

RGICS  
ISSUE BRIEF  
**THE JUVENILE JUSTICE (CARE AND  
PROTECTION OF CHILDREN) BILL,  
2015**  
(December, 2015)

# RGICS Issue Brief

## THE JUVENILE JUSTICE (CARE AND PROTECTION) BILL, 2015

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### ISSUE

The Juvenile Justice (Care and Protection of Children) Bill, 2015, adopted by the Lok Sabha in May, 2015, is to be considered by the Rajya Sabha in December, 2015 as a replacement for the Juvenile Justice (Care and Protection of Children) Act, 2000.

The most contentious issue in the Bill is the proposal that the minimum age for a child to be placed in the *adult* criminal justice system be lowered from the current 18 years to 16 years for certain crimes.

Under current law, children below 18 years are subject to criminal action ONLY in a specially trained and equipped juvenile justice system geared to seeking the reintegration of children in conflict with law as productive members of society so as to prevent them falling into a black-hole of lifelong criminality if they were put in the adult criminal justice system and exposed to the influence of hardened criminals and gangs in adult lock ups and prisons.

The proposed Bill is backed by a section of vocal public opinion mainly of India's more privileged upper and middle classes -- who fear becoming victims of crime more than becoming victims of the criminal justice system. Their view is that the only way to deal with crimes by 16-18 year olds is to inflict maximum physical and mental pain and suffering on them so as to frighten them into deterrence from future crimes. This demand is also animated by a hangover from a pre-modern, feudal, vengeful and violent past in which the cry for blood -- "an eye for an eye and a tooth for a tooth" -- was the central philosophy of an uncivilized criminal justice system. Its simplistic mantra -- illiterate and unintelligent -- is: "if you are old enough to rape, you are old enough to hang". This view does not care for reason, rationality or truth. It ignores data on the very small number of crimes committed by children 16-18 years of age (see details below); as well as on the increased risk that sending such children to the adult criminal justice system would increase their "recidivism" -- their tendency to commit repeat offences (see below). There is not a shred of scientific evidence that points to any proven social benefit in sending children 16-18 years old to adult prison. On the contrary, this approach runs counter to international experience which supports the current minimum age of 18 years. An uneducated, barbarian and primitive demand from a tiny but privileged section of the public to give harsh punishment in our corrupt, brutal, and failed adult criminal justice ignores the hard evidence that harsh punishment of offenders does not deter heinous crimes. If that had been the case, countries such as China and Saudi Arabia would have had no crime at all. Nor would India have had any rape after the enactment of tough anti-rape laws in the post Nirbhaya period. Keeping 16-18 year olds in the juvenile justice system gives society the best chance to save their futures and save society from them in future.

This draconian change to the law is being supported by an orchestrated right wing media campaign that is deliberately spreading disinformation that the juvenile convicted in the Nirbhaya case was the most brutal amongst the assailants -- a claim that has been firmly rejected by the Juvenile Justice Board that convicted and punished the juvenile for his role in that case.

In adopting a policy of transferring juveniles below 18 years of age to adult prisons, it is ironic that a self proclaimed nationalist government that rejects western ideas in many spheres is blindly -- and quite proudly -- copying the US criminal justice system. There are aspects of the US system that may be worth emulation --but the US juvenile justice and criminal justice systems are certainly not worth emulation. The US is a black-sheep on child rights -- it is the only UN member country in the world that is not a party to the UN Convention on the Rights of the Child. There is a huge body of research in the US that points out that the US approach to transfer

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of juveniles to adult jails has failed. The US has a failed criminal justice system -- with some of the highest crime rates in the world along with the harshest punishments and highest rates of incarceration. It has a very violent society. Even if we want to change the current law, we should not adopt the failed US model which is what the Bill proposes to do. However, in the US too there is a new and better informed trend to move away from this regressive approach to juvenile justice as seen in the recent proposal by Connecticut Gov. Dannel P. Malloy, who has proposed making the state the first to raise the age of those tried in the juvenile justice system to 21, with special confidentiality protections for adults under 25. The move is based on a deep understanding that applying research which indicates that addressing the unique needs of young adults and changing the way the justice system deals with young adults has the potential to improve public safety outcomes and reduce recidivism etc. This view is also gaining ground with respected policy-makers like the Harvard Kennedy School which in September 2015 recommended that the age for entering the juvenile justice system be raised to 21 and that youths under age 25 receive developmentally appropriate treatment<sup>1</sup>.

The poor people of the country are silently and helplessly watching this drama unfold with much fear and anxiety. They are more afraid of becoming victims of the criminal justice system than of becoming victims of crime. They know that the proposed Bill will have a disproportionate impact on them. It will lead to the destruction of the future of tens of thousands of their children, whose only real crime is poverty.

The middle classes are also at risk under this Bill. Indeed, EVERY CHILD IS AT RISK OF BEING CRIMINALIZED AND BRUTALIZED IN THE ADULT CRIMINAL JUSTICE SYSTEM when the draconian provisions of this Bill are read with provisions of other laws.

The issue for our MPs is a straight forward one: will you be loyal to the philosophy of the Father of the Nation of compassion and kindness (“an eye for an eye will make the whole world blind”) and give our 16-18 year old children who get caught up in the criminal justice system a chance to regain their future? Or will you be guided by the blood-thirsty anger of lynch mobs that have no reason or rationality on their side? Will you ensure that a youthful India maintains her normative ideals and is able to gain from her much touted “demographic dividends” by engaging with her youngest citizens with justness and care? Will you follow a failed US model of juvenile justice or will you develop solutions that are responsive to the unique needs of our own society?

