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Juveniles, Rape and Justice: Juvenile Penalty or Leniency?

Yeseswini S & Sowmya M

ABSTRACT

In the era of women empowerment and feminism, women's safety is at stake. Rape continues to be a problem in modern society. Rape was considered to be caused by unbridled sexual desire but now understood as a pathological assertion of power over a victim. However, can a supposedly innocent juvenile partake in heinous crime such as rape? Research reveals that in 2019, 47% of sex offenders comprised of juveniles in India. This essay explores the fluid nature of maturation, age, and how one of those does not guarantee the other. Circumstances and mental capacity of the juvenile determine his ability to form conscious decisions, keeping in mind the gravity of the offence – in this context, heinous crime of rape. The interests of the victim largely override the interests of the juvenile sex offender acting out in his total mental capacity with meticulous planning, perfect execution, and complete knowledge. Juveniles who commit an adult crime of rape should be tried and treated as adults in a court of law. This essay concludes by emphasizing that physical arousal in humans begins much earlier than 18 or even 16 years of age. While arousal is a natural phenomenon, there is a natural responsibility to bear restraint, respecting boundaries, and consent of the victim. Law provides justice only to those who deserve justice and not to juveniles who take the sole arbitrary defence of 'age'.

I. INTRODUCTION

Rape Victim at Blame? - Humanity at Stake

India being home to diverse cultures, castes, races, religions is now a “place of fear” for women to live. Rape is unlawful sexual intercourse or sexual penetration of the vagina, anus, or mouth of another person, with or without force, by a sex organ, or foreign object, without the consent of the victim.

Men rape eight-month-old infants as well as 100-year-old women. Girls are told how to dress in order to not invite any attention to them, which normalises male predatory behavior. To change this mentality, society must focus on the real culprits: MEN who commit rape.

Around four women are raped every hour in India, which reveals that only 90 percent of the women find the courage to report their sexual violation. The real number- probably way higher - never gets captured as many rapes go unreported, buried under shame, confusion and fear.¹ Recently, a 23-year-old woman from Unnao, Uttar Pradesh, died,² after five men burned her alive when she was on her way to meet her lawyers in the morning.

There can be no excuse for sexual violence anytime. The tendency to blame women is so deep-rooted. Women are always blamed for being the instigators which is the most saddening part of the rape. The comments made by Mukesh Singh, one of the convicts in the Nirbhaya case which shocked the world, are downright unacceptable but represent the majority of India’s view on rape:

- “Women who go out at night have only themselves to blame in case they attract the attention of male molesters.”
- “While being raped, she shouldn't have fought back. She should have just remained silent and allowed the rape.”
- “A decent girl won't roam around at 9 p.m. A girl is far more responsible for rape than a boy. Boys and Girls are not equal. Housework and housekeeping are for girls, not roaming in discos and bars at night or wearing wrong clothes. About 20 percent of girls are only good.”

When you warn, you blame. When you blame, you justify violence. Women have a right to freedom from fear - to a life without blame and life equal to men. The harsh reality is that not only adults see women this way: juveniles, persons below 18 in the eyes of the law also hold the same perception.

¹ Anjana Menon, *Sexual Violence: India's Serious Problem, Its Men*, E.T., Dec. 10, 2019.

² *All that has happened in Unnao rape case: a timeline*, HINDUSTAN TIMES, April 10, 2018.

Rape committed by juveniles has increased to 47% in 2019 and has become more brutal. However, none have got brutal punishments, leaving victims at the pain.

The law has always been kind to have kept immense trust over them that after their period of rehabilitation, they 'reform'. However, is this true when it comes to heinous offences of rape? Moreover, age follows maturity or maturity follows age? This article aims to explore these issues in detail.

Journey of the Juvenile Justice Act

A. Legislative Deliberation: Post Twenty First Century

India has entered the twenty-first century with the aim of an improved and child-friendly justice system that is unfavorable to stress and stigma. Marching forward to achieve this goal, the legislature and judiciary played their parts together along with the executive. However, when the legislature was heading rightly through the path of light, the judiciary's actions were wholly faulty and inconsistent, which created an obstacle to the legislature traveling rightly. Now, to critically analyse our judicial system, let us delve deeper into the history of juvenile justice.

