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JUVENILE JUSTICE BILL, 2014- A REGRESSIVE STEPIsha Kabra¹**Introduction**

Juvenile justice legislations have always been an important aspect of policy-making in a country. It is important that they are framed keeping all the aspects and implications in mind because they deal with and affect people, who do not have the maturity of adults, but the offences committed by them can also not be just ignored without taking any action. Every country has a separate way of dealing with juvenile offenders. While some countries might take a punitive and retributive approach, the others might decide to take up a more reformative and rehabilitative approach. At this moment in India, juvenile justice is a majorly contentious issue following the Delhi rape case where one of the persons accused of committing rape is a juvenile. The gory and heinous nature of the crime has given birth to nationwide as well as international protest and reaction. An aspect of this has been that doubts are being cast on the current system of juvenile justice in India. In the wake of that, a new juvenile justice legislation was introduced which seeks to make some substantial changes in the existing law. Before such a law is put into place, it becomes absolutely vital to analyse on what road the new legislation is taking us, what will be the larger policy implications of such changes and whether or not these changes are in line with the philosophy of juvenile justice. This paper seeks to analyse the proposed law in detail, tracing the history of these kinds of legislations to understand the basic logic, look at the international standards that have been set for such legislations and then understand how the new Act will impact all of these and whether or not the impact is serving the objective of treating juvenile offenders differently.

History of Juvenile Justice Legislations in India

Ancient India was conspicuously marked by the absence of laws that separately dealt with the juveniles who committed crimes. There was hardly any law which specialised in dealing with juvenile delinquency. This led to the creation of a huge problem of neglect of juvenile delinquents and it was felt that there is a need for a separate

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legislation dealing with the juveniles who are in conflict with the law. India was a British colony at that time and a legislation separately dealing with juveniles had been already passed in England. Taking some inspiration from that, The Apprentices Act was passed in 1850 in India which dealt with children in India. According to the provisions that were present in the Act, if a child, who was between 10 to 18 years in age, was found indulging in a crime, that child was placed in apprenticeship in a trade.

Ten years after this legislation, the Indian penal Code was passed. It had some specific provisions which dealt with underage criminals. Principle of *doli incapax* (meaning incapable of crime) was integrated by means of Section 82 and blanket immunity was given through this section to children below the age of 7 years.² Behind this immunity lies the assumption that a person below 7 years of age does not have the mental capacity to form a mental intent and knowingly commit a crime. A further extension of Section 82 can be seen in Section 83 where qualified immunity is given to children aged between 7 to 12 years of age with a rider attached.³ The next major act in the history of juvenile justice legislations in India is The Reformatory School Act which came in the year 1876. Through this Act, powers were given to the government to establish schools for the purpose of reforming young criminals and they were kept in these schools till they found employment. The year 1919 saw the appointment of a jail committee which gave various recommendations on the issue of juvenile justice reform programmes and legislations. As per these recommendations, separate juvenile justice legislations were formed in different provinces with the first ones coming in Madras, Bengal and Bombay. Since then, the concepts of juvenile justice and juvenile delinquency have gone through constant evolution and refinement.

After India achieved independence, a new act was passed in 1960 called as the Children's Act which had the objective of providing for care, protection, maintenance as well as giving education and training for the rehabilitation of the children who were neglected or were delinquents and also provided for their trial in the Union Territories.

² Section 82 of Indian Penal Code, 1860 reads as follows "*Act of a child under seven years of age — nothing is an offence which is done by a child under seven years of age.*"

³ Section 83 of Indian Penal Code, 1860 reads as follows "*Act of a child above seven and under twelve of immature understanding- Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion*".

Even after all of this, a lot of problems in the juvenile justice system kept cropping up and none of them proved to serve the purpose with complete satisfaction. One of the biggest problems was the multiplicity of the legislations which resulted in children in the same position being treated differently in different places due to different provisions. It was then observed by the Supreme Court in the case of *Sheela Barse v. Union of India*⁴ that instead of every state having a separate Act, the Parliament should enact a Central legislation in order to bring uniformity in the treatment to children who are in conflict with law. It was suggested that the Children's Act which should be enacted by the Parliament should contain provisions not just for the investigation and trial of offences which are committed against children but should also contain provisions envisaging the social, economic as well as psychological rehabilitation of children who either have committed a crime or who have are abandoned, lost or destitute. It was also recognised that merely enacting legislation would not suffice in solving the problem. It is required to be made sure that the legislation is properly implemented. Lack of finances on the part of the state cannot be pleaded as a ground for the non-implementation considering the gravity of the matter at hand. For all the expenditure that the state will be incurring on this, it will eventually be compensated by powerful human resource that will build up and will prove vital in the development of the nation. This led to the passing of Juvenile Justice Act, 1986 which had the objective of providing for care, protection and rehabilitation of juvenile delinquents as well as neglected children.

