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JUVENILE JUSTICE BILL 2014 – A REGRESSIVE STEP

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Abstract

This paper critically examines the Juvenile Justice Bill 2014 as introduced in the Lok Sabha and argues that selective exclusion of children between the age of 16-18 years committing heinous offences has been provided only due to the media hype created post-Nirbhaya gang rape case in which one of the accused was a juvenile and is not supported by data, research and scientific findings relating to adolescent brain. The bill also contravenes the provisions of the Indian Constitution and is against India's obligations under the Convention on the Rights of the Child. Keeping children for long duration in prison will make them hardened criminals and not result into their reformation or rehabilitation. It is in the interest of children, women and society at large to give each child another chance as they get into crime due to failure of family and state to show them the right path.

I Introduction

THE JUVENILE Justice (Care and Protection of Children) Bill 2014(hereinafter JJ Bill) has been introduced in the Lok Sabha on August 12, 2014 by Maneka Gandhi, Minister for Women and Child Development:[1]

> [T]o consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, hereinunder and for matters connected therewith or incidental thereto.

It may be noticed that there is no mention in this statement that this JJ Bill is for 'punishing' children or sending them to jail in certain circumstance. However, this is

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1 Lok Sabha Debates, *available at*: http://164.100.47.132/newdebate/16/2/12082014/12To1pm.pdf (last visited on Aug. 12, 2014).

precisely what this proposed legislation does and this statement of purpose of the proposed law is mischievous and false. There are many provisions which betray the deep seeded retributive response to commission of crime setting aside the long history of more than 150 years bringing more and more children within the protective umbrella of juvenile justice.

The JJ Bill is ideologically problematic and technically unsound and the tearing hurry with which the government has introduced the JJ Bill in Parliament makes one believe that children within the age group of 16-18 years are running amok committing heinous crimes making everybody unsafe. Emergent measures are required to deal with this emergency situation, suspending fundamental rights and the constitutional processes to pass this new law to restore law and order in India. The JJ Bill was put in public domain for comments only for 15 days and has been hurriedly introduced in Parliament without following any of the processes provided in the 'Pre-legislative Consultation Policy of the Government of India' adopted as recently as January 2014 which *inter alia* states thus:[2]

> The Department/Ministry concerned should publish/place in public domain the draft legislation or at least the information that may inter alia include brief justification for such legislation, essential elements of the proposed legislation, its broad financial implications, and an estimated assessment of the impact of such legislation on environment, fundamental rights, lives and livelihoods of the concerned/affected people, etc. Such details may be kept in the public domain for a minimum period of thirty days for being proactively shared with the public in such manner as may be specified by the Department/Ministry concerned.

The draft JJ Bill was posted on the website on June 18, 2014 for comments of general public. While it included a general statement for the introduction of the JJ Bill, it contained no facts and figures or research finding in support of the statement. There was no statement about broad financial implications of the proposed legislation. There is also no statement about the impact of this legislation on environment, fundamental rights, lives and livelihoods of the concerned people. Opinions were required to be given within fifteen days instead of the thirty days mentioned in this decision and that too "limited to five pages of A4 size to be submitted latest by 6 pm

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2 Adopted in the meeting of Committee of Secretaries held on Jan. 10, 2014 under the Chairmanship of Cabinet Secretary, *available at*: http://lawmin.nic.in/ld/plcp.pdf (last visited on Aug. 11, 2014).

on 3rd July 2014".[3] Despite requests from many quarters for extension of the deadline for comments for a month, especially since it was 69 pages legislation, no extension was permitted. Many including the author did try their best to send in their comments in time within limit. The author was a member of the review committee set up by the government to review the Juvenile Justice Act, 2000 and many changes were agreed upon. However, the JJ Bill has little reflection of the consultations of this review committee.

The pre-legislative policy further directs that the "summary of feedback/ comments received from the public/other stakeholders should also be placed on the website of the Department/Ministry concerned." The MWCD chose to not follow this direction also. The ministry invited some NGO representatives for a consultation on July 14, 2014 but no discussion was permitted on the provisions relating to exclusion of 16-18 years old children committing serious offences contained in the JJ Bill. They were told that the JJ Bill will be revised as per suggestions received on other aspects. However, the revisions so made were not made public. The JJ Bill was being revised and Cabinet was under preparation despite the fact that the Law Commission of India had already taken *suo motu* cognizance of the matter 2-3 months ago and an expert committee was preparing its report on the subject. The Ministry of WCD did not bother to consult the Law Commission or wait for its report.

