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Sentencing of Juvenile offenders in India: A theoretical analysis

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Abstract
World over, and in India too- sentencing Juveniles in Conflict with Law, (JCL), has been an intricate task. A concern is to deal with the Juvenile offenders in a way that they shouldn't become the victims of their own childhood. Owing to rising criminality, and the typical nature of child delinquents, the approach of sentencing has undergone through the multifarious changes. Sometimes it has been 'punitive' in nature, while as most times-the only purpose used to be 'rehabilitation', and or, 'correctional/therapeutic'. This paper is an attempt to creep through the serpent winding of the different phases of Juvenile Justice System to understand its shifting jurisprudence of treatment for young delinquents.

Keywords: Juvenile in conflict with law, sentencing, judiciary and juveniles, rising crime in juveniles

Introduction
Sentencing is a post-conviction framework of the criminal justice process, in which an offender is brought before the court for imposition of a penalty, if convicted in a criminal prosecution [1]. In pre-modern societies, punishment was largely vindictive, and awarded at the satisfaction of a wronged individual. The quality and quantity of such sentencing had no special relation- neither with the offence- nor with the offender. Punishment was not based on any rational principle/s. For instance, Classical criminologist, Cesare Beccaria (1738-94) vehemently [2] has emphasized on proportionality of punishment to the harm done [3].
Under the Utilitarian philosophy of objective outcome of sentencing [4] children are subject to the different standards of moral evaluation. This view was much endorsed by 'Neo-classical School' asserting that in sentencing there are certain categories of offenders, such as minors, idiots, insane and incompetent who need to be treated leniently… Thus, application of sentencing on the basis of age, sex, and psychological conditions was advocated, which eventually gave birth to the 'reformative and rehabilitative approaches of sentencing' [5] The reformative approach is premised on the belief that the criminal justice system can be revisited to make it more efficacious, and meaningful by inculcating the principles of rehabilitation. In this regard, the young offenders have great chance of reformation being immature and highly amenable.
The recent trends with regard to punishment of juveniles, however, have brought the very foundations of the juvenile justice system under scanner. Is juvenile a young criminal exercising free choice or a product of circumstance is the basic question that needs to resolved before legislatively establishing the jurisprudence of punishment for them?

Phase I- Pre-Colonial Era
The pre-colonial era, an epoch of religious dominance, was governed by the ecclesiastical principles of criminal as well as civil justice. In this phase, which can be traced prior to 1773, both Hindu as well as Muslim laws had provisions for the regulation of child conduct. The primary responsibility to maintain and regulate the conduct of the children was on the parents. Legal experts have written that neither set of laws had a proper reference towards the Juvenile delinquents [6]. However, they have mentioned that a 'differential treatment' was given to the children for certain offences. For example
"A child throwing filth on a public road was not given any punishment under the Hindu law, but was subject to admonition and was made to clean it. While an adult offender in the same wrong was liable for fine. Similarly, any minor having any illicit conduct with a consenting adult woman was not given any punishment."

In Muslim law discretion was given to a Kazi (Judge) to determine the degree of Tazeer [7] (discretionary punishments). The result of such awards was diverse— with some corrected by reprimands, and others (more obstinate) given a proper punishment [8]. Though, King was empowered to decide the punishment of an offender, however, he was at the same time having the duty to take care of a child's interests [9]. All these endowments clearly substantiate that children were recognized as separate entities from adults for the purpose of treatment for any wrong.

