in criminal case' and then concluded, on page 731, that 'The grounds urged in the petition and at the Bar do not make out a case for review'. Justice Thomas proceeded 'to consider the point raised by the learned counsel for the petitioner after informing ourselves of the width and dimensions of the review jurisdiction of this Court', which has been considerably widened by various Supreme Court judgments (at page 745). See *Ram Deo Chauhan @ Rajnath Chauhan v. State of Assam* (2001). See fn.15.

¹⁹ Notification No. JDJ.138/200/52 dated 28th January 2002.

²⁰ *Bani Kanta Das and Anr. vs. State of Assam and Ors.*, Writ Petition (Civil) No. 457 of 2005 (08 May 2009), Supreme Court of India.

²¹ *Bani Kanta Das and Anr. vs. State of Assam and Ors.*, Review Petition No. 1378 of 2009, in Writ Petition (Civil) No. 457 of 2005. See fn.20.

Cases like those of Ramdeo Chauhan and Thompson and Venables raise the important question of why people, including judges, do not see the ‘child’ in children who commit serious offences. This motivates the investigation undertaken in this paper.

3. Paradox in Children Committing Crime

This section analyses the concepts of ‘crime’ and ‘child’ to investigate how their relationship *inter se* leads to the demand for severe action against children who commit crimes. It also seeks to find a perspective that may promote the protection of children found to have committed serious offences under the juvenile justice system.

One way to study the phenomenon of crime by children may be to analyse the official and unofficial statistics relating to juvenile delinquency, and to investigate the trends in the volume, severity and nature of crime by children.²² However, listening to accounts given by adults of their delinquent activities as children gives a different perspective. Most of the time, when students and trainees share incidents from their childhood, the incidents are about something they knowingly did ‘wrong’ including truancy, theft, fighting, daredevil actions, injuries to themselves or others, beating, defiance, cheating, theft, and running away. Adults rarely recalled their actions when they were ‘good’ and I noted that all of them recalled their delinquent actions with smiles on their faces, and described the incidents as fun, cleverness, bravery, adventure, pure mischief, attention-seeking, and competition. Most of the time they were not caught but if they were, their actions were addressed by their family or neighbourhood. At the time of the incident, they were aware that what they were doing was ‘wrong’ or prohibited, but they do not recollect or describe the incident as ‘criminal’.

Crime is conceived as a wrongful act affecting society as a whole. Because crime affects society as a whole, the state assumes the responsibility for dealing with the offender on the people’s behalf. Retribution and deterrence have come to be recognised as the purposes served by punishment for crimes. The response of the state to crime has changed in response to the development of criminological theories of causation, shifting the focus of punishment from the crime onto the criminal. This has resulted in the personalization of punishment to the offender. The emergence of the Indian JJS may be attributed to this development, as it recognised that children constituted a category apart from adult criminals even though their acts caused the same harm to society.

By examining the concepts of crime and childhood, we can see more clearly that one construction wipes out the other when the two intersect when a child is found to have committed an offence. Crime is conceived primarily as wilful conduct intended to cause harm. Children are seen as being vulnerable, uncontrolled, forgiving, and innocent, and as having other characteristics that generate feelings of love, affection and care towards them. The moment someone seems to be in control, and acting with the intention to cause harm, that person can, by definition, no longer be conceived as a child.

²² For example, the chapter on Juvenile Delinquency in *Crime in India*, published every year by the National Crime Records Bureau, Ministry of Home Affairs, Government of India, available at <http://ncrb.nic.in/index.htm>.

It is important to notice the collapsing of two different worlds when a child is found to have committed an offence. From the child's point of view, stealing from the neighbourhood orchard may be a 'wrongful act', but it is also a fun, thrilling, or exciting event. However, the act qualifies as 'an offence' in the legal parlance. Law categorises 'wrong' as 'criminal wrong' from the moment the child is presumed to have acquired the ability to distinguish right from wrong. According to the established principles of law, a child is not responsible for any civil wrong, but must take responsibility for the criminal wrong.²³ The state judges the action of the child from the perspective of the adult world, in which there is a distinction between civil and criminal wrongs. The question of whether the child is capable of understanding the difference between these two types of wrongs is neither asked nor determined.