Contrary to the direction contained in the pre-legislative consultation policy, the MWCD did not put any summary of feedback/comments received from the public and stakeholders. Even a meeting of the review committee was not called to discuss the revisions made after receipt of the comments. The Law Ministry approved the JJ Bill as sent by the MWCD on July 25, 2014.[4]

It was immediately sent to various ministries asking them to send back their comments by August 8, 2014. The minister met a select group of representatives from Prochild on August 4, 2014 and allowed them to look at the revised (secret) draft. They too were asked to give their comments by August 8, 2014.

However, the Cabinet approved the JJ Bill on August 6, 2014 even though the deadline for sending feedback by various ministries and Prochild was still not over and indeed feedback from all the ministries had not been received. How many ministries, state governments, NGOs and other concerned individuals and institutions gave feedback, how many of them opposed transfer of children to adult court, or suggested what changes? What led the government to shun the review committee and its

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3 *Available at*: http://pib.nic.in/newsite/PrintRelease.aspx?relid=105729 (last visited on Aug. 14, 2014).

4 As per the media reports, *available at* :http://ibnlive.in.com/news/draft-to-amend-juvenile-justice-act-approved sent-to-cabinet-for-appr/488271-3.html (last visited on Aug. 14, 2014).

recommendations? Who drafted the JJ Bill? Nothing is in the public domain and remains shrouded in secrecy while the JJ Bill is moving in leaps and bounds despite serious objections being raised against it from many quarters including the UNICEF.

A comparison of the JJ Bill as introduced in the Lok Sabha on August 12, 2014 with the draft JJ Bill as approved by the Cabinet on August 6, 2014 shows that many changes have been made in the JJ Bill after its approval by the Cabinet. While some of the changes are in the right direction, the question still remains about procedural propriety. How could the JJ Bill be approved by the Cabinet before the deadline for sending the feedback on the JJ Bill had expired? Why did the Cabinet not raise any questions for presenting the JJ Bill before it before the deadline for feedback was over? Did the Cabinet actually look at the JJ Bill and the feedback received from various ministries? How could the Ministry of WCD introduce changes in the JJ Bill after it has been approved by the Cabinet? What is the reason for this hurried introduction of the JJ Bill in Parliament?

So far the manner and the speed with which the JJ Bill is being pushed, it seems as if some disaster has befallen India and the government is required to take urgent measures as part of disaster management plan. In addition it shows an authoritarian attitude arising perhaps from the majority enjoyed by the party in power and a political response to the fear psychosis created by the media hype since Nirbhaya rape case in Delhi in 2013 closely followed by the Shakti Mills case in Mumbai. It is a commonly accepted principle in law making that a bad case cannot make a good law. The JJ Bill brought in the shadow of Nirbhaya proves it as the bill contains many various provisions which are retrograde, far removed from official statistics, uninformed of scientific developments and research findings, based on erroneous assumptions, unconstitutional, and technically unsound.

II JJ Bill – A regressive step 150 years back

India started on its journey to protect children from the ill effects of prison life since 1850 when it passed the first legislation, namely, the Apprentices Act, 1850 providing for apprenticeship to children below the age of 15 years committing petty offences instead of sending them to prison. It was followed by the Reformatory Schools Act, 1897; Criminal Procedure Code,1898; Borstal Schools Acts – all recognizing and gradually increasing the scope of applicability of protective juvenile justice and exclusion of children from prisons. The most significant break from the adult system came when following the recommendation contained in the All India Jail Committee Report of 1919-20, Madras in 1920, Bombay in 1922 and Bengal in 1924 enacted their Children Act removing all children from adult courts and making imprisonment of children an exception rather than the rule. A complete break from the adult criminal justice system was introduced by Parliament by the Children Act, 1960 which was

applicable to only union territories but was presented as a Model Act to be followed by the states. It completely barred keeping of children in police station or jail under any circumstance. All the Children Acts enacted by various states followed this model and prohibited keeping of children in prisons or police stations under any circumstance. Pursuant to this trend, when the official statistics showed that there were still 1400 children in various prisons in India in 1983, Sheela Barse filed a public interest legislation. The Supreme Court recognized that differential provisions contained in various Children Acts in force in different states resulted in discrimination against children and it suggested that Parliament should enact a uniform legislation. It also directed release of all children from prisons. Parliament enacted the Juvenile Justice Act, 1986 and introduced a uniform system of juvenile justice prohibiting keeping of children in police station and prisons under any circumstance. It also specifically barred death penalty or imprisonment of any duration for commission of any offence. All doubts regarding sending of children to prisons for offences punishable with death and life imprisonment or for committing offences under special legislations having overriding effect were removed in various judgments of the Supreme Court specifying that in all cases, the Juvenile Justice Act, 1986 had supremacy over all other provisions contained in various legislations.[5] India had adopted the protective approaches much in advance before the Beijing Rules, 1985 and the Convention on the Rights of Children, 1989 came into existence. The same protective approach was extended to all children up to the age of 18 years by the Juvenile Justice (Care and Protection of Children) Act, 2000. In the year 2006, a non obstante clause was inserted in section 1 (4) giving over riding effect to the Juvenile Justice Act over all other legislations

However, today when India is obligated to fulfill its obligations under the CRC having become its signatory and having ratified it, and accordingly having raised the age of defining children at 18 years by the Juvenile Justice (Care and Protection of Children)Act, 2000, India is proposing to go back to the situation of 1920 when some children could be sent to prison under the state Children Acts passed prior to 1960.