Phase II-Colonial Era

During the early phase of Colonial era there was no such organized mechanism to deal with the child offenders and part them from adult counter-parts. Juveniles were kept in jails too. To overcome the problem- some schools- meant for reformation and apprenticeship of juveniles were established in general [10]. To strengthen it further, the Apprentice Act, 1850 was enacted, which authorized the magistrates to bind Juveniles-between 10 and 15 years- as apprentices. Instead of sending them to prison for minor offences, 'a chance to learn trade, craft or employment', as an endeavor was realized. The Act mooted the concept of neglected children for first time for legislative purposes and provided for a community alternative to imprisonment for delinquent children [11] Similarly, the IPC, 1860 declared children below 7 years of age as doli incapex, while as it allowed a qualifying defense in case of children from 7 – 12 years age group [12]. So the law embodied the concept of less responsibility owing to the tender age. This age bracket has been nullified by the later Juvenile Justice legislation recognizing 18 years as the age of juvenility.

In 1861, prison reports suggested a need for change. It also noticed the high rate re-committals, and the increase in number of Juvenile offenders. This, subsequently, resulted in enactment of Whipping Act, 1864 with a hope of eminent service in thinning Juvenile population in jails [13]. It proved a great success in curbing delinquency. The Act applied uniformly to all with leniency in giving number of lashes to young delinquents. The Juvenile delinquents and reformatories were among the issues with jail management on which some legislative action was needed straightaway. Jail Committee(s) were of the opinion that reformatories should impart education with the object that the Children who're provoked to commit crime would get better understanding through government education [14]. In 1889, another jails Committee suggested, and reiterated that there is a need for segregation and classification of offenders owing to their age and duration of sentence. While emphasizing that the Juvenile offenders should never be punished with the curtailment of diet. It recommended the daily exercise and compulsory education. It also focused that the regular Juvenile offenders should not be sent to reformatories as they take with them the worst traditions and convictions [15].

With the enactment of Reformatory Schools Act, 1876, juveniles were made subject to reformatories rather than jails [16]. In 1898, Code of Criminal Procedure was enacted. Besides, the provisions relating 'grant of probation and trial of children by the Juvenile court', [17] authorized the magistrates to send the child offenders to reformatories in specified circumstances. In order to achieve the task of reformation, many reformatory schools were established at many places in India. Unfortunately, the infrastructure and the overcrowding of these institutions had converted them as jails for young, rather than to real schools [18].

One of the most significant developments was the report of Indian Jail Committee, 1919-20. It was realized that Juvenile offenders shouldn't be exposed to the association of hardened and recidivist criminals. Juveniles requiring certain jail period, should be accommodated separately [19]. The committee recommended special institutions equipped for the purpose of reformation, and stated that the object should be to make the inmates self-reliant and self-controlled [20]. There were certain other suggestions made by the Committee to improve the structure of sentencing [21]. Consequently, some Children's Acts were passed in a quick succession. Several State level committees were constituted to consider the possible reforms to inculcate changing approach in correctional treatment [22].

Post-Independence, 1950-2000- Phase III

While adopting the Indian Constitution, it was ensured that the welfare of children should remain a primary focus [23]. Juvenile justice law(s), which besides establishing Juvenile courts, remand homes, probation and certified schools [24] laid provision for the exclusion of Juvenile delinquents from adult jails, courts or police lock ups. The first model central legislation, the Children's Act [25] was enacted in 19060, applicable in UTs and model Act for states. This model legislation envisaged for segregation of the children from their first contact with law and law enforcement agencies by establishing two different bodies. It further:

- Prohibited the imprisonment of Children under any circumstances and laid focus on the Children's Court and Child Welfare Board, (CWC).
- Provided for the establishment of Children's Home and a Special School for delinquent children.

After the landmark judgment in Sheela Barse vs Union of India [26], the Apex Court laid a focus on the uniform Juvenile justice laws. Parliament enacted the Juvenile Justice Act, 1986. The Act hindered the confinement of Children in police lock ups or jails, and laid focus on the separate institutions for processing, treatment and rehabilitation. It also imbibed the earlier guidelines of different committees to create a favorable sentencing prospect [27]. After the ratification of 'Child Rights Convention in 1989', certain infrastructural changes were made in the Juvenile Justice (Care & Protection of Children) Act, 2000. The establishment of 'Juvenile Courts and Juvenile Welfare Boards' were affirmed to ensure the objectivity of parens patriae [28]. 'The JCL ought not to be punished like an adult', remained universal [29]. Of the several milieus, 'right to bail', is the paramount hallmark of the JJA, 2000. The Act made grant of bail to a juvenile a rule, and denial of bail an exception [30].