The presumption of *doli incapax*²⁴ adopts the same process of constructing the concepts of 'children' and 'crime' as opposites. Children are assumed to be incapable of harbouring criminal intent before a certain age, and their actions are not construed as offences despite any resultant harm or injury. Before that age, it is not the harm but the child that remains the focus of attention and legal response. However, the age of *doli incapax* varies from state to state. In India it is fixed as low as seven and in the UK it is fixed at ten years. However, children above that age face the paradoxical situation of being classified either as children or as criminals. By definition they cannot be both, unless the relationship of children with crime is reconstructed. From the moment children are expected to have acquired knowledge of the distinction between right and wrong, adults become less and less forgiving of their actions and the resulting harm. Cases of children like Venables and Thompson in the UK, or Ram Deo Chauhan in India are examples of such intolerance. Irrespective of their tender age, the state and its people respond to such children with vengeance. Venables and Thomson were only ten and a half years old – *doli incapax* under English law at the time.²⁵ The public outrage generated by the media was so strong that England responded by abolishing the presumption of *doli incapax* for children above the age of 10 years.²⁶ It is interesting to consider whether the media, state and individuals would have responded in the same way if the offence had been committed by children below the minimum age of criminal responsibility. However, what is clear is that when children commit serious offences, they are held responsible by authorities with reference to the principle of *mens rea*, and penal consequences will be imposed on them either according to, or in defiance of, the law.

The exclusion of children below a certain age from criminal liability shows that criminality is thought to lie in the intention and knowledge of the child to cause harm and not in the harm itself. Parents of children found to have committed an offence rarely accept that their child was capable of having the intention of causing harm. Even those parents who initially abandon their children in the wake of their commission of a serious offence come to believe that their children

²³ For example, children are not bound by any liability in a contract entered by them or by the loss suffered by the other due to non-fulfilment of the conditions of contract.

²⁴ The CRC directs that the State Parties should prescribe the 'the minimum age below which children shall be presumed not to have the capacity to infringe the penal law' (Art. 40 (3)(a)) and that 'no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by children below the age of 18 years of age' (Art. 37 (1)).

²⁵ In India, the minimum age of criminal responsibility is seven years, and children above seven but below the age of twelve are presumed to be *doli capax*, unless proved to be otherwise, as per ss. 82 and 83 of the Indian Penal Code.

²⁶ See S. 34, UK Crime and Disorder Act 1998.

are inherently good, but were misled. The belief in the inherent goodness of children is common across the world and the CRC can be seen as the most eloquent recognition of this.

Children, with their inherent innocence, and crime, the epitome of harm, therefore constitute two opposite poles. While some countries respond to crimes committed by children by focusing on *children*, others respond to it by looking at the *seriousness of the crime* committed by them. While in India no punishment may be given for any offence committed by a person below the age of eighteen, the death penalty continues to be imposed on children committing offences in some countries. The Supreme Court of the United States of America abolished the imposition of the death penalty on children in 2005, but there are reports that now US courts are giving sentences of life imprisonment without parole to children.²⁷ Even in India, where the law prohibits punishment to a child found to have committed *any* offence, scepticism bordering on contempt towards such laws is reflected in cases like *Ram Deo Chauhan*, mentioned above.

4. Children as Criminals *versus* Children as Self-Actualizers: A proposal for re-constructing the concept of criminality in relation to children

Numerous complex questions about the nature of crime and the commission of crimes by children need to be addressed. Why is crime constructed as a wrong against society, even when the actual harm is usually suffered only by identified victims? Why do victims and others demand penal action against children when they are found to have committed serious offences? What justifications may be offered for giving no punishment to children whatever their offence? Why is differential treatment meted out to children in need of care and protection and those found to have committed offences? Until now, the literature on the subject does not seem to have answered these questions nor, crucially, the basic question raised in this paper: how to ensure that *children*, not *crime*, remain the focus of response in the wake of a serious offence committed by them. One way to find answers to these questions is to explore the nature of relationships among human beings. Is our experience of relationships with others one of mutual trust and friendship, or a potential source of harm? What makes the idea of punishment for the person who has committed an offence resonate with people across the world who are otherwise separated by time, place, social milieu, health, caste, and sex?

