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### Enigma of Capital Punishment in Rape Cases: A Socio-Legal Approach

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#### **Abstract**

There can be no offence than that of rape which attacks on the dignity and sanctity of womanhood especially in countries like India where woman is treated as goddess under Hinduism. It is needless to argue that the offence committed against woman is increasing on daily basis and the numbers available on government records does not provide the full pictorial representation of prevailing scenario under the societal influence and menace of underreporting of such cases. Every offence of rape is the representation of legislative and judicial inefficiency which fails to provide justice to the vulnerable group of the society, that is, woman. But question arises that whether increasing the severity of punishment is enough to address the plethora of issues coupled in rape cases? Or, there is systematic failure of existing legal framework? Thus, the present paper focuses on how “severity” of punishment is not an answer to the questions which arises due to social, economic, and politico-legal structure that stigmatizes the rape victims as a result of which “justice” becomes “utopian dream” for the victims of rape cases. Furthermore, the paper will also highlight on the point that “*just because someone stumbles and loses their way, does not mean they are lost forever,*” thus, the focus of legislatures and society at large must be directed towards addressing the core issues pertaining to implementation aspect of existing legal safeguards to the rape victims, and changing the perception of society which is deeply engraved in aggressive male chauvinism, instead of imposing capital punishment in mechanical fashion to satiate general public opinion for political purposes.

**Keywords:** Rape, Capital Punishment, Consent, Reform, Deterrence,

## Introduction:

Since time immemorial, rape is often used as potent weapon to silence the dissenting voices. But, society's belief system puts the victim herself to face the stereotypes that are developed over the years of aggressive male chauvinism in an Indian society. However, one fails to understand that it is not her attire, or friendly attitude with boys, that make her subject to rape, instead, such rapes are planned to keep in mind the accessibility and vulnerability of the victim.

There are ample records available through National Crime Records Bureau,<sup>1</sup> which suggest that in almost 97.3% of rape cases, victim knows the perpetrator.<sup>2</sup> Situation is such that in every 15 minutes, a women in India, become the victims of molestation, while in every 53 minutes, sexual harassment takes place in India against woman/girl,<sup>3</sup> moreover, it is important to note that almost one-fourth of the victims of rape belong to age group of less than 16-years, and, it is needless to say that this figure is based on only reported cases as this picture is far more worse than our expectation if every incident of rape is duly registered by the police and society sees rape as crime against women, not crime by woman.<sup>4</sup>

Oscar Wilde once said "*The only difference between the saint and the sinner is that every saint has a past and every sinner has a future*", which hint towards the fact that no straight-jacket formula can be applied in imposing punishment on the convict; apt consideration must be given to factual matrix of the concerned case. Because, its ignorance will lead us to imposing fetters on judicial discretion and non-application of mind as it totally negates the possibility of convict being reformed while serving his/her jail sentence. And, in cases of death sentence, no one can give back the life of convict who was subjected to capital punishment because of some error of law or fact.

Thus, the question arises, whether death penalty should be continued or abolished in rape cases which are of heinous nature that can easily shock the conscience of normal human being?

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<sup>1</sup> Hereinafter NCRB.

<sup>2</sup> National Crime Records Bureau (Ministry of Home Affairs), Crime Report- 2005, Available at: [https://ncrb.gov.in/sites/default/files/crime\\_in\\_india\\_table\\_additional\\_table\\_chapter\\_reports/CHAP5\\_2005.pdf](https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/CHAP5_2005.pdf), (Accessed on June 5, 2022).

<sup>3</sup> National Crime Records Bureau (Ministry of Home Affairs), Crime Clock- 2005, Available at: <https://ncrb.gov.in/sites/default/files/Crime%20Clock-05.pdf>, (Accessed on June 5, 2022).

<sup>4</sup> The Times of India, "*India sees 88 rape cases a day; conviction rate below 30%*", October 7, 2020, Available at: <https://timesofindia.indiatimes.com/india/india-sees-88-rape-cases-a-day-but-conviction-rate-below-30/articleshow/78526440.cms>, (Accessed on May 23<sup>rd</sup>, 2022)

### Existing Legislative Framework in Cases of Rape:

The Indian Penal Code contains several categories of punishment which can be imposed subject to facts and circumstances of the concerned case. Like under section-376 of the IPC itself has two categories of offences, firstly, those which comes under the ambit of sub-section (2), shall be punished with minimum 10-years and maximum upto life imprisonment, while those offences which do not fall under the said sub-section, shall be punished with minimum 7-years of rigorous imprisonment upto life imprisonment.