The Act of 1986 was then replaced by Juvenile Justice (Care and Protection of Children) Act, 2000 to cure the deficiency of the earlier Act. Yet according to Prakash D. (2013: 39), the new Act did not provide for differential approach to juveniles who were delinquent or negligent. This was done to bring the juvenile justice legislations in India in line with the UN Convention of 1989. The Juvenile Justice (Care and Protection of Children) Act, 2000 was further amended in 2006 and then in 2010. A special framework for the protection, treatment and rehabilitation of children is envisaged under this Act. A Child Welfare Committee and a Juvenile Justice Board have been established by this Act which deal with children who are in need of care and children who are in conflict with law, respectively. A juvenile who is accused of or detained for a crime is not brought before the regular criminal court but is brought before a Juvenile Justice Board. The constituents who form the Juvenile Justice Board are a metropolitan magistrate or a judicial magistrate of the first class and two social workers of whom one has to be necessarily a woman. Police also form a major component of the entire

⁴ *Sheela Barse v. Union of India*, 1986 SCALE (2) 230.

system. As a result, in every police station, a separate Special Juvenile Police Unit (SJPU) is required to be set up. Apart from these, there were many provisions which had the aim of ensuring a quick trial for the child and proper rehabilitation and care after that. The provision that has triggered debate in the recent past is related to the maximum punishment that can be given to a juvenile which, as per this Act, is three years in a protective home no matter what is the seriousness of the crime (Prakash D., 2013).

International Norms on the Issue of Juvenile Justice

Over the history of the world, there have been numerous international treaties and documents that have dealt with the rights of children. Before World War II took place, Geneva Declaration of the Rights of the Child was adopted by the League of Nations in 1924. A further step was taken by the United Nations (UN) when it established the United Nations International Children's Emergency Fund in 1946 (shortened as United Nations Children's Fund in 1953) and declared the importance of child rights through this. After two years, Universal Declaration of Human Rights was adopted by UN General Assembly which also recognised the need for protection of children. The first UN document to specifically focus on this issue was the Universal Declaration on the Rights of the Child, but it was not a legally binding document. It was in 1989 when the United Nations Convention on the Rights of the Child was adopted by the global community.⁵ The Convention was ratified by the Government of India on November 12, 1992 without any reservation which led to major changes in the national legislations on juvenile justice.⁶ According to UNCRC, a person below 18 years of age is a child. The primary duty of the parents to provide care and protection to the children and the obligation of the state to help them in fulfilling this duty is recognised in this convention. The articles contained in this Convention can be grouped together under the following themes:

⁵ Information on International Mechanisms for the Protection of the Child and Child rights, available at <http://www.childlineindia.org.in/united-nations-convention-on-the-rights-of-the-child.htm> (accessed 15th May, 2015).

⁶ See the results of "Representing Children Worldwide Survey", conducted by Yale Law School, (February 2006) esp. Jurisdiction Research, India available at <http://www.law.yale.edu/rcw/rcw/jurisdictions/assc/india/frontpage.htm> (accessed on 16 May, 2015);

1. Survival rights- The most basic rights which are necessary for the existence and rights of the child are included under this category such as nutrition, shelter, adequate living standard, access to medical services etc.
2. Development rights- This category includes rights such as right to education, play, leisure, freedom of thought, conscience and religion, leisure, cultural activities etc.
3. Protection rights- These rights aim to safeguard the children against all kinds of abuse, neglect and exploitation. It also includes special treatment such as special care for refugee children, safeguards for children who were facing the criminal justice system, etc.
4. Participation rights- These rights have the objective of ensuring a children's freedom to express opinion, have a say in the matters which directly affect them, become members of associations and assemble peacefully. With increasing capacity of the child, more participative rights should be granted.⁷

More importantly, there are four articles in the Convention which deserve special emphasis. These rights are also known as the 'general principles' and form the bedrock of the right provided under the Convention-

- Article 2- It states that without any kind of discrimination, all the rights that have been provided by UNCRC must be made available to all children.⁸

⁷ See the website of *Children's Right Alliance*, for the information on the UN Convention on the Rights of the Child available at <http://childrensrights.ie/childrens-rights-ireland/un-convention-rights-child> (accessed 15 May, 2015).

