Comparative Study of Legal Services to Women and Juvenile Offenders: India and USA

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Abstract

This research paper is a doctrinal research that aims to address the main issue of the legal services available for women and juvenile's welfare. It seeks to identify the legislation available in India and USA which offer legal recourse to women and juvenile offenders. The scope of this research paper is limited to the legislation formulated within India and USA only. This paper will also compare the current trends and impact of mass incarceration of women & juvenile offenders belonging to particular communities of colour, caste with a focus on criminal justice policy of India and USA. It is because of an increasing research interest of scholars that we are able to learn about the history and evolution of crimes committed by female and juvenile offenders. The focus of this research paper will be comparing the laws of two nations which differ in development goals, policy-making and individualism concept. The presumption that all the offenders are dangerous shape most of the law enforcement policies. Media manipulates the public by encouraging the law enforcement officers and the general public to adopt a position that emphasizes extremely harsh punishment for juvenile and women offenders in general. Under juvenile various acts such as Juvenile Justice Act, 2015, will be comparatively analyzed with its counterpart in the USA. The paper will also focus on various international conventions such as Convention of the Rights of the Child, 1990, United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990. Following this, under women, the legal remedy available to women in prison along with their living conditions will be analyzed keeping in mind the laws formulated in these countries. There will be a brief discussion on as to how the women and juvenile offenders belonging to the lower strata of the society do not have the access to legal recourse such as hiring a good lawyer, affording court fees, etc. The main question of this paper will be whether this fundamental right could be denied lawfully to the accused woman and juvenile if he/she does not apply for free legal aid. Legal aid would be an idle formality if it was to depend upon a specific application by such poor or ignorant juvenile or a woman

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offender for such legal assistance. The paper will conclude by giving some suggestive measures to improve the conditions of women and juvenile offenders in India.

Introduction

The importance of legal rights for the accused has social dimensions of empowering the accused persons who are circumstantially vulnerable and kept away from social resources. One of the breakthrough development in India is incorporation of Article 39-A into Part IV of the constitution for promoting equal justice for all vulnerable sections of the society. Even the legislations regarding welfare of juvenile and women offenders have quite a lot of loopholes. In the last few decades, the number of crimes committed by children under the age of 16 years has increased drastically. There can be many factors behind this, such as the upbringing environment of the child, economic conditions, lack of education and the parental care, etc.Unfortunately, some people even manipulate innocent children aged 5-7 as a tool for committing crimes. The problem of juvenile delinquency is not new. Juvenile delinquency occurs in all societies. It happens when a relationship is affected between a group of individuals leading to maladjustments and conflict.

Violence against women is regarded as necessary concomitant of the generally oppressed position to which women are subdued in the social structure.[3]Violence is always opposed to reason and tolerance, and undermines human rights and welfare and this situation becomes horrible when those women are legal offenders. The amount of harassment, torture, harms or injuries, physically and mental abuse, abetted suicide, insults, humiliation suffered by women who are in prisons has been increasing. In any society, women are the womb of the whole human race. Therefore, there needs to be special provisions for protection of women and children in custody. The National Crime Victimization Survey (NCVS) is one of two statistical series maintained by the Department of Justice to learn about the extent to which crime is occurring in the society by men and women. About 65% of women confined in State prisons had a history of prior convictions; in 1998 there were an estimated 951,900 women under the care, custody, or control of adult criminal justice authorities. Women accounted for about 16% of all felons convicted in State courts in 1996. Women were 8% of convicted violent felons, 23% of property felons, and 17% of drug felons. Women defendants accounted for 41% of all felons convicted of forgery, fraud, and embezzlement. At the end of 1998, 84,427 women were under the jurisdiction of State and Federal correctional authorities.[4] The amount of disparity in justice criminal policies has been increasing frivolously.Mass incarceration's current trends and its impact on communities of colour

[3] MDA Freeman, *Violence against women: Does the legal system provide solutions or itself constitute the problem*, Journal of Legal Studies 215, 216-217 (1981).
[4] Supra 3

hasproved that Native Americans are incarcerated at more than twice the rate of Whites, while Asian Americans/Pacific. For example women in USA, the overall figures are considerably lower, but the racial/ethnic disparities are similar: 1 of every 18 African American females, 1 of every 45 Hispanic females, and 1 of every 111 White females can expect to spend time in prison.[5]