The most unfortunate part is that it is being done, despite various research studies showing that children transferred to the adult system end up committing more offences than those who were dealt within the juvenile justice system, and despite the scientific neurological adolescent brain studies. Three-fold arguments have been put forth in the popular media in support of exclusion of 16-18 years old children committing serious offences from juvenile justice. One, children in the age group of 16-18 are old enough to distinguish between right and wrong and hence, must take the penal consequences of their wrongful actions. Second, there has been tremendous increase

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5 *Rohtas* v. *State of Haryana,* AIR 1979 SC 1839; *Raghbir* v. *State of Haryana,* 1981 Cri LJ 1497; *Raj Singh* v. *State of Haryana* (2000) 6 SCC 759; *Madan Singh* v. *State of Bihar,* AIR 2004 SC 3317.

in the offences of rape and murder by children. Third, children are committing more offences because they know that they cannot be punished in view of the Juvenile Justice Act, 2000.

All the three arguments are fallacious and need to be refuted.

The official data

No facts and data have been cited to support the need for hurrying this legislation and the only rationale one may have heard for introduction of the JJ Bill was the statement imputed to Maneka Gandhi that a police officer had told her that 16-18 years old children have been involved in 50% of the sexual offences and they are committing these crimes because they know that they cannot be punished under the current law.

Enough official data from *Crime in India* has been highlighted in numerous pieces published in various newspapers that this information is completely false and it is not based on any data or research.[6] A brief glimpse in the official data shows the offences by children in India are a miniscule 1.2% of all the crimes committed. Out of the total number of persons arrested for murder and rape, children constituted a miniscule 1.3% and 3.29%[7] and not 50% as believed by the minister.

It is important to look at the following data from *Crime in India* published by the Government of India to get the correct national perspective of crime by children in India:[8]

Incidence of juvenile crime in India:

- From 2003-2013, the percentage of juvenile crimes to total crimes has marginally increased from 1.0% to 1.2%.[9]
- The percentage of juvenile crimes to total crimes remained constant at 1.2% in 2013.

6 For example, Satish Mrinal and S. Rukmini, "Misunderstanding Rape Condemning Juveniles" *The Hindu*, Aug. 13,2014 *available at*: http://www.thehindu.com/opinion/op-ed/misunderstanding-rape-condemning-juveniles/article6309522.ece?homepage=true (last visited on Aug. 14, 2014); Ved Kumari, "Not a Grown Up Debate" *Indian Express* Delhi Edn, July 24, 2014, *available at*: http://epaper.indianexpress.com/309684/Indian-Express/24-july-2014#page/11/2 (last visited on July 24, 2014).

7 A total of 845 were children out of 64813 persons arrested for murder and 1388 children out of the total of 42115 persons arrested for rape in 2013. "Persons Arrested Under IPC And SLL Crimes By Age Groups And Sex During 2013 and Juveniles Apprehended Under IPC and SLL Crimes By Age Groups & Sex During 2013" *Crime in India, 2013*.

8 Data on Juvenile Crime from Crime in India, 2013, prepared by Centre for Child and the Law (CCL), National Law School of India University (NLSIU) Bangalore, 2.8.14.

9 Incidence and Rate of Juveniles in conflict with law under IPC (2003-2013), *Crime in India, 2013*.

- In 2013, juveniles between 16 and 18 years apprehended for murder and rape constituted 2.17% and 3.5% of all juveniles apprehended for IPC crimes.[10]

Socio-economic profile

- 32.14% of juveniles had primary-level education and 19.28% were illiterate. Together, they constitute 51.43% of juveniles apprehended for crimes under IPC and SLL in 2013.
- 50.24% juveniles had an annual income of upto Rs 25,000 and 27.31% upto Rs 50,000. Taken together, 77.56% of juveniles apprehended have an annual income below Rs. 50,000.
- The majority of juveniles apprehended for murder and rape in 2013 hail from deprived socio-economic backgrounds, and who have not completed primary education.