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<sup>1</sup> See Mark Schindler and Vincent Schiraldi, “Good Reasons to Raise Age for Juvenile Justice”, *The Hartford Courant*, 17 November, 2015. <http://www.courant.com/opinion/op-ed/hc-op-schindler-malloy-young-adults-1117-20151116-story.html>

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### KEY MESSAGES

(1) The proposal of the NDA Government to allow “transfer” of juveniles aged 16-18 to the adult criminal justice system *poses a grave danger to society. Rather than make India safer, the Bill is likely to increase crime.*

- *Juveniles transferred to the adult criminal justice system are far more likely to become hardened criminals and commit even more serious crimes than if they are kept within the juvenile justice system.*
- *A stint in adult prisons most often makes the juveniles more open to commit further –and often even more -- serious crime. It makes them inured to violence and sadism. It brutalizes them. Studies in the US show that “the New York kids treated as adult criminals were rearrested faster, more often, and for more serious crimes, and more often were returned to prison” and that 80% of the juveniles who are released from adult prisons go on to commit more serious offences. Putting juveniles in adult prisons exposes them to hardened criminals who will feed on their vulnerability and initiate them into serious crime. This will put society at a higher risk and increase the supply to organized crime. The JJ system will become a breeding ground for producing criminals rather than stopping them.*
- *Experience shows that where juvenile justice offers juvenile offenders a caring environment, the damage done by a lack of it in the past can be undone.*
- *There is no evidence whatsoever that putting juveniles who commit serious crimes in adult prisons will deter crime.*
- *At a time when the penal system desperately needs to be strengthened, this proposal will increase the prison population and contribute to a further breakdown of already overcrowded and dysfunctional prisons.*

(2) The public is being misled into believing that juveniles accused of committing crimes today enjoy impunity and are not punished. This is wrong. The fact is that, *under the law as it stands today, juveniles accused of committing crimes are tried, convicted and punished. Therefore the proposed new law is unnecessary.*

- *The juvenile justice system simply prescribes an alternative system for the trial, conviction and punishment of juveniles who commit crimes recognizing their age and physical and emotional status. It does not exempt them from criminal liability.*
- *Therefore there is no need to “transfer” juveniles to the criminal justice system to ensure their liability under the law.*

(3) The proposal to “transfer” juveniles committing crimes that are punishable by sentences of more than seven years would be **unconstitutional**. According to the Indian Constitution, all juveniles are equally entitled to *proper care, protection and treatment meeting their developmental needs, to child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation.* “No juvenile can be deprived of this protection simply because he or she happens to commit a crime for which the legislature has imposed a sentence of a particular duration or because the crime is considered to be “heinous”. **The proposed new law violates various fundamental constitutional rights and provisions. It also violates India’s commitment as a signatory to the UN Convention on the Rights of the Child, 1989 (UNCRC)**

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- The assumptions in various clauses of the proposed law treats children between 16 and 18 as culpable as adults, *violating the fundamental constitutional guarantee of the special protection for children under Article 15 (3). It also violates the right to equality under Article 14.*
- The clauses allowing for preliminary assessment by the Juvenile Justice Board, and assessment of reformation by the Children's Court also *violates the constitutional prohibition on procedural arbitrariness under Article 21* of the Indian Constitution.
- Children's basic right to life protected by Article 21 of the Indian Constitution stands to be affected by the proposed law by depriving those between the ages of 16-18 of the protection against disqualifications attached to conviction such as ability to secure gainful employment, stand for elections, and thus undermine the fundamental principle of reintegration that juvenile justice is premised upon.
- *The proposed law is also a violation of the principle of non-discrimination* under the UN Convention on the Rights of the Child, 1989 (UNCRC), which recommends that all signatories extend juvenile laws to all persons under the age of 18 years in order to achieve a non-discriminatory approach towards all children as a human right. *It is also a violation of the principle of best interests of the child* which is to be of primary consideration to all signatory states.

(4) ***The right to vengeance, a part of our feudal past, has been roundly rejected by India's progressive and rational Constitutional law and philosophy.*** The transfer of juveniles committing heinous crimes like rape to the adult criminal justice system to placate the cry of the victims or of society for retribution and vengeance would violate various decisions of the courts that reject retribution as a basis for punishment in India. This would also be contrary to our Constitutional vision of justice - derived from our freedom movement which placed non-violence and compassion as central values. The only objective of the JJ law, as stated in the preamble to the JJ Act, is: *'proper care, protection and treatment of juveniles by catering to their developmental needs, and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation'*.

(5) ***The proposal of the Government is anti-poor and anti-OBC/SC/ST,*** given that almost the juveniles in the JJ system almost always come from the poorest and most marginalized sections of society (OBC, SC, ST, minorities), often without even the support of a family or proper legal representation. They will be the ones ending up in the adult prisons.

(6) The government should put its energy and resources into ***providing greater care and protection to juveniles*** so that they don't take to crimes by implementing the rights based approach begun by the UPA government and guarantee that all children get adequate nutrition (RTF) and education (RTE).

(7) The need of the hour is to strengthen the **effective implementation of the Juvenile Justice Act, 2000** so that juveniles have the fullest opportunity for rehabilitation and re-socialization so that they can make a future as productive citizens. This is a big challenge in and by itself.

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### PART I. CONTEXT

The Nirbhaya gang rape, in which one of the accused was a juvenile, led to a debate on the question of stronger punitive actions against juveniles committing heinous crimes. On July 17, 2013, the Supreme Court rejected a batch of petitions seeking changes in the law to ensure that juveniles be tried under adult law in heinous offences like rape and murder and decided that the existing law must not be disturbed.

A three-judge bench, headed by Chief Justice P Sathasivam, rejected two petitions, filed by BJP leader Subramanian Swamy and parents of December 16 gangrape victim, challenging the constitutional validity of the Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act 2000). The SC judgment of March 28, 2014 also tried to put an end to further contestations on the issue. “If the legislature has adopted the age of 18 as the dividing line between juveniles and adults and such a decision is constitutionally permissible, the enquiry by the courts must come to an end. Even otherwise there is a considerable body of world opinion that all under 18 persons ought to be treated as juveniles and separate treatment ought to be meted out to them so far as offences committed by such persons are concerned,” the bench, also comprising justices Ranjan Gogoi and Shiv Kirti Singh, said.

