

THE SOCIO-LEGAL IMPACT OF DEATH PENALTY FOR JUVENILES

Written by *Nikhil Kothakota*

2nd Year B.A L.LB Student, Symbiosis Law School, Hyderabad

ABSTRACT

It is no secret that Indian does not permit, explicitly ,death penalty for juveniles , and emphasis is majorly put on such decisions by western countries such as the USA, as was held in *Roper v. Simmons*, or countries which permit death penalty for juveniles such as the amalgamation of the Middle Eastern countries but when the conversation extends to the status of said juveniles, exclusively in a liberal democracy , that is , in the Indian context , few analyze the root of the problem , the Evaluation Boards that determine their fate and the efficiency of the system that governs the section of the society that has fallen victim to its circumstance, and whether the true aim of death penalty is actually fulfilled, i.e , deterrence [while statistics show a rising rate of juvenile crime and rapes in spite of said measures.]

The paper shall deal with juveniles in the strictest sense, i.e juveniles who are convicted of heinous crimes, with a special emphasis on the Nirbhaya case , and whether the age of 18 is just an arbitrary rule, and the procedure when juveniles who show the same mental tendencies of a fully grown adult and the implications of them being subject to the same punishment as them, i.e the death penalty ,as were the other assailants in the aforementioned Nirbhaya case.in a physiological and sociological basis

As mentioned, the impact of such a penalty will be analyzed, keeping in mind the custom, law and practice in India and laws of various other countries, assessing rates of efficiency to come up with an amicable solution to curb juvenile crime.

INTRODUCTION

Before delving into the intricacies and nuances of the aforementioned topic and research objectives, it is imperative to understand the position of a child under the Indian penal code and the difference or maybe, the lack of between a child/minor and a juvenile, along with extensive research upon the history of juvenile law in India, as follows, to have a full-fledged understanding of the flexibility of juvenile laws in accordance with socio-political limitations and obligations.

The Indian penal code is a derivative of British India, with the same being drafted in the year of 1860, but the law on crimes committed by children has been efficient up to the point of any lack of rehabilitation, which has been effectively compensated by the subsequent children's act and the proceeding juvenile acts, up until the apprentice act of 1950, which in the lead had a semblance towards recognizing the precarious position of minors in an increasingly segregated society and had the country follow a law which had to have all convicts aged 10 to 18 work as an apprentice to focus their rehabilitation into a fruitful process, and this act was transplanted by the Reformatory Schools Act, 1897¹ subsequently provided that children up to age of 15 may be sent to reformatory cell.

The next major development came in 1986, when the juvenile system started to take shape as we know it today, and later on amended in 2000 and subsequently in 2014, enforced in 2015[which shall be discussed later on under detailed heads] due to mounting international conventions such as the UN Declaration of the Rights of Child in 1958² as started for securing the rights of the child, regarding the special treatment and care to the child. With this on the other hand UN Standard Minimum Rules for the Administration of Juvenile Justice, 1985(The Beijing Rules)³ started to work on accountability of exercise of discretion relating to children.

In accordance with established provisions and precedents under the general exceptions of the Indian Penal Code, no child under the age of seven can be prosecuted, Section 83⁴ says nothing is an offence which is done by a child above seven years of age and under twelve, who has not

¹Reformatory Schools Act, 1897 [Act VIII of 1897]

² G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. [No. 16] at 19, U.N. Doc. A/4354.

³ Adopted by General Assembly resolution 40/33 of 29 November 1985

⁴ Section 83 of Indian Penal Code - Free Legal Acts & Rules - Central/State Latest Bills, Acts & Rules: Legal India, Legal News / Law News & Articles - Free Legal Helpline - Legal Tips: Legal India, <https://www.legalindia.com/acts/topic/section-83-of-indian-penal-code> (last visited Sep 26, 2018).

attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

In **Marsh v. Loader**⁵ the court held that the child could not be held liable for robbery due to his lack of mens rea, as he is below the age of 7. In **Krishna Bhagwan v. State of Bihar**⁶, Patna High Court upheld that if a child who is accused of an offence during the trial, his age at the time of commission of offence is seen, not the age at the time of the trial. As was held in the landmark case of **Pratap Singh vs State of Jharkhand**⁷.

But for all intents and purposes, under the latest amendment of Juvenile [Care and Protection of Children] act of 2015, a juvenile is a child in conflict with the law, as defined in the same legislation differentiates the level of maturity and proximity to mens rea⁸, with every juvenile over 16 and under 18 subjected to an evaluation to determine whether to be tried as an adult.

Having said the same, the paper shall devolve into the history of juvenile law in India since 1986, in an endeavour to define and set the scope for the term juvenile, with analysis of juvenile law in other countries for secondary questions.

HISTORY OF JUVENILE LAW IN INDIA

India is a signatory to UN Declaration on the Rights of the Child, 1959⁹ which characterized and perceived different rights of the children in particular:

1. the right to wellbeing and care,
2. the right to assurance from exploitation,
3. right to security from disregard and abuse
4. right to sustenance and so forth have been characterized as fundamental privileges of children by the convention of the privileges of the child. as needs, be. The national policy for children has reaffirmed the constitutional arrangements for satisfactory

⁵ Marsh v. Loader [1967] 3 ALL E.R. 386

⁶ Krishna Bhagwan v. State of Bihar, JT 2002 (6) SC 523

⁷ Pratap Singh vs State of Jharkhand ,Appeal (Crl.) 210 of 2005

⁸ CHILD Protection & Child Rights » IV. National Mechanisms » Child Related Legislations » India Penal Code and Child related offenses, Child Labour in India - Issues and Concerns,

<http://www.childlineindia.org.in/india-penal-code-and-child-related-offenses.htm> (last visited Sep 22, 2018).