This data clearly shows that there has been no dramatic increase in juvenile crime in the recent past nor are 50% children responsible for commission of sexual offences. The source of the police officer that informed Maneka Gandhi that 50% of sexual offences are committed by juveniles of 16 years old is not known. It certainly is contrary to the official figures given in *Crime in India 2013*. It may be noted that the figures given above relate to children 'arrested' and not of children 'found to have committed rape'.

Crime in India 2013 indeed has reported 35.2% increase in rape cases by adults in the year 2013 over 2012. In case of children the increase in arrest for rape is 60.3% in 2013 over 2012. In terms of real numbers, it means that 709 more children and 8784 more adults were arrested in 2013 over 2012. This increase has to be understood by reference to the changes made in the definition of rape by the Protection of Children from Sexual Offences Act in 2012 and in Indian Penal Code in 2013. The definition of penetrative sexual assault or rape has also been widened to include not only peno-vaginal penetration by man of a woman but also anal and oral penetration by objects and fingers and is also gender neutral in case of children below the age of 18 years. More juveniles fall within the net of sexual offences as the age of consent for sexual intercourse has been raised to 18 years for both boys and girls. Any consensual sexual contact among 16-18 years old is now an offence from kissing, hugging, to sexual intercourse while it was not so earlier. In the absence of segregated data about peno-vaginal rapes and other instances of rape with the age of offender and victim in each

10 Juveniles apprehended under different IPC Crimes during 2013 (State & U-T wise), *Crime in India, 2013*.

case, it is wrong to say that there has been an increase of 60.3% cases of rape over 2012 when the offence was limited only to peno-vaginal sexual intercourse.

Also, all these children have not committed 'brutal rape'. On the contrary, many of these are "Love and Elopement Cases of adolescents" leading to the charge of rape. *The Hindu* newspaper carried a study of rape cases in Delhi. NCRB reported 1636 rape cases in Delhi in 2013. It examined deeply the 583 cases disposed of by the sessions court in that year. It has reported as follows: [11]

> The Hindu found that one-fifth of the cases were wound up because the complainant did not appear or turned hostile. Of the cases fully tried, over 40% dealt with consensual sex, usually involving the elopement of a young couple and the girl's parents subsequently charging the boy with rape. Another 25% dealt with "breach of promise to marry". Of the 162 remaining cases, men preying on young children in slums was the most common type of offence.

Compulsory reporting about sexual offences and raising of the minimum age of consent for sexual intercourse are causing havoc and there is huge worry among judicial circles and child rights activists about criminalization of young persons for their romantic alliances – sometimes despite the knowledge and consent of their parents but most of the times for acting against the wishes of their parents. It defies reason as to why the Ministry of Women and Child Development has proposed the JJ Bill to exclude these very youngsters from the protection of juvenile justice instead of reviewing the POCSO?

No scientific report exists in India to show that children found to have committed a serious offence have committed similar offences repeatedly. The exclusion of children committing violent offences from juvenile justice is being introduced in response of demonization of children by the media since the Nirbhaya rape case in December 2012. It is a well-accepted principle in the legal arena that one exceptional case does not make the rule and any rule made on an exception is bound to be a bad law. The matter of exclusion of children from juvenile justice and lowering the age of juvenility from 18 to 16 years has been raised twice already before the Supreme Court and has been rejected by it on both the occasions.[12] If the government is going against the judgments of the Supreme Court and its obligation under the United Nation

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11 "The Many Shades of Rape Cases in Delhi", *available at*: http://www.thehindu.com/data/the-many-shades-of-rape-cases indelhi/article6261042.ece (last visited on Mar. 23, 2014).

12 See, *Salil Bali* v. *Union of India,* decided on 17th July 2014, *available at*: http://judis.nic.in/supremecourt/imgs1.aspx?filename=40577, (last visited on July 20, 2014); *Subramanian Swami* v. *Raju Through Member Juvenile Justice Board, available at*: http://judis.nic.in/supremecourt/imgs1.aspx?filename=41356 (last visited on Apr. 6, 2014).

Convention on the Rights of the Child, the burden is on the government to put forward its reasons for going back on its own rationale for bringing about the Juvenile Justice Act, 2000 raising the age of juvenility from 16 to 18 years to discharge its obligation under the CRC.