⁸ Article 2 of United Nations Convention on the Rights of the Child, 1989 states thus: "(1). *States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.* (2). *States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members*".

- Article 3- According to this Article, the primary consideration that should be there while taking any action concerning the child is the best interests of the child.⁹
- Article 6- This Article guarantees the right to life, survival and development to every child.¹⁰
- Article 12- This Article says that in any matter affecting the child, the view of the child has to be considered.¹¹

Juvenile Justice (Care and Protection of Children) Act, 2014

On 16th December, 2012, a gang rape took place in Delhi which shook the entire nation. A 23 years old girl was raped by six persons in a moving bus. One of these six persons, who were later convicted of the crime, was a juvenile who was just few months short of turning 18.¹² The debate on the juvenile justice legislations in the country started when he was convicted by the Juvenile Justice Board which gave him three years of imprisonment, which is the maximum punishment that can be given under the Juvenile Justice Act at the moment. The gravity of the crime led to a lot of protests and people

⁹ Article 3 of United Nations Convention on the Rights of the Child, 1989 states thus: “(1). *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.* (2). *States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.* (3). *States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision”.*

¹⁰ Article 6 of United Nations Convention on the Rights of the Child, 1989 states thus: “(1). *States Parties recognize that every child has the inherent right to life.* (2). *States Parties shall ensure to the maximum extent possible the survival and development of the child”.*

¹¹ Article 12 of United Nations Convention on the Rights of the Child, 1989 states thus: “(1). *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.* (2). *For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law”.*

¹² Nirbhaya Gang Rape Case: Juvenile Found Guilty of Rape and Murder, *The Times of India*, (August 31, 2013) available at <http://timesofindia.indiatimes.com/city/delhi/Nirbhaya-gang-rape-case-Juvenile-found-guilty-of-rape-and-murder/articleshow/22183253.cms> (accessed 17 May, 2015).

raised objections over the short term of the punishment. Many people demanded that in the light of the Delhi rape incident, the upper limit for juveniles should be reduced from 18 to 16. But the child rights activists like Dey M. (2014) are claiming that such a change in the law would be regressive.¹³

In the light of the above debate Juvenile Justice (Care and Protection of Children) Bill, 2014 was proposed which sought to bring some major changes in the existing juvenile justice system in India. According to the new Bill, for heinous crimes, a juvenile between 16 to 18 years of age can be tried as an adult. There was another provision which was a part of the Bill originally according to which a juvenile between 16 to 18 years of age who commits a less serious offence but is apprehended after 21 years of age can be tried as an adult. But this was later removed from the Bill as violative of Article 14, Article 20(1) and Article 21 of the Constitution. However, the provision, treating the juveniles between 16-18 years as adults, still remains as a part of the Bill. It becomes necessary to examine where is the new Bill taking us and what will be the implications of bringing such a major change in the existing scheme of the Act.¹⁴

Retributive Approach v. Reformatory Approach

Retributive justice revolves around the notions of merit and desert. It believes that people should get what they deserve. This implies that people who work hard are entitled to the fruits of their labour and the people who break rules should be punished. Further, people should be treated in the same way that they had voluntarily chosen to treat others. Retributive justice is a backward looking phenomenon. In response to a past event of punishment or injustice, punishment is warranted. The reason given behind this is that when a person commits an act of wrongdoing, someone who does not deserve benefits gains them while someone else who deserved them, loses them. Punishment is aimed at removing those undeserved benefits from the person who commits the wrong. Michelle M. (2013) suggests that it is a way of reinforcing the rules and restoring the balance of the scales of justice.¹⁵ Restorative justice on the other hand, does not focus on the punishment. Rather, it aims at repairing the harm that has been

¹³ Mousumi Dey (2014), "Juvenile Justice in India", 1(6) *IJIMS* 64, 67 (2014).

¹⁴ See the analysis on The Juvenile Justice (Care and Protection of Children) Bill, 2014 on the website of *PRS Legislative Research*, available at <http://www.prsindia.org/billtrack/the-juvenile-justice-care-and-protection-of-children-bill-2014-3362/> (accessed 17 May, 2015).