⁹ UN Declaration on the Rights of the Child, 1959, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354.

administration to children both when birth and through the time of development to guarantee their full physical, mental and social improvement. through its national policy for children the administration of India assumed the liability of children's support, keeping in mind the door opens for advancement to all children amid the time of development ought to be our point, for this would fill our bigger need of decreasing imbalance and guaranteeing social equity.

In spite of its shortcomings in the field of implementation , the juvenile justice act of 1986¹⁰ was the first effort by India after it became a signatory to various treaties [in accordance with the persuasive value of article 51 of our constitution] to implement protection specifically for vulnerable groups such as children by assuming state responsibility for socio-economic development and provide towards a specialised approach towards the prevention and control of juvenile delinquency, to have our machinery and infrastructure adapt for Juvenile Justice operations, to establish norms and standards for the administration of Juvenile Justice, to develop appropriate linkages and coordination between the formal system and voluntary agencies and to constitute special offences in relation to juveniles and to prescribe punishment thereof.

Juvenile Justice [Care and Protection of Children] Act of 2000

This act was brought about as an amendment to effect and counter the drawbacks of the previous mentioned act, and its flexibility is evident with its changing nature to adapt to international standards such as the revised CRC¹¹ [Convention on Rights of child] Beijing rules and the corresponding 1990 rules.

The act was set up keeping in mind rehabilitation in mind as compared to an adversarial system of governance which is warranted, for the nature of a child is such, and hence in **Raj Singh v. State of Haryana**¹² the court held that legislations dealing with juveniles shall reign supreme in cases dealing with juveniles irrespective of the nature of offence committed.

¹⁰ First ever law solely concentrating on the probability of punishments for juveniles

¹¹ Signed, 28th November, 2018

¹² *Raj Singh v. State of Haryana*, CRIMINAL APPEAL NOS. 701-702 /2015 (Arising out of S.L.P. (Crl.) Nos.5767-5768/2013)

In the same way, in *Jameel v. State of Maharashtra* ruled that so far as contention of the appellant is concerned regarding applicability of the respective act the court defined a juvenile as a boy below 16 and a girl below the age of 18.

Juvenile Justice [Care and Protection of Children] Act of 2015

The said act was enacted through almost no hurdles within the parliament for the situation in India was very volatile, with the Delhi gang rape case of **Nirbhaya**¹³ fresh in all minds, a bill-initiated by Maneka Gandhi herself.

The **Justice Verma Committee**¹⁴ was appointed to look for possible amendments to the criminal law in India, and in spite of the minor in the Nirbhaya case having “gotten off easy” as the maximum punishment that could be awarded in spite of the seriousness of the crime was three years in a remand home, due to such as technicality as an age, and a change in law was demanded by the masses, the committee said, in its report otherwise, and suggested to reduce the age of consent from eighteen to sixteen, with children above sixteen being tried and for such crimes considered as adults.

The legislation henceforth, having to balance between the suggestions given and the general outcry, divided the classes of crimes into petty crimes, serious crimes and heinous crimes, and for heinous crimes, if the child is aged between 16 and 18, with an evaluation board determining the maturity of the child during the commission of the offence

Thus, the paper henceforth shall devolve into a discussion of death penalty of juveniles in other countries such as the US compared to the conglomerate of the middle east, the social implication of the same in prospective effect by foregoing section 21¹⁵ of the 2015 act, and implementing a policy of death penalty in India, and compare death penalty with other reformative measures and life imprisonment and analyse their effectiveness.

¹³ *Mukesh and others v. NCT of Delhi and others*, CRIMINAL APPEAL NOS. 607-608 OF 2017 (arising out of S.L.P. (Criminal) Nos. 3119-3120 of 2014)

¹⁴ Justice Verma Committee Report Summary, PRS, <http://www.prsindia.org/parliamenttrack/report-summaries/justice-verma-committee-report-summary-2628/> (last visited Aug 18, 2018).

¹⁵ No child in conflict with law shall be sentenced to death or for life imprisonment without the possibility of release, for any such offence, either under the provisions of this Act or under the provisions of the Indian Penal Code or any other law for the time being in force.

It is to be duly noted that section 16¹⁶ of the 2000 act also prohibits death penalty, i.e”, and even in the 1986 act under section 22¹⁷-

therefore, it is of due consideration to notice that India has never been a country to execute juveniles, at least post-independence without due consideration and it shall be of prime while determining the sociological aspects of such implementation.

DEATH PENALTY FOR JUVENILES IN VARIOUS COUNTRIES

At this certain point of the paper, it would be apt to define a juvenile in the widest scope that the paper can muster, to be considerate of the social standing of the so defined, but aware enough of the circumstances of a definition, too liberal. Hence, a juvenile is

“ A person or child , aged below 18 , or a certain age limit as per a country’s norm , the age before which the particular sovereign in all its good consciousness seemed to exempt such a class from the same punishment as a reasonable prudent man would muster on an adult for a crime, due to varying reasons, such as lack of complete development of cognitive skills to , consideration of abusive, exploitative and desperate surroundings they were raised in and various other mitigating circumstances that had them be a “child in conflict with law” and not the usual duty bound citizen the state aspires of have and are primarily looked to be rehabilitated and integrated into the fabric of the society”

Secondly, one must keep in mind and be ever vigilant that although death penalty as a whole is a concept that would rather be abolished in a democratic society, it is often viewed upon as a necessary evil in the society, where order ought to be maintained, and the justice propagated is not retributive, that is eye for an eye [which is not a feature of a democracy], but rather punitive for the accused and deterrence for the majority of the community.