The US started excluding children from juvenile justice since mid 1990s as a panic reaction to a very high violent juvenile crime rate. In the US, 1,020,334 children under the age of 18 years were arrested in 2011[13] and they constituted 10.8% of total arrests.[14] The rate of juvenile delinquency is still at 4367 in the age group of 10-17 which was at its peak at 8476.1 in 1996.[15] India must not think of the same approach with total juvenile crime rate of 2.6 in 2013. Even with the existing crime rate of more than 500 despite the exclusion of children as young as 12 and 13 in some jurisdictions in the US, all studies now being published in the US are concluding that it was a mistake to exclude children from juvenile justice as they have been found to be more prone to reoffending than those who were not so transferred.[16]

The *New York Times* reported that "Teenagers prosecuted in adult courts or who do time in adult jails fare worse in life and can go on to commit more violent crimes than those who are handled by the juvenile justice system. …These facts argue for steering adolescents into the juvenile justice system, where they can receive rehabilitative services and be spared adult criminal convictions that banish them to society's margins and make it virtually impossible for them to find jobs."[17]

Surely, one can learn from their research findings as well as from findings that deterrent punishment does not deter. One has to address the socio-economic circumstances, patriarchal values that promote discrimination and violence against women, provide support to families for better care of children, improve the standard of education, and reduce the drop-out rate in schools to address the problem of crime by children. Exclusion of children from juvenile justice is a knee jerk reaction, deflecting the focus away from the real issues.

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13 Table 38, "Arrests by age" in *Crime in the United States* 2012, *available at*: http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/38tabledatadecoverviewpdf (last visited on Apr. 9, 2014).

14 *Ibid*. Table 41, *available at*: http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/41tabledatadecoverviewpdf (last visited on Apr. 9, 2014).

15 "Juvenile Arrest Rates by Offense, Sex, and Race (1980-2011)", *available at*: http://www.ojjdp.gov/ojstatbb/crime/data.html (last visited on Apr. 9, 2014).

16 Janet C. Hoeffel, "The Jurisprudence of Death and Youth: Now the Twain Should Meet" in 46 *Texas Tech Law Review* (2013); Elizabeth S. Scott and Laurence Steinberg, "Adolescent Development and the Regulation of Youth Crime" 18(2) *The Future of Children* (Fall 2008).

17 Dated Sep. 16, 2013.

Adult punishment for adult crime - erroneous assumptions

One basis for the demand for adult punishment for adult crime is that it is the desert of their deed. "Desert of their deed" and retribution were the basis for punishments in the barbaric times when an eye for an eye was considered justice. These approaches do not have a place in the civilized societies.

Today, deterrence and rehabilitation are considered the two primary purposes of punishment in India and abroad. However, there is no evidence that severe punishment deters. Punishments for rape have been made harsher by amendments in the Indian Penal Code in 1983 and 2013. However, there has not been any visible reduction in the offence of rape by adults with the introduction of harsher punishment. On the contrary, *Crime in India 2013* indeed has reported 1255.3% increase in rape cases by adults since 1971. With such increase in rape by adults, how does one know or can be sure that adolescents will be deterred due to fear of harsh punishment by transfer to the adult system while the adults do not seem to have been deterred.

There is also the widely held belief that adolescents are committing more offences because they know that they will not be punished due to prohibition contained in the Juvenile Justice Act. The basis for this argument is traceable to the free will theory of the natural school which propounded the idea that all human being are free and rational and they choose to commit an offence after doing a cost-benefit analysis. Hence, providing more and more stringent punishment is the answer. This approach to crime and punishment was overshadowed and dropped with the emergence of deterministic theories of causation of crime which proved that people committed crimes because of the economic, social, and cultural pressures. In today's world and especially in case of children there is little rationale for punishing children on the basis of pain and pleasure theory, especially in view of the scientific findings relating to the adolescent brain.

India had outlawed punishment for children since 1986 for all boys till the age of 16 years and all girls till the age of 18 years. In 2001, punishment was excluded for all boys and girls till the age of 18 years. Despite this provision, in 2013, 99,997 children out of 100000 did not commit any offence. Focusing on the reasons why the miniscule number of three out of one lakh children commit any offence despite there being no punishment will lead us in the correct direction of what needs to be done to ensure that even the miniscule number of children do not commit crime. The reason for their committing the offence certainly cannot be traced to absence of punishment for children. No country in the world has shown that it has reduced crime by providing harsher punishments. No significant change in the crime rate was found in countries that abolished and then reintroduced death penalty.[18]

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18 35th Report of the Law Commission of India on Capital Punishment, *available at* : http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf (last visited on Aug. 20, 2014).