Indian parliament enacted the Juvenile Justice Act, 2000 with an emphasis on the protection of child rights and references from international instruments. This act abolished Juvenile child courts and replaced them with Juvenile justice boards which would consist of a judicial magistrate and two social workers of which one would be a woman. The 1986 Act provided the use of social workers for assistive roles which now changed to a full-fledged role. This Act prohibited the joint trial of a juvenile and a non-juvenile so that the juveniles do not undergo any psychological trauma. It further stated that no juvenile should be sentenced to death, or jail, or life imprisonment except in cases where the juvenile is above 16 years and has committed some severe offenses in which he/she should be kept in a place of safety. The commission for protection of the Child Rights Act, 2005 was enacted to protect child rights upholding gender neutrality and a victim-centered approach. Since, this act was confusing and not clear on many vital aspects, a year later Juvenile Justice Act, 2000 was amended to Juvenile Justice Amendment Act, 2006.

The 2006 Act made JJ Board's mandatory in each district to deepen the juvenile justice system. The rules framed by the central government in 2007 also incorporated the justice principles in JJ 2007 and made sure its applicability to all children below 18 years. The Protection of Children from

Sexual Offenses (POSCO) Act was passed in 2012 and it offered victim-centered legislation. The main objective was to protect the child's privacy by maintaining anonymity and ensuring a child-friendly atmosphere during the proceedings. In the case of a child victim, the burden of proof lies with the accused person and for child offenders, he/she will be dealt with under the 2000 Act. The POSCO Act also increased the age from sixteen to eighteen for consensual sexual activity. Due to this, the cases which fell under "consensual activity" in the past due to socio-cultural opinions now started to become criminalized. Hence the juvenile justice system started to take a basic shape. When the legislature moves towards the right path, the judiciary starts to take a conflicting approach leading to a disruption in the system. Analyzing the Juvenile Justice framework from the 2000 Act to the passing of the POSCO Act 2012, the fundamental notion was that India has adopted a reformatory approach for juvenile delinquents and not a punitive method. Nevertheless, this entire legal topography took a severe hit in 2012 due to one incident which gave rise to substantial social movements for women's safety, violence against women and demanded protection for women's sexual sanity.

B. Back to Square One: The Incident and the Aftermath of Juvenile Justice Act, 2015

On the night of 16th December 2012, the gory incident of "The Nirbhaya Gang rape" took place. The rape victim, a 23-year-old girl succumbed to her injuries 13 days after this incident. This led to widespread protests in the national capital as people took to the streets to showcase their anger. They demanded harsh and severe punishments for such intolerable and immoral crimes against women. On 22nd December 2012, the Verma committee was constituted to suggest changes in criminal law to deal with sexual assault cases firmly. The report of the Verma committee identified gender bias and neglect of women as the root cause. The emotional catastrophe that the Nirbhaya case created was huge. When the Supreme Court upheld the death sentence of adult convicts, the hearts in the courtroom started to applaud as this judgment was the first-ever of its kind. However, there was also dissatisfaction among the public as the juvenile who was 17 years and ten months had to be tried in the Juvenile courts. This showcased the reformatory nature of act on Juveniles. It proved that the rule of law is always overpowered by the rule of emotions.

In 2014, a new central government came to power, and on 12th August 2014, the Juvenile Justice Bill was introduced in the Lok Sabha. This bill was passed on 7th May 2015 after just two parliamentary discussions by the Lok Sabha. The main highlight of this act was that juveniles in the

age of sixteen to eighteen years can be tried as adults in serious offences such as rape. This act triumphed as a light in the darkness that prevailed after the Nirbhaya case. However, this lacked in its enforcement. On this disputed issue, the court said that the juveniles between sixteen to eighteen years should also be tried as juveniles under the Juvenile Justice Act. The court has suggested the legislature to draft a restorative and not a retributive form of legislation.

The Juvenile Justice Act of 2000, needed revisiting and as a result, Juvenile Justice Bill 2015, which was enacted, which is progressive in dealing with children in conflict with the law. However, its appreciated features will take a back seat due to the provision stating children to be tried as adults in heinous cases because of conflicting views - the judiciary wants to have a reformatory system. In contrast, the public wants more of a retributive approach. This may lead to constant conflict between the two.

II. JUVENILE JUSTICE OR DEFENDING 'INNOCENT' CRIMINALS?

Before delving into the question of whether juveniles should be tried as adults in rape cases, it is pertinent to examine the psychological aspect of adolescent behaviour: Can their act of committing a heinous crime such as rape get overlooked just because they are adolescents and act out of impulse?