¹⁶ Notwithstanding anything to the contrary contained in any other law for the time being in force, no juvenile in conflict with law shall be sentenced to death [or imprisonment for any term which may extend to imprisonment for life

¹⁷ 22. Orders that may not be passed against delinquent juvenile. – (1) Notwithstanding anything to the contrary contained in any other law for the time being in force, no delinquent juvenile shall be sentenced to death or imprisonment, or committed to prison in default of payment of fine or in default of furnishing security

Hence death penalty is often used as a last resort, when it can be proved above and beyond reasonable doubt, the guilt and evil intent of a person. Therefore, it is used only in cases of heinous crimes, the former word which is defined as “hateful or shockingly evil”. But having said the same, it is also crucial to note that juvenile justice is often corrective. Hence, let us look into the jurisprudence of various countries and their particular stance.

THE UNITED STATES OF AMERICA

The USA has a system of dual federalism or the remnants of the same, and hence the age before which one may be liable for death penalty may change from 16 as in Alabama, 17 in Florida and 18 in California, and the historical Supreme Court judgement of **Roper v. Simmons**¹⁸ needs due consideration, the judgement where death penalty for juveniles was held unconstitutional and hence not considered by law, as the punishment for juveniles in such circumstances was held to be “cruel and unusual”, which were marking criterion.

Hence it is imperative to understand the guidelines for such cruel and unusual punishments, which were laid down and still hold ground to this day, as exemplified in **Furman v. Georgia**¹⁹

The guidelines laid down in the judgement, with a wafer-thin majority of 5 to 4, with the former holding the death penalty unconstitutional of the 8th and 14th amendments of the US constitution are –

- “1. It is a punishment originally understood by the framers of the Constitution to be cruel and unusual.
2. There is a societal consensus that the punishment offends civilized standards of human decency.
3. It is grossly disproportionate to the severity of the crime or makes no measurable contribution to acceptable goals of punishment.”

¹⁸ Roper v. Simmons, 543 U.S. 551

¹⁹ Furman v. Georgia, 1972 U.S. LEXIS 169

In similar fashion, in **Gregg v. Georgia**²⁰, to reduce the arbitrariness of death penalty, it was suggested that in death penalty cases, the determination of guilt or innocence must be decided separately from hearings in which sentences of life imprisonment or death are decided, with the court must consider aggravating and mitigating circumstances in relation to both the crime and the offender. The death sentence must be subject to review by the highest State court of appeals to ensure that the penalty is in proportion to the gravity of the offense and is imposed even-handedly under State law.

Furthermore, in **Kent v. United States**²¹, the devolved into death penalty specially for juveniles, where the factors to be taken into consideration were the seriousness of offences, the mitigating factors such as age, influence, living patterns, environment, previous record and most importantly the probability of rehabilitation into a good citizen. This was taken as precedence in **Eddings v. Oklahoma**²², where a sixteen year old, although tried as an adult was exempt from death penalty due to the mitigating circumstance of age, in spite of the murder of a highway patrol officer, who is a government official, and the same was followed in **Thomson v. Oklahoma**²³, where there was clear intent on part of the accused to murder his brother in law, but the court looked into the prospects of rehabilitation of the 15 year old and held by a majority that the punishment would be “cruel and unusual” echoing through the aforementioned judgement of **Furman v. Georgia**²⁴.

The inconsistencies came with regards to such precedents in **Stanford v. Kentucky**²⁵, where the death penalty conviction was upheld, but since the constitutionality of death penalty for juveniles was not examined in the previous cases, although raised as an issue, the state court in this case, held that on a literal interpretation of the 8th amendment, it does not prohibit death penalty for a child, say aged 16 or 17, irrespective of public or national consensus and the guidelines laid down in *Furman*.

Therefore, we can analyse that until **Roper v. Simmons**²⁶, since there was no judgment declaring the constitutionality, or rather unconstitutionality of death penalty for juveniles, there

²⁰ *Gregg v. Georgia*, 1976 U.S. LEXIS 82

²¹ *Kent v. United States*, 383 U.S. 541

²² *Eddings v. Oklahoma*, 487 U.S. 815

²³ *Thomson v. Oklahoma*, 487 U.S. 815 [cases heard together]

²⁴ *Furman v. Georgia*, 1972 U.S. LEXIS 169

²⁵ *Roper v. Simmons*, 492 U.S. 361

²⁶ *Supra*, note 24

was a certain grey area in the same, but as mentioned in *Roper v. Simmons*, the following statistics were taken into consideration, them being that –

1. *“At least half of juveniles sentenced were Almost half of those sentenced had troubled family histories and social backgrounds and problems such as physical abuse, unstable childhood environments, and illiteracy.*
2. *Twenty-nine suffered psychological disturbances such as profound depression, paranoia, self-mutilation.*
3. *Just under one-third exhibited mental disability evidenced by low or borderline IQ scores.*
4. *Eighteen were involved in substance abuse before the commission of the crime.”*

This coupled with the previous judgement of **Atkins v. Virginia**²⁷, where mentally disabled people could not have undergone death penalty, was seen as a beacon for a new petition in the case, as mental disability was seen as a “mitigating” circumstance and the punishment cruel and vindictive. Since the facts show that juveniles go through the same trauma, it was argued that *Simmons*, who broke into a woman’s home, bound her and threw her into a river, albeit having had committed a heinous crime, was still a product of his circumstance and death penalty for him is “cruel and unusual.” And the majority opinion held that no person blows the age of 18 shall be sentenced to death for any crime committed whatsoever.