However, on June 18, 2014 the Ministry of Women and Child Development, Government of India put on its website a notice containing the decision to ‘Repeal and re-enact the Juvenile Justice (Care and Protection of Children) Act, 2000’. The Ministry also put up a draft Juvenile Justice (Care and Protection of Children) Bill, 2014 and invited suggestions/ comments from the public on the provisions of the proposed Bill within 15 days i.e. by July 3, 2014. The Parliamentary Standing Committee on the Bill observed that the Bill was based on misleading data regarding juvenile crimes and violated various provisions of the Indian Constitution. The Bill was passed on 7<sup>th</sup> May, 2015, amidst heavy criticism and protests from various sections of the polity, and is now pending consideration in the Rajya Sabha.

This decision of the NDA government to change the law has led to serious debates which question the very basis of juvenile justice system in India. The decision questions not only why juveniles above a certain age indulging in violent crimes not be treated as adult criminals, but also why there should be a need to separate crimes committed by older juveniles from those committed by adults. In this regard it is important to state that the changes in the law will have serious repercussions for a marginalized section of society. The juveniles in conflict with law and their families neither have the resources nor the information to fight for their rights.

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### PART II: CONTENTIOUS PROVISIONS

- Mechanism for children between 16 to 18 years be tried in regular courts alongside adults for heinous crimes punishable with imprisonment for seven years or more.
  - JJ Act 2000 mandated that cases of juveniles in conflict with law to be heard only in front of Juvenile justice Boards
- Draft bill requires the Juvenile Justice Board (JJB) to make an assessment within three months to determine the nature of the offence, mental and physical capacity of the child and the circumstances in which the offence was allegedly committed following which the JJB may order for the child to be tried under the JJ Act or a regular court
  - As opposed to this the JJ Act 2000 mandated Juvenile cases not to be processed with Non-Juvenile cases
- Cognizable and Non-bailable Offenses: Offences punishable under Section 66 and any section under chapter IX are cognizable and non-bailable
  - As opposed to this the JJ Act 2000 mandated bail to be available to juveniles in all cases as long as the board decides that the child is not in danger.
- Fails to address existing gaps in law. The new law does not taken into account the special needs and requirements of certain sub-groups among juveniles in conflict with law. For instance, it fails to stipulate guidelines or policy directions for dealing with juvenile sex offenders, recidivists, female juveniles and/or other victims of juvenile crime. These are categories on which the existing legislation is silent. By failing to address these existing gaps the new law ensures that the problems continue.

### PROGRESSIVE PROVISIONS OF THE BILL

There are some provisions in the Bill that are progressive and will improve the law. These include the following.

- JJ Board for every district
  - JJ Act sought establishment of JJ Boards in a district or a group of districts. Did not specify one for every district compulsorily.
- The word ‘juvenile’ has been replaced with the word ‘child’ and the expression ‘juvenile in conflict with the law’ has been changed to ‘child in conflict with law.’ While in the JJ Act, 2000, juveniles in conflict with the law are defined as the ‘accused’, the draft Bill identifies a ‘child in conflict with law’ to be one who has been found by the Juvenile Justice Board to have actually committed an offence.
- Institutionalisation is suggested as a measure of last resort- juveniles institutionalized only if no other family care option possible or available.
- Mandatory registration of childcare institutions has been provided. Observation, shelter and special homes may be established by State governments.
- CARA (Central Adoption Resource Authority) has been made a statutory body vested with functions of in-country and inter-country adoptions. Section 58 of the draft Bill lays down special emphasis on intercountry adoptions, stating that all applications for adoption shall be filed before a Principal Magistrate of the concerned jurisdiction where the registered adoption agency is located.

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### PART III: KEY ISSUES

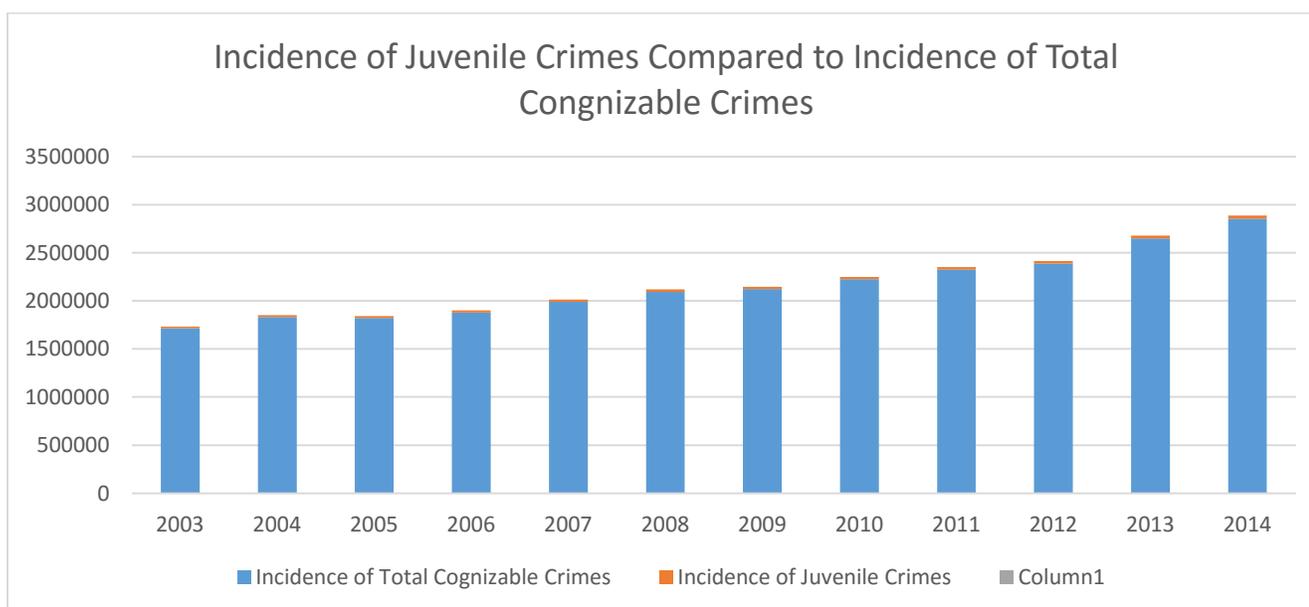
**I. The move to enact a new law presumes that juvenile crime rate is very high and our society is at risk. Data indicates otherwise.** Juvenile crime constitutes a miniscule fraction of the total crimes being committed in India. As per the National Crime Records Bureau's annual reports on Crime in India, the percentage of crimes under Indian Penal Code (IPC) reportedly committed by juveniles to total IPC crimes reported in the country has ranged from 1.0% to 1.2% in the last decade!