Psychologists Sigmund Freud and Carl Rogers, in different ways, theorised that people have a 'hidden' personality of which they are unaware. Freud believed that all human beings possess an unconscious mind which has aggressive tendencies towards others and which will manifest itself in murder, incest, and other offences if left unbridled.²⁸ People become neurotic due to tension resulting from the suppression of hedonistic tendencies which seek the gratification of all desires.²⁹ Rogers was dissatisfied with the dehumanizing nature of this psychoanalytical school of thought, and submitted that people are driven towards self actualization,³⁰ or the motivation

²⁷ Human Rights Watch, "When I Die, They'll Send Me Home": Youth Sentenced to Life without Parole in California (January 2008), Volume 20, No. 1(G), available at <http://www.hrw.org/en/reports/2008/01/13/when-i-die-they-ll-send-me-home>. Last access 3 November 2010.

²⁸ As explained by P. Prevos, *Hidden Personalities According to Freud and Rogers* (January 2005), available at http://prevos.net/ola/hidden_personalities.pdf. Last access 3 November 2010.

²⁹ Prevos, *Hidden Personalities*. See fn.28.

³⁰ Prevos, *Hidden Personalities*. See fn.28.

present in every life form to develop its potential to the fullest extent.³¹ Rogers agreed that people can behave aggressively and violently. However, when they do so, they are neurotic and not functioning as fully developed human beings.³² Carl Rogers' humanistic psychology is preferred over Sigmund Freud's psychoanalytical approach as it is more in tune with current scientific research, which has found that people with a more positive attitude to life cope better with its stresses.³³

Hidden, uncontrolled hedonistic tendencies, in Freudian terms, may lead people to commit crimes. However, they do not explain why people, and not just the state, want punishment for offenders, rather than tolerating traits that are common to all. Analysis of Carl Rogers' theory, as further developed by Abraham Maslow,³⁴ may however explain why people across the world unite against intentional harm whether caused to oneself or others, demanding punishment for the offender. At the same time it offers a basis for arguing that crime by children should be viewed in a more humanistic manner.

While Rogers has proposed that all living organisms are genetically engineered to attempt to attain their full self, Abraham Maslow developed the theory further in relation to human beings.³⁵ According to Maslow, all human beings have four kinds of needs which they strive to fulfil: (a) physiological needs,³⁶ (b) safety needs,³⁷ (c) belonging needs,³⁸ and (d) esteem needs³⁹. These are, as a group, called Deficit Needs (D-needs) because they are felt only until the time that they are fulfilled. Once fulfilled, these needs are not felt and they cease to be motivating. The second category of needs is Being Needs (B-needs), which involve the continuous desire to fulfil potentials, to 'be all that you can be.'⁴⁰ Maslow organised these needs in his 'hierarchy of needs' pyramid with physiological needs at the bottom of the pyramid and Being needs for actualizing self at the top. Once the D-needs are fulfilled at least substantially, human beings start striving for the B-needs. "Once engaged, they are constantly felt. They are a matter of becoming the most complete, the fullest, 'you'."⁴¹ The B-needs are never satisfied. "In fact, they are likely to become stronger as we 'feed' them."⁴² Self-actualization is described as a process of growth, happiness and satisfaction. According to Maslow, a self-actualizer is driven by the following needs:

³¹ Prevos, *Hidden Personalities*. See fn.28.

³² Prevos, *Hidden Personalities*. See fn.28.

³³ Prevos, *Hidden Personalities*. See fn.28.

³⁴ C. George Boeree, *Personality Theories*, available at <http://www.ship.edu/%7Ecgboree/perscontents.html>. Last access 24 March 2008.

³⁵ This analysis is based on 'Abraham Maslow' in Boeree, *Personality Theories*. See fn.34.

