

MISSING THE 'JUSTICE' IN THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) BILL, 2014

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The Juvenile Justice Amendment Bill was passed by the Lok Sabha in May this year, amidst protests by several parliamentarians that its punitive approach is fatal to the rehabilitative foundations of juvenile justice. The government's argument for harsher punishment seems to be a reaction of moral panic rather than one of well thought-out, empirically supported propositions. This issue of the Law & Policy Brief argues that the 2014 Bill, is insensitive to the principles of rule of law, proportionality and the concept of mitigation in criminal adjudication. The Bill allows the government to shirk away from its responsibilities of tackling the socioeconomic conditions that very often trigger criminal behavior among children and adolescents in India.

Law and Policy Research Group, at the Jindal Global Law School, brings the tools of legal analysis and policy analysis in conversation with each other. Its Law & Policy Brief presents inter-disciplinary analyses of Bills pending before the Parliament, recent court judgments, amendments to existing laws, recently enacted laws, and other topical legal issues that have important policy implications.

The Juvenile Justice Bill is meant to comprehensively reenact and strengthen the law dealing with the care and protection of children in need, and those found to be in conflict with the law. Alarming it proposes to try juveniles between the ages of 16 and 18 as adults for the commission of heinous offences, and in the case of serious offences if they are apprehended after the age of 21. Heinous and serious offences are punishable with imprisonment for seven and three years or more respectively under the Indian Penal Code. This policy of excluding children from the protection of juvenile law is based on a system of judicial waiver and individualized sentencing that ignores findings of adolescent culpability, procedural fairness and the amenability of children to corrective intervention. It sits incongruously with the Bill's own objectives of ensuring proper care, protection, development and social reintegration of juvenile offenders. Lastly, it overlooks the Parliamentary Standing Committee on Human Resource Development Report that found the Bill's amendments to be unconstitutional, and therefore seriously prejudicial to the future of juvenile care and rehabilitation in India.

A Trigger-Happy Response

The Juvenile Justice Act, 2000 and its subsequent amendments were meant to bring India in compliance with its obligations under the UN Convention on the Rights of the Child. For this reason, the current law adopts a child-friendly approach to delinquency with the ultimate aim of rehabilitation. This principle stands reversed by the call for harsher punishment, born out of the outrage against a juvenile offender, who along with four others was responsible for the brutal gang rape of a 23-year-old medical intern in New Delhi. What followed was a pattern of escalating alarm, reinforced by politicians, the media and the public, in response to which the government hastily prepared the Bill and so blatantly undermined the importance of a pre-legislative deliberative process.

In support of its contention for punitive action against juveniles, the Ministry of Women and Child Development has relied on data from the National Crime Records Bureau to demonstrate that children are increasingly committing heinous crimes. This data is based on the number of First Information Reports lodged against children and therefore is grossly misleading as

Editors

Dr. Ashish Bharadwaj
Saptarshi Mandal
jgls-lpb@jgu.edu.in
www.jgu.edu.in
www.jgls.edu.in



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evidence of escalating crime amongst them. The correct position is that juveniles are responsible for only 1.2 per cent of crimes committed in India. These figures have remained constant for the last two decades, which further indicates that the Bill may be premature in its response and misguided in its objectives.

In this respect, it is worth noting that a majority of juvenile offenders come from poor families and are homeless or living without parents at the time of their apprehension. Around 80 per cent of delinquents come from families whose income is less than Rs. 50,000/- per annum. As with most developing nations, India suffers the upshots of development in the form of heterogeneous populations, cultural variations, occupational differentiations and overcrowded conditions. Children are particularly susceptible to the disorganization and maladjustment of such a life. It is therefore incumbent on the government to adopt a holistic approach to the rule of law and justice that takes into consideration these unique causes of delinquency. In its current form the Bill effectively punishes socioeconomic exclusion. This contradicts the Government's stated pre-election commitment of laying special emphasis on vulnerable children including those belonging to backward communities.

Effects of a Transfer System

By virtue of Section 16(1), 19(3) and 7 of the Bill, children between the ages of 16 and 18 may find themselves incarcerated in prisons alongside adults. A law that maximizes sanctions for violent offenders is jurisprudentially defensible for its retributive value; but in the case of juveniles, its policy implications are troubling. Based on the US experience of transfer systems, there is definitive sociological and empirical evidence regarding the failure of transfers in achieving the goals of deterrence and public safety.

Empiricists and psychologists generally agree that transferred adolescents are more likely to “recidivate, recidivate at a higher rate, and be rearrested for more serious offenses on average, than those retained in the juvenile system”.¹ According to a report by Raise the Age NY, a public awareness campaign that studies criminal responsibility in New York State, around 80% of children released from adult prisons reoffend often going on to commit more serious crimes. Even without these statistics, it cannot be disputed that prison systems often provide children with opportunities to emulate the criminal behavior of those around them, rather than be discouraged by it. For this reason, at least 20 states in the US have decided to close down or downsize their youth facilities and reduce their reliance on incarceration.