**Table 1: Crimes committed by Juveniles as compared to Total Cognizable Crimes in India 2003-2013**

Year	Incidence of Total Cognizable Crimes	Incidence of Juvenile Crime	Percentage of Juvenile Crimes to Total Crimes
2003	1716120	17819	1.0
2004	1832015	19229	1.0
2005	1822602	18939	1.0
2006	1878293	21088	1.1
2007	1989673	22865	1.1
2008	2093379	24535	1.2
2009	2121345	23926	1.1
T2010	2224831	22740	1.0
2011	2325575	25125	1.1
2012	2387188	27936	1.2
2013	2647722	31725	1.2
2014	2851563	33526	1.2

**Table 1: Crimes committed by Juveniles as compared to Total Cognizable Crimes in India 2003-2013**

Source: National Crime Records Bureau, Ministry of Home Affairs, GOI

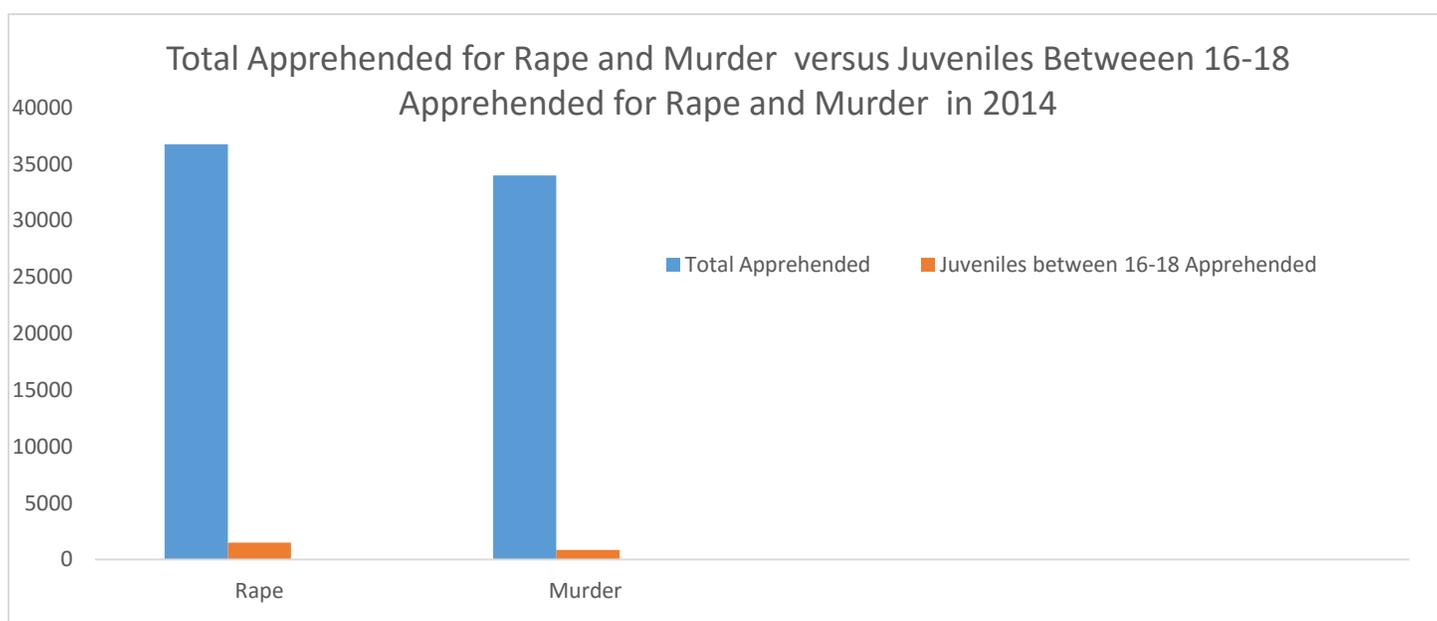


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The Bill presumes that there has been a significant increase in violent crimes by juveniles and provides for harsher punishment for those in the age group of 16- 18 years. As per the National Crime Records Bureau's annual reports on Crime in India, approximately 65% of juveniles were apprehended for property-related offences such as theft and burglary. As opposed to this, from 2010 to 2013, only 4% to 6% of the total rapes and 2% to 4% of total murders in India were committed by juveniles. 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. They also constituted a meager 1.30% (845) and 3.29% (1388) of all persons arrested for murder (64813) and rape (42115) in 2013 thereby lending zero credence to the statements that they are significantly responsible for violent crimes.



Source: National Crime Records Bureau, Ministry of Home Affairs, GOI

Year	Total Incidence of Rape	Total incidence of Rape by Juveniles	% Share of Juvenile to Total	Rape by Juvenile (16-18)	% share of Rape by Juveniles aged 16-18 to Total	Rape by Juvenile (12-16)	% share of Rape by Juveniles aged 12-16 to Total	Rape by Juvenile (7-12)	% share of Rape by Juveniles aged 7-12 to Total
2010	22172	937	4.2	651	2.9	276	1.2	10	0.0
2011	24206	1231	5.1	839	3.5	367	1.5	25	0.1
2012	24923	1316	5.3	887	3.6	396	1.6	33	0.1
2013	33707	2074	6.2	1388	4.1	636	1.9	50	0.1

**Table 2: Incidence of Rape (Section 376 of IPC) by Juveniles and its share to Total Incidence of Rape in India (2010-2013)**

Source: National Crime Records Bureau, Ministry of Home Affairs, GOI

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Year	Total Incidence of Murder	Murder by Juvenile (Total)	% Share of Murder by Juvenile to Total	Murder by Juvenile (16-18)	% share of murder by Juveniles aged 16-18	Murder by Juvenile (12-16)	% share of murder by Juveniles aged 12-16	Murder by Juvenile (7-12)	% share of murder by Juveniles aged 7-12
2010	33335	847	2.5	600	1.8	237	0.7	10	0.0
2011	34305	1168	3.4	781	2.3	356	1.0	31	0.1
2012	34434	1281	3.7	861	2.5	394	1.1	25	0.1
2013	33201	1230	3.7	845	2.5	362	1.1	23	0.1

**Table 3: Incidence of Murder (Section 302 IPC) by Juvenile and its share to Total Incidence of Murder in India (2010- 2013)**

Source: National Crime Records Bureau, Ministry of Home Affairs, GOI

### II. The Proposed Bill May be Counter Productive

The Bill also presumes that treating juveniles who commit serious crimes as adults will serve as a deterrent against juvenile crime and therefore promote public safety. However, there is no evidence available to support the claim that subjecting juveniles who commit serious crimes as adults will deter crime. There is on the contrary, a lot of evidence that the exact opposite is true.