³⁶ These include fulfilment of basic survival needs like oxygen, water, protein, salt, sugar, calcium, and other minerals and vitamins. See 'Abraham Maslow' in Boeree, *Personality Theories*, p.4. See fn.34.

³⁷ This second layer of needs include safe circumstances, stability, and protection. You might develop a need for structure, for order, some limits. See 'Abraham Maslow' in Boeree, *Personality Theories*, p.4. See fn.34.

³⁸ For example, need for friends, a sweetheart, children - affectionate relationships in general, even a sense of community. See 'Abraham Maslow' in Boeree, *Personality Theories*, p.5. See fn.34.

³⁹ Maslow noted two versions of esteem needs: a lower one and a higher one. The lower one is the need for the respect of others, the need for status, fame, glory, recognition, attention, reputation, appreciation, dignity, even dominance. The higher form involves the need for self-respect, including such feelings as confidence, competence, achievement, mastery, independence, and freedom. See 'Abraham Maslow' in Boeree, *Personality Theories*, p.5. See fn.34.

⁴⁰ 'Abraham Maslow' in Boeree, *Personality Theories*, p.6. See fn.34.

⁴¹ 'Abraham Maslow' in Boeree, *Personality Theories*, p.6. See fn.34.

⁴² 'Abraham Maslow' in Boeree, *Personality Theories*, p.6. See fn.34.

- Truth, rather than dishonesty
- Goodness, rather than evil
- Beauty, not ugliness or vulgarity
- Unity, wholeness, and transcendence of opposites, not arbitrariness or forced choices
- Aliveness, not deadness or the mechanization of life
- Uniqueness, not bland uniformity
- Perfection and necessity, not sloppiness, inconsistency, or accident
- Completion, rather than incompleteness
- Justice and order, not injustice and lawlessness
- Simplicity, not unnecessary complexity
- Richness, not environmental impoverishment
- Effortlessness, not strain
- Playfulness, not grim, humourless, drudgery
- Self-sufficiency, not dependency
- Meaningfulness, rather than senselessness⁴³

From this perspective, a live birth signifies that the physiological and safety needs of the foetus were fulfilled substantially in the womb and that soon before, or at the time of birth it was ready to move towards the actualization of the D-needs of belonging and self-esteem. The process of birth causes regression when the child is delivered into an unfamiliar world full of light, noise and strange surroundings. A newborn experiences the world as a dangerous place in which other human beings are the source of pain and suffering. This fear, perhaps hidden, is shared universally by all children and is thus an innate part of their being as adults and of their relationship with the rest of the world.

A close look at the driving needs of self-actualizers as given by Maslow shows that all children have the qualities that self-actualizers seek. Applying Maslow's classification of needs to the process of growth in children shows that a child's physiological and safety needs are fulfilled when he or she starts experiencing a positive and nurturing relationship with his or her carers. When something goes wrong, the child feels threatened and regresses to the need of feeling safe. The child secures the protection of others, and avoids being left alone, by 'being good' in given circumstances. Thereafter, if a child still feels threatened despite 'being good', it does something creative to protect itself. This action may take one of many forms: telling a lie⁴⁴ or feigning illness, or, alternatively, being studious. By becoming intelligent, the child acquires self-esteem. Children are motivated by the desire to be good, to excel and to develop their full potential. Children as self-actualizers realise that they are physically dependent and therefore *need* to be charming, lovable, forgiving, etc., to ensure their own survival and growth. All their actions are motivated to promote their safety and to actualize their full potential.

⁴³ 'Abraham Maslow' in Boeree, *Personality Theories*, p.8. See fn.34.

⁴⁴ In February 2008, I attended a course called Landmark Education for Living (www.landmarkeducation.com), at which one participant shared an experience which took place when she was five or six years old. She had been left alone in a running car by her father, who had stepped out for a minute to visit the grocery shop. She fiddled with the gear and the car started rolling. She tried to stop it by jumping out, and then jumped in again and pulled out the car key and succeeded in stopping the engine. When her father returned to the car and found it standing at a different place, she felt too afraid of the possible scolding to tell the truth, so she wove a false story and escaped the scolding. She grew up in a supportive environment and became a fiction writer. The course coach surmised that growing up in a negative environment may have led such a child to become a master cheat.

