

# JUVENILE MATURITY AND HEINOUS CRIMES: A RE-LOOK AT JUVENILE JUSTICE POLICY IN INDIA

*Gauri Pillai & Shrikrishna Upadhyay\**

*On December 22, 2015, the Juvenile Justice (Care and Protection of Children) Act, 2015 received parliamentary approval, bringing forth an entirely new regime with respect to juveniles above the age of sixteen, accused of committing heinous offences. The background for its introduction was set by the horrific rape of a young student in 2012. The government justified the law as a measure which would have a deterrent effect on potential juvenile offenders. However, the opponents argue that the law would defeat the objective of having a separate juvenile justice system, and would not serve the goal of deterrence. They instead suggest that efforts be expended in ensuring more effective implementation of the Juvenile Justice (Care and Protection) Act, 2000. The paper analyses the viability of the mechanism proposed by the new measure. It also evaluates the potency of the counter claim which proposes that the existing law be better implemented, and thereby examines the necessity for the introduction of a new approach governing juvenile policy in India.*

## I. INTRODUCTION

India has had a chequered history with regard to the determination of the age of juveniles in conflict with law. The Children Act, 1960 ('1960 Act') was the first central legislation post-independence that aimed at conceptualising a system, separate from the criminal justice system under the Code of Criminal Procedure, 1973, for the treatment of juvenile delinquents. It defined a "child" to be a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years.<sup>1</sup> However, during this period, each state was allowed to frame its own laws on the subject as the 1960 Act extended only to the Union Territories.<sup>2</sup> This resulted in similar cases of juvenile delinquency being dealt with differently by courts of each state, thereby leading to discrepancy in judicial practice.<sup>3</sup>

---

\* 4th and 1st year students of the W.B. National University of Juridical Sciences, Kolkata. We would like to thank Shivam Bhardwaj for his continuous guidance. All errors, however, remain solely ours.

<sup>1</sup> The Children Act, 1960, §2(E).

<sup>2</sup> *Id.*, §1(2).

<sup>3</sup> *Sheela Barse v. Union of India*, (1986) 3 SCC 596 : AIR 1986 SC 1773 (per Bhagwati J.: "[...] we would suggest that instead of each State having its own Children's Act in other States, it would be desirable if the Central Government initiates Parliamentary

This discrepancy prompted the Supreme Court to observe that a parliamentary legislation on the subject of juvenile justice was desirable.<sup>4</sup> It would not only bring about uniformity in provisions relating to children but also ensure better and more effective implementation of the same.<sup>5</sup> This led to the enactment of the Juvenile Justice Act, 1986, the first comprehensive legislation, which had countrywide application, except the state of Jammu and Kashmir. Notably, the provision relating to the age limit of juveniles was carried forward from the 1960 Act and was kept unchanged.

In 1992 India signed the United Nations Convention on the Rights of the Child, 1989 ('CRC'). The CRC defined a child as "every human being below the age of eighteen".<sup>6</sup> Being a signatory, India sought to fulfil its international obligation by enacting the Juvenile Justice (Care and Protection of Children) Act, 2000 ('2000 Act'). Importantly, this led to the age of juvenile irrespective of gender, being fixed at eighteen years.<sup>7</sup>

The brutal gang rape and murder of a female physiotherapy intern in Delhi in December, 2012, by six men, one of whom was a seventeen-year-old juvenile, retriggered the debate on the age limit of juveniles. Under the existing 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.<sup>8</sup> This led to tremendous public outcry demanding a change in the juvenile justice laws, lowering the age limit of juveniles, and stricter punishment for juveniles committing grave offences like rape and murder.<sup>9</sup> The Committee on Amendments to Criminal Laws, headed by Justice J.S. Verma, was constituted to examine the deficiencies in the existing criminal law regime governing sexual assault against women.<sup>10</sup> The Committee categorically rejected the demand for lowering the age of juveniles to sixteen.<sup>11</sup> Instead, it opined that

---

Legislation on the subject, so that there is complete uniformity in regard to the various provisions relating to children in the entire territory of the country.").

<sup>4</sup> Childline India, *Child Protection and Juvenile Justice System*, 14, available at <http://childlineindia.org.in/pdf/CP-JJ-JCL.pdf> (Last visited on March 10, 2017).

<sup>5</sup> Sheela Barse v. Union of India, (1986) 3 SCC 596 : AIR 1986 SC 1773.

<sup>6</sup> United Nations Convention on the Rights of Child, Art. 1, U.N. Doc. A/RES/44/25 (September 2, 1990).

<sup>7</sup> The Juvenile Justice (Care and Protection of Children) Act, 2000, §2(k).

<sup>8</sup> *Id.*, §15.

<sup>9</sup> Livemint, *Juvenile Crime: Let Children be Children*, August 13, 2014, available at <http://www.livemint.com/Opinion/PsfkCblI83BhhFB0HFwpdN/Juvenile-crime-Let-children-be-children.html> (Last visited on January 21, 2016); Hindustan Times, *Amended Juvenile Justice Act is a Message for Society*, December 24, 2015, available at <http://www.hindustantimes.com/punjab/amended-juvenile-justice-act-is-a-message-for-society/story-MJEUtPHKthry-aLFkndJUpL.html> (Last visited on January 21, 2016).

<sup>10</sup> See generally JUSTICE J.S. VERMA COMMITTEE, *Report of the Committee on Amendments to Criminal Law* (January 23, 2013).

<sup>11</sup> PARLIAMENTARY COMMITTEE ON HUMAN RESOURCE DEVELOPMENT, Rajya Sabha, *The Juvenile Justice (Care and Protection of Children) Bill, 2014*, Two Hundred and Forty Sixth Report, ¶54 (February 2015).

there was a pressing need to reform and restructure the existing juvenile justice and welfare system and called for stricter implementation of the 2000 Act.<sup>12</sup> It found no merit in reducing the age of juveniles for certain offences and relied, among others, on the fact that recidivism had fallen from 8.2 percent in 2010 to 6.9 percent in 2011.<sup>13</sup>

However, the government disregarded these recommendations and heeded to popular demand by introducing the Juvenile Justice (Care and Protection of Children) Act, 2015 ('2015 Act'), with the twin objectives of setting deterrence standards for juvenile offenders and protecting the rights of the victims.<sup>14</sup> The 2015 Act differentiates between petty, serious, and heinous offences, and proposes to treat juvenile offenders who commit "heinous offences" between the ages of sixteen and eighteen as adults by putting them to trial under the criminal justice system.<sup>15</sup>

The 2015 Act legitimises the transfer of juveniles above the age of sixteen to adult courts, if the Juvenile Justice Board ('Board') concludes that the level of maturity of the juvenile indicates that he committed the heinous offence as an adult and not as a child.<sup>16</sup> We believe that such a system, which establishes a link between the gravity of the offence committed and the maturity of the child, defeats the objectives of juvenile justice law as it lets the crime overshadow the child.<sup>17</sup> We thus argue that the transfer mechanism envisaged by the 2015 Act is contrary to principles of constitutional law and international principles governing juvenile policy [II]. However, we acknowledge that a child committing a "heinous crime" would require more intensive scrutiny, and ought not be treated similarly to children committing less serious crimes.

Therefore, we propose a mid-way approach, which envisages differential treatment to the former within the juvenile justice system itself. While this model encapsulates the rehabilitative ideals of the 2000 Act, it goes beyond it, seeking to remedy its shortcomings. We refer to international best practice where appropriate, to illustrate working models India could adopt [III]. However, a purely rehabilitative approach towards juvenile offenders committing heinous offences may not be ideal and thus we propose the adoption of principles of restorative justice as the second limb of juvenile policy in India

<sup>12</sup> *Id.*, ¶44-47, 49.

<sup>13</sup> *Id.*, ¶48.

<sup>14</sup> Indian Express, *16 to 18: LS Passes Bill Redefining A Juvenile's Age In Serious Crimes*, May 8, 2015, available at <http://indianexpress.com/article/india/india-others/juvenile-justice-bill-passed-in-lok-sabha/> (Last visited on January 2, 2016).

<sup>15</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, §15, 16, 19.

<sup>16</sup> *Id.*, §19.

<sup>17</sup> VED KUMARI, *JUSTICE SYSTEM IN INDIA: FROM WELFARE TO RIGHTS* (2010) (When the nature of the crime is serious, the criminal justice system treats the child as monstrous and incapable of rehabilitation and therefore equates them to adults. This is described as the crime overshadowing the child, as "the psychological, social and legal construction of 'childhood' can be lost, understated, ignored or overshadowed by the notion of 'crime'.")

[IV]. Therefore, a rehabilitative system, complemented by restorative principles would be an effective approach to dealing with juvenile offenders above the age of sixteen who have committed heinous offences.

## II. THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015: A CRITIQUE

This section examines the validity of the 2015 Act, through the lens of international standards governing child rights, and constitutional guarantees, identifying the several instances where the 2015 Act deviates from established practice. *First*, the 2015 Act makes a flawed correlation between the gravity of the crime and the maturity of the juvenile. It also attempts the impossible, by permitting the Board to conduct a case by case determination of maturity, before deciding whether to transfer the juvenile or not. Further, the 2015 Act also violates the presumption of innocence enshrined in the Constitution. *Second*, the absence of definitions vests in both the Board and the Children's Court limitless discretion, threatening the interests of the juveniles. The 2015 Act also violates the mandate of equal treatment of all juveniles within a separate juvenile justice system, as required by international standards of juvenile justice, and the equality code in the Constitution. *Third*, the 2015 Act is in contravention on the cardinal principle of fresh start, which offers the juvenile a renewed opportunity for reformation.

### A. EVALUATION BY THE JUVENILE JUSTICE BOARD

The 2015 Act vests the Board with the power to make a preliminary assessment of the maturity of a child above the age of sixteen, who has committed a heinous offence. The Board is required to assess the mental and physical capacity of a child to commit such offence, his ability to understand its consequences, and the circumstances in which the said offence was committed.<sup>18</sup> Using these parameters, the Board is to accurately determine, within a period of three months,<sup>19</sup> whether the child committed the offence as a child or as an adult.<sup>20</sup> The Board may obtain the assistance of experienced psychologists for such determination.<sup>21</sup> The structure proposed by the 2015 Act suggests that the commission of a heinous crime by a juvenile is an indication that the juvenile is as mature as an adult, and thus need not receive special treatment provided to children within the juvenile justice system in India. However, this

<sup>18</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, §15(1).

<sup>19</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, §14(3).

<sup>20</sup> Aditi Malhotra, *Indian Cabinet Gives Nod to Changes in Juvenile Age for Serious Crimes*, April 23, 2015, available at <http://blogs.wsj.com/indiarealtime/2015/04/23/indian-cabinet-gives-nod-to-change-in-juvenile-age-for-serious-crimes/> (Last visited on January 21, 2016).

<sup>21</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, §15(1).

is based on two erroneous assumptions: *first*, that the gravity of the offence committed by a child is an indicator of his maturity and the *second*, that an accurate determination of maturity is possible.<sup>22</sup> Further, the procedure proposed under the 2015 Act is against the principle of presumption of innocence, a cardinal rule of fair trial.

The assessment by the Board under the 2015 Act correlates the heinousness of crime to the maturity of the juvenile. Research in development psychology however proves, to the contrary, that the seriousness of the crime cannot be relied on as a measure of the maturity of the child, thereby indicating that the determination of maturity by the Board is premised on a flawed parameter. Neuroscience findings reveal that while the cognitive capacity of a child above the age of sixteen is similar to that of an adult, the psychosocial maturity is not.<sup>23</sup> The development of cognitive abilities renders the child increasingly capable of multidimensional, deliberative and hypothetical thinking, improving his ability to understand decisions.<sup>24</sup> Through the development of their cognitive facilities, children often know right from wrong; six year olds may know that it is wrong to kill, while being unsure about what killing is, or why it is wrong.<sup>25</sup> However, maturity of judgment involves the exercise of both cognitive abilities and psychosocial capabilities.<sup>26</sup> Psychosocial capabilities enable an individual to control his impulses, through the use of reason to guide his behaviour, the long term consequences of his acts being factored in.<sup>27</sup> Though juveniles above the age of sixteen show the former, the latter is absent.<sup>28</sup> In fact, research indicates that children are unable to look more than a few days into the future while making decisions,<sup>29</sup> and thereby place emphasis on the short term consequences rather than on long term impacts. Psychological research also consistently demonstrates that children have a greater tendency than adults to make decisions based primarily on emotions such as anger or fear, than guided by logic or reason.<sup>30</sup> The role played by emotion is only heightened in stressful situations.<sup>31</sup> Therefore, due to the lack of development of their psychosocial

<sup>22</sup> Shiladitya Rakshit, *Missing the 'Justice' in the Juvenile Justice (Care and Protection of Children) Bill, 2014*, 8(1) LAW & POLICY BRIEF 2 (2015).