The transfer system proposed in the Bill has been in existence in the US for over two decades. Multiple studies in the US conclude that this system has in fact been ineffective in addressing juvenile crime, public safety, and recidivism. The independent Task Force on Community Preventive Services set up by the US Centre for Disease Control reviewed published scientific evidence on the effectiveness of waiver laws to ascertain whether this prevented or reduced violence among those transferred, and among juveniles on the whole. Based on a review of nine studies on the specific and general deterrence effect of transfer laws, the Task Force concluded that: “...transfer policies have generally resulted in increased arrest for subsequent crimes, including violent crime, among juveniles who were transferred compared with those retained in the juvenile justice system. To the extent that transfer policies are implemented to reduce violent or other criminal behavior, available evidence indicates that they do more harm than good.”<sup>2</sup> “Studies have found that young people transferred to the adult criminal justice system have approximately 34% more re-arrests for felony crimes than youth retained in the youth justice system.”<sup>3</sup> “Around 80% of youth released from adult prisons reoffend often going on to commit more serious crimes.”<sup>4</sup>

In order to identify what works, the Pathways to Desistance Study, a large multidisciplinary project by the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice and funded by the US Department of Justice found that “longer stays in juvenile institutions do not reduce recidivism, and some

<sup>2</sup> Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services, *Centre for Disease Control and Prevention*, MMWR 2007, <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm>

<sup>3</sup> Raise the Age NY, ‘Get the facts’ (2013): <http://raisetheagency.com/get-the-facts>; *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: Report on Recommendations of the Task Force on Community Preventive Services*, Centers for Disease Control and Prevention, November 30, 2007, <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm>

<sup>4</sup> Raise the Age NY, ‘Get the facts’ (2013): <http://raisetheagency.com/get-the-facts>, National Campaign to Reform State Juvenile Justice Systems. *The Fourth Wave: Juvenile Justice Reforms for the Twenty-First Century*; p. 20. <http://www.publicinterestprojects.org/wp-content/uploads/2012/11/JJ-Whitepaper-Design-Full-Final.pdf>.

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youth who had the lowest offending levels reported committing more crimes after being incarcerated.”<sup>5</sup>It found that **“community-based supervision as a component of aftercare is effective for youth who have committed serious offenses, and offenders who receive community-based services following incarceration are more likely to attend school, go to work, and reduce offending.”**

Recent scientific findings on the maturity of the adolescent brain and the research on the failure of the transfer system has led to a shift even in the USA towards less punitive methods of dealing with juvenile crime – “since 2009, at least 20 states have closed or downsized youth facilities or reduced their reliance on incarceration. In many places, the money saved is being redirected to programs that supervise and treat youths in their communities. States that reduced juvenile confinement most dramatically also saw the greatest decline in juvenile arrests for violent crimes.”<sup>6</sup> In December 2012, the Attorney General’s National Task Force on Children Exposed to Violence, December 2012, recommended that “No juvenile offender should be viewed or treated as an adult. Laws and regulations prosecuting them as adults in adult courts, incarcerating them as adults, and sentencing them to harsh punishments that ignore and diminish their capacity to grow must be replaced or abandoned.”

### III. Violations of the Indian Constitution<sup>7</sup>

1. **Assumptions in clauses 15(3), 16(1), 19(3), 20, 21, 22, and 25 that children between 16 and 18 years are as culpable as adults and are competent to stand trial in an adult court, violates the right to equality under Article 14 and the special protection for children under Article 15(3).**

The Constitution of India guarantees Fundamental Rights to all children in the country. Article 15 the Constitution guarantees special attention to children through necessary and special laws and policies that safeguard their rights. The right to equality, protection of life and personal liberty and the right against exploitation is enshrined in Articles 14, 15, 16, 17, 21, 23 and 24 of the Constitution. The Directive Principles of State Policy guide the state in securing children from abuse and ensuring that children are given opportunities and facilities to develop in a healthy manner in conditions of freedom and dignity.

2. **Preliminary assessment by the Juvenile Justice Board (JJB), under clause 16(1), violates the constitutional prohibition on procedural arbitrariness under Article 14 and 21.**The provision requires the JJB to assess whether a child alleged to have committed a heinous offence, has the physical and mental capability to commit the offense, and also the ‘circumstances in which he allegedly committed the offence’. Latest research shows that individualized assessments of adolescent mental capacity is not possible and the suggestion that it can be done would mean “exceeding the limits of science”. The assessment proposed is fraught with errors and arbitrariness and will allow inherent biases to determine which child is transferred to an adult court. This assessment is also in essence- a sentencing decision that is arrived at even before guilt is established, a step that would be in complete violation of the presumption of innocence - a central tenet of the juvenile justice as well as the criminal justice system.

<sup>5</sup> Edward P. Mulvey, “Highlights from Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders”, US Department of Justice, March 2011, <https://ncjrs.gov/pdffiles1/ojdp/230971.pdf>

<sup>6</sup>Giudi Weiss, The Fourth Wave – Juvenile Justice Reforms for the Twenty-First Century, Winter 2013, p.4, Commissioned by the National Campaign to Reform State Juvenile Justice Systems for the Juvenile Justice Funders’ Collaborative. Available at: <http://raisetheageny.com/wp-content/uploads/2011/08/The-Fourth-Wave.pdf>

<sup>7</sup> This section is taken from the brief prepared on the Juvenile Justice Bill by the Centre for Child and the Law, National Law School of India University.