Other arguments presented in favour of giving adult punishment to children in the age group of 16-18 are that they know the difference between right and wrong and if they are old enough to commit the adult offence, they should be given adult punishment. Both the arguments are antiquated and need to be rejected for that reason alone. If children are to be punished like adults as soon as they start distinguishing right from wrong, the cut off age for imposing adult punishment will have to be much lower than 16 years. Sections 82 and 83 of the Indian Penal Code have chosen 7 years and 12 years as the cut off ages on that principle. It is unclear which offences are 'adult offences'. The offence of rape may be committed by a person on attaining puberty and that happens much before 16 years. Hence, there will be space for asking for exclusion of younger and younger children from juvenile justice with each brutal rape case by a young person just below the specified age. It is with this process that some western countries have ended up excluding children as young as 12 and 13 from the juvenile justice system. In England, even the 10 and 11 year old children in the Jamey Bulger's case were given 15 years of imprisonment by reference to the brutal manner they had battered a two year old child to death.[19]

Another fallacious argument proposed for punishing children is that they are being exploited by adults who know that children cannot be punished. It is the most ironical position where the demand is to punish the victim of exploitation to protect him from exploitation. It is common sense that we need to identify and punish the exploiters and not the children who are victims of exploitation.

Uninformed of scientific developments

There are two facts that are very typical of adolescents. One, their brain functions differently than that of children and adults. Two, they are open to influence from peers and others. Both these reasons must be taken into consideration while making policy decision regarding what should be done to adolescents when they commit serious offences.

Neuroscientists have carried on brain scans of adolescents and found that their brains are different from those of children and adults. Different parts of the brain do not develop at the same rate. Adolescents are more vulnerable to taking risky and violent behaviour and instant gratification because the part of the brain which urges people to do so, is more developed in adolescents but the part that makes adults restrain themselves from such behaviour is not so developed. Finding of these researches have been relied upon by the American Supreme Court while declaring

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19 *Reg.* v. *Secretary of State for the Home Department, Ex parte V.* and *Reg.* v. *Secretary of State for the Home Department, Ex parte T., available a*t: http://www.parliament.the-stationery-office.co.uk/pa/ld199798/ldjudgmt/jd970612/vandt01.htm (last visited on Aug. 20, 2014).

imposition of death penalty on children unconstitutional.[20] These scientific findings have also led to prohibition of imposition of life imprisonment without possibility of parole for children for any offence.[21] There is scientific evidence available today that needs to be taken into consideration in making public policy for adolescents.[22]

The opposition to exclusion of adolescents from juvenile justice is not based on the incapability of 16-18 years old to distinguish right from wrong, but on the basis of their incapacity to control their risk and pleasure seeking behaviour at that age. The state of the adolescent brain coupled with absence of sufficient and required social guidance and supervision from the parents as well as from the state leaves the adolescents vulnerable to the pressures of their brain programmed to promote risk and pleasure seeking behaviour. The policy decision how to deal with adolescents committing serious offences must not ignore these scientific findings and the fact that these adolescents did not receive the needed guidance in appropriate social behaviour from their parents, society and the state.

III Bloomers in the JJ Bill

Apart from the problematic policy of exclusion of children from juvenile justice, the JJ Bill contains provisions that are unconstitutional or technically unsound or impossible to implement. For example, look at the following clause contained in section 3 of the JJ Bill:

> S.3(*i*) *Principle of presumption of innocence:* Any child shall be presumed to be an innocent of any mala fide or criminal intent up to the age of eighteen years.

Currently, section 82 of the Indian Penal Code provides that nothing done by a child below the age of seven years is an offence. It presumes such children to be innocent of any *mala fide* or criminal intent. Section 83 of the IPC provides that children above the age of seven but below the age of 12 are presumed to have the necessary intention unless proved otherwise. Reading these provisions together means

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20 *Roper* v. *Simmons,* 543 U.S. 551 (2005), *available at*: http://www.csustan.edu/cj/jjustice/CaseFiles/ROPER-v-Simmons.pdf (last visited on Mar. 24, 2014).

21 *Graham* v. *Florida,* 560 U.S. (2010), *available at*: http://www.njdc.info/njdc_members/images/pdfs/graham_decision.pdf (last visited on Mar. 24, 2014); *Miller* v. *Alabama,* No. 10–9646 with No. 10–9647, *Jackson* v. *Hobbs*, Director, Arkansas Department of Correction, on certiorari to the Supreme Court of Arkansas, decided on June 25, 2012, *available at* :http://www.supremecourt.gov/opinions/11pdf/10-9646g2i8.pdf (last visited on Mar. 23, 2014).