Contemporary Position-Phase IV

The involvement of a 17 year old juvenile in brutal gang rape and murder, which took place in the year 2012 in Delhi [31], came as a force majeure to the tenets of Juvenile justice. Under the then prevailing law the maximum punishment that could be awarded to Juveniles was three years of detention in a remand home irrespective of the gravity of the offence and age of offender [32]. Pleading a change in the Juvenile justice laws, a humungous outcry started for- lowering the age limit, and stricter punishment for grave offences like rape and murder [33]. The government appointed committee [34], however, suggested against that. Succumbing to the pressure

groups, the Central government took no notice of the suggestions, and enacted the Juvenile Justice (C&P of Children) Act, 2015 with the twin objectives of- setting 'deterrence standards for Juvenile offenders' and 'protecting the rights of the victims'. The instant Act classified offences on the basis of gravity as well as severity. It also purports to try Juvenile offenders, above 16 years- who commit "heinous offences" in Children Court as an adult [35]. The previous enactments didn't in comparison to the instant Act prescribe penalty of any sort. This shifting approach from purely welfaristic approach to punitive approach has made it inevitable to peep in history to develop a better jurisprudence of treatment/punishment for young delinquents.

Sentencing- Determinate and Indeterminate

The justice under the criminal justice comes in many forms most common among them being punishment. As discussed earlier the children were considered proper subjects for punishment with least concessions. This approach has changed in the recent past with the recognition of "childhood" as a different stage of life. The philanthropist, child rights activists, policy makers and judiciary has played a pivotal role in developing the new jurisprudence that "children are different and shall be treated differently from their adult counter-parts". This has, inturn, baffled the jurists and scholars to determine the question "what could amount justice" to young offenders.

Under the set retributive philosophy, the gravity of punishment is determined on the gravity of offence. It presupposes that the severity of sentence must be proportionate to gravity of offence. Early the accused were supposed to undergo the determinate sentence as pronounced by the court. With the advent "new penology" the convicted are at times incarcerated for an indeterminate period of time. Thus, now, when a person undergoes a fixed sentencing period- it's a determinate sentence [36]. On the other hand the indeterminate sentencing, however, has an open-ended sentence. Only after a close examination into his behavior within incarceration- he can be released for further assessment. It is mostly applied in rehabilitation and reformation cases, and Juveniles justice system adopts the same [37].

The squabble of 'determinate and indeterminate sentencing' has a steadfast philosophical foundation of 'punishment and treatment'. A determinate sentence, which relies on the 'free will principle' to impose penalty, presumes that Juvenile-too is a competent individual [38]. An individual is responsible for the act he has committed- thus a specific sentence is what he fetches. It can be retributive in nature, and it's mostly inflicted on an individual to punish him for his past wrong doing. The extension of 'determinate sentencing' entirely ignores the reformative tendencies. This ignores the fact that children to a certain age remain immature, which is further affirmed by the neuroscientists [39] and substantiated by judiciary as well [40]. Open-ended punishment emphases on rehabilitation and does not subject a person to time-bound program of reformation. It upholds the child friendly treatment which is embodied in the juvenile justice system. Different experts and studies have suggested that India too should adopt this model [41].

Punitive Loom of JJ (C&P) Act, 2015

The JCL who have been found liable for the commission of a heinous offence, having the age group of 16-18 years, are to be detained mandatorily in a place of safety, till they attain the age of 21 years [42]. Consequently, the Children's Court is having a duty to conduct an examination to determine-whether such Juvenile has become a 'contributing member of society' [43]. This test, however, is highly skewed. It gives plenteous discretion to Children's court, thereby, leaving an ample room for prejudice. It's this court's power to decide on the transfer of a JCL to an adult jail. In case such shifting takes place, the chances of rehabilitation sine die.