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3. **Arbitrariness is inherent in the assessment of reformation by the Children's Court under clause 21 and therefore violates the test of procedural fairness under Article 21.** Upon turning 21 years of age, the fate of the person will lie in the hands of the Children's Court. As per Clause 21, the Court will decide whether or not a person has "undergone reformatory changes" or "can be a contributing member of the society". Such an inquiry is highly subjective and prone to arbitrariness that falls foul of Article 14 of the Indian Constitution. This will inevitably result in the targeting of marginalized communities in India. Data already shows that more than half the children apprehended for offences, come from families with an annual income of less than Rs. 25,000 while only 0.55% of the children apprehended come from families with an annual income of more than Rs. 3,00,000.<sup>8</sup> Undoubtedly, the provisions of the JJ Bill will result in class, caste and religion-based targeting of children under the garb of assessing their potential contribution to society and extent of reformation.

4. **Deprivation of the protection against disqualification under the provisos to clauses 25(1) and 25(2) violates the right to life under Article 21 and the right to equality under Article 14.** Children between 16 and 18 years found to be in conflict with the law under clause 20(1)(i) will incur disqualifications thus rendering their rehabilitation and re-integration impossible. The reformation inquiry under clause 21 also becomes redundant in light of these two provisions. Even if a child is found to have undergone reformatory changes at the end of a highly arbitrary assessment process, she/he will incur the disqualification attached to the conviction, making it impossible to secure gainful employment, stand for elections or benefit from the fundamental principle of 'fresh start'. These provisos constitute a flagrant violation of the right to life and human dignity, as they will deprive children of a livelihood and leave them with no avenues for a dignified existence.

### IV. Violation of the UN Convention on the Rights of the Child, 1989 (UNCRC)<sup>9</sup>

The National Policy for Children was adopted in 1974 when the Government of India reiterated its commitment to secure the rights of all the children of this country by ratifying various international conventions and treaties. Over the years this has included its commitment on paper to the Declaration of the Rights of the Child, the United Nations Convention on the Rights of the Child and its two Optional Protocols. The Juvenile Justice Bill, 2015, violates many of the provisions of these treaties that India is signatory to.

1. **Violation of the principle of non-discrimination:** Trial and punishment of children between 16 and 18 years as adults violates the prohibition on discrimination under Article 2. The Committee on the Rights of the Child (CRC), recommended that "States parties **which limit the applicability of their juvenile justice rules to children under the age of 16 (or lower) years, or which allow by way of exception that 16 or 17-year-old children are treated as adult criminals, change their laws with a view to achieving a non-discriminatory full application of their juvenile justice rules to all persons under the age of 18 years.**"<sup>10</sup>
2. **Violation of the principle of best interests:** The transfer system violates the core principle of the best interest of the child, which is to be a primary consideration (Article 3). According to the CRC, the primary

<sup>8</sup>*Crime in India, 2013*, Compendium, National Crime Records Bureau (2014), pg 4. Available at <http://ncrb.gov.in/CD-CII2013/compendium%202013.pdf>

<sup>9</sup> This section is taken from the Brief prepared on the Juvenile Justice Bill by the Centre for Child and the Law, National Law School of India University.

<sup>10</sup> Committee on the Rights of the Child, General Comment No.10, para 34.

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consideration even in cases involving serious offences by children should be the best interest of the child – “[i]n cases of severe offences by children, measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered, including considerations of the need of public safety and sanctions. **In the case of children, such considerations must always be outweighed by the need to safeguard the well-being and the best interests of the child and to promote his/her reintegration.**”<sup>11</sup>

3. **Violation of the principle of institutionalization as a measure of**

50 Countries<sup>12</sup> that treat juveniles as adults based on the nature of offence and/or their age have been found to be non-compliant with the UNCRC by the CRC. The CRC has issued recommendations to them to reform their discriminatory laws to ensure that all persons below the age of 18 years are dealt with exclusively under the juvenile justice system.

**last resort:** Institutionalization under clauses 20(3), 21(2) and 22 violates the basic right that deprivation of liberty should only be a measure of last resort and for the shortest appropriate period of time (Articles 6 & 37(b)). Further, the new system will imply that persons found guilty of sexual offences under the Indian Penal Code and the Protection of Children from Sexual Offences Act, 2012 will receive the minimum mandatory sentences prescribed under the law. This will undermine the principle of last resort as it leaves judges with no option but to institutionalize a person and also violates the prohibition on cruel, inhuman and degrading treatment.

4. Preliminary assessment by the JJB under clause 16(1) and a determination by the Children’s Court under clause 21(1) both violate the prohibition on arbitrary deprivation of liberty under Article 37(b) of the UNCRC.
5. Trial and sentencing by the Children’s Court, which is essentially an adult court trying offences by adults *against* children, offends the obligation under Article 40(1) to ensure that the child offender is treated with dignity and also that his or her reintegration into society is facilitated.
6. The Bill allows the imposition of life imprisonment upon juveniles, which violates international standards that prohibit the imposition of life imprisonment in any form.

“...laws, policies and practices that allow children to be subjected to adult sentences are inherently cruel, inhuman or degrading because they fail to consider any of the special measures of protection or safeguards that international law requires for children. Children should never be treated as if they were adults. Because children are less emotionally and psychologically developed, they are less culpable for their actions and their sentencing should reflect the principle of rehabilitation and reintegration.”

“Life sentences or sentences of an extreme length have a disproportionate impact on children and cause physical and psychological harm that amounts to cruel, inhuman or degrading

<sup>11</sup>General Comment No.10 (2007) Children’s rights in juvenile justice, CRC/C/GC/10, 25 April 2007, para 71

<sup>12</sup> Angola, Antigua and Barbuda, Azerbaijan, Bahrain, Bangladesh, Barbados, Belgium, Bolivia, Canada, Cape Verde, Cuba, Cyprus, Denmark, Ecuador, Eritrea, France, Greece, Grenada, Guyana, India, Iran, Japan, Kenya, Libya, Madagascar, Malta, Mexico, Montenegro, Mozambique, Netherlands, Pakistan, Portugal, Qatar, Rwanda, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Singapore, Solomon Islands, Sri Lanka, Suriname, Syrian Arab Republic, Tanzania, The Former Yugoslav Republic of Macedonia, Tunisia, Turkmenistan, United Arab Emirates, United Kingdom, Viet Nam, Yemen.