<sup>23</sup> Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 16(3) THE ANNUAL REVIEW OF CLINICAL PSYCHOLOGY 55 (2008).

<sup>24</sup> *Id.*, 56.

<sup>25</sup> Human Rights Watch, *The Difference between Youth and Adults*, October, 2005, available at <https://www.hrw.org/reports/2005/us1005/6.htm> (Last visited on March 10, 2017).

<sup>26</sup> Steinberg, *supra* note 23, 56.

<sup>27</sup> *Supra* note 25.

<sup>28</sup> Steinberg, *supra* note 23, 56.

<sup>29</sup> Catherine C. Lewis, *How Adolescents Approach Decisions: Changes over Grades Seven to Twelve and Policy Implications*, 52 CHILD DEVELOPMENT 538, 541-42 (1981) (This study examined how only twenty five percent of students in standard X (whose approximate age is sixteen) consider the long term impacts of their decisions, in comparison to forty two percent of students in class XII (whose approximate age is eighteen)).

<sup>30</sup> *Supra* note 25.

<sup>31</sup> Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STANFORD LAW AND POLICY REVIEW 155 (2003).

maturity, children are unable to apply their cognitive skills effectively, and are often swayed by emotional and social variables.<sup>32</sup>

Neuroscience studies attribute such difference in maturity between a child and an adult to the difference in growth of the prefrontal cortex in children. The prefrontal cortex is responsible for the performance of crucial functions such as planning, reasoning, judgment, impulse control and mood regulation.<sup>33</sup> Thus, the prefrontal cortex is the basis of reason, controlling the tendency of an individual towards impulsive behaviour.<sup>34</sup> The prefrontal cortex is in a stage of development during adolescence.<sup>35</sup> According to scientific research, due to the absence of a well-functioning prefrontal cortex, adolescents tend to use a part of the brain referred to as amygdala during decision making.<sup>36</sup> The amygdala is the center for impulsive and aggressive behaviour.<sup>37</sup> In adults, the prefrontal cortex places a check on the emotions and impulses originating from the amygdala. During adolescence, due to the dominance of the amygdala over the prefrontal cortex results, children often react in line with “gut instinct”, unable to balance their instincts against rational and reasoned responses.<sup>38</sup> As a direct consequence, adolescents, even at the age of sixteen are more prone to peer influence than adults.<sup>39</sup> They are also less likely to carefully evaluate future outcomes before acting and thereby are likely to overstate rewards without fully analysing the risks.<sup>40</sup> Further, they are unable

<sup>32</sup> Steinberg, *supra* note 23, 56.

<sup>33</sup> Brittany Kintigh, *Adolescent Development: Juveniles are Different than Adults*, August, 2012, available at <http://docplayer.net/29573912-Adolescent-development-juveniles-are-different-than-adults.html> (Last visited on March 18, 2017).

<sup>34</sup> The New York Times, *A Brain Too Young For Good Judgment*, March 10, 2001, available at <http://www.nytimes.com/2001/03/10/opinion/a-brain-too-young-for-good-judgment.html> (Last visited on March 10, 2017).

<sup>35</sup> Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 28(3) ISSUES IN SCIENCE AND TECHNOLOGY (2012); See also Sara B. Johnson, Robert W. Blum & Jay N. Giedd, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45(3) J. ADOLESC. HEALTH 216 (2009); Allan L. Reiss et al, *Brain Development, Gender and IQ in Children: A Volumetric Imaging Study*, 119 BRAIN 1786; Elizabeth R. Sowell et al, *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Post Adolescent Brain Maturation*, 21 JOURNAL OF NEUROSCIENCE 8821 (2001).

<sup>36</sup> Jan Glascher & Ralph Adolphs, *Processing of the Arousal of Subliminal and Supraliminal Emotional Stimuli by the Human Amygdala*, 23 JOURNAL OF NEUROSCIENCE 10274 (2003).

<sup>37</sup> *Supra* note 25.

<sup>38</sup> *Id.*; Gargi Talukder, *Decision-Making is Still a Work in Progress for Teenagers*, March 20, 2013, available at <http://brainconnection.brainhq.com/2013/03/20/decision-making-is-still-a-work-in-progress-for-teenagers/> (Last visited on March 10, 2017).

<sup>39</sup> Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58(12) AMERICAN PSYCHOLOGIST 1009 (2003); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41(4) DEVELOPMENTAL PSYCHOLOGY 625 (2005).

<sup>40</sup> D.S. Fareri, L.N. Martin & M.R. Delgado, *Reward-Related Processing in the Human Brain: Developmental Considerations*, 20 DEVELOPMENT AND PSYCHOPATHOLOGY 1191 (2008).

to understand and appreciate the future consequences of their current actions.<sup>41</sup> Thus, scientific research strongly indicates “maturity”, measured through risk assessment abilities, is linked to the growth of the brain, which in turn depends on the age of the individual. This implies that all children of a given age have the same level of maturity, since the growth of the pre-frontal cortex remains the same at a particular age. Consequently, the commission of a heinous crime by a juvenile is not an indicator of the “maturity” of the child, since maturity remains constant. Instead commission of such crimes by children is bound to occur in “circumstances of neglect, exploitation and abuse [...] the child having been socialized in a way where his/her decision making goes awry, rather than in a context of premeditation and criminality”.<sup>42</sup> Therefore, the preliminary assessment by the Board under the 2015 Act proceeds on an incorrect assumption that a juvenile committing a heinous crime could be as mature as an adult.

Further, it is also accepted that there exists no scientifically accurate method to determine the maturity of an individual.<sup>43</sup> Such determination, it is stated, would exceed the “limits of science”, the results being fraught with error and arbitrariness.<sup>44</sup> Since such a case by case analysis of maturity to determine culpability is scientifically impossible, a presumption of maturity exists beyond the age of eighteen. Yet, the 2015 Act empowers the Board to make an individualistic determination of the maturity of adolescents, between the ages of sixteen to eighteen. Further, on this basis, the 2015 Act also empowers the Board to transfer the juvenile to a Children’s Court for trial as an adult.<sup>45</sup>

<sup>41</sup> Laurence Steinberg et al, *Age Differences in Future Orientation and Delay Discounting*, 80(1) CHILD DEVELOPMENT 28 (2009).

<sup>42</sup> Centre for Child and the Law, National Law School of India University, *Submission on Clauses 14, 17(3), and 19 of the Juvenile Justice (Care and Protection of Children) Bill, 2014*, available at [https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwjGxIDXgITQAhUBLY8KHZdlDGcQFggkMAE&url=https%3A%2F%2Fwww.nls.ac.in%2Fcccl%2Fjdocuments%2FMWCDNLSIUNIMHANS.docx&usg=AFQjCNFdiRozNjSpQXVSY9DRsUJgencWNg&sig2=L\\_xk6Y0AAgCs8WtMHetRcw](https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwjGxIDXgITQAhUBLY8KHZdlDGcQFggkMAE&url=https%3A%2F%2Fwww.nls.ac.in%2Fcccl%2Fjdocuments%2FMWCDNLSIUNIMHANS.docx&usg=AFQjCNFdiRozNjSpQXVSY9DRsUJgencWNg&sig2=L_xk6Y0AAgCs8WtMHetRcw) (Last visited on March 18, 2017).

<sup>43</sup> A study released by Elizabeth S. Scott and Laurence Steinberg, former members of the John and Catherine T. MacArthur Foundation Research Network on Adolescent and Juvenile crime states:

“The problem with individualized assessments of immaturity is that practitioners lack diagnostic tools to evaluate psychosocial maturity and identity formation on an individualized basis. Recently, courts in some areas have begun to use a psychopathy checklist, a variation of an instrument developed for adults, in an effort to identify adolescent psychopaths for transfer or sentencing purposes. This practice, however, is fraught with the potential for error; it is simply not yet possible to distinguish incipient psychopaths from youths whose crimes reflect transient immaturity. For this reason, the American Psychiatric Association restricts the diagnosis of psychopathy to individuals aged eighteen and older. Evaluating antisocial traits and conduct in adolescence is just too uncertain.”

<sup>44</sup> Richard J. Bonnie & Elizabeth S. Scott, *The Teenage Brain: Adolescent Brain Research and the Law*, 22(2) CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 161 (2013); Rakshit, *supra* note 22; *Supra* note 11, ¶10.5.

<sup>45</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, §19.

The fundamentals of the transfer itself being flawed, the transfer mechanism will lead to increased incarceration of juveniles as adults.

Additionally, the evaluation by the Board of the maturity of the juvenile to commit the offence is the first step of the evaluation process, taking place before it is even proved if the offence has been committed by the juvenile. Thus, the preliminary assessment of the Board proceeds on the assumption that the alleged offence has been committed, and is thus a sentencing decision before guilt is established.<sup>46</sup> This contravenes the constitutional guarantee of presumption of innocence.<sup>47</sup> The further trial of the juvenile also proceeds on this preliminary assumption of culpability, which may prejudice the decision making body against the juvenile.<sup>48</sup> Therefore, the evaluation by the Board is bereft of procedural fairness, which is considered an integral part of due process under Article 21<sup>49, 50</sup>. The presumption of innocence is also embodied within the CRC,<sup>51</sup> and it is the duty of all public authorities to guarantee the same to refrain from prejudicing the outcome of the trial.<sup>52</sup> It has been enumerated as a central principle in the 2015 Act,<sup>53</sup> and in the 2000 Act<sup>54</sup> as well. The 2015 Act thus falls short of this fundamental mandate of juvenile law.<sup>55</sup>

## B. EVALUATION BY THE CHILDREN'S COURT

The Board, through its preliminary assessment, may conclude that the heinous offence was committed by the juvenile as an adult. On such determination, the juvenile is transferred to the jurisdiction of the Children's Court. The Children's Court is empowered under the 2015 Act to conclusively determine whether there is "need for trial" of the child as an adult.<sup>56</sup> Notably, the parameters on the basis of which such discretion is to be exercised are absent. If the Children's Court concludes that trial as an adult is not required, it conducts an enquiry as a Board, and passes appropriate orders under §18,

<sup>46</sup> *Supra* note 11, ¶10.3.

<sup>47</sup> *Id.*, ¶9.2; Dhvani Mehta, *An Iron First in a Velvet Glove: Draft Juvenile Justice Bill*, 49(31) ECONOMIC AND POLITICAL WEEKLY 13 (2014).

<sup>48</sup> Rakshit, *Supra* note 22, 3.

<sup>49</sup> *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 : AIR 1978 SC 597.

<sup>50</sup> Centre for Child and the Law, *Critique of the Juvenile Justice (Care and Protection of Children) Bill, 2014*, May 6, 2015, ¶8, available at <https://www.nls.ac.in/ccl/jjdocuments/jjcritique2015.pdf> (Last visited on January 21, 2016).

<sup>51</sup> *Supra* note 6, Art. 40(2)(b)(i).

<sup>52</sup> Committee on the Rights of the Child, Convention on the Rights of the Child, *General Comment No. 10 Children's Rights in Juvenile Justice*, ¶42, U.N. Doc. CRC/C/GC/10 (April 25, 2007).

<sup>53</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, §3(i).

<sup>54</sup> Juvenile Justice (Care and Protection of Children) Rules, 2007, Rule 3(I).

<sup>55</sup> The principle of presumption of innocence is also embodied in the United Nations Standard Minimum Rules for Administration of Juvenile Justice, G.A. Res. 40/33 (November 29, 1985), Rule 7 and United Nations Rules for the Protection of Juveniles Deprived of their Liberty, G.A. Res. 45/113 (December 14, 1999), Rule 17.

<sup>56</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, §19(1).



including directing the juvenile to be sent home after suitable admonition, participation in group counseling or community service, and ordering vocational training and therapy. However, if the Children's Court opines that trial be conducted as an adult, the child would be prosecuted and punished as an adult, as per the provisions of the Criminal Procedure, Code, 1973,<sup>57</sup> thus transferring the child out of the juvenile system.