A. Broken Bridge between Juveniles and Adults – Is it Really Broken?

Several factors that instigate juveniles to commit sexual offences have been identified, notably: extreme pornography, abusive family, exposure to drugs, peer pressure. Out of these, peer pressure most often plays a significant role because adolescents are carried away by the need to get accepted as 'one' among their peers that they might cross boundaries of consent to please their peers.

While many of these crimes go unreported, there exists a staggering amount of evidence - according to National Crime Records Bureau, the highest increase in incidents of crime committed by juveniles in 2013 was reported in these categories: assault on women with intent to outrage her modesty, 132.3%; an insult to the modesty of women, 70.5%; and rape, 60.3%. Of the 43,506 juveniles arrested for different crimes in 2013, 66.3% were in the 16-18 age group, and 50.2% came from low-income families, with an annual income of up to ₹ 25,000. Most were illiterate or had attended only primary school.

The MacArthur Foundation Research Network conducted psychosocial research that has correlated the neurobiological research on adolescent brains; the research concluded that decision-making

capabilities are diminished in adolescents. The transition from adolescence to adulthood is not abrupt but a gradual process. Nevertheless, the study shows that cognitive abilities and intellectual maturity mirror adults' by the time adolescents reach age 16, advanced cognition and psychosocial development continue into the 20s.³ Immaturity, impulsivity are not defences when it comes to rape – it is equivalent to saying that the accused juvenile could not hear the screams of the victim in suffering.

However, it is a blunder to ignore the background of the juvenile: socio-cultural-economic situation, maturity, intelligence, any underlying serious mental illness, an extreme form of peer pressure, or any past abuse.⁴ In the absence of any of these factors, the 'reckless' behaviour of the juvenile owing to hormones, emotions do not make a compelling argument when the nature of the act is not just reckless, but also cruel and sadistic. Adolescents who commit a brutal crime, rape, have sufficient maturity to understand the nature of the act and should not be labeled as just another 'reckless' teen.

For adolescents below the age of 16, the lobes of the brain responsible for executive functions are not yet fully developed. The average human brain is not entirely developed until the age of 25.⁵ However, it cannot be understood in the sense that sex offenders till 25 should be considered as juveniles. This further clarifies that the transition from adolescence to adulthood is fluid, heavily dependent on circumstances, and not abrupt. Studies reveal that by the age of 15 years, there is little difference in adolescents' and adults' decision-making patterns about hypothetical situations. Teens were found to be capable of reasoning about the possible harm or benefits of different courses of action.⁶

Maturity depends upon the mental capability, the heinousness of the crime committed, and the background history of the juvenile. It is a well-established medical, psychological fact that the level of maturity and understanding of a 16-year-old is at par with adults.⁷ It is necessary to assist the offender in taking responsibility for their offending behaviour, to ensure compliance with therapeutic requirements and prison time, and to address the needs of the victim.

³ Laurence Steinberg et al., *Are adolescents less mature than adults?*, 64, AMERICAN PSYCHOLOGIST ASSOCIATION, 583 (2009).

⁴ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁵ National Conference of State Legislatures, *Adolescent development and competency: Juvenile Justice Guide Book for Legislators*, Nov. 10, 2011.

⁶ Steinberg L., *Risk taking in adolescence: what changes and why?*, 1021, THE N.Y. ACADEMY OF SCIENCES, 51-58, (2004).

⁷ *Salil Bali v. Union of India*, (2013) 7 SCC 705.

B. Reformation and Recidivism: Truth Revealed

Till a few decades ago, very little thought was given to the difference between offences committed by juveniles and adults. Furthermore, the distinction between sexual and non-sexual offences by juveniles was almost insignificant, which proved to be a blunder as the latter is more heinous. The new amended act is indeed much needed with the raise in heinous offences committed by juveniles. Changes and amendments of laws and policies are almost always well intentional and appreciative; however, the way it gets implemented and followed up is the only way to measure the object which the amendment wanted to achieve. The main question at hand is whether juvenile sex offenders re-offend when they reach adulthood or it naturally fades away.