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punishment. Similarly, the Special Rapporteur finds that mandatory sentences for children are similarly incompatible with the State's obligation regarding children in conflict with the law and the prohibition of cruel, inhuman or degrading punishment.

**Juan E. Méndez, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, March 2015**

7. Transfer of children to prison under clauses 20(3) and 21(2)(ii) violates the mandatory requirement of separation of children from adults under Article 37(c).
8. Maintenance of records of a child transferred to jail under clause 25(3) violates the right to the protection of privacy at all stages of the proceedings under Article 40(2)(vii).

The Human Rights Council:

Urges States to ensure that, under their legislation and practice, neither capital punishment nor life imprisonment are imposed for offences committed by persons under 18 years of age;

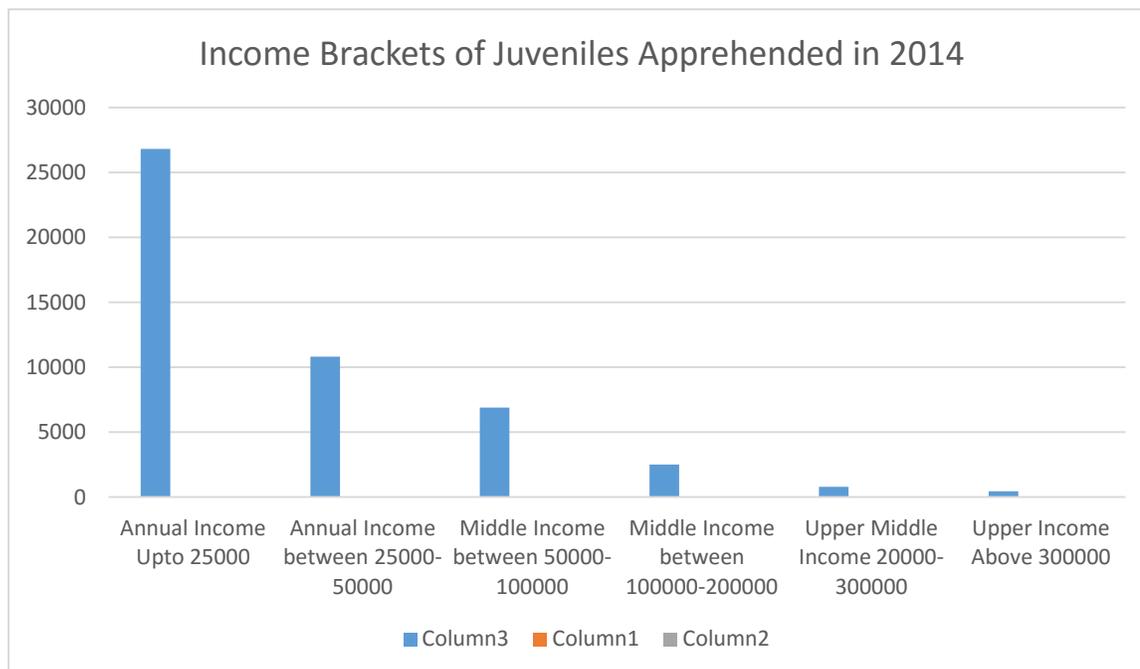
**Human rights in the administration of justice, including juvenile justice, A/HRC/24/L.28, adopted on 26.9.13**

**V. The Bill targets an extremely marginalized section of the society.** The socio-economic profile of juveniles apprehended under law shows that they hail from deprived socio-economic backgrounds, and who have not completed primary education. This is a segment that needs protection and not incarceration. In 2013, 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. 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.

In 2014, Out of the total Juveniles apprehended (48,230), 21.83% were illiterate, 21 % were educated up to the primary level, and 36.6% were above primary level. The economic Profiles of Juveniles Apprehended in 2014 is depicted in the graph below.

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### VI. The move to pass a new law shifts focus from the real problem.

The Bill is trying to amend the law to make punishment for juveniles harsher, whereas it is ignoring the reason why such crimes are happening in the first place. The NDA government instead of focusing on implementing the rights that the UPA government guaranteed to the children of India is focusing on provisions that would appease the public; however this will not address the root of the problem. UPA besides enacting the Right to Education also enacted the Food Security Act. It is these laws that will ensure that children of India grow into healthy and productive citizens.

**Budgetary provisions for children in the NDA Budget 2014-15 seem to belie their commitment to protect children as put forward in the Bill.** Children, who constitute almost 40 percent of the population, have been allocated less than 5 per cent of the total budget (4.52 percent). According to the figures on Budget estimates the overall allocation has in fact dropped from 4.64% in 2013-14 to 4.52%. This, despite substantial increase in existing schemes like ICDS, ICPS and SSA and the addition schemes for children with disability and girl children. While education sector receives the maximum share (3.26 per cent) in the Union Budget, there is a 2.32 per cent decline against the allocation made for school education in the previous year. In fact the budget for 2014-15 has shown a decrease in the shares of child education and child development.