Once the appropriate sentence has been decided by the Children's Court, the juvenile is transferred to a place of safety, where he is retained till the age of twenty-one.<sup>58</sup> At this stage, there is a second evaluation by the Children's Court, to determine whether the offender has to be released or transferred to adult jail, to complete the rest of the sentence. During such evaluation, the Children's Court assesses whether the offender has undergone reformatory changes, to become a "contributing member of the society".<sup>59</sup> The criteria on the basis of which the ability of the offender to become such a member is to be assessed have not been detailed under the 2015 Act, thus vesting the discretion of such determination in the Children's Court. This inquiry is highly subjective, and prone to arbitrariness, thereby falling foul of Article 14.<sup>60</sup> Further, it could lead to involuntary targeting of children from weaker socio-economic backgrounds, who may not be deemed contributing members of society.<sup>61</sup>

The 2015 Act seeks to serve the goal of deterrence by assuming that the trial as an adult, and the consequent transfer out of the juvenile justice system would be a disincentive for potential juvenile offenders, a claim found in the statements made by Minister for Women and Child Development Maneka Gandhi in the Lower House.<sup>62</sup> However, closer scrutiny reveals that this model would fail to deter juvenile offenders as presumed. It is established that the goals of potential deterrence may be fulfilled only if there exists substantial awareness about the legislative provisions among the juvenile population.<sup>63</sup> As per records of the National Crime Records Bureau, 30303 juveniles were arrested in 2010 out of which 6339 were illiterate and 11086 had received education only till the primary level.<sup>64</sup> The large percentage of uneducated or minimally educated juvenile offenders gives weight to the argument that the newly proposed model will fail to deter potential offenders who indulge in

<sup>57</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, §19(1)(i); See also Amnesty International, *Children must not be Treated as Adults under new Juvenile Justice Law*, July 31, 2014, available at <https://www.amnesty.org.in/show/news/children-must-not-be-treated-as-adults-under-new-juvenile-justice-law> (Last visited on March 10, 2017).

<sup>58</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, §19(3).

<sup>59</sup> *Id.*, §20(1).

<sup>60</sup> *Supra* note 50, ¶7.

<sup>61</sup> *Id.*, ¶7, 17.

<sup>62</sup> *Supra* note 14.

<sup>63</sup> Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, June, 2010, available at <https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf> (Last visited on January 2, 2016).

<sup>64</sup> *Supra* note 11, ¶3.9.

crimes primarily as a result of factors like peer influence or socio-economic conditions and could hardly be deterred by laws that they are unaware of.

Further, the structure proposed by the 2015 Act would, in essence, lead to trial of the child in adult courts, by persons not adequately trained in dealing with children. *First*, it ought to be noted that specialised Children's Courts<sup>65</sup> have either not been set up or are not functional in majority of states and Union Territories in India.<sup>66</sup> In the absence of Children's Courts, Sessions Courts, which are adult courts, are vested with the jurisdiction of dealing with juvenile offenders above the age of sixteen.<sup>67</sup> Conducting the trial of a juvenile as an adult in a criminal court violates the juvenile's right to fair trial.<sup>68</sup> International law, including the CRC, provides for additional rights to be accorded to juvenile under trial, emphasising particularly on the need for the juvenile to fully comprehend the legal procedures in order to stand trial.<sup>69</sup> Moreover, the Beijing Rules stipulate that the trial must be conducted in a child-friendly atmosphere where there does not exist any hindrance to the free expression of views by the child.<sup>70</sup> In order to secure this, the rules lay down the need for modified courtroom procedures and practices for juveniles.<sup>71</sup> Juvenile courts therefore are based on a cooperative model, distinct from the adversarial model followed by adult courts.<sup>72</sup> Adult courts, in their functioning, are insensitive to the needs of a juvenile and the complicated legal environment is not suitable for conducting trials of juveniles.<sup>73</sup> In fact, empirical data collected from juveniles who faced similar adversarial system of justice in the United States suggests that court proceedings are perceived by them as "formal and hurried" and the functions of judges, prosecutors and defence counsel remained unclear to most of them.<sup>74</sup> The Parliamentary Standing Committee Report also noted that the

<sup>65</sup> In fact, Children's Courts were to be set up under Section 25 of the Commission for Protection of Child Rights Act, 2005. They are Sessions Courts, specifically designed to try offences against children, to ensure their speedy trial. Instead, under the 2015 Act, they have been vested with the jurisdiction to conduct the trial of children as adults.

<sup>66</sup> Center for Child and the Law et al, *Report of the Judicial Colloquium on Children's Court*, February 26, 2012, available at <http://www.nls.ac.in/ccl/justicetochildren/JudicialColloquiumReport.pdf> (Last visited on January 2, 2016).

<sup>67</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, §2(20).

<sup>68</sup> Penal Reform International, *When the Crime Overshadows the Child: International Standards and National Practice in Reconciling Serious Crime and Childhood*, 2014, available at <http://www.ojj.org/sites/default/files/when-the-crime-overshadows-the-child.pdf> (Last visited on March 18, 2017).

<sup>69</sup> *Id.*

<sup>70</sup> The Constitution of India, 1950, Art. 14.

<sup>71</sup> *Supra* note 68.

<sup>72</sup> Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Serious Juvenile Crime: When Should Juveniles Be Treated as Adults?*, 63 *FED. PROBATION* 52 (1999).

<sup>73</sup> Bree Langemo, *Serious Consequences for Serious Juvenile Offenders: Do Juveniles Belong in Adult Court?*, 30 *OHIO N.U. L. REV.* 141 (2004); J. Thomas Grisso & Carolyn Pomietter, *Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver*, 1 *LAW AND HUMAN BEHAVIOR* 4 (1977).

<sup>74</sup> Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 *CRIME AND JUSTICE* 81 (2000).

adult criminal justice system's procedures do not address the special needs of juveniles and thus termed the transfer to adult courts violative of right to personal life and liberty secured under Article 21 of the Constitution.<sup>75</sup> Thus, juveniles, even if they are accused of heinous offences, are not adequately suited to undergo trial in an adversarial adult court atmosphere.

Presumably taking this into account, the 2000 Act does not provide for a role for such 'Children's Courts'. In fact, the Juvenile Justice Model Rules, 2007 ('Rules'), adopt various measures to ensure that proceedings concerning a juvenile are not conducted in an environment resembling an adult court. For instance, it requires that the Board hold its sittings either in an observation home, or proximate to such homes, mandating that the Board should, in no circumstances, operate from within court premises.<sup>76</sup> The Rules also specify that the premises of the sitting should not resemble a court room, and there should be no witness boxes or raised platform for the Board members.<sup>77</sup> Therefore adjudication in an adult court, such as the Sessions Court, is contrary to the child-friendly juvenile model being followed in India.

*Second*, while the 2015 Act prescribes qualifications for Magistrates<sup>78</sup> and social workers<sup>79</sup> constituting the Board, thereby ensuring that they are experienced in dealing with children, similar qualifications have not been prescribed for judges of the Children's Court. Being ill-equipped in juvenile psychology, the Children's Court, or the Sessions Court, is not adequately qualified to pass orders concerning children. Moreover, exposing a juvenile who is yet to be found guilty to an adult criminal justice system whose hallmark is delayed adjudication of cases is not in accordance with the "best interests" of the juvenile,<sup>80</sup> which is enshrined under the CRC.<sup>81</sup> Further, 2015 Act does not impose time limits for disposal of juvenile cases in the Children's Courts, therefore reducing the emphasis on time bound adjudication of cases concerning juveniles. This is in contravention of the right of the juvenile to decisions being taken without delay.<sup>82</sup>

<sup>75</sup> *Supra* note 11, ¶ 3.23.

<sup>76</sup> The Juvenile Justice (Care and Protection of Children) Rules, 2007, Rule 9(1).

<sup>77</sup> The Juvenile Justice (Care and Protection of Children) Rules, 2007, Rule 9(2).

<sup>78</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, §4(5) requires that Magistrates be offered induction training and sensitisation on care, protection, rehabilitation, legal provisions and justice for children.

<sup>79</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, §4(3) requires that a social worker be appointed as a member of the Board only if such person has been actively involved in health, education, or welfare activities pertaining to children for at least seven years or a practicing professional with a degree in child psychology, psychiatry, sociology or law.

<sup>80</sup> John W. Parry, *Transfers to Adult Court and Other Related Criminal Incompetency Matters Involving Juveniles*, 33 MENTAL AND PHYSICAL DISABILITY LAW REPORTER 2 (2009) (The principle of "best interests" of juveniles may be derived from Art. 3 of the Convention on Child Rights).

<sup>81</sup> *Supra* note 6, Art. 3.

<sup>82</sup> *Id.*, Art. 40(2)(b)(iii).

The transfer system envisaged by the 2015 Act is also contrary to the principle of non-discrimination embodied within the CRC. The CRC mandates that state parties treat all children in conflict with law equally, and without any discrimination.<sup>83</sup> Given that the CRC does not authorise any form of distinction between children on account of the gravity of the offence committed by them, the transfer of children who have committed heinous offences above the age of sixteen to an adult court is discriminatory. In fact the United Nations Child Rights Committee ('Child Rights Committee') has unequivocally stated that treatment of children as adults is a violation of the right against discrimination embodied in the CRC. On this basis, the Child Rights Committee has issued notices to more than fifty countries, mandating that all persons below the age of eighteen be dealt with solely within the juvenile system.<sup>84</sup> Similarly, transferring a child to an adult court, such as the Sessions Court, would also be against the guarantee of Article 14 of the Constitution which deems that only like individuals be treated equally.<sup>85</sup> Special provisions for juveniles are in fact in accordance with the mandate of Article 15(3) which permits the State to make laws catering to the specific needs of children. Therefore, the transfer mechanism within the 2015 Act is violative of both constitutional and international mandates.

### C. VIOLATION OF THE DOCTRINE OF FRESH START

The principle of fresh start, which espouses that the criminal records of a juvenile offender be expunged, is premised on the objective of reintegrating juvenile offenders into society. It flows from the right to privacy of juveniles, embodied under the CRC, which guarantees to all juvenile offenders, without distinction, this right during all stages.<sup>86</sup> It is meant to avoid the labeling and stigmatisation of the juvenile offender, prejudicing his access to future education, employment, or housing.<sup>87</sup>

The principle of fresh start seeks to liberate juvenile offenders from the stain of a criminal conviction and offers them a second chance, a fresh start free of the social and economic disabilities which often accompany a conviction.<sup>88</sup> Highlighting the need for a system of expungement, the court

---

<sup>83</sup> *Id.*, Art. 2.

<sup>84</sup> Swagata Raha & Arlene Manoharan, *Juvenile Justice Amendment: Adolescents are not Grown-ups*, May 9, 2015, available at <http://blogs.economictimes.indiatimes.com/et-commentary/juvenile-justice-amendment-adolescents-are-not-grown-ups/> (Last visited on January 21, 2016).

<sup>85</sup> *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : AIR 2007 SC 71; *Joginder Nath v. Union of India*, (1975) 3 SCC 459 : AIR 1975 SC 511.

<sup>86</sup> *Supra* note 6, Arts. 16, 40(2)(b)(vii).

<sup>87</sup> *Supra* note 52, ¶64; *United States of America v. Viken Hovsepian*, 307 F 3d 922 (9<sup>th</sup> Cir 2002).

<sup>88</sup> *John Doe v. William H. Webster*, 606 F 2d 1226 (DC Cir 1979); *Mestre Morera v. United States Immigration and Naturalization Service*, 462 F 2d 1030 (1st Cir 1972).

in *United States v. Dancy*<sup>89</sup> remarked that “the stigma of a criminal conviction may itself be a greater handicap in later life than an entire misspent youth”. Expunging records of a juvenile is also in sync with rehabilitative ideals of the juvenile justice system, which aims to ensure re-integration of juvenile offenders into society.<sup>90</sup>

The 2015 Act espouses the principle of fresh start by requiring that the records of juvenile offenders be erased. However, this provision is accompanied by a caveat which allows deviation from the rule in “special circumstances”.<sup>91</sup> The nature of these special circumstances has however not been specified, leaving an aspect so sensitive completely open-ended. It is feared that the open ended nature of the provision could lead to “racial profiling” of the offender, on the basis of his family background, caste, community, and religion.<sup>92</sup>

Further, the 2015 Act exempts juvenile offenders from any disqualification which could be incurred under any law<sup>93</sup> for commission of an offence under the law.<sup>94</sup> However, children above the age of sixteen who have committed heinous offences are not given protection under this clause.<sup>95</sup> This implies that disqualifications under the law would apply to them, thereby casting a permanent stain on their future lives. Such exclusion is contrary to the principle of fresh start and the rehabilitative ideals underlying juvenile policy.

### III. THE MID WAY APPROACH

Research in neuroscience clearly demonstrates that children are intrinsically different from adults in terms of their psychological development and thus are less culpable as well.<sup>96</sup> Their level of mental and emotional development also means that children demonstrate a greater potential for rehabilitation in comparison to adults and thereby are more likely to respond positively to rehabilitation interventions.<sup>97</sup> Acknowledging this crucial distinction, juve-

<sup>89</sup> *United States v. Dancy*, 640 F 3d 455 (1st Cir 2011).