22 See Laurence Steinberg, "Should the Science of Adolescent Brain Development Inform Public Policy?" *Issues in Science and Technology*, Spring 2012*, available at*: http://www.issues.org/28.3/steinberg.html (last visited on Mar. 23, 2014).

that everybody above the age of seven is presumed to have the capacity to form *mala fide* or wrongful intention but it may be proved otherwise in case of children between 7-12 years of age. The principle of innocence contained in the bill raises the age of presumption of innocence of *mala fide* and wrongful intent up to the age of 18 years from the age of 7 years. While this is a welcome provision given the criticism that Indian government has received from the CRC Committee to its 3rd and 4th periodic country report for having set the age of criminal liability too low at seven,[23] it seems more a case of either non-application of mind in drafting or ignorance of basic principles of criminal liability rather than the intention of the government to raise the age of criminal responsibility to 18 years. If the government meant to raise the age of criminal responsibility to 18 years, the JJ Bill would not have made provisions for establishment of the juvenile justice board (JJB) or for exclusion of children in the age group of 16-18 years from juvenile justice and shifting them to adult criminal courts.

So far the principle of presumption of innocence had meant that everybody is presumed innocent till proved guilty. India has also been adhering to the common law legal maxim of "*actus non facit reum nisi mens sit rea*" for imposing criminal liability. It means that no person may be held criminally liable unless his/her act was accompanied by the necessary criminal intent. Most of the offences contained in the Indian Penal Code specify the wrongful intention required for convicting a person for the offence. Very few offences in the IPC are strict liability offences. This provision seems to have amended sections 82 and 83 of IPC and raised the age of criminal responsibility to 18 with the burden to prove existence of *malafide* or wrongful intention on the prosecution for all children up to the age of 18 years. The principle of presumption of innocence as contained in the JJ Bill takes away the very jurisdiction from the JJB unless the prosecution proves existence of *mala fide* or wrongful intention in each case where a child till the age of 18 years is alleged to have committed an offence.

The provisions contained in sections 7 and 8 of the JJ Bill are violative of articles 20 and 14 of the Constitution.

Section 7 of the JJ Bill reads:

> Any person, who is apprehended after completing the age of twenty-one years, for committing any serious or heinous offence when such person was between the age of sixteen to eighteen years, then he shall, subject to the provisions of this Act, be tried as an adult.

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23 Adopted by the Committee at its sixty-sixth session (26 May - 13 June 2014).

Article 20 of the Constitution reads:

> **Protection in respect of conviction for offences.—**(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

On the face of it, section 7 violates the prohibition contained in the second part of this article as it applies criminal liability of adults on a child not by reference to the date of offence but date of first production. The question of applicability of the Juvenile Justice Act has been long litigated before the Supreme Court and questions had been raised if the applicability has to be decided by reference to date of offence or date of first production after arrest. In *Arnit Das*,[24] a division bench of the Supreme Court erred in 2000 in choosing the age at the date of first production for applicability of the Juvenile Justice Act in contrast with the decision in *Umesh Chandra*[25] given in 1982 by a full bench. The decision of the division bench in *Arnit Das* was set aside by the constitutional bench in 2001.[26] Final verdict on the matter was given on the question by another constitution bench in *Pratap Singh*[27] in 2005 holding that it is the date of offence that determines applicability of the Juvenile Justice Act. Section 7 is in apparent violation of article 20 of the Constitution as well as the Supreme Court verdict.

Section 8 of the JJ Bill provides that children who are arrested after attaining the age of 18 years but below the age of 21 years for offences committed before the age of 18 years will be dealt with by the adult court though applying the provisions contained in the JJ Bill. As the adult court do not provide the same procedural safeguards and are required to pass differential orders, this provision violates the guarantee of equal protection of law and equality before law contained in article 14 of the Constitution. While the right to equality permits reasonable classification, there must be a nexus between the classification and the object to be achieved. As the object of the JJ Bill is reformation and rehabilitation of children committing offences, this purpose is not served by providing differential procedures without the safeguards available to children who committed similar offences during juvenility and were arrested before attaining 18 years of age. The reasons why a child was not arrested before ceasing to be a juvenile may be manifold and the child cannot be made to suffer the consequences of such delays without even asking if he was responsible for such delay.

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24 AIR 2000 SC 2264.

25 *Umesh Chandra* v. *State of Rajasthan,* 1982 Cri LJ 994.

26 *Arnit Das* v. *State of Bihar*, 2001 (6) Supreme 461.

27 *Pratap Singh* v. *State of Jharkhand* (2005) 3 SCC 551.

Transfer of children to adult court

Section 17 of the JJ Bill permits transfer of children between the ages of 16-18 years by the JJB if alleged to have committed a heinous offence, *i.e.*, any offence punishable with minimum seven years of imprisonment, to the adult court to be tried as adults. The matter of exclusion of children from juvenile justice and lowering the age of juvenility from 18 to 16 years has been raised twice already before the Supreme Court and was rejected by it on both the occasions.[28] If the government is going against the judgments of the Supreme Court and its obligation under the United Nation Convention on the Rights of the Child, the burden is on the government to put forward its reasons for going back on its own rationale for bringing about the Juvenile Justice Act, 2000 raising the age of juvenility from 16 to 18 years to discharge its obligation under the CRC.