What is defined in the adult world as ‘crime’ is likely, from the child’s perspective, to be an adventure, an effort to realise their full potential, gone wrong. Thus, analysing children’s actions in the light of Maslow’s theory poses many points for further discussion. Does crime and criminality as constructed by adults reflect children’s perceptions of the same activity? Adults judge children’s action by reference to the ability of those children to distinguish right from wrong. While children will merely perceive whether an action is right or wrong, the legal system and adults classify wrongs into crimes and civil wrongs.⁴⁵ So far, sufficient attention has not been given to finding out whether children understand the distinction between a civil wrong and a crime, or the reasons behind these classifications.

Criminality in children’s actions is imputed when an intention to cause harm is assumed. This loses sight of the innate characteristic of childhood, the genetic disposition to actualise all that one is capable of doing. Does the commission of a crime resonate with the fear experienced by every child at the time of birth, which affects our sense of safety at a core level? That experience makes each instance of hurt or harm personal. The more serious the harm seems, the more difficult it becomes not to feel personally afraid, irrespective of the actual harm caused to oneself or another. Shifting the focus from the action of the person committing the offence to the reaction of the harmed and the source of that harm may be key in reconstructing criminality in relation to children.

Maslow’s theory of personality, when applied to children, offers a construction of childhood as a period where all actions are motivated by efforts to realise one’s real self, and not by the desire to cause harm. The proper response to harm caused by children is to ensure the fulfilment of their basic needs of survival, security, belonging and self-esteem so that they continue their growth and achieve their full potential of happiness and satisfaction. A close look reveals that it was adults who failed to provide a secure world to the ten year old Thompson and Venables, resulting in the brutal killing of two year old James Bulger. Adults as a group have the obligation to ensure the right environment for the growth and development of their children, as opposed to holding them personally responsible for the harm that resulted from their actions for which they are incapable of understanding the consequences. From this perspective, the appropriate response to ‘crime’ by children would be one which could ensure that harm is not done to either the children or others, and that the children could continue towards self-actualization rather than being punished for their actions.

5. The Juvenile Justice System in India

In this section, the juvenile justice system (JJS) in India will be analysed to show how the traditional way of thinking about crime and criminality sometimes hampers the implementation of the Juvenile Justice (Care and Protection of Children) Act 2000 (the ‘JJA 2000’) in its true spirit.

⁴⁵ Civil wrong is construed by the legal system as a wrong against an individual, thus wronged individuals need to initiate litigation to seek a remedy. Crime, on the other hand, is construed as a wrong *in rem*, i.e. against the whole world, and the state takes on the responsibility of initiating action against the wrongdoer.

The JJA 2000 came into force throughout India, with the exception of the State of Jammu and Kashmir, on 1st April 2001. This Act was passed

to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection, by providing for proper care, protection and treatment by catering to their development needs, and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation and or matters connected therewith or incidental thereto.⁴⁶

The Act aimed to secure children's basic human rights, pursuant to the Constitution of India, the UN CRC, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), 'and all other relevant international instruments.'⁴⁷

The JJA 2000 made provisions for two categories of children: children in conflict with the law,⁴⁸ and children in need of care and protection.⁴⁹ It provided for the establishment of the Juvenile Justice Board (JJB), consisting of one magistrate and two social workers,⁵⁰ to deal with juveniles in conflict with the law. The Child Welfare Committee, consisting of five social workers invested with the powers of magistrates will address children in need of care and protection.⁵¹ No magistrate who does not have specialist knowledge of child psychology or child welfare may be appointed as a member of the JJB.⁵² Both bodies function as a bench of magistrates⁵³ and follow the procedure prescribed for summons cases under the Code of Criminal Procedure.⁵⁴

As mentioned earlier, care and protection without exclusion of any child from the purview of the JJS has been secured in India consistently since the Children Act 1960. The JJA 2000 also prohibits the imposition of any punishment for any offence⁵⁵ committed by a person who was below the age of eighteen years on the date of offence.⁵⁶ With the long legal tradition of the exclusion of punishment for children in India, one would assume that this must have become ingrained in the functioning of the JJS in India. The truth, however, is different.