Year	Health	Development	Education	Protection	Other BfC Schemes
2012-13	3.76	23.14	72.18	0.85	0.058
2013-14	3.42	23.81	71.99	0.72	0.058
2014-15	3.59	23.36	72.21	0.78	0.053

**Table 4: Sectoral Share within Budget for Children (BfC) 2014-2015**

Source: Budget for Children 2014 – 2015, HAQ: Centre for Child Rights

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### VII. The Bill Signifies a Regressive Reversal of Past National Policies for Children

Further, the Bill also regressively reverses several pioneering and progressive policies that have been designed for children in India. The National Charter for Children 2003 underlined the intent to secure for every child the inherent right to enjoy a healthy and happy childhood, to address the causes that negate healthy growth and development of children and to protect them from all forms of abuse. In 2013, the Indian Government adopted a new Resolution on the National Policy for Children. According to this policy, a child was recognized as any person below the age of 18 years. Their needs were recognized as different since children are not a homogenous group, and their various multi-dimensional vulnerabilities were also recognized. These previous National Policies for children maintained the need for a long term, sustainable, multi-sectoral, integrated and inclusive approach to the justice, care, protection and development of children in the country. Some of the relevant provisions of this 2013 National Policy included the following:

- Every child has the right to life, survival, development, education, protection and participation.
- All children have equal rights, and no child shall be discriminated against on the grounds of religion, race, caste, sex, place of birth, class, language and disability, social, economic or any other status.
- Family or family environment is the most conducive space for the all round development of children; they are not to be separated from their parents, except where such separation is necessary in their best interest.
- Safety and security of children is integral to their well-being. Children are to be protected from all forms of harm, abuse, neglect, violence, maltreatment in all settings, including care institutions, schools, hospitals, families and communities.
- Children are capable of forming views and must be provided with a favourable environment and the opportunity to express their views in any way they are able to communicate in matters affecting them

By treating children between the ages of 16-18 as adult individuals and holding them responsible for crimes in a retributive manner, we would be subjecting them to the harm, abuse, violence and maltreatment that is common in adult jails. We would also be depriving them of an environment or conducive space for their all-round development and well-being. We would also be sending across a signal that as a state and society, we are not prepared to care for those who may have a chance to live better lives.

Moreover, if this Bill treats 16-18 year olds as adult offenders, it must also take the political and social opinions of those within this age-group seriously and gain their opinions on whether this Bill must be passed. How many within this age group would support their peers going to an adult jail?

### VIII. Promoting Healing of Victims

The victim has little or no say in the adult criminal justice system and the proposed measure of trying juveniles in adult courts does not advance their interests. Research on victims of criminal justice conducted in several jurisdictions have revealed that victims of crimes want five basic things: **information, participation, emotional restoration and apology, material reparation, and fairness and respect.**<sup>13</sup> **Studies have also shown that the restorative justice process addresses these five needs much better than the criminal justice system and also helps in healing and closure.**<sup>14</sup> The JJ system has the potential to provide an enabling

<sup>13</sup> Sherman & Strang, "Repairing the harm: Victims and Restorative Justice", *Utah Law Review* 2003:15, pp. 15-42 at pp.20-25.

<sup>14</sup>ibid, p.41.

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framework to promote healing for the victim *and the* juvenile through restorative justice programs. Restorative justice processes have been in vogue in New Zealand, Australia, South Africa, Canada, USA, and several European countries. Experts who have studied various models of restorative justice have recommended that it be adopted to address “the more serious offences. It is here that the impact of the offending on victims is greatest and that victims are most in need of closure...” and consider it “most appropriate for repeat offenders.”<sup>15</sup> Studies have also shown that contrary to belief restorative justice has been effective in preventing recidivism and enhancing public safety.<sup>16</sup>

Victims should be supported and protected in their journey in the criminal justice system. A robust victim protection program will safeguard victims from threats and intimidation by the accused. The juvenile justice framework should also be expanded to include restorative justice processes so that real healing, recovery and re-integration can take place for both juvenile offenders and victims of their crimes.

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<sup>15</sup>Allison Morris & Gabrielle Maxwell, “Implementing Restorative Justice: What Works?” in MORRIS & MAXWELL, ED., RESTORATIVE JUSTICE FOR JUVENILES CONFERENCING, MEDIATION AND CIRCLES, 2001, p.268.

<sup>16</sup> Sherman & Strang, “Repairing the harm: Victims and Restorative Justice”, *Utah Law Review* 2003:15

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### PART IV: WAY FORWARD

Various experts have recommended that the need of the hour is to reform the juvenile system and not repeal the existing laws. The following give a glimpse of the major recommendations that have been put forward in recent times:

- The provisions of the JJ Act and Model Rules concerning the scope of the law relating to age of juveniles in conflict with law are in line with the internationally accepted goals and principles of juvenile justice as well as child and adolescent psychology, and should therefore not be disturbed through an amendment. The legal framework provides a fairly comprehensive framework to enable a genuine reform and rehabilitation of children/adolescents who are alleged to or found to have committed serious/violent crime. The law does not need to be amended either to reduce the age of the juvenile or to enable the establishment of a waiver system that will enable the transfer of juveniles alleged to have committed serious offences into the adult criminal justice system.
- The Government should consider amending the Right of Children to Free and Compulsory Education to enable the extension of the age limit for the fundamental right to Education up to 18 years from the present 14 years. This will ensure that the children of that age group are retained in common neighbourhood schools until age 18 or completion of Class XII, instead of being subjected to risk and exploitation at a very tender age and facing the risk of getting into situations of neglect, abuse or exploitation and/or turning to crime. Funding for implementation of the JJ Act to State Governments for implementing Rules relating to provision of education and related programmes needs to be enhanced, and the State Governments need to be accountable for ensuring that the right to education for all children in the age group of 6-14 years in these institutions is realized.
- It will, be prudent to analyze the gaps in the existing Act through a systematic analysis/study before repealing and enacting a new law.
- The parliament can consider enhancing the maximum limit of 3 years during which a juvenile is kept in a Special Home, during which meaningful reform programme can be implemented to ensure that the juveniles in conflict with law are really redeemed and society feels it is adequately protected.

These are also the opinions of the Parliamentary Standing Committee on the Juvenile Justice Bill. The need of the hour is to strengthen the existing Juvenile Justice System rather than develop new legislation that may cause greater harm to the children of this country.

“...the existing juvenile system is not only reformative and rehabilitative in nature but also recognises the fact that 16-18 years is an extremely sensitive and critical age requiring greater protection. Hence, there is no need to subject them to different or adult judicial system as it will go against Articles 14 and 15(3) of the Constitution.”

**264<sup>th</sup> Report, the Department-Related Parliamentary Standing Committee on Human Resource Development on The Juvenile Justice (Care and Protection of Children) Bill, 2014, para 3.21**

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