In India, the problem of juvenile delinquency and the number of women offenders are considerably low when compared to a country like USA but is increasing gradually. Earlier, the concept of JJ was based on a belief that the problem of juvenile delinquency in aberrant situations is not amenable to the resolution within the edifice of traditional process of criminal law.[6] The word 'juvenile' owes its origin to the word 'juvenis' which means young. Over the years, it was realized that JJ system delivers services like community support, harmonizing impersonal state intervention with family, and as a means of prevention, rehabilitation and socialization through schools and religious bodies.

In India, the Apprentice Act, 1850 was the first legislation which dealt with the issue of child delinquency, after which the Indian Jail Committee established in 1919 urged for separate institutions to have separate trials for the juveniles. It said that the reformation and rehabilitation of juveniles should be the motive of the law. Supreme Court played a significant role in the case of *SheelaBarse&ors. v. Union of India & ors.*[7] by passing the constant and uniform law, under which it acknowledged that the children in jails are subject to special treatment. It was after this case only that for the first time, law provided for care, protection, treatment, development and rehabilitation of juvenile offenders. Now coming to USA, the first institution for the control of juvenile delinquency in the United States was the New York House of Refuge, found in 1825. The early houses of correction, or so called 'Bridewells', accepted all types of children including the destitute, the infirm, and the needy. In *Kent v. United States (1966),*[8] the supreme court warned juvenile courts against 'procedural arbitrariness' and in *In re Gault (1967),*[9] the court recognized the rights of juveniles.

Chapter I – What is the Structure of Juvenile Justice System in India and How is it Different from its Counterpart in the United States of America?

[5]Mauer Marc, *Addressing Racial Disparities in Incarceration*, 91 Prison J. 87, 87 (2011).
[6]KUMARI VED, THE JUVENILE JUSTICE SYSTEM IN INDIA: FROM WELFARE TO RIGHTS 1 (1st ed. 2004).
[7]AIR 1986 SC 1773.
[8]383 U.S. 541 (1966).
[9]387 U.S. 1 (1967).

There are three main assumptions on which the JJ System in India is based - young offenders should not be tried in courts, rather they should be corrected in all the best possible ways; they should not be punished by the courts, but they should get a chance to reform; trial for child in conflict with law as per Section 2(13) should be based on non-penal treatment through the communities based upon the social control agencies for e.g. Observation Homes provided under Section 47 and Special Homes provided under Section 48.The JJA act aimed at restructuring the system in the line of internationally proclaimed set of principles such as CRC. It also intended to evolve a new concept of JJ within the true meaning of social justice as enshrined in the Constitution of India. In order to achieve this goal, the act has imbibed the essential elements of *parenspatriae*, that is, state's duty to protect children as their own parents would have protected them. According to this act, any boy who is less than 16 years of age and any girl who is less than 18 years of age is a juvenile.

After this, in the year 2000 JJ (Care and Protection of Children Act) was passed because of the inadequacy of JJ act 1986 in certain aspects. But then again, JJ Act, 2015 was passed to replace the 2000 act so that juveniles within the age group of 16-18 years could be tried as adults. In the year 2012, the brutal Nirbhaya gang rape case took place in which one of the offenders was a juvenile. The aftermath of the incident was filing of a case *Subramanian Swamy and Ors. v. RajuThr. Member Juvenile Justice Board and Anr,*[10]after which the said 2015 act was passed. In the new act, the age of juvenile was reduced uniformly to 16 years. Under this act, JJ Board is to be established in each district whose role will be to conduct a preliminary inquiry to determine whether a juvenile offender is to be sent for rehabilitation or to be tried as an adult. The most debatable question among the legal fraternity and socialists is the "claim of juvenility". In case of *Kulai Ibrahim v. State of Coimbatore*[11] it was observed by the Court that accused has right to raise the question of juvenility at any point of time during trial or even after the disposal of the case under the Section 9 of JJ Act , 2015.Even the Constitution of India in Part III has provided Fundamental Rights for its citizens in the same manner in its Part IV it has provided Directive Principles of State Policies (DPSP) which acts as general guidelines in framing government policies.