<sup>90</sup> *United States v. Moore*, 1975 SCC OnLine US SC 191 : 46 L Ed 2d 333 : 423 US 122 (1975).

<sup>91</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, §3(xiv).

<sup>92</sup> The Hindu, *Crime and Commensurate Punishment*, July 22, 2015, available at <http://www.thehindu.com/opinion/op-ed/the-juvenile-justice-bill-and-rights-of-children/article7448576.ece> (Last visited on January 21, 2016).

<sup>93</sup> For instance, under §8 of the Representation of Peoples Act, 1951, persons convicted for offences as listed are disqualified from contesting in elections for prescribed periods. Similarly, when a person is convicted for an offence under the Motor Vehicles Act, 1988, as per §20, the person can be disqualified from holding a driving license.

<sup>94</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, §24.

<sup>95</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, §24(1).

<sup>96</sup> See *Salil Bali v. Union of India*, (2013) 7 SCC 705; *Subramanian Swamy v. CBI*, (2014) 8 SCC 682.

<sup>97</sup> *Supra* note 68; *Graham v. Florida*, 2010 SCC OnLine US SC 47 : 176 L Ed 2d 825 : 560 US 48 (2010) (where the Court acknowledged that juveniles have a “unique potential for

nile justice programs around the world place maximum emphasis on rehabilitation.<sup>98</sup> The failure of the “get tough” approach adopted in the United States is resounding proof of the positive effect of rehabilitation on juvenile offenders. Fearing the onset of a “new breed” of juvenile offenders, termed the “super predators”, a number of states in the United States tightened their juvenile policy, transferring a number of young offenders to the adult criminal system.<sup>99</sup> The framers of this approach hoped that it would lead to lower rates of crime, due to increased deterrence.<sup>100</sup> However, studies conducted demonstrated that incarceration of juveniles merely led to an increase in the rate of recidivism, thereby defeating the object of the policy.<sup>101</sup> This resulted in a return to the rehabilitation ideal espoused by traditional juvenile justice law,<sup>102</sup> indicating that rehabilitative programs are crucial for the treatment of juvenile offenders, irrespective of the severity of the offence.<sup>103</sup> The 2015 Act, by sanctioning the prosecution and punishment of children as adults, is regressive by nature, and

---

rehabilitation”, when compared to their adult counterparts. Therefore the Court concluded that there exists a greater possibility that the deficiencies in the character of a minor are reformed.); *Miller v. Alabama*, 183 L Ed 2d 407 : 132 S Ct 2455, 2460 : 567 US \_\_\_ (2012) (“juveniles typically outgrow their antisocial behaviour as the impetuosity and recklessness of youth subside.”); See also Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANNUAL REVIEW OF CLINICAL PSYCHOLOGY 47 (2009) (Criminologists in their findings have relied on ‘Age-crime curve’ which shows that criminal activity in juveniles peaks at the age of seventeen and reduces drastically thereafter. This finding illustrates that only a handful of juvenile offenders are chronic offenders while the rest are adolescence-limited).

<sup>98</sup> Alex Piquero & Laurence Steinberg, *Rehabilitation Versus Incarceration of Juvenile Offenders: Public Preferences in Four Models for Change States*, available at [https://www.macfound.org/media/article\\_pdfs/WILLINGNESSTOPAYFINAL.PDF](https://www.macfound.org/media/article_pdfs/WILLINGNESSTOPAYFINAL.PDF) (Last visited on March 10, 2017); Jerome R. Price, *Birthing Out Delinquents: Alternative Treatment Options for Juvenile Delinquents*, 4(1) AMERICAN UNIVERSITY CRIMINAL LAW BRIEF 51, 52 (2009), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1084&context=clb> (Last visited on March 10, 2017).

<sup>99</sup> Mark W. Lipsey et al, *Improving the Effectiveness of Juvenile Justice Programs*, 7, December, 2010, available at [http://cjjr.georgetown.edu/wp-content/uploads/2015/03/ImprovingEffectiveness\\_December2010.pdf](http://cjjr.georgetown.edu/wp-content/uploads/2015/03/ImprovingEffectiveness_December2010.pdf) (Last visited on January 21, 2015).

<sup>100</sup> STEVEN E. BARKAN & GEORGE J. BRYJAK, MYTHS AND REALITIES OF CRIME AND JUSTICE 180 (2014); LARRY SIEGEL & BRANDON WELSH, JUVENILE DELINQUENCY: THE CORE 66 (2014).

<sup>101</sup> Centre for Disease Control and Prevention, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, November 30, 2007, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm> (Last visited on January 21, 2016) (An independent Task Force was set up by the US Centre for Disease Control to review the effectiveness of the transfer model. The Task Force concluded that:

“transfer policies have generally resulted in increased arrest for subsequent crimes, including violent crime, among juveniles who were transferred compared with those retained in the juvenile justice system. To the extent that transfer policies are implemented to reduce violent or other criminal behaviour, available evidence indicates that they do more harm than good.”)

<sup>102</sup> Lipsey, *supra* note 99; Bonnie & Scott, *supra* note 44.

<sup>103</sup> *Supra* note 68.

in contravention of the principles of reformatory justice, thereby defeating the “intent and purpose of the juvenile justice system”.<sup>104</sup>

Taking into account this backdrop, juveniles who commit heinous crimes ought to be treated differently from offenders committing petty offences, as the former require more intensive treatment than the latter. Therefore, for such children, we propose a juvenile justice model hinging on rehabilitative ideals. While it does treat offenders committing heinous crimes differently, such differential treatment is envisaged solely within the juvenile justice system, without a subsequent transfer to the adult prisons. The rehabilitation model we propose is premised on the “what works” approach to juvenile offender rehabilitation, followed in Australia.<sup>105</sup> This approach has yielded highly optimistic results with respect to rehabilitation and reformation of juvenile offenders, with a significant reduction in rates of recidivism.<sup>106</sup> The “what works” approach is characterised by three predominant principles, which dictate its functioning: the risk principle, the needs principle and the responsivity principle.<sup>107</sup> The model being suggested, would be a viable alternative to the approach adopted by the 2015 Act, and would reflect the aforementioned principles.

## A. ROLE OF JUVENILE JUSTICE BOARDS

The Board is a major player in the juvenile justice mechanism in India, and is vested with the duty of determining the culpability of the juvenile

<sup>104</sup> Letter sent by Kushal Singh & addressed to Shankar Aggarwal, ¶5 (July 3, 2013), available at <http://ncpcr.gov.in/showfile.php?lid=925> (Last visited on March 11, 2017).

<sup>105</sup> Andrew Day & Kevin Howells, *Victorian Juvenile Justice Rehabilitation Review*, 3, January, 2003, available at [http://www.aic.gov.au/media\\_library/archive/publications-2000s/victorian-juvenile-justice-rehabilitation-reveiw.pdf](http://www.aic.gov.au/media_library/archive/publications-2000s/victorian-juvenile-justice-rehabilitation-reveiw.pdf) (Last visited on January 21, 2016) (The “what works” approach evolved in response to a study published by Robert Martinson (1974) which evaluated juvenile rehabilitation programs and concluded “nothing works” since rehabilitation programs have no effect on recidivism. However, subsequent study by D. Thornton (1987) demonstrated that the data relied on by Martinson did not suggest that nothing worked. To the contrary, the data reveals that treatment through rehabilitation has a positive effect on recidivism. This has been further backed by a number of meta-analytic reviews, which have confirmed the optimistic impact of rehabilitation on recidivism of juvenile offenders).

<sup>106</sup> The National Reentry Resource Centre, *Reducing Recidivism*, 4, June, 2014, available at <https://www.bja.gov/Publications/CSG-ReducingRecidivism.pdf> (Last visited on January 21, 2016); Elizabeth Seigle, Nastassia Walsh & Josh Weber, *Core Principles for Reducing Recidivism and Improving Other Outcomes for Youth in Juvenile Justice System*, 7, available at <https://csgjusticecenter.org/wp-content/uploads/2014/07/Core-Principles-for-Reducing-Recidivism-and-Improving-Other-Outcomes-for-Youth-in-the-Juvenile-Justice-System.pdf> (Last visited on January 21, 2016); JAMES BONTA & DON A. ANDREWS, RISK-NEED-RESPONSIVITY MODEL FOR OFFENDER ASSESSMENT AND REHABILITATION (2007); Amanda McMasters, *Effective Strategies for Preventing Recidivism Among Juveniles*, 51, 52, available at [http://digitalcommons.wou.edu/cgi/viewcontent.cgi?article=1057&context=honors\\_theses](http://digitalcommons.wou.edu/cgi/viewcontent.cgi?article=1057&context=honors_theses) (Last visited on January 21, 2016).

<sup>107</sup> Andrew Day, Kevin Howells & Debra Rickwood, *Current Trends in Rehabilitation of Juvenile Offenders*, 284 TRENDS & ISSUES IN CRIME AND CRIMINAL JUSTICE 4 (2004); Day & Howells, *supra* note 105.

offender. Within the 2015 Act, the Board has been granted the extraordinary power of conducting a preliminary enquiry to determine the maturity of the juvenile to commit the offence.<sup>108</sup> Though the Board has been given the discretion to consult experienced psychologists or psycho-social workers for the purpose of such determination,<sup>109</sup> we have earlier argued that it is impossible for the Board to arrive at an objective conclusion regarding the offender's maturity. To prevent subjective elements from distorting the functioning of the Board, as an alternative, we propose the incorporation of the risk principle.

The risk principle requires the classification of offenders into low, medium or high risk groups. This principle uses risk assessment tools,<sup>110</sup> such as the seriousness of the crime committed by the juvenile, along with the juvenile's previous record, which are commonly relied on to make such classification.<sup>111</sup> More intensive treatment programs are then provided to juvenile offenders of the higher risk category.<sup>112</sup> Thus the seriousness of the offence committed by the juvenile is not deemed an indicator of the juvenile's maturity; it is instead used to dictate the nature of risk posed by the juvenile offender. The intensity of the rehabilitation plans is proportional to the level of risk.<sup>113</sup>

When a juvenile offender, accused of committing a heinous offence is produced before the Board, the Board first ought to determine whether the offence has been committed by the offender. Such determination, unlike the 2015 Act, is in accordance with the fundamental principle of presumption of innocence, and will follow child friendly methods of adjudication, as embodied under the 2000 Act and the relevant Rules. If the Board concludes that the offender has committed the offence, the Board should employ the risk principle to determine whether the offender falls within the low, medium, or high risk category. Since the tools of determination, namely the seriousness of the crime committed and the previous record of the juvenile, are thoroughly objective, the process of determination is bereft of arbitrariness. After such determination, the juvenile offenders should be deployed to places of safety, which offer treatment programs attuned to the level of risk posed by each offender. Therefore, the adoption of the risk principle to govern the functioning of the Board removes the element of subjectivity introduced by the 2015 Act. Further, the application of the risk principle is also in consonance with the mandate of the CRC, which requires that the treatment offered to the offender be proportionate to his offence.<sup>114</sup>

---

<sup>108</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, §15(1).

<sup>109</sup> *Id.*

<sup>110</sup> Day, Howells & Rickwood, *supra* note 107, 42.

<sup>111</sup> *Id.*, 3.

<sup>112</sup> *Id.*, 2.

<sup>113</sup> Day & Howells, *supra* note 105.

<sup>114</sup> *Supra* note 6, Art. 40(b).



## B. STRUCTURING OF INDIVIDUAL CARE PLANS IN “PLACES OF SAFETY”

We have argued above that children committing heinous offences often are victims of circumstances, such as socio-economic conditions, neglect and exploitation, and substance abuse. In our rehabilitative model, we suggest that these children be separated from children who have committed petty offences, as the former require more intensive care and therapy for rehabilitation. In fact, the 2000 Act sanctions such differential treatment to serious offenders, acknowledging the separate needs of such offenders. At the same time, it also recognises that it would not be in the best interest of the other children if they were to be placed along with serious offenders, as they are highly susceptible to adverse influence. Thus, the 2000 Act mandates the creation of “places of safety” for serious offenders.<sup>115</sup> We seek to adopt this framework into our rehabilitative model. This is supported by the opinion of the Parliamentary Committee Report which noted that the strengthening of places of safety, through a greater focus on rehabilitation, is a more effective, juvenile friendly option than the approach adopted by the 2015 Act.<sup>116</sup>

“Places of safety” have been defined under the 2000 Act and the 2015 Act as any place or institution, not being a police lockup or jail, established separately or attached to an observation home or a special home.<sup>117</sup> Places of safety, within our model, provide the ideal environment for the rehabilitation of offenders, by providing specialised care to a certain category of juveniles through the incorporation of the needs principle and the responsivity principle which underlie the successful “what works” approach. The needs principle suggests that the most effective methods of dealing with juvenile offenders are programs which address the needs most proximate to the offending.<sup>118</sup> These needs, termed criminogenic needs, range from family and social factors, to educational history, substance abuse, non-severe mental health problems and

<sup>115</sup> The Juvenile Justice (Care and Protection of Children) Act, 2000, §16 (which reads:

“Where a juvenile who has attained the age of sixteen years has committed an offence and the Board is satisfied that the offence committed is of so serious in nature or that his conduct and behaviour have been such that it would not be in his interest or in the interest of other juvenile in a special home to send him to such special home and that none of the other measures provided under this Act is suitable or sufficient, the Board may order the juvenile in conflict with law to be kept in such place of safety and in such manner as it thinks fit and shall report the case for the order of the State Government.”