THE UNITED KINGDOM²⁸

In 1983, Protocol 6 to the European Convention on Human Rights ²⁹banned the death penalty for all domestic offenses and, in 2002, Protocol 13 abolished the death penalty in all circumstances.

In spite of extensive executions in the 1800’s in the then British Kingdom, with public hangings, gradually changing to private hangings, the **Children Act 1908** ³⁰banned the execution of juveniles under the age of 16, at the turn of the century. later on, in 1933 the

²⁷ *Atkins v. Virginia*, 536 U.S. 304

²⁸ *Juveniles and the Death Penalty*, Lynn Cothorn, Office of Juvenile Justice and Delinquency Prevention

²⁹ Entry into force: 1 March 1985

³⁰ 1908 c. 67

minimum age for capital punishment was raised to 18 under the Children and Young Persons Act 1933.³¹

Furthermore, except for a certain class of crimes such as treason espionage , military offences, death penalty was completely abolished in the UK by virtue of **Murder [Abolition of Death Penalty] Act 1965** , and **Northern Ireland [Emergency Provisions] Act 1973**³², after much public outcry over wrongful executions and false witnesses and arbitrary action as in the wrongful execution of timothy Evans ,after the conclusive evidence was taken from John Christie , who was in fact the one who had murdered the Evans' family .

PRACTISING COUNTRIES

Having talked of countries which have gravitated towards the abolition of death penalty, it would only be appropriate to mention countries in which death penalty for juveniles is still a prevalent practice and the jurisprudence governing the same.

Iran³³ is the most prolific country in recent years to execute juveniles, and in accordance with amnesty international, there have been at least 73 cases of juvenile executions, none of which are notified officially by the Iranian government. such lack of notification may result or stem from arbitrarily action and it is absolutely necessary to maintain transparency in proceedings such as this, especially when there is an element of life or death involved.

The Arab Human Rights Charter, which is ratified by majority of the middle eastern countries, in its previous version in 1994, held that no minor shall be inflicted with death penalty. But the amended article 7[1]³⁴ of the 2004 Arab Human Rights Charter states otherwise.

This grey area with regards to incompatibility with international standards such as the CRC, to which Iran and other middle eastern countries are signatories to, has been a rising issue in recent years, with many activist and death penalty watch groups spreading awareness of such

³¹ Replaced the previous law in place

³² Based on aforementioned Protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of Death Penalty

³³ Iran, Saudi Arabia, Sudan: End Juvenile Death Penalty, Human Rights Watch (2015), <https://www.hrw.org/news/2010/10/08/iran-saudi-arabia-sudan-end-juvenile-death-penalty> (last visited Sep 21, 2018).

³⁴ Sentence of death shall not be imposed on persons under 18 years of age, unless otherwise stipulated in the laws in force at the time of the commission of the crime.”

discrepancies as even if a crime is committed when a child is below 18, the subject might be put on hold until he or she turns 18, that is the age of majority and then subject to the death penalty³⁵.

Further countries such as Sudan, which has been divided into north and South Sudan, with no legislative clarity with regards to what laws are at play and warn torn countries such as Yemen exercise discretion of death penalty over Juveniles. A very crucial point is the fact that it is not just the middle eastern countries or warn torn countries that may have such practice, in spite of the dismal percentage of total executions juveniles occupy, there are countries such as Sri Lanka which has according to official estimates has executed around 60 juvenile offenders in the year of 2014.

CONCERNS ABOUT INDIA

From a purely empirical and analytical standpoint, the issue of death penalty for juveniles was never as prominent as it was in the aftermath of the Nirbhaya gang rape, an incident which shook the collective conscience of our country, and the houses and parties of all legislatures and backgrounds for once all seemed to agree towards a radical driving solution oriented for a social change with vast implications.

In Stanford, even while passing the order for execution of a juvenile , the court was very much aware of the public interest in the particular case and their mutual national consensus for want of justice, the court concluded that although justice is an ultimate principle and a universal virtue, the court in the spirit of equity shall not take into consideration the shaky foundation of public consensus , but rather judge a case on its own merits , as the means to achieve justice that might be used by the public is more retributive in nature , with an eye for an eye philosophy , the reason why the state originated , i.e insecurity due to unpredictable and primal instincts. Therefore, it is the duty of the sovereign to execute a decree as it may seem fit, for the sake of the people of the country, for the sake of the social contract with the people, and the general will of the people.

³⁵ Juvenile Death Penalty: Is it “cruel and unusual” in light of contemporary standards? By Adam Caine Ortiz

In the [Nirbhaya] **Mukesh and others v. NCT of Delhi and others**³⁶ case, the now known as Jyothi Singh Pandey was dragged to the rear of the bus [after boarding the same and the assailants deviating from the usual route and knocking and throwing off the bus her friend Pratap Pandey], beating her with the rod and raping her while the bus driver continued to drive. She had suffered serious injuries and ultimately succumbed to the same.