The role of juvenile homes in India is fundamental in determining the rates of recidivism, coupled with the reformation of the juvenile. For juveniles in conflict with the law, treatment must be aimed from a multidisciplinary perspective than treating them on par with adult criminals who are serving prison time. The prevalence of bullying and harassment by other juveniles and the workers does more harm than good. However, when dealing with a heinous crime committed by a juvenile, the Act revolves around the question of the mental state of the accused committing the crime – if he/she was thinking and acting out like an adult at the time of the crime or not?

Reforming the juvenile observation homes is the foremost step in reforming juvenile justice. These homes have to be established with remarkable treatment facilities, where juveniles in conflict with the law are converted into responsible adult citizens. Failure to follow up on this leads to the juvenile completely disregarding the reformation phase and getting stuck in the loop of recidivism.

Before reviewing the concept and threats of recidivism, the difference between reoffending and recidivism is much needed. Recidivism is defined as the return to criminal behaviour by an individual previously convicted of or adjudicated for a criminal offence. It indicates a criminal offender's recurrent failure to abide by the law despite having been subject to some type of response from the criminal or juvenile justice system. Recidivism is not merely repeated offending, but rather, refers to the recurrence of illegal behaviour after a criminal offender receives negative legal consequences, including legal supervision, rehabilitative treatment or some form of residential or institutional placement.

The effectiveness of juvenile homes and psychological treatment almost always plays a remarkable role in recidivism rates among juveniles who sexually offend. Juvenile homes in India harbor a

significant number of juveniles, who are stuck in a never-ending loop of reoffending. The sole solution to this problem is undeniably education. Unless the professionals who handle the juveniles are well equipped and possess expertise in their diverse fields to counsel and motivate the children in conflict with the law, particularly juvenile sex offenders, we are left with little to no hope in achieving the stated motive of the Act.

A point to deliberate at this juncture would be the instance of following up on juvenile sex re-offenders. Depending on the gravity of the crime committed, several follow up sessions might be arranged, not only for general public safety but also for the betterment of the life of juvenile to significantly reduce chances of recidivism considering the profound impact sexual recidivism has on the victim and society at large. Groundbreaking research is required in the aspect of juvenile sexual recidivism in India; however, juvenile sex offenders tend to exhibit patterns of non-sexual recidivism equally, if not, more.

Revolving around the topic of heinous crimes such as rape, murder and follow up sessions, if it is established that the juvenile did not have the mental capacity to reason as an adult would in similar circumstances, it is pertinent to establish treatment and follow up sessions that need to be leveled up impressively on a targeted case to case basis. Another point of view is that juveniles of the age 16-18 are considered to be in a separate category of ‘adolescents’ and dealt exclusively, but in so far this point of view is concerned, it might create mishaps than effective implementation keeping in mind the sheer overwhelming number of cases on the rise.

C. 16 to 18: Adult Time for Adult Crime

In India, 1,614 rapes and 1,456 other sexual assaults were committed by juveniles in 2018, reveals the National Crime Records Bureau (NCRB)⁸. Over 40,000 juveniles were caught across the country in 2018 for their alleged involvement in various offences, with 72% of them belonging to the age group from 16 to 18 years.⁹

The terrifying incident of “Nirbhaya Delhi Gang Rape Case”¹⁰, on December 16, 2012, shocked the entire nation and many debates started on a large scale. The issue of the debate was the release of one of the accused, who was almost 18 years old. The involvement of the juvenile accused in such a

⁸ National Crime Records Bureau, Crime in India -2011, Chapter 10: *Juvenile Delinquency*.

⁹ Press Trust of India, *over 40k juveniles caught in 2018*, BUSINESS STANDARD, Oct. 22, 2019.

¹⁰ Criminal appeal No. 607-608 of 2017 (SLP 3119-3120 OF 2014).

heinous crime forced the Indian Legislation to introduce a new law. As a result, the Indian Parliament came up with a new law which is known as “Juvenile Justice (Care and Protection), 2015”. The Act has replaced the existing juvenile laws and has introduced some remarkable changes. One of the remarkable changes is juvenile offenders of the age group of 16 to 18 years, should be tried as an adult in heinous offences¹¹ after preliminary assessment, which was passed on May 7th in the Lok Sabha.¹²

The Act, in case of juvenile offenders, believes much on reformation, as sending them to bars or prisons reaffirms their identity as “criminals” - But can it be extended to a juvenile in his total mental capacity committing rape? Rape is rape; one cannot walk away taking the plea of age factor. Juvenile offenders often believe that committing a heinous crime is no issue as they will get away very little or no punishment in the name of reformation.