Coming to USA, most of the states have set the threshold upper age of juvenile court jurisdiction at 17. However, New York and North Carolina have a much lower upper limit for adolescents in criminal courts at 15 years of age. Twelve other states employ age 16 as the upper limit of original juvenile court jurisdiction. However, several states permit the juvenile

[10] AIR 2014 SC 1649
[11] AIR 2014 SC 2726

court to retain its jurisdiction of cases already in the system until age 21. Several states actually allow this continuing jurisdiction for some youths as old as 25 who are under the control of the state youth correction authority. So we can see that, unlike India, there is no uniformity in the age limit for juveniles. Over the past years, JJ system has become more like criminal justice system. But there are major differences between the two. Unlike the adult system, the JJsystem is guided by a philosophy of rehabilitation and child protection. Juvenile Justice systems are more focused on preventive practices and actively try to divert young people from the formal court process. The criminal justice system has a lesser emphasis on diversion and principally pursues prevention through the notion that its penalties serve as a deterrent to the political offenders. In USA, the juvenile is first taken into custody by the police or by some other sources such as schools. Then he or she is sent to prosecutor's office. After this, adjudicators are approached who give the judgement of guilt or innocence. Following this, sentence is given. For the correction of the juvenile offender, he is either sent to community correction home or to an institutional correction home. Community correction can be observed by probation and institution correction place can be training schools.

There are certain landmark US judgements in this regard which have, time and again contested the provisions regarding protection of juvenile offenders. The case of *Kent v. US*[12] establishes protection against transfer to adult court by imposing due procedure on the court. Before a juvenile can be transferred, a hearing must be held, juvenile has a right to counsel, and juvenile and counsel must have access to social network. Then in the case of *In Re Gault*,[13] it was held that juveniles have basic due process rights such as notice of charges, right to counsel and privilege against self-incrimination. The case of *In re Winship*[14]increased the standards of burden of proof from preponderance of evidence (relatively low standard of proof) to proof beyond a reasonable doubt (a much higher standard of proof) for juvenile adjudication proceedings. Then in the case of *McKeiver v. PA*[15], juveniles were denied the right to a jury trial. This case had the effect of reminding observers of the JJ system that although juveniles have certain constitutional rights and protections, the JJ system is still separate and distinct from the adult criminal justice system. After this, the case of *Breed v. Jones*[16], it was established that fifth amendment protection against double jeopardy that is, being tried twice for the same offence applies to juveniles. Juveniles cannot be tried in

[12]383 U.S. 541.
[13]*Supra* 9.
[14]397 U.S. 358.
[15]403 U.S. 528.
[16]421 U.S. 519.

juvenile court and later in adult court for the same offense. Lastly, coming to capital punishments, the case of *Stanford v. Kentucky*,[17] sanctioned the imposition of the death penalty on offenders who were at least 16 years of age at the time of the crime. This decision came one year after *Thompson v. Oklahoma*,[18] in which the Court had held that a 15-year-old offender could not be executed because to do so would constitute cruel and unusual punishment. In 2003, the Governor of Kentucky Paul E. Patton commuted the death sentence of Kevin Stanford, an action followed by the Supreme Court two years later in *Roper v. Simmons*[19] overruling Stanford and holding that all juvenile offenders are exempt from the death penalty.

Chapter II – How the Legal Services Provided to Female Offenders in India and USA Differ With Each Other?