This led to widespread protests not only in India but also all over the world and although death sentence was awarded to the five convicts who were majors, the minor, who was also an assailant, and just short of being a major, was only to serve a maximum imprisonment of three years under the current law, although even if he was tried as an adult.

This led to more outrage, as the Indian public felt as if justice had not been served and demanded the age of consent be reduced to 16, from 18, which would also effectively mean that any consenting person, if the law was changed, was above 16, then the same person would be treated as an adult in all prospective cases and hence could be awarded the sentence of death penalty as well.

Justice Verma Committee³⁷, which was appointed to reform the criminal law after the incident proposed against the said, and ultimately for heinous crimes, any person above 16 and below 18 could be tried as an adult under the amended juvenile justice act of 2015, subject to evaluation, but could not be awarded death penalty or life imprisonment without a chance of release, with section 15³⁸ setting the scope for the same.

³⁶ Mukesh and others v. NCT of Delhi and others ,CRIMINAL APPEAL NOS. 607-608 OF 2017 (arising out of S.L.P. (Criminal) Nos. 3119-3120 of 2014)

³⁷ Pti, Juvenile convicts can't get death penalty for every rape, murder: SC judge <http://www.asianage.com/> (2018), <http://www.asianage.com/india/all-india/230718/juvenile-convicts-cant-get-death-penalty-for-every-rape-murder-sc-judge.html> (last visited Aug 18, 2018)

³⁸ “15. (1) *In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of subsection (3) of section 18:*

Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts.

Explanation. —For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence.

(2) Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973:

Provided that the order of the Board to dispose of the matter shall be appealable under

It is to be duly noted that they have been assenters and dissenters to the same act and sections, with large sections of the society putting their faith in the evaluation process of juvenile justice boards and other sections, which would rather have death penalty for juveniles, or even life imprisonment without a chance of release, and would see a juvenile tried as an adult, bear the same consequences as if he or she were the adult.

To estimate the prospects of death penalty for juveniles in the later stages of our country , especially in light of even more child rape cases in 2018 [as will be discussed in the conclusion] , we would need to discuss the effectiveness of death penalty as a means of warning or deterrence to further commission of crimes, the effectiveness of the boards which evaluate the juveniles as mentioned , and alternate sources of punishment , such as life imprisonment with chances or no chances of release or other reformative measures, when compared with death penalty .

THE PSYCHOLOGICAL ASPECTS OF DEATH PENALTY ON A SOCIETY

The purpose of death penalty is to ultimately deter others from committing such heinous crimes, and set a precedent for the same. But every society is erratic and unpredictable and ever changing and the arguments from the side of the groups who want to abolish death penalty shall be, that the fear of punishment is not enough, as the rate of crime is always on the increase³⁹, especially with regards to rapes and murders, and hence deterrence cannot be expected of a highly segregated society, but rather we should try to integrate the same under the heads of reformation, i.e empirical data supports that in spite of reforms and stricter measures, the average number of rapes per year in India is on the rise [find figures 1 and 2 attached to the end of the paper.]

From a strictly Utilitarian⁴⁰ standpoint, if the death of one criminal can result in at least some other person from committing the same and harming an innocent life, the purpose of death

sub-section (2) of section 101:

Provided further that the assessment under this section shall be completed within the period specified in section 14.”

³⁹ Deterrence theory – punishment of one criminal will dissuade others by instilling a fear of punishment in their mind.

⁴⁰ Mill, J.S, On Utilitarianism, <https://www.utilitarianism.com/mill1.htm>

penalty is fulfilled, that is protection of members of the society, at whatever cost it may come, to maximize benefit and prevent loss of life or integrity.

But does the utilitarian argument take into consideration the mitigating circumstances as discussed in the previous pages would be the real question, for any child committing the crime might only be so, due to his circumstance and situation, over which he has no control, nor has developed a complete cognitive skill set. isn't it the duty of the state to protect and rehabilitate them, rather than punish them for what they have no control over, and if they are punishing instead of rehabilitating, doesn't it go against the object of the juvenile justice acts?

Such questions that may be raised may only be answered by the effectiveness of the evaluation boards which prescribe reformatory measures, and hence the paper shall delve into the efficiency of the evaluation boards in their assessment, and compare reformatory and imprisonment with chances of release with death penalty for juveniles.

EFFICIENCY OF THE JUVENILE JUSTICE EVALUATION BOARDS IN INDIA

The juvenile justice act of 2015 prescribes the need for a board to adjudicate upon the matters on juvenile over 16 and below 18 in relation to their commission of heinous crimes, to decide their level of maturity during the commission of the crime and hence the future implications of it, as prescribed under section 4 of the same act⁴¹. The board is required to assess the physical and mental capacities of the juvenile in question and help establish a causal connection of the same with the crime committed and this preliminary hearing may employ psychologists for the same, for the assessment before the expiry of the statutory limit of three months.

However, the general consensus of the scientific community is that there is no concrete policy set in stone that may help assess one's individual mental capacity, as different people are brought up in different atmospheres and different mitigating circumstances and hence no hard and rule test or policy could be applied for the same. Yet the paper does concur to the point

⁴¹ The amended form of the Juvenile Justice Act of 2015

that such evaluations do have a certain benefit as it treats a certain class of individuals without grouping them all en masse into the groups of murders, serial rapists and so on.