Penalisation, as an adult, will not only serve as a deterrent but also provide justice and protect the interests of the victim.

II. GRIM REALITY OF RAPE VICTIMS, FAIRY TALE ENDING FOR JUVENILE SEX OFFENDERS!

The most important and critical area of reform is not only of the law but also in the way it is implemented. In case of a heinous crime committed by a child, who has completed or who is above 16 years of age, the Juvenile Board conducts a ‘preliminary assessment’ concerning his mental capacity and physical capacity to commit such a heinous offence and ability to understand the consequences that follow the crime and the circumstances in which the crime was committed.¹³

A. The Overriding Concern – Interests of the Victim or the Juvenile?

These problems are both sociological and psychological, which needs to be viewed scientifically and holistically on a case to case basis. The Juvenile Justice Board may take the assistance of experienced psychologists or psycho-social workers or other experts, which has to be made mandatory. Provisions relating to management, reformation, or treatment of juvenile sex offenders are,

¹¹ The Juvenile Justice (Care and Protection of Children) Act, 2015, § 15(1).

¹² The Juvenile Justice (Care and Protection of Children) Act, 2015, § 18(3).

¹³ The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016.

however, conspicuous by their absence in the JJ Act and Rules.¹⁴ Even though with these assessments in place, from a legal point of view, trying juveniles as adults is a vast grey area.

A blanket transfer of juveniles by default who commit serious crimes to the adult system would imply a presumption that such all juveniles who commit rape do not suffer from any severe mental illness or past abuse.¹⁵ An individualized approach, on a case to case basis, is essential to balance the interests of the victim and the juvenile; both in petty and heinous offences. There should be a balance between the threat posed by the juvenile to society at large, the interests of the victim, interests of the juvenile keeping in mind the gravity of the offence.¹⁶

Regards to a heinous offence such as rape, the gravity of the situation should not be set aside with age being the only determinant. Unlike theft, burglary, or other crimes, perhaps even murder, rape is a willful act and must not be exonerated only on the grounds of age. The interests of the victim largely override the interests of the juvenile who is acting in his total mental capacity when it comes to rape.¹⁷

Experts agree that physical arousal in humans begins much earlier than 18 or even 16 years of age. While arousal is a natural phenomenon, there is a natural responsibility to bear restraint.¹⁸ Such restraint is deemed normal along with arousal. After committing a brutal crime of rape, when these juveniles are let out in the world under the supposed cloud of 'reformed', the best interest of the rape victim has been lost and justice, forgotten.

¹⁴ The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016.

¹⁵ Eileen P. Ryan, *Juvenile Sex Offenders*, 25, CHILD PSYCH, 81-97 (2015).

¹⁶ Andrew Day et al., *Current trends in the rehabilitation of juvenile offenders: Trends & issues in crime and criminal justice*, 284, AUSTRALIAN INSTITUTE OF CRIMINOLOGY (2004).

¹⁷ David Yellen, *Sentence Discounts and Sentencing Guidelines for Juveniles*, 11(5), FEDERAL SENTENCING REPORTER 286 (1999).

¹⁸ Chethan Kumar, *76% juveniles held for rape aged 16 or more*, TOI, Dec. 9, 2017.

IV. CONCLUSION

What was considered immoral a decade ago is no more seen in the same light. In the same way, considering juveniles as “innocents” just based on their age and their supposed ‘immaturity’ to comprehend rape, despite the brutality of the crime committed by them needs to change.

Sex education is not gender exclusive – it is equally vital to juvenile boys as it is to girls. The concept of boundaries and consent should be taught in schools. Punishment is given to juvenile sex offenders for inculcating a sense of guilt and make them repent for the sufferings endured by the victim. Nevertheless, in reality, the law is providing them with loopholes to justify their unjustifiable act and pain caused to the victim. When a juvenile commits rape with full consciousness and ill motive, he should be treated and tried as an adult in the eyes of the law. Trying to reform rather than penalising a person whose eyes see only the wrong, whose tongue shifts the blame on the victim, whose ears listen only to the words of other cowards is equivalent to ignoring the rights and interests of the victim. The legislature should amend the Act to penalise the “juvenile escapists” rather than the victims who already face trauma. Law should provide justice to the deserved and should not tie the eyes of justice with the age of the juvenile to make him look innocent.

“Injustice anywhere is a threat to justice everywhere.”