Furthermore, there are several provisions contained in section-376A to 376E which deals with specific kind of offence, and section-376E in particular, states that if person found to be habitual offender in commission of rape, then, he shall be subject to minimum life imprisonment, and, keeping in mind the heinousness of crime committed by him, he can be awarded death sentence too by giving 'special reason'<sup>5</sup> for the same.

Thus, it can be seen that, except under section-376E, IPC did not provide for death sentence for committing the offence of rape which imposes death sentence as maximum penalty for those who found to be repeat offenders vide section-376, 376A or 376D in any form as contained under different provisions of the said code. Situation is such that, even if murder has been committed in pursuance of committing rape or the victim became subject to permanent vegetative state, then also, the punishment ranges from minimum 20-years of rigorous imprisonment to life imprisonment for the remainder of life of the convict. Because of this very reason, public outrage is evident demanding death penalty for the rape convicts whenever there is some grave incident happens like that of Nirbhaya,<sup>6</sup> or Kathua.<sup>7</sup>

However, there is another legislative enactment on the present subject-matter vide Protection of Children from Sexual Offences Act, 2012.<sup>8</sup> Unlike IPC, POCSO Act is made gender neutral which broaden its ambit and recognizes the fact that even male child can become subject to sexual harassment.<sup>9</sup> And, 2019-Amendment to POCSO Act increases the punishment aspect in cases pertaining to aggravated penetrative sexual assault on minor child, shall be subject to 20-years imprisonment to death penalty.<sup>10</sup> But, we are often gets

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<sup>5</sup> Code of Criminal Procedure, 1973, Act No. 2 of 1974, s.354(3).

<sup>6</sup> *Mukesh and Anr. v. NCT of Delhi*, (2017) 6 SCC 1.

<sup>7</sup> *Mohd. Akhtar v. The State of Jammu and Kashmir*, 2018 SCC OnLine SC 386.

<sup>8</sup> *Hereinafter* POCSO Act.

<sup>9</sup> *Ref.* Protection of Children from Sexual Offences Act, 2012, Act No. 32 of 2012, s.2(d).

<sup>10</sup> *Id.* s.6(1).

blindfolded in considering retributive theory of justice, but it should be kept in mind that retribution must not be driven through vengeance. On the aspect of death penalty in rape cases, even Law Commission opined that the “notion of an eye for an eye, tooth for a tooth, has no place in our constitutionally mediated criminal justice system. And, capital punishment fails to achieve any constitutionally valid penological goals.”<sup>11</sup>

Moreover, on the question of “consent,” there is grave injustice done by the legislatures on the person accused of committing rape by inserting section-114A in the Indian Evidence Act,<sup>12</sup> which makes the statement of so-called victim of rape or sexual harassment on the question of “**consent**” is enough to award sentence on the accused person, provided that the factum of sexual intercourse between the accused and the victim has been established, and there is no proof to the contrary which can establish that the said intercourse is with proper consent.

Thus, though there are only select offences of rape in which criminal justice system in India imposes death penalty on rape convicts, however, it is important to note the fact that almost all the developed countries except China, and UAE<sup>13</sup> still continues this draconian punishment. Which is why, the question arises on the very notion of being “civilised,” but, instead of choosing the path of reforming existing framework, legislature keeps on increasing maximum penalty along with making the path difficult for accused person to prove his innocence in such offences in order to appease general masses.

Moreover, CrPC was amended<sup>14</sup> with respect to compensation aspect as now in accordance with section-357A<sup>15</sup> of the code in which the convict can validly be “recommended” by the court to an appropriate authority or District Legal Services Authority (DLSA) to pay compensation to the victim. Section-357A(2) empowers the court to pass any order directing the convict to compensate suitably as the court deems fit, while through section-357A(4) victim can also file an application before the state or DLSA for the purpose of award of compensation and DLSA has an inherent power to “direct” the convict to pay the compensation as it has been determined.

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<sup>11</sup> 262<sup>nd</sup> Report of Law Commission of India, “*The Death Penalty*,” Chap.VII, August 2015, Available at: <https://lawcommissionofindia.nic.in/reports/report262.pdf>, (Accessed on 08 June 2022).

<sup>12</sup> The Indian Evidence Act, 1872, Ins. by Act No. 13 of 2013, s.26. (w.e.f. 3-2-2013.)

<sup>13</sup> Naimul Karim, “Factbox: From Bangladesh to Iran, countries where rape carries the death penalty,” *Thomson Reuters Foundation*, October 13, 2020, Available at: <https://www.reuters.com/article/us-bangladesh-rape-women-factbox-idUSKBN2741H0>, (Accessed on 15, June, 2022).