Furthermore criticisms that mitigate the effectiveness of the present system is confusing cognitive ability to that of psychological maturity. a child, aged above 16⁴², may, just as an adult know that it is wrong to kill, or that certain punitive measures will be exerted onto him in case he or she commits the same, but his physiological maturity is not developed enough to understand that there are many other lawful ways to fulfil one's positive motive and commission of an offence is not the only way, and that a democracy does protect the rights of each and every individual, and our society is no longer based on the concept of the survival of the fittest as it.

In other words, when cornered with no other option for escape, a child may feel like he has to kill the perpetrator to save his life, and does well know, that killing is punishable, but does not know that hurting or incapacitating the assailant enough so that he is unarmed is enough and such a balance or proportionality determines a person's psycho-social maturity, which coupled along with his cognitive skills form the determining basis, but often the former is ignored.

Furthermore, when the board decided one is to be tried as an adult⁴³, there is no level or hierarchy of appeal, and the case is transferred to the children's court. The juvenile is basically declared guilty, before he even has a fair chance to prove his innocence through appropriate means and counsels, and this violates article 6 of the convention on the rights of a child, which guarantees against prejudicial hearings.

However, the ultimate end result of the board may only result in reformatory measures taken up with the child, and life imprisonment with a possible chance of release⁴⁴. And hence it is imperative to look into the same

⁴² JURISEEDGE, HISTROY OF JUVENILE JUSTICE SYSTEM IN INDIA JURISEEDGE (2017), <https://www.jurisedge.com/histroy-juvenile-justice-system-india/> (last visited Sep 21, 2018).

⁴³ Gauri Pillai and Shri Krishna Upadhyay, Juvenile maturity and heinous crimes – a look into the Juvenile Justice Policy of India, NUJS Law Journal, Manupatra

LIFE IMPRISONMENT

Section 21 of the 2015 act prescribes life imprisonment for a juvenile convict with a chance of release one day, for him or her to be integrated into a part of the society. It expressly forbids death penalty or life imprisonment without a chance of release.

Hence the notion arises, comparisons drawn between death penalty and life imprisonment without any chances of release. as one the main object of criminal law is deterrence, it is contested that death penalty is much more effective than life imprisonment, due to the inherent fear of loss of life, but research shows otherwise, that such measures to deter vulnerable sections of the society will work only if they are aware of their consequences, in most of the cases which they are not, due to the circumstances the bulk of them have been brought up in and therefore renders the theory of deterrence ineffective. also further such harsh measures may build upon distrust in the governing authorities and police officers, due to their perceived draconian measures , and results I even more compartmentalization of such juvenile classes, i.e in accordance with the 2010 statistics out of the about thirty thousand arrested , more than half of the juveniles were uneducated or educated until primary level itself, with at least six thousand offenders receiving no education whatsoever during the course of their lifetime

EFFICIENCY OF REFORMATORY SYSTEMS IN INDIA

If a child, under the juvenile justice age has been determined by the board, having the maturity of an adult, firstly the children's court to which the case is passed onto, must ensure that the board took into consideration the mitigating circumstances that lead to the acts of the child.

After taking the aforementioned precautions, if the court still finds the juvenile guilty and tries him as an adult, then the general rules of the criminal procedure code apply to the juvenile, now being tried as an adult.

The juvenile convict is now placed in a remand home⁴⁵ until he or she turns 21, then connected to another round of trial to assess the reformatory transaction that he or she may have gone

⁴⁵ CHILD Protection & Child Rights » IV. National Mechanisms » Child Related Legislations » India Penal Code and Child related offenses, Child Labour in India - Issues and Concerns, <http://www.childlineindia.org.in/india-penal-code-and-child-related-offenses.htm> (last visited Sep 22, 2018).

through during the certain period, and hence be released or transferred to the regular adult jail. The limitation that arises in this case is much severe, as although the juvenile justice act of 2015 was an astounding step for juvenile protection, it does not specify the parameters or even the guidelines though which the reformation of a juvenile offender can be adjudicated upon, which leads to further arbitrarily action, in violation of the spirit of equality under article 14 of our constitution.

When cases are presented before the sessions court⁴⁶ , if conviction upheld in the children's level, the law does not pay heed to the reformation and maturity of the convict, which was a sole basis of determination and the juvenile offender, who in spite of his age, if not properly rehabilitated, shall not have the cognitive skills, when subjected to the starkness of the sessions court with an adversarial system of judgement, as they were previously sought after rehabilitation only.

The Beijing rules⁴⁷ prescribe a friendly atmosphere of a court during proceedings, as adopted in the 2007 juvenile justice model rules , that have been followed ever since, with measures such as not having the proceedings in a formal atmosphere of a court room with raised platforms and witness boxes, but the sudden and stark change in court atmosphere after the convict turns 21 , presented before courts whose jurisdiction is not cooperative but adversarial and does not put sole focus on rehabilitation of the juveniles.

Further drawbacks include lack of qualifications for judges of the children court, and lack of limitation for disposal cases, expressly mentioned in the same act⁴⁸.