¹⁵ Michelle Maiese (2013), 'Retributive Justice', *Beyond Intractability* (June, 2013) available at <http://www.beyondintractability.org/essay/retributive-justice> (accessed 17 May, 2015).

done.¹⁶ Restorative justice can be best accomplished when the parties involved themselves meet and decide cooperatively how this has to be achieved. It is a way in which people, communities and relationships get transformed. The goal of such meeting between the victims, the offenders and the affected members of the society is to come up with an agreement as to how amends will be made by the offender to the other party for the crime committed by him.¹⁷ In the context of juvenile justice reforms, restorative justice requires a more effective engagement on the part of the citizens of the society as well as the community as a whole playing their parts as both the client and the resources in order to generate an effective response to youth crime. Balance can be said to be achieved when there is increase in public safety, sanction on juvenile crimes and offenders are re-integrated through the process of rehabilitation.¹⁸

On looking at the provisions of the new Act, it can easily be seen that it is taking a turn towards a more punitive and retributive mode of justice. It needs to be examined whether this is in line with the existing jurisprudence nationally as well as internationally on the matter of juvenile justice and whether these changes will be able to fulfil the objectives they have been brought for. In the previous part of this paper, we traced the history of the various juvenile legislations in India. A careful reading of the objectives behind these many legislations which kept evolving from time to time would reveal that none of them had the objective of retributive justice or awarding punitive sanctions to the children who were found indulging in criminal activities. The major aim was to provide adequate care and protection to the neglected children and bring in mechanism to re-integrate the children in conflict with the law back into the society through rehabilitation. These arrangements were meant to ensure that the a member of the society, who could not rationalise his actions while committing the crime, should not be lost and efforts should be made to bring him back into the system and enhance human power for the development of the nation.

¹⁶ See information about 'Restorative Justice' on the website of *National Council on Crime and Delinquency*, available at <http://www.nccdglobal.org/what-we-do/major-projects/restorative-justice> (accessed 17 May, 2015).

¹⁷ Micheal A. Corriero, *Judging Children as Children- A Restorative Juvenile Justice System*, available at <http://www.unicef.org/tdad/3michaelcorriero%281%29.pdf> (accessed 17 May, 2015).

¹⁸ Information about 'Juvenile Justice' on the website of the Centre for Justice and Reconciliation, available at <http://www.restorativejustice.org/university-classroom/02world/nothamcar/juvenile> (accessed 17 May, 2015).

Behind creating separate legislations for juveniles lies the premise that young people are fundamentally different from adults and are amenable to rehabilitation. This premise is based on well-researched theories in psychology and science and there are plenty of evidences available to prove these theories right. The prevailing belief is that as compared to adults, adolescents have less well-developed reasoning, maturity and impulse control. Going by this logic, young people should not be blamed fully for their act because their delinquent behaviour was the result of the larger systems of influence such as family problems, material deprivation or community conditions. Young people, who were exposed to destructive outside influences, must be given a chance to rehabilitate and re-integrate into the society. This, according to Laura S. (2013: 727-728), is in line with the various child reforms such as compulsory schooling, restrictions on child labour etc which try to demarcate childhood and adolescence through these institutions.

United States and Somalia are the two countries who have not ratified the United Nations Convention on Rights of the Child (UNCRC).¹⁹ As a result, they have legislations which allow juveniles to be treated like adults. There have been various studies conducted on the effect of such kind of legislations and we can use them here for our purpose to determine the better policy. For example in New York, a person can be treated as an adult at the age of 16 years of age in a criminal court. The main aim behind such legislation is to create deterrence. These harsh interventions have led to negative interactions between the criminal justice system and the young offender instead of giving him an opportunity to return to the society as a healthy and useful human resource.²⁰ Most of the states in United States have reformed their juvenile justice systems to make them tougher. There has been a clear shift by means of these reforms from traditional models of rehabilitation to juvenile justice which is punishment oriented. Legal means have been expanded and now greater number of juveniles are moved to the criminal courts and treated as adults in trial and punishment. An example of this is Florida where in pursuance of such changes, a large number of juveniles were shifted to the criminal courts. What has been the result is that Florida has the maximum number of juveniles in prison as compared to any other state. But despite this, there has been negligent change in crime rates by juveniles, remarks Charles Frazier et al.