This has also been identified by the Supreme Court in *Salil Bali v. Union of India*, (2013) 7 SCC 705, ¶34 where the court stated under the 2000 Act, “in exceptional cases, provision has also been made for the juvenile to be sent to a place of safety where intensive rehabilitation measures, such as counseling, psychiatric evaluation and treatment would be undertaken.”)

<sup>116</sup> *Supra* note 11.

<sup>117</sup> The Juvenile Justice (Care and Protection of Children) Act, 2000, §2(q); The Juvenile Justice (Care and Protection of Children) Act, 2015, §2(46).

<sup>118</sup> Day, Howells & Rickwood, *supra* note 107, 3.

anger management.<sup>119</sup> Addressing these needs has a direct positive impact on recidivism.<sup>120</sup> The responsivity principle focuses on developing programs which take into account contextual variables such as age, socio-economic background, ethnicity, gender, and disability which influence the outcome of treatment.<sup>121</sup> The responsivity principle thereby seeks to match the intervention to the characteristics and circumstances of the individual client.<sup>122</sup> This enhances the skills and strategies that the juvenile offenders imbibe from these programs.<sup>123</sup> The responsivity principle is also reflective of Article 40(b) of the CRC which provides that the treatment of a juvenile offender is to be proportionate not just to the offence, but also to the circumstances of the offender.<sup>124</sup>

For optimal utilisation of the needs and responsivity principle for treatment of juvenile offenders committing heinous crimes, we propose the formulation of “individual care plans” for such offenders, based on their classification by the Board into low, medium and high risk categories. “Individual care plan” has been defined as:<sup>125</sup>

“A comprehensive development plan for a juvenile or child based on age specific and gender specific needs and the case history of the juvenile or child, prepared in consultation with the juvenile or child, in order to restore the juvenile’s or child’s self-esteem, dignity and self-worth and nurture him into a responsible citizen and accordingly the plan shall address the following needs of a juvenile or a child:

- (i) Health needs;
- (ii) Emotional and psychological needs;
- (iii) Educational and training needs;
- (iv) Leisure, creativity and play;
- (v) Attachments and relationships;
- (vi) Protection from all kinds of abuse, neglect and maltreatment;

<sup>119</sup> C. Cottle, R.J. Lee & K. Heilbrun, *The Prediction of Criminal Recidivism in Juveniles: A Meta-Analysis*, 28 CRIMINAL JUSTICE AND BEHAVIOUR 367 (2001).

<sup>120</sup> Day & Howells, *supra* note 105, 3.

<sup>121</sup> Day, Howells & Rickwood, *supra* note 107, 4.

<sup>122</sup> Day & Howells, *supra* note 105, 6.

<sup>123</sup> *Id.*, 3.

<sup>124</sup> *Supra* note 6, Art. 40(b).

<sup>125</sup> The Juvenile Justice (Care and Protection of Children) Rules, 2007, Rule 2(h).

- (vii) Social mainstreaming; and
- (viii) Follow-up post release and restoration”

The structuring of such individualised treatment plans for juveniles, within places of safety, incorporates the demands of both the needs and the responsivity principle. Through its focus on several needs of the juvenile offender, individual care plans identify and address causes most proximate to the offending, thereby incorporating the needs principle. Further, individual care plans also emphasise on the age, gender and case history of the offender, taking into account the differential variables which could impact the outcome of a given form of rehabilitative treatment. This is reflective of the responsivity principle. Thus, individual care plans correspond to the specific characteristics of each child, therefore improving the potential of rehabilitation and reducing the risk of recidivism.

In fact, individualised treatment has been considered the “key-stone” to a progressive juvenile justice policy<sup>126</sup> as it respects and responds to the distinct needs of every juvenile offender. While the 2015 Act recognises the role of individual care plans, it does not specify the agency responsible for the preparation of these plans. Instead, it merely states that the order of the Children’s Court concerning juvenile offenders committing heinous crimes shall contain an individual care plan. The 2000 Act and the Rules, on the other hand, specify that the individual care plans are to be prepared by either a probation officer or a voluntary organisation.<sup>127</sup>

We rely on an alternative system followed in Massachusetts and Missouri, which are prominent for their treatment of juvenile offenders, including the provision of individual rehabilitation plans for each offender.<sup>128</sup> Youth committed to the Department of Youth Services<sup>129</sup> at both Massachusetts and Missouri are evaluated by a team of case workers, before the preparation of a report. These workers prepare the case history of the juvenile, taking into ac-

<sup>126</sup> *Use Of The Indeterminate Sentence In Crime Prevention And Rehabilitation*, 7 DUKE LAW JOURNAL 65, 71 (1958).

<sup>127</sup> The Juvenile Justice (Care and Protection of Children) Rules, 2007, Rule 15(3).

<sup>128</sup> Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation Personal Accountability and Public Safety*, 84 OREGON LAW REVIEW 1005 (2005); IRA M. SCHWARTZ & RUSSELL K. VAN VLEET, *INCARCERATING YOUTH: THE MINNESOTA AND MISSOURI EXPERIENCES* 10 (1996) (The emphasis of these systems is on treatment rather than incarceration in the least restrictive environment possible without compromising public safety); Richard A. Mendel, *Less Cost, More Safety: Guiding Lights in Juvenile Justice*, 11-13, available at <http://www.aypf.org/publications/lesscost/pages/full.pdf> (Last visited on January 21, 2016) (The result of such a system has been a reduction in recidivism, accompanied by costs lower than amounts spent by other states. This approach has thereby been termed one which ought to be adopted as a model for nations).

<sup>129</sup> The Department of Youth Services is the authority which maintains juvenile homes in Massachusetts and Missouri.

count his previous involvement with the court or other state agencies, school history, family history and medical history. The juvenile is also subjected to a psychological evaluation, the results of which are incorporated into the report. The individual treatment plan, which is structured on the basis of the results of the report, is subsequently discussed both with the juvenile and his parents.<sup>130</sup> These plans are conceptualised in an ethnically sensitive environment, to enable youths to “develop self-esteem and make positive behavioural changes in their lives”.<sup>131</sup> Though detention of juvenile offenders is strongly discouraged in both states, they acknowledge that youths committing serious crimes require more intensive supervision. Therefore, they are placed in residential facilities, modeling the places of safety in the Indian context.<sup>132</sup>

It is noteworthy that the individual treatment plans in both Massachusetts and Missouri are prepared by the Department of Youth Services, and not by the juvenile court. In fact, judges in Massachusetts opine that the treatment decisions and rehabilitation plans for serious offenders ought to be structured by the Department of Youth Services, though it implies that the court does not exercise significant control over the treatment plan.<sup>133</sup> The Department of Youth Services is considered to be more qualified for this purpose.

Following the successful model incorporated in Massachusetts and Missouri, we propose that in the absence of an overseeing agency such as the Department of Youth Services, the staff at the places of safety themselves ought to prepare the individual care plan, instead of assigning it to a voluntary organisation, as required under the 2000 Act and the Rules. The staff, who will be in constant contact with the juvenile, will be better equipped for this purpose, rather than voluntary organisations which prepare the plan in accordance with their limited interactions with the juvenile and his family, where possible.<sup>134</sup>

However, recent reports reveal shortage of trained staff and absence of facilities at existing places of safety.<sup>135</sup> Alternatively, certain states have not yet established places of safety, despite there being an express mandate under the 2000 Act.<sup>136</sup> The success of the juvenile justice system in general,

<sup>130</sup> Boston Bar, *Report of the Boston Bar Association's Task Force on the Juvenile Justice System*, 14-21, available at <https://www.bostonbar.org/prs/reports/majuvenile94.pdf> (Last visited on January 21, 2016).

<sup>131</sup> Abrams, *supra* note 128, 1065.

<sup>132</sup> *Id.*, 1066.

<sup>133</sup> *Supra* note 130, 15.

<sup>134</sup> The Juvenile Justice (Care and Protection of Children) Rules, 2007, Rule 15(3).

<sup>135</sup> The Economic Times, *'Place of Safety' Suffers Shortage of Staff, Facilities: CAG*, February 26, 2016, available at <http://economictimes.indiatimes.com/news/politics-and-nation/place-of-safety-suffers-shortage-of-staff-facilities-cag/articleshow/51154844.cms> (Last visited on March 11, 2017).

<sup>136</sup> TheHindu, *No 'Place of Safety' for Children in Conflict with Law*, October 5, 2016, available at <http://www.thehindu.com/news/cities/chennai/no-place-of-safety-for-children-in-conflict-with-law>

and the rehabilitative model we propose in particular, hinges on the presence of trained personnel in places of safety, who are able to determine the specific needs of the juveniles, and formulate individual care plans accordingly. Adequate training of staff is therefore crucial for the optimal functioning of the system.<sup>137</sup>

### C. INDETERMINATE SENTENCING

Under the 2015 Act, juveniles who have committed heinous offences between the ages of sixteen and eighteen are mandatorily detained in a place of safety till the age of twenty-one. Subsequently, the Children's Court conducts an evaluation to determine whether the offender has become a "contributing member of society". As abovementioned, this test is highly subjective. On the basis of this subjective threshold, if the Children's Court determines that the offender has not rehabilitated sufficiently, the offender is placed in an adult jail, for the remainder of the sentence.<sup>138</sup> This model of sentencing is commonly referred to as blended sentencing, as it is characterised by a mixture of a juvenile and an adult sentence.<sup>139</sup> Such a blended sentencing model results in a situation where an offender who continues to exhibit recidivistic tendencies is relegated to an adult prison, where he is away from the rehabilitative environment of the juvenile homes. In such an environment, the positive changes brought about by rehabilitation mechanisms could ebb away, making the offender a greater threat to public safety. It is to avoid such an outcome that the Child Rights Committee clarified that the mandate to separate juvenile offenders from adults is not purely technical, it does not mean that children placed in a juvenile facility are to be shifted to adult prisons after they attain eighteen years of age.<sup>140</sup> Thereby the Child Rights Committee issued an implicit prohibition on blended sentencing.

The period of the sentence may be used to judge if the sentence is determinate or indeterminate. Determinate sentencing envisages a fixed sentence, determined by the juvenile court on the basis of the offence committed by the juvenile; the more serious the offence, the greater is the sentence. Release of juvenile occurs only after expiration of the complete term of the

---

/article9185913.ece (Last visited on March 11, 2017).

<sup>137</sup> See generally SUNIL K. BHATTACHARYYA, *JUVENILE JUSTICE: AN INDIAN SCENARIO* 105 (2000).

<sup>138</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, §20(2)(ii).

<sup>139</sup> See Randi-Lynn Smallheer, *Sentence Blending and the Promise of Rehabilitation: Bringing the Juvenile Justice System Full Circle*, 29(1) *HOFSTRA LAW REVIEW* (1999); Cathi J. Hunt, *Juvenile Sentencing: Effects of Recent Punitive Sentencing Legislation on Juvenile Offenders and a Proposal for Sentencing in the Juvenile Court*, 19(2) *BOSTON COLLEGE THIRD WORLD LAW JOURNAL* 1 (1999); Grace E. Shear, *The Disregarding of the Rehabilitative Spirit of Juvenile Codes: Addressing Resentencing Hearings in Blended Sentencing Schemes*, 99 *KENTUCKY LAW JOURNAL* (2010-11).

<sup>140</sup> *Supra* note 52.

sentence.<sup>141</sup> The 2015 Act follows a determinate structure, since the term of sentence is fixed, though the sentence, being a blended sentence, may be spent either in juvenile homes or in adult prisons, based on the contributory potential of the offender as determined by the Children's Court. The term of the sentence is thus mandatory, and is predetermined by the Children's Court. Instead of the determinate model currently enacted, we propose an indeterminate model of sentencing for juvenile offenders committing heinous crimes.