Article 39A of the Indian Constitution obligates the state to secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes. The legal framework relating to custodial justice to women comprises of various enactments passed by the Parliament or state legislatures, subordinate legislations, executive instructions, circulars, memoranda and manuals. Emergence of Public Interest Litigation, enactment of Arbitration and Conciliation Act, 1966 and implementation of the Legal Services Authority Act, 1987 by constituting LokAdalat have opened up new opportunities for restoring vulnerable offender's confidence in the justice delivery system. The Maneka approach is a source of several rights such as right to information and safety at the time of arrest, right to bail, right to speedy disposal of cases, right to legal aid, right against unjustified detention, right against handcuffing, right to fair conditions in custodial detention and right to free transcription of judgement for appeal.[20] Besides, there are notable judicial decisions of the Supreme Court in this context.[21] Today, the contribution of human rights approach in the criminal justice system towards bringing

[17] 492 U.S. 361 (1989)
[18] 487 U.S. 815
[19] 543 U.S. 551 (2005)
[20] M.H. Hoskot v. State of Maharashtra, (1978) 3 SCC 544: AIR 1978 SC 1548
[21] HussainaraKhatoon (III) v. State of Bihar, AIR 1979 SC 1360; Prem Shankar Shukla v. Delhi Admn, AIR 1980 SC 1535; UpendraBaxi v. State of Delhi Admn. (WP No. 2526 of 1981, order dated 14.9.81); NandiniSatpathy v. P.L. Dani, AIR 1978 SC 1025; SheelaBarse v. State of Maharastra, AIR 1983 SC 1086; State of Maharastra v. Ranikant (1991) 2 SCC 373; NilabatiBehera v. State of Orissa (1993) 2 SCC 746; NilabatiBehera v. State of Orissa (1981) Cr LJ 481 (SC); MM Hoskot v. State of Maharastra, AIR 1978 SC 1548; Zasrolina v. Government of Mizoram (1981) Cr LJ 1736; Sukhdas v. Union Territory of Arunachal Pradesh, AIR 1986 SC 991; D.K. Basu v. State of West Bengal, 1997 Cri LJ 743 (SC).

social transformation is quite significant. Special provisions for protection of women and children in custody have been insisted in SheelaBarse and other cases.[22]

In India nature of sentence depends on the nature of crime as almost all offences under IPC are punished with Imprisonment. The aim of Criminal Justice Policy of India is justice, retribution, deterrence, reformation and protection. Female offenders in India have been sentenced to imprisonment mostly in the cases of theft, immoral trafficking, crimes under NDPS Act, etc. In the course of arrest of a woman, it is of utmost importance to see that there is no violation of her modesty, either by words or by touching of her body.[23]For the purpose of protecting Female offenders Indian law provides that no woman should be arrested after sunset and before sunrise which was inserted by 2005 amendment of Cr PC, new subsection (4) has been inserted in section 46, Cr PC in the following terms: Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist the woman police officer shall by making a written report obtain the prior permission of the judicial magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made. The legislative changes introduced in 1973 through Section 354(3) of Cr.P.C. brought in the concept of death penalty, which should be awarded in the 'rarest of the rare cases' for 'special reasons' to be recorded after balancing the aggravating and the mitigating circumstances of a given case. Section 416, Cr PC, provided earlier that if a woman sentenced to death was found to be pregnant, the High Court shall order the execution of the sentence to be postponed and may, if it thinks fit, commute the sentence to imprisonment for life.

In India when it comes to prisoner's health, it becomes state duty to promote the welfare aspect in terms of security to the prisoners. There has been a continuous hazard in jails due to unsanitary conditions and when appropriate treatment is not accorded to the inmates. The foremost reason behind this is because of the condition of their incarceration inmates are exposed to more health hazards than free citizens. Section 53, Cr PC, requires that in the case of a female accused, the medical examination should be done by a female medical practitioner. The Supreme Court had suggested, inter alia, that the magistrate should inform the arrested person about this right in case that person has any complaint against torture by the police.

[22]SheelaBarse v. Secy., Children's Aid Society, (1987) 3 SCC 50; SheelaBarsev. State of Maharashtra, (1983) 2 SCC 96; UpendraBaxi (II) v. State of U.P., (1986) 4 SCC 106.
[23]G. PicheswaraRao v. S.I. of Police, 1997 Cri LJ 1145.