CONCLUSION

The paper in all its humble conscience believes that with regards to developments on death penalty for juveniles , we , as a country should not have death penalty for juvenile offenders as it is law under section 21 of the juvenile justice [care and protection of children] act of 2015, and so has been the legislation since the 1986 Juvenile Act and the paper concurs with the

⁴⁶ Supra, note 50

⁴⁷ Adopted by General Assembly resolution 40/33 of 29 November 1985

⁴⁸ On a retrospective analysis of the same act of 2015

judgement of **Furman v. Georgia**⁴⁹, where it was held that all civilized countries found and held, with respect to ratification of international treaties, death penalty for juveniles inhumane and unjust in nature, and in **Gregg v. Georgia**⁵⁰, where in most cases it is seen that there are certain mitigating circumstances i.e reasons why a juvenile, becomes a juvenile, circumstances that are out of his reach, and this is the case in India, as seen in majority of her juvenile convicts, where the juveniles are more often than not, victims of their circumstances, no matter how heinous the crime might be, and when exceptions prevail, our law has provisions for life imprisonment, with chances of release on reformation⁵¹

The age of 18, below which one may not be subjected to death penalty is not arbitrarily set, but rather a devolution through time, with majority of civilized countries agreeing on the same, due to complete mental development by the same age, with assumption of responsibility that one incurs from the aforementioned age. The Minimum Age Convention⁵², comprising a Preamble and 18 articles, was adopted by the 58th Session of the General Conference of the International Labour Organisation on June 26, 1973, to which India paid certain heed in its past.

An argument with regards to comparing death penalty with life imprisonment with no chances of release often leads to unfruitful conclusions as there is always a chance in the latter, with prospective changes in law leading to such a change in absolution as imposed, provided rehabilitation and reformed as criterion are satisfied. The reason for abolition of death penalty in England was led by wrongful execution of innocent lives, and this is especially prominent with regards to juveniles, where such errors, might be even more pronounced.

Therefore, the paper reaffirms its faith in the fact that rehabilitation measures are far superior than death penalty, with the former methods including⁵³ –

1. directing the child to participate in group counselling and similar activities;
2. ordering the child to perform community service under the supervision of an organisation or institution, or a specified person, persons or group of persons identified by the Board;

⁴⁹ *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726; 33 L. Ed. 2d 346; 1972 U.S. LEXIS 169

⁵⁰ *Gregg v. Georgia* 428 U.S. 153, 96 S. Ct. 2909; 49 L. Ed. 2d 859; 1976 U.S. LEXIS 82

⁵¹ *Juveniles and the Death Penalty*, Lynn Cothorn, Office of Juvenile Justice and Delinquency Prevention

⁵² Effective: 19 June 1976

⁵³ Reformatory measures as under the act of 2015

3. Directing the child to be sent to a special home, for such period, not exceeding three years, as it thinks fit, for providing reformatory services including education, skill development, counselling, behaviour modification therapy, and psychiatric support during the period of stay in the special home⁵⁴.

Furthermore, The UN Convention on the Rights of the Child (the CRC)⁵⁵ which India has ratified in 1992, recognizes the importance of diverting young offenders from the formal processes of the criminal justice system. By becoming a party to the CRC, India has voluntarily undertaken to introduce appropriate diversionary measures for juvenile offenders and to ensure that such measures comply with a number of minimum standards.

Therefore, the paper is written on the grounds that the current system of punishment for juveniles, if convicted of heinous crimes, is life imprisonment with chance of release, the release which will be the cause and consequence of rehabilitation.

But however, the juvenile justice act suffers from the vice of arbitrariness in some matters⁵⁶, as mentioned in the previous pages and hence is to be amended in part to ensure propagation of justice and equity, such as setting parameters to adjudicate upon the status of rehabilitation of a juvenile, as otherwise it would warrant discretionary action and suppress the weaker socio-economic section of the society⁵⁷. the guidelines may fall under the head of, “whether a juvenile has sufficiently, in the due course of time, understood the gravity of his or her crime, and has shown remorse toward the same, and the court shall take into consideration the background the child was brought up in, as his or her formative years make up a crucial part of one’s life.”

“Furthermore, the process of determination must be transparent and strong, cogent reasons must be given, if the court deems otherwise, and provisions for appeal to the same must be put into place.” Other amendments in the areas of qualifications of judges and evaluation boards of children courts, to have them be more specific and not as a lacuna in the law.

Our law should be able to keep up with the changing scenario and conditions of an ever-growing and increasingly segregated society and after the shocking incidents of the Kathua and

⁵⁴ CHILD Protection & Child Rights » IV. National Mechanisms » Child Related Legislations » India Penal Code and Child related offenses, Child Labour in India - Issues and Concerns, <http://www.childlineindia.org.in/india-penal-code-and-child-related-offenses.htm> (last visited Sep 22, 2018).

⁵⁵ Signed, 28th November, 2018

⁵⁶ Juvenile Death Penalty: Is it “cruel and unusual” in light of contemporary standards? By Adam Caine Ortiz

⁵⁷ Due to said arbitrariness

Asifa child rape cases, which shook the collective conscience and core of the country, and resulted in mass outrage, leading to the criminal law amendment ordinance of 2018, which talks of death penalty for rape of a girl child below 12, one needs to notice the object of the ordinance, which was deterrence with a certain element of retribution. But as mentioned restorative justice is of prime importance with regards to juvenile's justice and with certain amendments in the current exigency of laws, a fine balance between justice for the victim of such heinous crimes and restoration of juveniles as faithful citizens, and continued incarceration if conditions are not satisfied, is the true essence.