The court to which these children will be sent is called the Children's Court established under the Commission for Child Rights Protection Act, 2005, or the special court established under the Protection of Children against Sexual Offences Act, 2005, or to session court having jurisdiction if neither of the two courts are established. All these courts are trained and oriented to impose harsh punishments on the accused charged with commission of offences against children or commission of serious offences. These courts are not geared towards reformation and rehabilitation of offenders compared to other ordinary criminal courts. The children's courts is further required to reconsider if the child so transferred should be tried as an adult or as a child. Even if it decides that the person should be dealt with as a child, it is not required to send the child back to the JJB. All the safeguards available to a child dealt with by the JJB are not available to a child dealt with by the children's court. This provision is violative of the fundamental right to equality before law and equal protection of law contained in article 14 of the Constitution of India.

The procedure prescribed for transferring children to adult court is also not without its share of difficulties. Section 15(1) requires the JJB to hold a preliminary inquiry with regard to the mental and physical capacity of the child to commit such offence, ability to understand the consequences of the offence and his circumstances before taking the decision for transferring him to the adult court. This provision proceeds on the assumption that the alleged offence has indeed been committed by the child and is contrary to the presumption of being innocent till proved guilty. The JJB is also required by section 14(3) to conclude this preliminary inquiry within one month of production of the child before it. In most cases of heinous offences even the final report is not filed within that period and may in fact be not filed ultimately

28 *Supra* note 12.

against the child but the JJB is required to decide the question of transfer of such a child even before that.

"Place of Safety" – a magical place for children and adults

Section 2(46) defines "Place of Safety" as "any place or institution, not being a police lockup or jail, established separately or attached to an observation home or a special home, as the case may be, the person in-charge of which is willing to receive and take care of the children alleged or found to be in conflict with law, by an order of the board or the children's court, both during inquiry and ongoing rehabilitation after having been found guilty for a period and purpose as specified in the order ." Children of different age groups and committing the full range of offences may be kept in this place. Section 6(2) authorizes keeping of a person between the ages of 18-21 years in this place pending inquiry if he is not released on bail. As per section 10(4), a person of any age claiming to be a child on the date of offence before any court other than the JJB may also be kept in the place of safety while his age is being determined. Children appearing before the JJB when not released on bail may also be kept in the place of safety as per section 13(3). Under section 19(1)(g) proviso, any child found to have committed any offence may also be sent to the place of safety by the JJB "if the conduct and behaviour of the child has been such that, it would not be in the child's interest, or in the interest of other children housed in a special home." Persons in the age group of 18-21 years on the date of arrest, if found to have committed the offence are also required to be kept in the place of safety till they are sent to prison on attaining the age of 21 years as per section 20 (3).

All these provisions mean that the place of safety may be housing children and persons of any age during the pendency of proceedings for age determination or commission of offence and children and persons in the age of 7-21 years found to have committed an offence. How will these children of various age groups be given individualized training for reformation in this place is still the hidden secret of this magical place. The cumulative effect of all these provisions will result in violation of the CRC direction for age-appropriate segregation.

Section 50 provides for establishment of at least one "Place of Safety" in each state. As the children or persons kept there may be required to attend cases in different districts, it will be anybody's guess how these children will travel the long distances between the place of safety and the JJB or the court before for attending the proceedings in their case. Each state is required to establish this place of safety but no financial memorandum has been attached with the JJ Bill to show how much money will be needed for establishing and running these place of safety or from where the money will be coming for them. In the absence of any financial allocation for establishment of such places with necessary infrastructure, sections of observation

homes or jails or sub-jails will be declared as place of safety and children and persons of all age groups will be dumped there together. These places will become the grooming grounds for criminal gangs and illegal activities in the absence of appropriate segregation, trained staff and specialized support mechanism for reformation and rehabilitation of these "hardened' child offenders.

IV Conclusion

The above discussion clearly shows that the JJ Bill is a retrograde step back in the history of progressive and protective legislative history of more than 150 years in India. It is a knee jerk reaction to the media hype created after the Nirbhaya case. It may be a political expediency but it is not an exercise in justice and it certainly does not protect children, women or society at large. Its deleterious results will be felt after the first batches of children will be released from prisons after serving long term imprisonments. One can either wait for young offenders to become hardened criminals during their long term incarceration in prisons or join the voices against passing of this bill in the present form. Each provision of the bill requires detailed scrutiny and must be examined critically for its adverse impact on children, women and society in the long run. There is enough evidence from around the world of the negative impact of transferring children to adult criminal justice system and there is no reason why India must make the same mistake and not learn from others' mistake.