Moving on to USA,the Fourteenth amendment guarantees that all the citizens are entitled to equal protection of the laws and due process and the same procedural steps that occur for men in the correctional system also pertain to women. Every inmate has the right to be free under the Eighth amendment from inhumane treatment and they can retain basic First amendment rights to the extent that the exercise of these rights does not interfere with their status as inmates. But one thing which is most absurd is the legacy of racial discrimination in death penalty in the United States. Capital Punishment was employed by whites in several states to repress slave's movements. It was used to similar effect in southern states that enacted "Black Codes" during the Reconstruction era – laws that reserved capital punishment for select crimes committed exclusively by the newly freed former slaves. According to the statistics compiled by Professor Victor Sterib regarding Women and Capital Punishment in USA (covering the period January 1, 1973, through December 31, 2012):

1. Women account for about 10% of murder arrests annually;
2. Women account for only 2.1% (178/8, 375) of death sentences imposed at the trial level;
3. Women account for only 1.9% (61/3,146) of persons presently on death row; and
4. Women account for only 0.9% (12/1,320) of persons actually executed in the modern era.

It has been indicated in 'Denis Councle MCG Dautha v. State of California', that no formula of full-proof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime.[24]

In general, women are consistently arrested less than men and many scholars posit that women commit fewer crimes then men because of differences in gender socialization, differences in criminal opportunities, and a different morality. But, today the number of women imprisoned in the United States has increased at a rate which is nearly double the rate of men. Nationally, the number of women in state and federal prisons increased nearly eightfold between 1980 and 2001, from 12,300 to 93,031. While nearly two-thirds of women under probation supervision are white, nearly two-thirds of those confined in local jails and State and Federal prisons are minority and black, Hispanic and other races. There are also a number of variables where women are different and in fact, significantly more at risk than men and it is the state's foremost duty to look after the issue of victimisation.

[24] (1971) 402 US 183 January 1, 1973.

A Series of focus groups were conducted with women in the criminal justice system for the National Institute of Corrections Gender-Responsive Strategies: Research, Practice, and Guiding principles for women offenders' project.The Bureau of prisons offers a community residential program called Mothers and Infants Nurturing Together (MINT) for women who are pregnant at the time of commitment and it promotes bonding and parenting skills for low – risk female inmates who are pregnant. In addition to confinement – based programs, justice systems have also devised programs such as KEY therapeutic community to assist women upon re-entering society on parole. Today the basic question in respect to punishment awarded to Female offenders in U.S. is whether stereotypes matter, as women who are perceived as more feminine or attractive are treated differently from women whose demeanour or physical attributes essentially deprive them.

Conclusion

It has been observed in several cases that there are certain shortcomings on the JJ(C&P) Act. It is important to devise some measures by which the object of act can be fulfilled which include amendments, training programs, etc. The most important one can be the implementation of the act as a whole, for which cooperation of various agencies is necessary to ensure care, protection to all children. It is also necessary to strengthen the links between JJ system and the welfare societies. In addition to this, certain provisions must be formulated to ensure speedy disposal of case related to children. The process of reinstating juveniles into the society should also be done in a quick and efficient manner to ensure a bright future for them. The court is not absolved from the duty to arrange for the defense of a juvenile or a female offender just because of the fact that the accused person is unaware of his rights to be defended by a lawyer of his choice. The media serves its societal purpose by things like the way they select topics, distribute their concerns, frame issues, filter information, focus their analysis, use rhetoric through emphasis and tone. The conception that the media presents a different picture of the juvenile and female offenders creates biasness in the minds of public and policy makers which results in a huge outcry against these two vulnerable sections of the society. It is particularly the marginalized who need the protection of Human rights and law: by definition, it is the state duty to protect these vulnerable sections of the society under the umbrella of democratic process. And most of these in our prisons were on the margins or at down trodden level long before they reached prison (look at the high levels of school or education exclusion, illiteracy, mental disorder, substance and other abuse); and may be even more so afterwards (with difficulty in securing jobs, homes, continued treatment, and even

more fractured family and community ties). Therefore, we can't treat everyone at the same platform; there is a need of Judicious Spectatorship that is, being in the shoes of the accused, so that we can achieve and fulfill the principles of Reformative Justice. One of the reasons that female criminals have been charged is that women are exploded with anguish and anger against the misbehavior, mistreatment and suppression by their male counterparts or other family members, so, it is the natural manifestation of their suppressed-self. It is the mental war which they are fighting inside and physical war with the outside world. And one-day line of provocation crosses its limit.