¹⁹ See information on the Amnesty International Website about the Convention on the Rights of the Child, available at <http://www.amnestyusa.org/our-work/issues/children-s-rights/convention-on-the-rights-of-the-child-0> (accessed 18 May, 2015).

²⁰ Laura Pearl Spivack, *Raise the Age: Legislative Reform for the Juvenile Justice System*, [Online: Web] Accessed 18 May 2015, URL: <http://cswr.columbia.edu/wp-content/uploads/2015/04/Raise-the-Age.pdf>.

(1999).²¹ Just like India where *Nirbhaya* case has led to the debate, most of the punitive measures in the juvenile justice system in U.S.A have been introduced in response to the rising rates of crimes by youth offenders. Empirical evidence suggests that most of the assertions about such changes are insuring more proportionate punishment and providing greater deterrence are wrong. Rather, Dona M. (2000) opines, they increase the chances of recidivism offsetting the incapacitative gains and expose the young offenders to a range of harsh and unfortunate experiences and outcomes heightening their vulnerability.²² Even the Supreme Court of India has ruled against reducing the age from 18 years to 16 years in a case before it basing its reasoning on psychology.²³

In South Africa, reforms have been brought in the juvenile justice system making restorative justice as the fundamental basis for reform. This is line with the African philosophy of humanity and community and also the modern international trend towards restorative justice for juvenile offenders (Ann S., 2002).²⁴ Research has shown that restorative justice has the potential to gain the much needed larger role. It has shown to achieve typically higher levels of victim and offender satisfaction as compared to all the other traditional approaches. It has also shown success in completing higher levels of obligations as agreed by the offenders and the community interest if the victim and the offender are also taken into account. Desired outcomes have been observed in issues of reoffending and community interests. More scope lies in for restorative justice, identifies Robert C. (1986: 691) to incorporate procedural fairness and proportionality as compared to retributive justice.

Conclusion

A reaction to a problem in the form of a legislation catering to the public outrage can never be the solution. Rather, it ends up being a new problem in itself. This holds absolutely true in the case of new juvenile justice legislation which seeks to lower the age limit in response to the public outrage against the *Nirbhaya case*. However, the

²¹ Charles E. Frazier, Donna M. Bishop and Lonan Lanza- Kaduce (1999), "Get-Tough Juvenile Justice Reforms: The Florida Experience", 564 *Annals of the American Academy of Political and Social Science* 167 (July 1999).

²² Bishop, Donna M. (2000), "Juvenile Offenders in the Adult Criminal Justice System", 27 *Crime And Justice* 81 (2000).

²³ Salil Bali v. Union of India & Anr., Writ Petition (C) NO. 10 OF 2013.

²⁴ Ann Skelton (2002), "Reformative Justice as a Framework for Juvenile Justice Reform: A South Indian Perspective", 42(3) *The British Journal of Criminology*, 496 (Summer 2002).

lawmakers fail to observe that this leads to the birth of a downward spiral and there is no end to it. If an unfortunate event like *Nirbhaya* repeats itself and this time it involves an accused aged fifteen and a half years who is later proved to be guilty, the reaction of the public would be the same. However, if the lawmakers react in the same manner of reducing the age again, then we should bid a goodbye to the entire concept of juvenile justice. But the problem is not just of 'Where will this end?'. It is not even a problem in itself because laws have to be amended to cope up with and serve the society. But the changes, such as the one being in this case, violate the very basic premise of the legislation itself. The main aim of juvenile justice is to restore an individual back to the society because there is a chance to do so as the crime committed by him/her is mostly due to societal factors, deprivation and immature reasoning and underdeveloped mental ability. But by imposing punitive and retributive sanctions instead of the reformative ones, the lawmakers have essentially defeated the entire purpose of it. It negates the entire history and evolution of the juvenile justice legislations. Surely, such a drastic change, which doesn't serve the purpose at all, is not the only solution available to remedy the situation. What is needed in this situation is an effective implementation of the existing laws. The proper adoption of the reformative approaches and improvement of infrastructure in this regard is the step in the right direction. Time and again, as has been surveyed in the examples in the earlier part of this paper, it has been proved that only properly implemented reformative laws would be of help to the society. And for this, it is not just the duty of the government, rather of the society as a whole to make sure that a juvenile who has deviated from the society is restored back to it as a mature contributing member. The entire community needs to participate in achieving the objectives with family care, school based interventions and community participation. If this can be done properly, there is no need to being any change in the existing Juvenile Justice Act in India.

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