The Report of the Indian Jails Committee 1919-1920, which predates international standards on this issue, has expressed its reservations about familiarizing “the young with the sight of prison life” and has denounced this as contrary to public policy. There is ample evidence to show that juveniles in adult populations are more likely to be victims of violence and sexual assault, and to commit suicide. Presently, India's jails suffer from overcrowding, have abysmal facilities, and barely provide any opportunities for gainful employment. It is imperative to have alternative institutional facilities for juveniles, which provide them with the environmental support necessary for their rehabilitation

Differentiation on the basis of Maturity

In the case of children who have committed a heinous crime and have completed 16 years, Section 16(1) of the Bill requires the Juvenile Justice Board to inquire into the child's mental and physical capacity in order to decide whether he should be tried as an adult or not. This is based on two faulty assumptions: the first, that children who commit heinous crimes are as culpable or blameworthy as their adult counterparts, and the second, that such maturity can be ascertained with scientific precision.

Increasingly, studies in neuroscience and developmental psychology concur on the opinion that adolescent crime is the result of transitory influences that are constitutive of youth. This means that adolescents, by virtue of their underdevelopment, are more susceptible and responsive to peer influence, less likely to focus on future outcomes, more impulsive, and evaluate risks and benefits differently from adults. Therefore they are more likely to commit crimes. To this extent, the argument that the nature of the crime committed indicates the maturity of a child is futile. An effective criminal justice system must recognize these characteristics and use them to distinguish children from adults in a way that mitigates culpability.

Additionally, it is accepted that there are no diagnostic tools for evaluating maturity on an individualized basis. Any such efforts are thought to exceed the limits of science, and by and large be fraught with error and uncertainty. If the Board continues to operate with such wide powers of discretion in determining maturity, transfers may be facilitated on arbitrary or biased grounds, amounting to a travesty of justice. A conclusive determination of maturity, also militates against the possibility that juveniles are likely to mature out of their antisocial tendencies. Ordinarily, such youths are not headed to a career in crime, unless their environments push them in that direction. This provides a strong utilitarian argument against incarcerating juveniles.

Participation in Trial

Section 20 empowers the Children's Court to receive juvenile delinquency cases from the Board and pass appropriate orders pursuant to a regular trial. These courts were originally designed under the Commission for Protection of Child Rights Act 2005, to try offences against children and not offences committed by them. Therefore, they are essentially designated Sessions Courts. It may be convincingly argued that trial in a Sessions court would be prejudiced against the child because of his inability to effectively participate in trial and assist the court in his own defence.

Criminal prosecution is always premised on the competency of the accused to stand trial. This is why most criminal justice systems exclude children and other mentally disadvantaged individuals from the jurisdiction of their courts. Although juveniles may be able to understand the factual components of a case, they will seldom know how to make a rational legal decision in their interest. A recent study on juvenile competency undertaken at the MacArthur Foundation noted that juveniles are more likely to make choices that are compliant to authority figures, such as confessing to the police rather than remaining silent or accepting a plea agreement. Therefore, subjecting juveniles to the jurisdiction of an ordinary court, would more often than not deprive them of their right to a fair trial.

Age of Apprehension

Section 7 of the Bill creates a distinction between juvenile offenders committing the same offence on the basis of the date of apprehension. For instance, children between the ages of 16 and 18 apprehended for heinous offences before the age of 21 will face trial contingent on a preliminary enquiry as to mental capacity; whereas if arrested after 21 will be tried as an adult. Similarly, where such children are apprehended for a serious offence before the age of 21 they may face a penalty of counseling, fine, or a maximum of three years in a special home; whereas if apprehended after 21 they will be tried as an adult. There appears to be no policy explanation for relying on the date of apprehension for awarding differential punishment for the same crime.

India has imported the concept of due process into its jurisprudence through Article 21 of the Constitution, which guarantees that no person shall be deprived of their right to life or personal liberty, except according to a procedure established by law [Menaka Gandhi v Union of India, AIR 1978 SC 597]. Due process implies that the procedure established by law must be fair and reasonable. The artificial differentiation created by the Bill, definitely falls foul of this standard. Additionally, although such

sanctions are not retrospective per se, they do have the effect of violating the spirit of Article 20(1) which requires that a person should not get a penalty higher than what would be applicable at the time of commission of the offence.

Presumption of Innocence

The presumption of innocence is embodied within our criminal justice system and the UN Convention. It prohibits the prejudging of the outcome of a case in any manner. According to the Bill, a Court will receive a case for trial pursuant to the Board's finding that the child has the requisite maturity to commit a heinous crime, and in some cases, after the Board has established that he is a repeat offender. Therefore, the trial of a juvenile will be based on a preliminary finding of culpability. This is likely to prejudice the court and trial, against the child from the very outset, thereby negating the presumption of innocence.

Constitutionality

The Amendment Bill is founded on the assumption that children can be classified and treated differently according to the maturity they display through their criminal behavior. This runs contrary to the constitutional mandate of providing special protection to children as a distinct class. Article 15(3) recognizes this by allowing the state to enact special laws for the protection of children. This exception to the doctrine of equality is permissible because it makes a reasonable classification for a legitimate purpose. In *Subramanian Swamy v. Raju*, the Supreme Court acknowledged that the classification of children based on age met the test of equality and refused to read down the provisions of the present Act to account for the mental and intellectual competence of a juvenile offender.