Indeterminate sentencing has an open-ended sentence, without a fixed duration. The decision to release the juvenile is made well into the juvenile's sentence, and is made after close examination of the offender's behaviour during the period of confinement. An assessment is made of the progress of the juvenile towards rehabilitation, which in turn influences the release decision.<sup>142</sup> Thus an indeterminate sentence seeks to release the juvenile offender only when he is rehabilitated, in contrast to a determinate sentence which prescribes a mandatory fixed period for a crime, irrespective of reformation.<sup>143</sup>

The distinction between determinate and indeterminate sentencing is strongly premised on the philosophical distinction between "punishment" and "treatment". Punishment is imposed by the State for the purpose of retribution of an individual who has committed a crime. Thus, punishment assumes the offender to be a responsible actor, exercising free-will in making blameworthy choices, thereby deserving the consequences of his past offences.<sup>144</sup> A determinate sentence, which focuses solely on the past offence of the delinquent, attempts to impose unpleasant consequences on this basis. Such sentencing presumes that the juvenile is a competent individual, challenging the assumptions of lack of criminal responsibility of juveniles developed by research in neuroscience, and is thus reflective of the mentality of punishment.<sup>145</sup>

"Treatment", on the other hand, emphasises on the mental health and future welfare of an individual, rather than on the act committed. It assumes the presence of certain antecedent factors which triggered the delinquent behavior, and aims to alter these factors, to improve the offender's future welfare.<sup>146</sup> An open-ended, indeterminate sentence focuses on rehabilitation, and does not impose a time-bound program of reformation, thus upholding the traditional

---

<sup>141</sup> Martin L. Forst, Bruce A. Fisher & Robert B. Coates, *Indeterminate and Determinate Sentencing of Juvenile Delinquents: A National Survey of Approaches to Commitment and Release Decision-Making*, 36 JUVENILE AND FAMILY COURT JOURNAL 4 (1985).

<sup>142</sup> *Id.*

<sup>143</sup> Gerald R. Wheeler, *Juvenile Sentencing and Public Policy: Beyond Counterdeterrence*, 4(1) POLICY ANALYSIS 35 (1978).

<sup>144</sup> Bary Feld, *Just Deserts for Juveniles: Punishment v. Treatment and the Difference it Makes*, 39-40 INT'L REV. CRIM. POL'Y 82 (1990).

<sup>145</sup> *Id.*, 88.

<sup>146</sup> *Id.*, 82.

ideal of treatment embodied within the juvenile system.<sup>147</sup> Indeterminate sentencing also acknowledges that the age and stage of development of juveniles means that they are more likely than adult offenders to respond to rehabilitative interventions, and abandon their offending behaviour if shown a better path.<sup>148</sup> Thus indeterminate sentencing, and its crucial focus on rehabilitation, would be more effective in case of juveniles, as compared to adults.<sup>149</sup>

In fact, historically, juvenile court sentences were indeterminate, as they aimed to secure the best interests of the juvenile offender.<sup>150</sup> Instead of punishing the juvenile for a past offence, the system developed a program aspiring to alleviate the causes behind juvenile delinquency. A fixed sentence was not considered ideal for the same, since it could not be moulded to the needs to each juvenile, and thus could not achieve the objective of offender specific, individualised sentences which are prominent in juvenile law.<sup>151</sup> Thus, to give full effect to individualised sentences, duration of juvenile treatment should not be based on arbitrary statutory presumptions. Indeterminate sentencing offers optimal flexibility to attain best results from enactment of treatment plans. It not only minimises the chances of excessive confinement, but also ensures public safety by protecting the society from the release of offenders with recidivistic tendencies before such tendencies have been modified.<sup>152</sup> Notably, such sentences have been proved to best suit the needs of serious offenders, since they particularly address factors prompting crime, and thus reduce recidivism.<sup>153</sup>

It is also widely accepted that indeterminate sentencing is more conducive towards rehabilitation than determinate sentencing.<sup>154</sup> Imposition of a mandatory sentence on the juvenile is found to increase defiance, since the juvenile offender is aware that he is bound to serve the entire sentence, irrespective of positive behavioural changes. Indeterminate sentencing, to the contrary, encourages the juvenile to engage effectively in the rehabilitation plan, motivated by the knowledge that alterations in behaviour and reduction in recidivist tendencies would prompt faster release.<sup>155</sup> Indeterminate sentencing therefore envisages a model whereby two juveniles committing the same heinous crime would have two different durations of treatment, on the basis of the improvement they demonstrate during the course of rehabilitation. Admittedly, this outcome has been criticised as arbitrary and inequitable, causing dispar-

---

<sup>147</sup> *Id.*

<sup>148</sup> *Supra* note 68, 2, 6.

<sup>149</sup> This does not imply that indeterminate sentencing cannot be used as a sentencing option for adults. However, that is beyond the scope of this paper.

<sup>150</sup> Feld, *supra* note 144, 85.

<sup>151</sup> Forst, Fisher & Coates, *supra* note 141, 3.

<sup>152</sup> *Supra* note 126, 72.

<sup>153</sup> *Id.*, 70.

<sup>154</sup> Jeffrey E. Butler, *A Study on the Issue of Indeterminate Sentencing Versus Determinate Sentencing*, 30 JUVENILE AND FAMILY COURT JOURNAL 43 (1979).

<sup>155</sup> *Id.*

ity in sentencing for identical offences.<sup>156</sup> Determinate sentencing is thereby encouraged since it offers greater certainty in sentencing.<sup>157</sup>

Such criticism ignores the well-established distinction between punishment and treatment. Sentence disparity would be inequitable in the context of punishment, since punishment attempts to penalise an individual for the crime committed, and thus requires that all individuals committing the same crime obtain similar punishments. However, in the context of treatment, sentencing disparity is justified since the focus is on rehabilitation and not retribution. Therefore, the offenders are to be retained in the system till they have been so rehabilitated, irrespective of the length of such retention. The goals of a rehabilitative system being thus, the disparity in sentences is not anomalous. This is well illustrated through questions surrounding the sentencing policy to be adopted with respect to two juveniles who have been caught stealing a car, one of whom is a member of a gang, and neither attends school nor works. The other, however, is a child who has maintained a fair school record, but has experienced some personal or family trauma of late.<sup>158</sup> It may certainly be “equitable” to impose identical sentences on the two juveniles accused of the same crime. However, it is neither in the interests of the child nor of society to do so. This reveals the need for an indeterminate form of sentencing, which would allow each juvenile to follow his own pace to rehabilitation, taking into account his specific needs which set him apart from the rest.

Further, the provisions of the 2015 Act sentence juveniles committing all forms of heinous offences to detention in a place of safety till the age of twenty-one.<sup>159</sup> “Heinous offences” have been defined widely to include all offences which have a punishment of seven years or more, under any law in the country.<sup>160</sup> This could lead to a conflation between civil and criminal offences,<sup>161</sup> which are now subjected to the same mandatory period. In fact, an examination of offences under the Indian Penal Code which command detention for more than seven years reveals that they include a wide range of offences from forgery for the purpose of cheating,<sup>162</sup> counterfeiting<sup>163</sup> and attempt to commit robbery<sup>164</sup> to murder<sup>165</sup> and rape<sup>166</sup>. Therefore, as a consequence of the 2015 Act, a juvenile who forges a document is mandatorily required to stay

<sup>156</sup> *Id.*, 40; Wheeler, *supra* note 143, 35; Feld, *supra* note 144, 83.

<sup>157</sup> Christopher M. Alexander, *Indeterminate Sentencing: An Analysis of Sentencing in America*, 70 SOUTHERN CALIFORNIA LAW REVIEW 1717, 1722 (1996-97).

<sup>158</sup> David Yellen, *Sentence Discounts and Sentencing Guidelines for Juveniles*, 11(5) FEDERAL SENTENCING REPORTER 286 (1999).

<sup>159</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, §19(3).

<sup>160</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, §2(33).

<sup>161</sup> The Hindu, *supra* note 92.

<sup>162</sup> The Indian Penal Code, 1860, § 468.

<sup>163</sup> *Id.*, §231, 234, 243 (coin) and §256, 257, 258, 260 (stamp).

<sup>164</sup> *Id.*, §393.

<sup>165</sup> *Id.*, §302.

<sup>166</sup> *Id.*, §376.



in a place of safety till the age of twenty-one. This is indeed absurd as such a juvenile would presumably not require detention till the age of twenty-one for adequate rehabilitation.

We therefore propose indeterminate sentencing as a viable alternative to the current determinate, blended sentencing model followed in India. *First*, while adopting an indeterminate sentencing model, it is crucial to ensure that the individual care plans formulated for each offender establish certain objective goals against which the performance of the juvenile may be assessed.<sup>167</sup> The progress of the juvenile, based on these goals, ought to be monitored closely by the staff of the place of the safety.<sup>168</sup> When they believe that the rehabilitation goals have been achieved in their entirety, they may refer the juvenile to the Board. The Board then evaluates whether the juvenile offender has met the threshold of the objective criteria mentioned in the individual care plan. For such determination, the Board ought to refer to the persons involved in the rehabilitation of the juvenile, including his clinician. If the Board concludes that the goals have been achieved, the juvenile may be released. Therefore, each juvenile is released on fulfilment of the rehabilitation ideals.

On the contrary, if the Board is of the opinion that sufficient reduction in recidivist tendencies is not apparent, the Board may commit the offender to the place of safety once again, for continuing treatment, irrespective of whether the offender has crossed the age of eighteen or not. Contrary to the model proposed by the 2015 Act, this will ensure that these offenders do not interact with hardened criminals, eroding the positives imbibed through rehabilitation. In this manner, the negatives of blended sentencing may be avoided.

*Second*, the adoption of an indeterminate system, followed by an evaluation before release, ensures that juvenile offenders committing heinous crimes are not released when they continue to pose a threat to public safety. This is particularly relevant in light of the debate surrounding the release of the juvenile in the Nirbhaya rape case. The 2000 Act authorises a maximum detention of only three years, after which irrespective of reformation, the juvenile has to be released.<sup>169</sup> The opponents to this approach suggest that there ought to be an evaluation of the juvenile when the three year period concludes, to determine whether he has adequately reformed.<sup>170</sup> We agree that a three year

---

<sup>167</sup> Butler, *supra* note 54, 41.

<sup>168</sup> *Id.*; *Supra* note 126, 77.

<sup>169</sup> The Juvenile Justice (Care and Protection) Act, 2000, §15(f).

<sup>170</sup> Sreemoy Talukdar, *Delhi Gangrape: Juvenile to Walk Free on Sunday as HC Refuses Stay; Time Rajya Sabha Passed New Bill*, December 18, 2015, available at <http://www.firstpost.com/india/nirbhaya-case-the-juvenile-should-remain-in-jail-if-released-he-could-prove-to-be-a-threat-to-society-2548344.html> (Last visited on January 21, 2016); The Indian Express, *December 16 Gangrape: Supreme Court Refuses to Block Release of Juvenile*, December 22, 2015, available at <http://indianexpress.com/article/india/india-news-india/december-16-gangrape-supreme-court-refuses-to-stay-release-of-juvenile/> (Last visited on January 21, 2015)

period may not be sufficient to completely transform recidivist tendencies in a juvenile who has committed a heinous offence. However, the solution is not to transfer him to an adult jail on attaining the age of twenty-one, as proposed by the 2015 Act. A more child friendly alternative would instead be to adopt an indeterminate model of sentencing in India. With constant monitoring by the staff of the juvenile facility and evaluation prior to release, such a model would address the concerns raised, and therefore would be in the best interests of both the juvenile offender and public safety.

#### IV. THE CRUCIAL SECOND LIMB

Traditional criminal justice systems, including rehabilitation and treatment models, view the State as the primary victim of a crime, and thereby place emphasis on the offender who violated the interests of the State.<sup>171</sup> In a rehabilitative approach to juvenile crime, the state machinery therefore attempts to reform the offender, to shield the State from future harm.<sup>172</sup> The juvenile offender is a mere passive recipient of the State efforts and the victims of the crime are absent from the picture.<sup>173</sup> As a result, while accountability to the system is inculcated in juvenile offenders, there is a dismal lack of accountability to the victims of the crime.<sup>174</sup>

The highly offender-centric nature of the traditional juvenile justice systems, including rehabilitative processes, and the consequent absence of accountability fostered the growth of restorative justice as an alternate philosophy for addressing crime.<sup>175</sup> Restorative justice views crime in terms of the harm caused to the victim and the community and attempts to repair such harm through active participation of the offender, the victim and the affected

---

(They rely on intelligence reports to suggest that the juvenile in the Nirbhaya rape case had been radicalised, and thus could continue to pose threat to society. To remedy this, they propose that the period of detention of the juvenile in the juvenile facility be extended, so that rehabilitation ideals may be met. This was rejected by the Supreme Court, which stated that such extension required legislative sanction, since the law currently permitted detention for a maximum period of three years only).