On a careful insight, the approach of sentencing under the instant Act is a blended one. It has the characteristics of both Juvenile, and adult sentencing. An offender continues to show the recidivistic tendencies and is put away from the rehabilitative environment in an adult prison [44]. A Juvenile, above 16 years may have to spend his jail term in the adult prison contingent to the outcome of his three year term in 'Special Facility'. The legal history shows that Juvenile Court sentences used to be indeterminate. Aimed to secure 'the best interests of the Juvenile offenders' a fixed sentence as is provided in the Act of 2015, has been never appreciated [45].

It's the commission of a 'heinous offence' which attracts a penalty under the 2015 Act [46]. "Heinous offences" have been defined widely to include all offences which carry a punishment of seven years or more [47]. An intrinsic approach of the JJ has been the welfare of Juveniles. More precisely, it advocates for the fresh start of a Juvenile offender [48]. By providing the obliteration of the criminal records. This provision is supplemented by a stipulation which allows a deviation from the rule in "special circumstances" [49]. What could be those circumstances? The answer is not known. Being so, there's an unequivocal risk of abuse in the classification of Juvenile offenders, on the basis of caste, community, or race, color, region and religion [50]. On the one side, a JCL has been given a cover against any disqualification [51]. Yet, children above the age of sixteen-who have committed heinous offences are excluded from this clause [52]. In so providing, JJ law in India is leaning towards the punitive scheme, contrary to the rehabilitative ideals, atleast for one category of juveniles who constituted the maximum percentage of juvenile offenders.

"**Best Interest Approach" of Judiciary**

A systematic, concessional and modest approach wherein every act done or proceedings carried safeguard the rights of children are protected- is called as best interest approach. Higher judiciary has always used 'liberal/welfare' scheme of interpretation, and has categorically rejected the strict penal notion. In so doing, courts not only have enhanced the 'due process protection' to juvenile offenders, but also have stressed on the individualization of their treatment. In the cases like- Dharam Pal, [53] Kakoo, [54] Hiralal Mallick, [55] Rasul, [56] and Harnam Singh [57], it's made clear that reformation-in-lieu-of-punishment, and rehabilitation-against-penalty should be the only-touchstone of law governing the Juvenile offenders [58] The children charged with- rape, murder and grievous hurt, have been directed to be tried by a Juvenile court, or any other specially empowered court [59]. In the case of Reepik Ravindran, [60] a 15-year old boy was convicted for the rape of a seven year old girl. While reversing his conviction, the Andhra Pradesh High Court ruled that a JCL under no circumstances shall be send to a prison. Court further opined that the mitigating circumstances to shall be given a weightage [61]. This forbearing attitude infers a fact that courts favor JJ Law over the other 'special purpose legislations'.

In Jagdish Bhuyan vs State, [62] a 16-year child was indicted for an offence under the TADA Act. In its differing opinion, Guwahati High Court gave preference to the TADA. But in Ramachandran v. Inspector of Police, [63] the High Court of Madras showed child friendly approach and uphold the non-exclusion of children from the purview of Juvenile Justice Act. The court found that it unnecessary to examine the overriding effect of the Act in question [64]. While raising a bar of juvenile friendly approach, court stated that a child will never become a perpetuator if the police discharge its functions properly. A child may commit a serious offence and the police must take the prompt step of taking him into custody and place him under a proper care so that he may be prevented from further criminal activities. In Re Anthony [65] the differential procedure to deal with the Juveniles was held to be permissible under the constitution of India. The High Court of Madras said the distinction is for the best interests of children. In Parvez Ahmad Shah vs State of J&K and Others [66] petitioner- a Juvenile, treated as an adult was charged under the NDPS Act 1985. Learned Trial Judge was of the opinion that "J&K JJA 1997 had no application in case of trials under the NDPS Act. If such cases aren't dealt strictly, it would encounter the drug mafia to use the juvenile offenders as the conduits.''