Despite the long legal tradition of no punishment for children, and the requirement to appoint magistrates with knowledge of child psychology and child welfare, judges have continued to focus more on the offence than the child. Since 2008, I have used an exercise during training sessions on the Juvenile Justice Act to assess 'judicial impartiality' in the determination of age. I prepared two fact situations. In situation 'A', I used *Ram Deo Chauhan* facts.⁵⁷ Situation 'B'

⁴⁶ Opening statement of objects and reasons in the JJA 2000, as amended in 2006.

⁴⁷ Opening statement. See fn.46.

⁴⁸ See S. 2(1) of the JJA 2000.

⁴⁹ See S. 2(d) of the JJA 2000.

⁵⁰ All of them enjoy the powers of a magistrate. In case of difference of opinion, the decision is to be made by majority. Presence of Magistrate is required for final disposal of the case. See ss. 4-6 of the JJA 2000.

⁵¹ For powers and functions of the CWC, see, ss. 29-31 of the JJA 2000.

⁵² S. 4 (3) of the JJA 2000.

⁵³ Ss. 4 (2) and 29 (5) of the JJA 2000.

⁵⁴ See S. 54 of the JJA 2000.

⁵⁵ S.16 and S.2 (1) of the JJA 2000.

⁵⁶ S.16 and S.2 (1) of the JJA 2000.

⁵⁷ **Situation A:** On 11th January 2008, Bhawna Devi, 57, returned home from her elder son's house, where she had gone for a few days, at about 5 p.m. She had returned earlier than expected as there was a bad omen. She found the

involved a child who was caught picking up scrap iron. He was attending school, and did rag picking after school hours. Motivated by the desire to see a popular Hindi film, he was persuaded to commit theft.⁵⁸ Unknown to the trainees, I provided the same evidence as was available in the

servant Anil standing at the gate. She noticed that the front door of the house was locked from the outside. On questioning, Anil said that as all the members of the family had gone to a wedding and returned late the previous night, they were sleeping inside, and the house was open from the back. Bhawna Das went to the back of the house, and Anil followed her. She entered the house by the back door and found her younger son, Mr Charan Das, Assistant Engineer, PWD, Morigaon Division, aged 37, lying dead in a pool of blood on his bed. She rushed to another room and found his wife Smt. Minati Das, aged about 30, and their daughter, aged 2 ½, dead, with slit throats. Her daughter, Ms Rekha Das, was lying dead in the third room. On seeing the ugly scene she shouted and tried to run outside. Anil pushed her back inside and attacked her with a spade. Hearing her cries a neighbour, Rajendra, came to the rescue of Ms Bhawna Das. Anil attacked him also. Hearing the cries raised by both of them, two labourers, Mohan and Ravi, who were working in the neighbour's house where some construction was going on, came and overpowered Anil. The police were called and Anil was arrested at the scene and taken to the police station. 2. Police Report: The post-mortem reports suggest that the time of death of all the deceased was around 1 p.m. The deceased's brother has stated to the police that Anil said he was 20 years old when they met soon after Anil was hired six months earlier. Anil also told the I.O. at the time of his arrest that he was 20 years old. He was kept in the police station overnight and in police custody. The police have not found any prior record of his involvement in any other crime. During a search of his belongings, police found his school identity card for 10th class in GBHS School, which showed his date of birth to be 15th July 1990. Police informed his parents. 3. Chand Ram, Anil's father, is present before you. He is about 60 years old, illiterate, and works as chowkidar in a housing society. He does not remember the exact date of Anil's birth. He took Anil to school when he was about 5 or 5 1/2 years old and told the headmaster that Anil was about one year old when Rajiv Gandhi was killed. The headmaster made all the entries at time of admission, and Chand Ram does not know what date of birth was recorded by the headmaster. Chand Ram says that Anil was studying in school but had run away nine months earlier after he had beaten Anil for not having returned home in time. Chand Ram had filed a missing person's report but, despite his best efforts, they were unable to find Anil. 4. Chand Ram has come with the principal of GBHS School who has stated that Anil's date of birth was recorded on the basis of the transfer certificate received from the first school in which Anil studied up to 5th class. 5. Anil says that since he ran away from home he worked in various dhabas for about three months. Mr Charan Das used to come for tea to the dhaba at which he was working last. One day he offered to take Anil home if he was ready to work. In order to get better pay, Anil told Mr Das that he was twenty years old. Anil says that he knows nothing about the murder. He was in a state of shock on seeing all the members of the family dead, and on hearing the cries of Bhawna Das accusing him of murder he became panicky and tried to run away. Rajendra came, hearing her cries. He was carrying a spade and tried to attack Anil. Anil snatched the spade from him and attacked Rajendra in self defence. Bhawna Das received some injuries while Anil was trying to protect himself. He had not heard any cries or seen anybody enter the house earlier and he knows nothing of how the four people within were killed. He was standing outside watching the construction work in progress in the neighbour's house after members of the family had taken an early lunch and gone to sleep. 6. Anil is from the north east, and it is difficult to ascertain his age by appearance. He is of small build and looks insolent. He does not have any facial hair.