<sup>171</sup> Dr. Dennis S.W. Wong, *Developing Restorative Justice for Juvenile Delinquents in Hong Kong*, 2, available at [http://www.iirp.edu/pdf/mn02\\_wong.pdf](http://www.iirp.edu/pdf/mn02_wong.pdf) (Last visited on January 21, 2016).

<sup>172</sup> Similarly in a retributive approach, the offender would be punished.

<sup>173</sup> Mark S. Umbreit, *Holding Juvenile Offenders Accountable: A Restorative Justice Perspective*, 46 JUVENILE AND FAMILY COURT JOURNAL 32 (1995).

<sup>174</sup> University of Minnesota, *Balanced Restorative Justice for Juveniles: A Framework for Juvenile Justice in the 21st Century*, 24, August, 1997, available at <https://www.ncjrs.gov/pdffiles/framwork.pdf> (Last visited on January 21, 2016).

<sup>175</sup> Allison Morris, *Critiquing the Critics: A Brief Response to Critics of Restorative Justice*, 42(3) THE BRITISH JOURNAL OF CRIMINOLOGY 598 (2002); Judy C. Tsui, *Breaking Free of the Prison Paradigm: Integrating Restorative Justice Techniques into Chicago's Juvenile Justice System*, 104(3), THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 641 (2014).

community.<sup>176</sup> It is founded on the principle that justice demands that those who have been injured be restored.<sup>177</sup> It thereby provides victims an opportunity to participate in the justice process and urges offenders to understand the harm caused by their behaviour.<sup>178</sup> It thereby improves accountability of the offender to the victim of the crime, and assists the juvenile in making amends for the harm caused.<sup>179</sup> We propose that along with the rehabilitation centered focus of the juvenile justice system, the framework should also incorporate elements of restorative justice, as the second limb.

There exist various forms of intervention utilising restorative justice processes, encouraging maximum participation from the juvenile, the victim and the community. One of the most popular forms is Victim Offender Mediation, which brings together the victim and the offender in the presence of a trained mediator, to discuss the incident. In a number of mediation programs, the mediator meets the parties separately, before conducting the joint session. During the mediation, the victims describe the impact of the offence and the consequent harm it had on them. In turn, the offender also attempts to explain his actions, and answers the victim's questions.<sup>180</sup> Another mode of restorative justice is Family Group Conferences, which are commonly used in New Zealand.<sup>181</sup> Participants of such conferences include the offender, the

<sup>176</sup> Tracy M. Godwin, *The Role of Restorative Justice in Teen Courts: A Preliminary Look*, 1, available at [http://www.globalyouthjustice.org/uploads/The\\_Role\\_of\\_Restorative\\_Justice.PDF](http://www.globalyouthjustice.org/uploads/The_Role_of_Restorative_Justice.PDF) (Last visited on January 22, 2016); Monya M. Bunch, *Juvenile Transfer Proceedings: A Place for Restorative Justice Values*, 47 HOWARD LAW JOURNAL 922 (2003-2004); Lode Walgrave, *Restoration in Youth Justice*, 31 YOUTH CRIME AND YOUTH JUSTICE: COMPARATIVE AND CROSS-NATIONAL PERSPECTIVES 552 (2004).

<sup>177</sup> Tan Wen Jun, Zhang Jialin & Faizan Rafi Hashmi, *Tackling Juvenile Delinquency: Enhancing Restorative Justice in Singapore*, 25, April, 2013, available at [http://www.beyondresearch.sg/PAE%20Final%20Draft\\_Tan%20Wen%20Jun\\_%20Faizan%20Rafi%20Hashmi\\_%20Zhang%20Jialin.pdf](http://www.beyondresearch.sg/PAE%20Final%20Draft_Tan%20Wen%20Jun_%20Faizan%20Rafi%20Hashmi_%20Zhang%20Jialin.pdf) (Last visited on January 21, 2016).

<sup>178</sup> Godwin, *supra* note 176; See also Kate E. Bloch, *Reconceptualizing Restorative Justice*, 7 HASTINGS RACE & POVERTY LAW JOURNAL 201 (2010) (The author describes the functioning of the restorative justice system through an interesting analogy. The traditional juvenile justice models are described as the spotlight which focuses solely on the center of the otherwise dark stage. Like the spotlight, traditional models, including the treatment approach, emphasises only a single point, i.e., the offender. The focus is placed on the current offence of the juvenile, previous violations of parole or probation and other criminal history. Alternatively, restorative justice is described as the floodlights which illuminate the entire stage. Like the floodlights, restorative justice factors in other participants, such as the victims of the crime and the community, who otherwise existed, but were hidden from the view).

<sup>179</sup> Umbreit, *supra* note 173.

<sup>180</sup> Vermont Agency of Human Services, *Promoting Youth Justice Through Restorative Alternatives*, 10, September, 2003, available at <http://humanservices.vermont.gov/publications/reports-whatworks/ww-restore-justice> (Last visited on January 21, 2016); *Id.*, 37.

<sup>181</sup> New Zealand is the jurisdiction foremost in the use of restorative justice as a model for juvenile crimes. The Family Group Conferencing approach adopted by New Zealand is considered a model to aspire to, as it has proven to be highly successful in reducing recidivism rates of the offenders taking part. See Stephanie Turner, *Fresh Start for Young Offenders*, 2, October, 2011, available at [http://policyprojects.ac.nz/stephanieturner/files/2011/10/A-Fresh-Start-for-Youth-Offenders\\_S-Turner.pdf](http://policyprojects.ac.nz/stephanieturner/files/2011/10/A-Fresh-Start-for-Youth-Offenders_S-Turner.pdf) (Last visited on January 22, 2016); Child, Youth and Family,

victim, their families, other affected individuals and members of the community, including schools, religious institutions and community based organisations, which offer a support system to the offender or the victim. Family Group Conferences acknowledge that a larger circle of people could be affected by the crime of the juvenile, apart from the victim and his immediate family. During these conferences as well, the impact of the crime is discussed, ensuring that the youth realises the harm caused by his actions.<sup>182</sup> Victim Impact Panels and Peacemaking Circles also offer a similar mode of restorative justice.<sup>183</sup>

A prominent feature of all these processes is the active role played by the victim. The victims are required to describe the harm caused by the crime and its impact, either orally, or through a victim impact statement.<sup>184</sup> However, it is to be noted that the success of a restorative justice system hinges on the voluntary participation of the victims and their families, and thus victim participation is not mandatory. In such circumstances, certain systems take the assistance of “surrogate victims”, who are victims of a similar crime, but not from the offender undergoing the restorative justice treatment.<sup>185</sup>

A restorative process, accompanied subsequently by rehabilitative measures, has several advantages over a purely rehabilitation centric system, both for the offender and the victim. Programs of restorative justice prompt increased accountability among juvenile offenders, assist in more effective societal reintegration and offer greater victim satisfaction. *First*, recounting by the victim of the harm caused by the crime contextualises the crime for the juvenile offender.<sup>186</sup> He is individually able to assess the harm borne as a result of his actions, thereby impressing on him the human impact of his behaviour.<sup>187</sup> Restorative justice programs which are well-conducted are said to invoke in the offender moral and social emotions like shame, guilt, remorse, empathy and compassion.<sup>188</sup> It is thus a process of “conscience building”.<sup>189</sup> Faced with the story of the victim, the offender is less likely to employ “techniques of

---

*Family Group Conferences*, available at <http://www.cyf.govt.nz/youth-justice/family-group-conferences.html> (Last visited on January 22, 2016).

<sup>182</sup> *Supra* note 180.

<sup>183</sup> *Id.*, 12; Kate E. Bloch, *Reconceptualizing Restorative Justice*, 7 HASTINGS RACE & POVERTY LAW JOURNAL 204 (2010).

<sup>184</sup> Godwin, *supra* note 176, 3.

<sup>185</sup> Block, *supra* note 183, 213.

<sup>186</sup> Tsui, *supra* note 175, 643.

<sup>187</sup> Umbreit, *supra* note 173; See Stephanie Turner, *Fresh Start for Young Offenders*, 3, October, 2011, available at [http://policyprojects.ac.nz/stephanieturner/files/2011/10/A-Fresh-Start-for-Youth-Offenders\\_S-Turner.pdf](http://policyprojects.ac.nz/stephanieturner/files/2011/10/A-Fresh-Start-for-Youth-Offenders_S-Turner.pdf) (Last visited on January 22, 2016).

<sup>188</sup> JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989); John Braithwaite & Stephen Mugford, *Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders*, 34 BRITISH JOURNAL OF CRIMINOLOGY 139 (1994); Nathan Harris, *Shaming and Shame: Regulating Drink-Driving in SHAME MANAGEMENT THROUGH REINTEGRATION* (2001).

<sup>189</sup> JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989).

neutralisation<sup>190</sup> and is compelled to face the consequences of his action.<sup>191</sup> This is termed “reintegrative shaming” as it focuses on the “evil deed of the offender, rather than on the offender as an irreclaimably evil person”.<sup>192</sup>

Through interaction with the victim, the offender thereby feels personally accountable for his acts. Accountability, in the restorative justice paradigm, manifests itself in the form of a recognition that when an offence occurs, the offender owes an obligation to the victim.<sup>193</sup> Such accountability not only helps offenders in developing a deeper understanding of the impact of their behaviour but also enables offenders to undertake specific measures to repair the harm and make amends.<sup>194</sup> In fact, recognition of the harm caused invokes empathy within the offender and thus functions as a “springboard” for the offender to initiate measures to remedy the harm.<sup>195</sup>

These measures may include forms of community service, or personal service to the victim.<sup>196</sup> Economic reparation is another option, even if it is merely symbolic in nature.<sup>197</sup> Such reparation may be made directly to the victim. If the victim is unwilling to accept the same, contribution may be made to a victim compensation fund.<sup>198</sup> For instance, in South Florida, United States, while being in a residential program the offenders assist the national park staff in maintenance and restoration of the ecology, and are paid for their services. A portion of amount paid to the offender is deducted and is transferred either to the victim or a victim compensation fund.<sup>199</sup> This enables the offender to make amends for the offence committed. Additionally, educational programs advocating the values of environmental protection are provided to the offenders. Through such restorative processes, juvenile offenders acquire education, job skills, communication skills and the ability to make productive decisions and engage in effective problem-solving.<sup>200</sup> They enhance the competency of the offender, contributing to the building of social capital.<sup>201</sup>

<sup>190</sup> Gresham M. Sykes & David Mazza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AMERICAN SOCIOLOGICAL REVIEW 664 (1957) (The neutralisation theory proposes to explain juvenile crime. The theory believes that usually guilt or shame dissuade adolescents from engaging in delinquent acts. Thus, when offenders participate in deviant behaviour, they have to neutralise the guilt and shame, which would provide a relief from moral constraint, thereby allowing them to commit the illegitimate act).

<sup>191</sup> Gwen Robinson & Joanna Shapland, *Reducing Recidivism: A Task for Restorative Justice*, 48(3) THE BRITISH JOURNAL OF CRIMINOLOGY 343 (2008).

<sup>192</sup> *Id.*

<sup>193</sup> Umbreit, *supra* note 173; *See generally supra* note 174.

<sup>194</sup> Turner, *supra* note 187; Dr. Dennis S.W. Wong, *supra* note 171, 3; *Supra* note 180, 6.

<sup>195</sup> Block, *supra* note 183, 205.

<sup>196</sup> Umbreit, *supra* note 173, 362.

<sup>197</sup> *Supra* note 180, 9.

<sup>198</sup> Walgrave, *supra* note 176, 557.

<sup>199</sup> *Supra* note 174, 46.

<sup>200</sup> *Supra* note 180, 3.

<sup>201</sup> Robinson & Shapland, *supra* note 191, 345.

*Second*, interaction with the offender enables the victim to look beyond the crime committed by the offender. Victims often imagine offenders to be “super predators”, children having no respect for human life — “radically impulsive and brutally remorseless”.<sup>202</sup> However, after close communication with the offender, such imagery often blurs, as the victim views the offender for the troubled child he is.<sup>203</sup> It also often invokes in the victim a feeling of empathy for the offender, as the victim sees the crime through the eyes of the offender.<sup>204</sup> Though the gravity of the offence committed is not diluted, there thus exists improved understanding between the parties of the circumstances and the consequences of the offence.<sup>205</sup>

This offers greater victim satisfaction than traditional models of juvenile justice.<sup>206</sup> It is also proven that victim satisfaction is a natural consequence of restorative justice processes, irrespective of the seriousness of the offence.<sup>207</sup> While a purely rehabilitation model focuses on reforming the offender, it is unsatisfying for the victims as it does not in any way restore their losses or answer their questions.<sup>208</sup> Restorative justice, on the other hand, emphasises on victim participation and empowerment.