Perhaps, the reluctance with reference to letting ex-juvenile offenders go⁵⁸, is the chance of a relapse, but here lies the essence of the argument, as rehabilitation, in its mere definition excludes the possibility of any possible relapse into crime, as it provides a fresh background for a renewed start, with all the amenities necessary, which they were deprived of and this deprivation which lead to their initial incarceration

Death penalty, as a whole, is seen by the society as a necessary evil, for even the sovereign cannot strip away the right to life of a certain person, all the while advocating for the same, except in certain extraordinary cases. And in the precarious case of juveniles⁵⁹, where extra-caution is to be taken, due to the exigency and probability of change there should exist a chance to turn a new leaf, with reference to the doctor of fresh start, a cardinal principle, with a renewed chance at life⁶⁰

⁵⁸ Pti, Juvenile convicts can't get death penalty for every rape, murder: SC judge <http://www.asianage.com/> (2018), <http://www.asianage.com/india/all-india/230718/juvenile-convicts-cant-get-death-penalty-for-every-rape-murder-sc-judge.html> (last visited Aug 18, 2018).

⁵⁹ Pti, Juvenile convicts can't get death penalty for every rape, murder: SC judge <http://www.asianage.com/> (2018), <http://www.asianage.com/india/all-india/230718/juvenile-convicts-cant-get-death-penalty-for-every-rape-murder-sc-judge.html> (last visited Aug 18, 2018).

⁶⁰ Juvenile Justice Amendment: Adolescents are not grown-ups, Economic Times Blog (2015), <https://blogs.economictimes.indiatimes.com/et-commentary/juvenile-justice-amendment-adolescents-are-not-grown-ups/> (last visited Sep 21, 2018).

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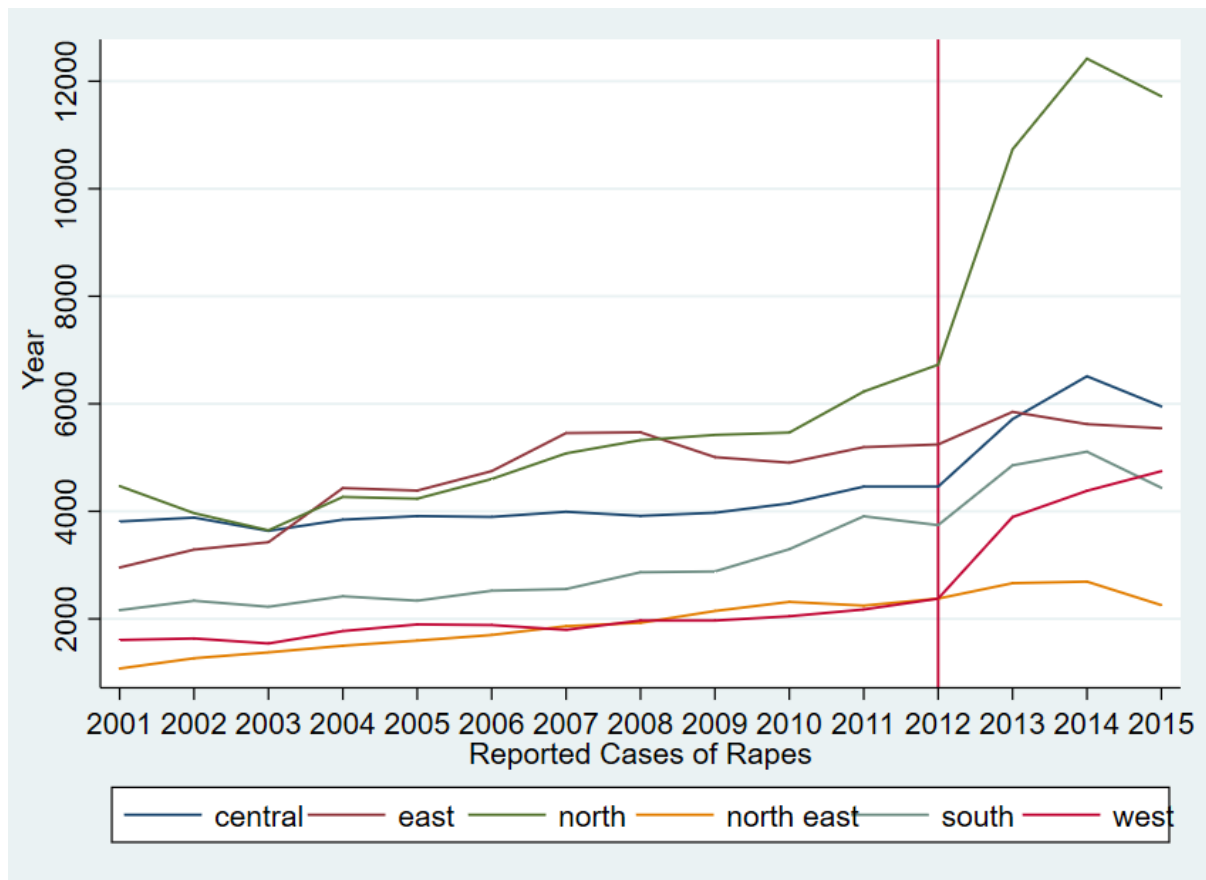


Figure 1- derived from <https://thewire.in/society/a-closer-look-at-statistics-on-sexual-violence-in-india>, Sujan Bandyopadhyay, A Closer Look at Statistics on Sexual Violence in India The Wire (2018), (last visited Sep 12, 2018).

CAPITAL SHAME

Rape incidents have seen a jump since 2013, averaging 2,000 a year



KEY FACTS 85% rapes committed in house of victim or accused; 5% in hotels

21% of accused directly known to victim – 41% family friends or lovers, 11% relatives

Figure 2- derived from http://indpaedia.com/ind/index.php/Rapes_in_India:_annual_statistics). Rapes in India: annual statistics, Phasmida: India - Indpaedia (last visited Sep 26, 2018)