<sup>14</sup> The Code of Criminal Procedure Amendment Act, 2008, Act No. 5 of 2009.

<sup>15</sup> *Supra* Note 5. s.357A.

And, even POCSO Act empowers special courts to direct convicts to pay compensation as determined by the court for the purpose of rehabilitation of child who is going to physical and mental agony because of convict's act.<sup>16</sup> Thus, it can be observed that while the trial court vide application of section-357A of the CrPC can only recommend the quantum of compensation to be paid to the victim, while the special courts under POCSO Act has the power to direct the convict to pay such compensation amount as it may deem fit. Apart from this, special courts can also award interim compensation to the victim at any stage once the first information report has been registered against the accused person.<sup>17</sup>

Thus, the legislative framework in India provides ample financial support to the victim of sexual offences in addition to the imprisonment term which may be imposed on the accused after his conviction. And, this financial backing becomes more crucial in several aspects like for bearing the cost of litigation, rehabilitation of the victim both physically and mentally, along with providing ample medical support in appropriate cases, any kind of financial support to poor/indigent victims will have positive impact on her future.

### **Viability of Death Sentences in Rape Cases:**

Firstly, it can be seen that if death sentence is being made mandatory in cases of rape, then the conviction rate, which is at just 39%,<sup>18</sup> will suffer further backlash because Courts are usually cautious in perusing the evidence, and witness' testimonies, when the conviction will result into taking life of the convict.

Secondly, through several judicial adjudications, "rarest of the rare" doctrine<sup>19</sup> has been developed by the Apex Court in order to ensure that death penalty must not become norm which is mechanically followed by the Courts. But, proving this doctrine so to qualify the case at hand to be falling under the ambit of "rarest of the rare" is in itself a hard task because even a small doubt over the indulgence of accused in the concerned act, will result in his/her acquittal. Moreover, there might arise a scenario in which what appears to be "rarest of the rare" to one judge, it might not be the same for other judge at the same time.

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<sup>16</sup> *Supra* Note 9. s.33(8).

<sup>17</sup> Protection of Children from Sexual Offences Rules, 2020, Rule 9(1).

<sup>18</sup> National Crime Records Bureau (Ministry of Home Affairs), Crime in India- 2020, Vol.I, Available at: <https://ncrb.gov.in/sites/default/files/CII%202020%20Volume%201.pdf>, (Accessed on 03 June 2022).

<sup>19</sup> *Bachan Singh v. State of Punjab*, AIR 1980 SC 898.

Thirdly, if giving death sentence is being made mandatory in rape cases, then there will be no difference between “rape simpliciter”, and “rape coupled with murder of the victim”, thus, in such cases, accused can try to eliminate the probable strong evidence against his guilt in the form of victim’s testimony.

It is generally observed that whenever judges are duty bound to pass death sentence in case of successful convictions, they try to find out the loophole through which they can refrain themselves from taking someone’s life, this attitude will ultimately reduce the conviction rate in rape cases, if death penalty is being made mandatory. And, this is evident from several judicial pronouncements which established that “life imprisonment is a rule and death penalty is an exception”,<sup>20</sup> which Court must exercise after giving due perusal to the given facts and circumstances of the case.

Moreover, in a civilized society, focus must be given to “reformation theory” rather than promoting age old “deterrence theory”, where the punishment is made severe enough to cause deterrence in the minds of prospective offender. We do not have quantifiable data to show the effectiveness of punishment aspect in reality creates deterrence in the minds of criminals, because if it so, then the offences like murder might have been uprooted as it ranges upto death sentence in select cases, but, on the contrary it is constantly rising as it increased by almost 75% in 1992 in comparison to that of 1950s, through percentage wise it is been declined since 1990, however, there is no apt data to show the reason for such decline.<sup>21</sup> Furthermore, if the legal framework insists on prescribing death penalty to certain offences, then it presumes that the offender went too far from the point where he/she can be reformed, but, there is no “cut and dried” test available to decide over this issue of fact.

### **Problems in Prevailing State of Affair Pertaining to Rape:**

It can be seen that the issues revolving around the rape has multi-dimensional perspective ranging from legislative framework and judicial response, to that of stigma which is attached by the society on the rape victims. Some of the major issues can be summarized under following heads;

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<sup>20</sup> *Ref. Arvind Singh v. State of Maharashtra*, Criminal Appeal NOs. 1515-1516 of 2017.