Further, victims of offences often desire some form of emotional reparation, which brings them a sense of closure.<sup>209</sup> Such emotional restoration is impossible in a purely rehabilitative model, where there is no interaction between the victim and offender. Taking this into account, restorative justice practices also include apologies from the offender to the victim, as a mode of showing remorse and accepting responsibility.<sup>210</sup> For many victims, the offender’s willingness to make amends itself constitutes a form of reparation.<sup>211</sup>

<sup>202</sup> WILLIAM BENNETT, JOHN P. WALTERS & JOHN J. DILULIO, *BODY COUNT: MORAL POVERTY..AND HOW TO WIN AMERICA’S WAR AGAINST CRIME AND DRUGS* (1996).

<sup>203</sup> Godwin, *supra* note 176, 3.

<sup>204</sup> Block, *supra* note 183, 205.

<sup>205</sup> Morris, *supra* note 175, 599.

<sup>206</sup> Kathaleen Daly, *Conferencing in Australia and New Zealand: Variations, Research Findings and Prospects* in RESTORING JUSTICE FOR JUVENILES: CONFERENCES, MEDIATION AND CIRCLES (2011); H. Strang, *Justice for Victims of Young Offenders: The Centrality of Emotional Harm and Restoration* in RESTORING JUSTICE FOR JUVENILES: CONFERENCES, MEDIATION AND CIRCLES (2011); M. Umbreit, R. Coates & B. Vos, *Victim Impact of Meeting with Young Offenders: Two Decades of Victim Offender Mediation Practice and Research* in RESTORING JUSTICE FOR JUVENILES: CONFERENCES, MEDIATION AND CIRCLES (2011).

<sup>207</sup> Morris, *supra* note 175, 602 (For instance, in New Zealand restorative justice is used as not only for minor offenders, but also for offenders committing serious and persistent crimes. Examples of cases which have been dealt with under the restorative justice system are a boy who broke into a house and raped a young woman, a group of children who set fire to an entire school and a child who assaulted the victim during robbery, leaving the victim with permanent brain damage).

<sup>208</sup> Jun, Jialin & Hashmi, *supra* note 177, 21.

<sup>209</sup> Morris, *supra* note 175, 604.

<sup>210</sup> *Supra* note 180, 9.

<sup>211</sup> Robinson & Shapland, *supra* note 191, 341.

Additionally, interaction with the offenders is empirically proven to reduce the victim's sense of re-victimisation.<sup>212</sup> Victims often suffer from feelings of anxiety, anger and uncertainty after the crime, arising from the socially constructed image of the juvenile as a "monstrous criminal". During restorative justice processes, this imagery recedes, and with it, the fears of secondary victimisation.<sup>213</sup> Restorative justice thereby restores the victim's sense of self-respect, dignity and control.<sup>214</sup>

*Third*, restorative justice also enables offenders to redeem themselves in the eyes of the community, through their willingness to cooperate. The efforts made by the offender to alleviate the harm caused by his actions often reaffirm the faith of the community in the morality of the offender.<sup>215</sup> This also helps prevent further social exclusion or stigmatisation.<sup>216</sup> Further, performance of reparative work inculcates in the offender valued skills. It enables the offenders, for the first time, to see themselves — and to be seen by other people — as valuable contributing members of the community, rather than mere passive recipients of help. This is the first step towards social reintegration of the juvenile offender.<sup>217</sup> Contrary to the individual treatment model, restorative justice helps deconstruct the existing public image of the juvenile offender, and builds a new image through the offender's efforts.<sup>218</sup> Thus, despite his undesirable criminal behaviour, the offender gradually becomes reintegrated into the community.<sup>219</sup>

*Fourth*, the growing sense of accountability within the juvenile offender has a direct correlative effect on the rates of recidivism. The primary cause behind the falling rates of recidivism is the mental makeup of a juvenile, as distinguished from an adult. The juvenile is at a stage where his beliefs and opinions are evolving and thus are more susceptible to reform.<sup>220</sup> Exposure to the harm caused by his reckless actions functions as a conscience-building exercise for the juvenile. This rediscovered morality or conscience in turn inhibits future offending behaviour.<sup>221</sup> It acts as a deterrent to subsequent juvenile crime, thereby enhancing public safety.<sup>222</sup> This is not a mere theoretical proposition, but is also backed by sufficient empirical evidence.

---

<sup>212</sup> Mark S. Umbreit, *Restorative Justice Through Victim-Offender Mediation: A Multi-site Assessment*, 1 WESTERN CRIMINOLOGY REVIEW 1 (1998).

<sup>213</sup> Walgrave, *supra* note 176, 578.

<sup>214</sup> Morris, *supra* note 175, 598.

<sup>215</sup> Robinson & Shapland, *supra* note 191, 343.

<sup>216</sup> Jun, Jialin & Hashmi, *supra* note 177, 24; Morris, *supra* note 175, 605.

<sup>217</sup> Robinson & Shapland, *supra* note 191, 344.

<sup>218</sup> *Supra* note 174, 28.

<sup>219</sup> Umbreit, *supra* note 173, 32.

<sup>220</sup> *Supra* note 68, 6.

<sup>221</sup> Robinson & Shapland, *supra* note 191, 343.

<sup>222</sup> Bunch, *supra* note 176, 931; Morris, *supra* note 175, 606.

Adopting restorative justice practices has a significant impact on the recidivism levels of juvenile offenders.<sup>223</sup> In fact, studies demonstrate that restorative justice programs are particularly effective in reducing recidivism among offenders committing serious crimes, as they have a deeper healing impact on such offenders, rather than offenders committing minor offences.<sup>224</sup>

A distinguishing feature of the restorative justice paradigm is that it invokes in juvenile offenders the desire to reform and make amends, rather than being compelled to do so by a court order. It is precisely this factor which sets the restorative approach apart from the model envisaged by the 2015 Act. The blended sentencing model adopted by the 2015 Act provides a window period—till the age of twenty one—for juveniles to reform. Reform is encouraged by the threat of a suspended adult sentence, which commences once the Children’s Court concludes that there does not exist sufficient evidence of reformation. Thus, in a blended sentencing model the motivation for the offender to reform is not an acceptance of the crime committed or a desire to remedy the harm caused. Instead, it is the apprehension of an adult sentence.<sup>225</sup> While it may lead to reformation,<sup>226</sup> we believe that restorative justice is a better path to obtain this result, as reformation in restorative justice programs flows from a deeper understanding of social responsibility, rather than a mere sense of fear.

To this extent, restorative justice is also superior to the rehabilitation only model proposed by the 2000 Act. A purely rehabilitative approach is predominantly offender centric, and envisages a passive role for the victims. Further, it does not invoke within the offender a sense of accountability for the crime committed, and thus the offender’s engagement with the rehabilitation programs is primarily on account of the order of the Board. Restorative justice programs, on the other hand, involve victims, and consequently instill

---

<sup>223</sup> Edmund F. McGarrell, U.S. Department of Justice, *Restorative Justice Conferencing as an Early Response to Young Offenders*, August, 2001, available at <https://www.ncjrs.gov/pdffiles1/ojdp/187769.pdf> (Last visited on January 22, 2016); Jeff Latimer, Craig Dowden & Danielle Muise, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85 THE PRISON JOURNAL 127, 135 (2005) (the authors of this study conducted a meta-analysis of thirteen restorative justice programs and concluded that they, on an average, yield greater rates of reduction in recidivism in comparison to non-restorative programs. In fact, offenders undergoing restorative justice treatment were found to be more successful during the follow-up periods).

<sup>224</sup> Lawrence W. Sherman & Heather Strang, *Restorative Justice: the Evidence*, 71, available at [http://www.iirp.edu/pdf/RJ\\_full\\_report.pdf](http://www.iirp.edu/pdf/RJ_full_report.pdf) (Last visited on March 11, 2017); Lawrence W. Sherman, Heather Strang & Daniel J. Woods, *Recidivism Patterns in the Canberra Reintegration Shaming Experiments (RISE)*, available at [http://www.aic.gov.au/media\\_library/aic/rjustice/rise/recidivism/report.pdf](http://www.aic.gov.au/media_library/aic/rjustice/rise/recidivism/report.pdf) (Last visited on March 11, 2017); See also Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of “Restorative Justice”*, 1 UTAH LAW REVIEW 384 (2003).

<sup>225</sup> Smallheer, *supra* note 139, 286.

<sup>226</sup> *Id.*; Richard E. Redding & James C. Howell, *Blended Sentencing in American Juvenile Courts* in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 146 (2000).



accountability in the juveniles. Further, unlike a rehabilitative model where the juvenile offender is often distanced by the community even after he completes the various treatment plans, restorative justice programs contribute towards reintegration of offender within the community. Therefore, it has been suggested that the restorative justice model be adopted to deal with serious juvenile offenders in India.<sup>227</sup>

However, like a purely rehabilitative model, a purely restorative approach, which proposes restorative justice as a substitute for the traditional models, also has its drawbacks. A predominant feature of the restorative model is that it envisages a bottoms-up approach to the determination of the juvenile sentence.<sup>228</sup> This indicates that the decisions regarding the form of sentencing, the specific measures to be undertaken by the juvenile, and the duration of the sentence are taken through negotiation between the parties.<sup>229</sup> This has been severely criticised as the severity or the laxity of the sentence would depend entirely on the preference of the victim in question,<sup>230</sup> leading to arbitrariness in sentencing.<sup>231</sup> If left solely to the victim, the sentence maybe inadequate to provide a comprehensive solution. It may be sufficient to remedy the harm caused to the victim, and bring the victim satisfaction. However, it may not address the underlying cause of the crime, and therefore would merely be a partial answer. For instance, the victim may obtain sufficient emotional reparation from an apology given by the juvenile who has committed the heinous crime, and this could be the possible outcome of the conference. However, such an outcome would not sufficiently address the criminogenic needs of the offender, which prompted him to commit the offence, and would thus be inadequate in curbing recidivism. Alternatively, in certain instances victims may be prompted to arrive at a sentence harsher than necessary. Therefore, we propose that instead of incorporating a purely restorative or rehabilitative model, India should attempt to adopt a rehabilitative model incorporating restorative principles, thereby using these principles as a complement and not a substitute for rehabilitation.

In such a model, the treatment of the juvenile will take place in accordance with the individual care plans which are structured taking into account the needs and the responsivity principle. Victim Offender Mediation or Family Group Conferences will be a part of such treatment programs. Solutions, including community service, victim-oriented personal service and apologies, arrived at as a result of negotiations may be implemented as components of the treatment process. However, they cannot be the only measures, and they should be given effect to along with the individual care plan.<sup>232</sup> While this ensures that

<sup>227</sup> *Supra* note 50; Rakshit, *supra* note 22, 2.

<sup>228</sup> Walgrave, *supra* note 176, 560.

<sup>229</sup> Morris, *supra* note 175, 598.

<sup>230</sup> Block, *supra* note 183, 209; Bunch, *supra* note 176, 923; *Id.*, 597.

<sup>231</sup> Robinson, *supra* note 224, 383.

<sup>232</sup> *Id.* (The author suggests implementing restorative processes as a complement to the traditional criminal justice system. The author believes that this would address the criticisms of the

benefits of adopting restorative processes have been met, it removes arbitrariness in sentencing and also attempts to address the causes of the crime, rather than merely addressing the harm caused by the crime.

## V. CONCLUSION

The proposed policy under the 2015 Act, as it stands today, is contrary to established principles of juvenile law. However, as suggested by many, the solution is not to go back to the 2000 Act, and merely focus on its implementation. As the current debate surrounding the release of the juvenile in the Nirbhaya rape case reveals, the 2000 Act also falls short of effectively guaranteeing rehabilitation of juvenile offenders as they may be detained for a maximum period of three years only. Therefore, merely re-enacting the model under the 2000 Act may be ineffective not only in rehabilitation of juveniles but also in addressing concerns of public safety. Further, the 2000 Act also does not cater to the interests of the victims of such crimes, and thus is purely offender centric. A rehabilitative model, incorporating indeterminate sentencing and restorative principles would provide an ideal balance between the welfare of the juvenile offender and concerns of public safety. Through adoption of a restorative approach, it would also meet the goals of deterrence which the 2015 Act seeks to embody. Therefore, while retaining the emphasis on rehabilitation, principles of restorative justice ought to be annexed as the mandatory second limb, for the formulation of a comprehensive juvenile justice policy in India.

---

restorative justice model, while imbibing its benefits).