The petitioner's plea of juvenility before the trial court was rejected. However, the High Court of J&K after evaluating the importance, scope and objective of the JJA 1997 observed that— the said legislation is enacted to provide for the care, protection, treatment, development and rehabilitation of the Juvenile delinquents.

Apart from this, Court also brought into limelight the observations made by the Supreme Court in a number of cases, like- Pratap Singh vs State of Jharkhand [67], Umesh Chnader vs State of Rajasthan [68], Kanta Goel vs B. P. Pathak [69], and Bhola Bhagat vs State of Bihar [70] and stated "JJA is meant to provide assistance to those children who are incarcerated along with adults. That the children's Act has been enacted to protect the young children from the consequences of their criminal acts on the footing of their age and mind. That in case of interpretation court must be 'illumined by the goal' of a statue. And, the technicalities shouldn't be allowed to defeat the benefits of socially-oriented legislations".

Court also stated that the commutative effect of Sections 7, 18, 22, 24, and 25 of the JJA 1997, and the Sections 36, 36A, and 37 of the NDPS Act make it clear that "an offender has to be treated by a special forum, which in case of the Juvenile offenders should be the Juvenile court." Accordingly, JJA being a socially-oriented legislation, and meant for benefits of Juvenile offenders should prevail over the NDPS Act.

Court while disposing of the writ petition, stated "The opinion of the trial judge that any concessions under juvenile justice shall encourage the adult offenders to abuse the provision of juvenility is preposterous and against the very philosophy of the Act. If such assertions are allowed to prevail, then the juveniles shall have to be excluded from the benefits of the Act in almost all conceivable crimes, as the danger of being poached always lurks around…." (Emphasis added).

A Trial Court had in the case of Sameer Nazir vs State of J&K [71] convicted the one, Mr. Sameer Nazir for the commission of an offence, punishable under Section 376, RPC. And, had later, sentenced him with a rigorous imprisonment for a term of 10 years, and the payment of fine of Rupees 50, 000. During the Appeal before High Court, the Appellant raised the 'plea of juvenility' for the first time under JJ Act, 2013. While recording for the Court, it was observed that- "The offence has taken place in the year 2004, when the 'Juvenile' was 16 years of age. Though the Act of 2013, wasn't implemented at that time, but the disposal of case, as well as the order of sentencing, is past the date of commencement of the said enactment. In view of that, the learned trial court was under a legal obligation not to sentence him."

Conclusion

It is discernable that Juvenile justice machinery has come across a huge change. From being protective, it now allows a certain level of penalty too. Though, in exceptional cases, but the scope of sentencing has been recognized. Justice Krishna Iyyer, while bemoaning on the disparity, and the laxity in Juvenile sentencing, in a case has observed- "Juvenile justice system still thinks in terms of terror, not cure; of wounding, not healing; resulting in the blind man's bluff. Besides, the negative approach has converted the Juvenile homes into junior jails. The states response to punitive issues, relating to the children has been stricken with ignorance and illiteracy. Thus, it needs to be awaken to a new dawn… (Emphasis added). Nothing has changed yet when it comes to question of rehabilitation and reformation. Children are still punished not helped within the reformatory homes. In re Gault [72] was right in extending due process protection to young delinquents to save atleast their one world. The juvenile justice is still in infancy in terms of infrastructure and institutional development required for the rehabilitation of child offenders. The stakeholders must understand the nuances of juvenile justice system to help to young offenders to redeem them. Young are not to be punished but helped- and it is the ultimate object of Juvenile Justice System.

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11. Supra Note 5 at Pg., 60; The Apprentices Act. 1850/1961;
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Nothing is an offence which is done by a child under seven years of age. Section 83. Act of a child above seven and under twelve of immature understanding. — Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.
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