Article 14 contemplates a categorization that is based on broad features that are identifiable, distinguishable and reasonably connected with the object targeted. We have already discussed the scientific and sociological limitations of individualized sentencing. Such an approach is not reliable, because there is no objective and accepted way of ascertaining the maturity of juvenile offenders. Therefore, any classification on the basis of maturity would be arbitrary and fall foul of Article 14. Further, the incarceration of children with adults cannot be a legitimate purpose of the Bill, because it undermines its own rehabilitative objectives instead of furthering them. To treat children as adults for the purpose of punitive action also violates their right to life and personal liberty. In these circumstances, it may be best to accept and respect the legislative wisdom inherent in the Act and focus reformatory efforts on better implementation of the law.

International Obligations

India ratified the United Nations Convention on the Rights of Children in December, 1992. Since then, each of its juvenile justice laws have been enacted under the aegis of the Convention, for the purpose of promoting the sense of dignity and worth of children and facilitating their constructive participation in society. As a party to the Convention, India may be considered to be in violation of its obligations.

Firstly, the Convention defines a child as every human below the age of 18 unless under the law applicable to the child, majority is attained earlier. It expects all parties to achieve a non-discriminatory full application of their juvenile justice rules to all persons under the age of 18 years. Although, under the Indian Majority Act, children attain majority at the age of 18, the effect of the Bill is that they may be deprived of the protection of juvenile laws well before that.

Secondly, the Convention lays down incarceration as a policy of last resort. It has recognized that even in cases of severe offences by children, considerations of public safety and sanctions must always be outweighed by the need to safeguard the well-being and best interests of the child. The proposed system of punitive sanctions clearly overlooks this requirement.

The Way Forward

The government's argument for harsher punishment seems to be a reaction of moral panic rather than one of well thought-out, empirically supported propositions. Research on the regulation of youth crime is quite settled in the view that systems of restorative justice should be adopted to address juvenile delinquency. This is also the case for more serious offences because such children are thought to be most in need of closure and assistance. An effective juvenile justice system should focus on isolating the specific risk factors, which are known to influence delinquent and criminal behavior. These may include in their most drastic form poverty and illiteracy, and in subtler ways anger and anti-social feelings, lack of self-control, lack of affection or weak parental supervision. It must then work around infrastructural and human resource limitations to holistically address these concerns. The current Bill, allows the government to shirk away from its responsibilities of tackling the socioeconomic conditions that very often trigger criminal behavior in India.

Any attempt at curbing juvenile offences will be unsuccessful if it does not remedy the current state of implementation of juvenile law. Issues such as overcrowding, lack of hygiene and dysfunctional infrastructure are widespread in both the juvenile and

adult criminal justice system in India. Although the current Act lays down minimum standards for infrastructure and quality of care for each child care institution, a study commissioned by the Ministry of Women and Child Development reveals that in 2007, 56% of children in institutional care were subjected to physical abuse and 47% reported sexual abuse. Although children account for 47% of the population, currently only 0.04% of the budget is allocated for child protection. These systemic problems are reflective of a wider disregard on the part of the government toward children in conflict with the law and are likely responsible for the state of delinquency in India. Lastly, it is imperative that any criminal justice system applied to children is based on the principles of rule of law, proportionality and the concept of mitigation in criminal adjudication. It is regrettable that the fate of youth offenders in India has been sealed by a public vote in favor of revenge; rather constitutionally and internationally sound principles of youth crime regulation. The need of the hour is to return to the view that juvenile delinquency is essentially a behavioral problem and not a criminal problem. The government must revise the constitutional infirmities in the Bill, which allow for the discriminatory treatment and imprisonment of children. It must embrace the idea of restorative justice and strengthen existing systems by investing in correctional intervention. ■

¹Bishop, D & CE Frazier. 2000. 'Consequences of Transfer' in: Fagan J, Zimring F (Ed.) *The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court*. Chicago, IL: University of Chicago Press. Pp. 13–43.

About the Author

Shiladitya Rakshit [BSL-LLB (ILS Pune); LL.M (Durham)] is Assistant Professor & Assistant Director, Centre for Penology, Criminal Justice and Police Studies, Jindal Global Law School. Shiladitya has worked in a number of reputed law firms in New Delhi and Mumbai in the past. His teaching and research interests lie in the areas of criminal law and criminal procedure.

Bani Brar is a fifth year student of BA LLB (Hons.) at the Jindal Global Law School. Her research interests are issues in constitutional law and governance.

Editors and Conveners of the Law and Policy Research Group

Ashish Bharadwaj, Assistant Professor, Jindal Global Law School
Ph.D. (Max Planck Institute, Munich), LL.M. (Rotterdam, Hamburg, Manchester), M.Sc. (Chennai), B.A. Hons. (Delhi)

Saptarshi Mandal, Assistant Professor, Jindal Global Law School
LL.M. (Central European University, Budapest), B.A. LL.B. Hons. (National University of Juridical Sciences, Kolkata)