⁵⁸ **Situation B:** On 11th January 2008, Vibhuti, 57 years old, returned home at about 4 p.m. She found three or four youths standing outside her house. They had two of the big plastic bags usually carried by rag pickers. She found one boy inside her courtyard, who was putting something into a similar bag. On seeing her, the boys standing outside ran away. Vibhuti suspected that they were stealing something from the courtyard, in which there were many beautiful artefacts made of iron. She shouted, 'Thief, thief.' On hearing her cries, a neighbour, Rajendra, was able to catch the boy who was inside the courtyard with the bag. From his bag, two iron artifacts worth about 500 rupees were recovered. He pleaded to be allowed to go and promised never to commit theft again, but Vibhuti called the police and handed him over to them. 2. Police Report: During a personal search of the accused, a school identity card of 10th class in GBHS School was found, showing Anil to be the boy's name and 15th July 1990 as his date of birth. Police informed his parents. He was taken to the observation home for an overnight stay and is now produced before you from there. The police have not found any prior record of his involvement in any other crime. 3. Chand Ram, Anil's father is present before you. He is about 60 years-old, illiterate, and works as chowkidar in a housing society. He does not remember the exact date of Anil's birth. He took Anil to school when he was about 5 or 5 1/2 years old, and told the headmaster that Anil was about one year old when Rajiv Gandhi was killed. The headmaster made all the entries at the time of admission, and Chand Ram does not know what date of birth was recorded by the

Ram Deo Chauhan case in both situations. The task given to the trainees was to decide if the evidence was sufficient to determine that the accused was a child on the date of offence.

The first group of trainees consisted of thirty judicial officers from Delhi.⁵⁹ In situation ‘A’, twelve out of fifteen judicial officers held that more evidence was required to determine the age of the accused. In situation ‘B’, fifteen out of fifteen magistrates said the evidence was sufficient to prove that the accused was a child. I repeated this exercise with a mixed group of seventeen trainees consisting of judicial officers, the police, public prosecutors (PP), Indian Air Force (IAF) and correctional officers.⁶⁰ In situation ‘A’, three declared him to be a juvenile (two Indian Police Service Officers, one Public Prosecutor); three gave him the benefit of the doubt and held him to be a child (one judge, two Indian Police Service officers, one Indian Air Force officer); two held him not to be a child (both superintendents of jails). In situation ‘B’, nine out of nine thought he was a boy below the age of eighteen (four judges, one Indian Air Force officer, one scientist, one Public Prosecutor, two unknown).

The responses changed dramatically when, in 2009, the trainees were asked to determine the age by reference to Rule 12 of the 2007 Model Rules under the Juvenile Justice (Care and Protection of Children) Act 2000 (Model Rules),⁶¹ which directs that age be determined by reference to a certificate from the school first attended and the medical examination be ordered only if no such certificate is available. Faced with this Rule, out of twenty-four trainees, two and three officers respectively for situation ‘A’ and ‘B’ asked for medical examination. These five perhaps did not understand the scheme of this new rule, or were so used to determining age by medical examination that they did not pay sufficient attention to the alteration in that practice. As the official designation of the trainees was not revealed, it is difficult to deliberate on the reason why they still asked for the medical opinion.

headmaster. Chand Ram is very upset that his son has been caught red-handed committing theft. He has been a proud father as Anil has never failed to go to school since he began. Chand Ram had hoped that Anil would become a big man one day. He pleads for mercy and says that Anil must be given another chance. He will ensure that Anil never steals again. Anil is good at his studies, and it is just a spur of the moment mistake on his part. 4. Chand Ram has come with the principal of GBHS School who has stated that Anil’s date of birth was recorded on the basis of the transfer certificate received from the first school in which Anil studied up to 5th class. 5. On being questioned, Anil stated that all his friends were going to see the movie *Taare Zameen Par*, which every one said was very good. He wanted to go with them but had no money. His father was a chowkidar in a housing society and did not earn enough. He was desperate to find money. He does rag picking work with some other poor boys from his neighbourhood after school to earn some money by selling the scrap he collects. That day as they were passing by Vibhuti’s house, he saw some iron made stuff in the courtyard and felt that he would be able to get sufficient money that day by selling those items. There was no one in sight and the gate was not very high. He was tempted and jumped over the wall. 6. Anil is from the northeast and it is difficult to ascertain his age by appearance. He is of small build and looks insolent. He does not have any facial hair.

⁵⁹ Orientation Course on Juvenile Justice Act, held on 12 January 2008.

⁶⁰ Session on the JJA 2000, at the National Institute of Criminology and Forensic Science, Delhi, held on 18 February 2008.

⁶¹ Model Rules under the Juvenile Justice (Care and Protection of Children) Act 2000, 2007, Gen. S. R. & O. 679(E), available at [http://wcd.nic.in/Final_JJ_Module_appd_by_law-25\[1\].10.pdf](http://wcd.nic.in/Final_JJ_Module_appd_by_law-25[1].10.pdf) (hereinafter Model Rules). Last access 3 November 2010. Rule 12 (3) of the Model Rules reads: (3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining: (a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat; (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child.

These figures point to the fact that, despite the direction of the law to secure care and protection to children committing *any* offence, even officials who are specifically charged with the responsibility of implementing those laws tend to note the seriousness of the offence first and foremost. Responding to the offence rather than the child is in line with the proposition that the usual process of birth creates an innate sense of fear of others, because of which people across the world relate more easily to the demand for punishment of the offender rather than care and protection for children who are in the process of developing their full potential.

6. Conclusion

A new construction of children committing crime is required to ensure that children may develop to their full potential. The meaning of wrongful actions as applied to situations where children commit crimes comes from the classification of wrongs into civil and criminal wrongs. Children are uninformed of this distinction. Their motivations for committing wrongful acts are different from those of adults. This is not to suggest that no action needs to be taken when serious harm has been caused or has the potential to cause harm either to the child or to others. However, the description of those actions as crimes denies children their status of being children despite the harm caused.

Until now, the concept of criminality has been constructed based on the intentions of the person who has committed the crime. This person is viewed as having intentionally caused harm to another and it is assumed that this harm is caused to the whole of society. Reconstructing criminality requires attention to the question of why criminal wrongs are construed as harm caused to the whole of society. What connects each member of society with the others so that the wrong to one is perceived as being against each of them? The innate fear of harm suffered by each person at the time of birth offers a different viewpoint on the construction of criminality: a construction that may lead to a more child-friendly juvenile justice system.

Children like Ram Deo Chauhan, Venables and Thompson can be provided with care and protection instead of punishment only when we can see that children are motivated all the time with the desire to maximise their potential and seek happiness. Their actions of causing harm to others need to be placed in the context of the child's existence and experiences of life, and not judged by the standards and principles of the adult world.