<sup>21</sup> The World Bank, Intentional Homicides (per 100,000 people)- India, Available at: <https://data.worldbank.org/indicator/VC.IHR.PSRC.P5?locations=IN>, (Accessed on 25 April 2022).

**(i) Definitional Aspect-** Firstly, offence of rape as defined under the Indian Penal Code suffers from inherent bias that men or male child cannot be subject to rape as the definition of rape starts with the word “A man is said to commit rape”.<sup>22</sup> Though the Law Commission had recommended making the provision gender neutral, but legislature ignored it from time to time.<sup>23</sup>

Secondly, the concept of marital rape which is now in the epicenter of intellectual debate is still remaining unrecognized under legislative framework. Moreover, exception to section-375 of IPC states that the sexual intercourse by the husband with wife who is more than 15-years of age will not amount to rape. This too has inherent problem because primarily it recognizes that there can be husband-wife relationship even if wife belongs to the age group of 15-18 years, thus, in its very nature defeats the purpose of legislations like The Prohibition of Child Marriage Act, 2006, which vide section-2(a) read with section-2(b), makes the act of contracting child marriage to be voidable in nature,<sup>24</sup> however, this provision is highly debatable as it bestows legitimacy on child marriages unless they are challenged before the Court of competent jurisdiction.

**(ii) Law of Evidence and Judicial Rigmarole-** When it comes to adducing evidence with respect to finding out accused's guilt in rape cases, the Courts often tilts in favor of accused when the conviction will result in death sentence, this is also because, once the life of a person is taken away, it cannot be returned subsequently, thus, before awarding capital punishment Courts tries to make sure that ‘no stone remains unturned’, on consideration of which there might be a situation under which the punishment can be commuted to lesser one. And, there should be special reason to award death sentence and guilt of the accused must not be taken as proved through circumstantial evidence.<sup>25</sup> As it is evident from section-354(3) of the Code of Criminal Procedure, 1973, too, which puts obligation on judges to provide “special reasons” in writing while awarding death sentence to the convict?

Furthermore, from 2000 to 2015, 30% of death sentences handed down by trial courts resulted in acquittals (rather than just reduced terms) when they were appealed to higher courts. It has also been discovered that the death penalty was commuted in another 65% of

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<sup>22</sup> The Indian Penal Code, 1860, s.375.

<sup>23</sup> 172<sup>nd</sup> report of The Law Commission of India, “*Review of Rape Laws*”, Chapter-VII, March, 2000, Available at: [https://lawcommissionofindia.nic.in/old\\_reports/rpt172.pdf](https://lawcommissionofindia.nic.in/old_reports/rpt172.pdf), (Accessed on: 15 June 2022).

<sup>24</sup> The Prohibition of Child Marriage Act, 2006, s.3.

<sup>25</sup> *Ref. Sahdeo v. State of U.P.* [(2004) 10 SCC 682].

cases. With so much doubt about the appropriate punishment- and whether the defendants are guilty- sending individuals to the gallows can have catastrophic effects.<sup>26</sup>

**(iii) Police Hostility:** Police officer is legally bound to register First Information Report with respect to commission of cognizable offence like that of rape vide section-154 of CrPC. Moreover, with 2013-Amendment to CrPC, FIR in cases pertaining to rape or acid attack shall be registered by lady police officer, this is done so to provide safeguard to the victim against the taunting of policemen, and to create an atmosphere where the victim feels safe to express their trauma.

However, it is important to understand that why such reporting mechanism must be made robust to ensure safeguard to the victim. At local level, police tends to favor the affluent perpetrator of such crime because of his political, social, or/and economic standing in the locality.<sup>27</sup> And, even if the FIR is being registered somehow, then the investigation is more likely to be tainted with malice, or, it will give required time-frame to the culprit to either flee or use force to put pressure on the victim's family to change the testimony of victim which is primary evidence for making prosecution's case, this police attitude is one of the major reason for underreporting as well.<sup>28</sup>

**(iv) Public Taunting:** When it comes to general masses in neighborhood of the victim, situation becomes much worse, it is often seen especially in case of rape of unmarried girls that the parents themselves pressurize the victim to keep silence about the incident as they fear that who will marry their daughter if such news comes to public knowledge? Moreover, society adds fuel to the fire by passing opinions on the character of victim, type of dress she use to wear, and her friendly attitude with boys, instead of providing much needed support to the victim in such testing time.<sup>29</sup>

These are some of the major issues, few other issues like re-victimization at the time of trial, poor technique of forensic/medical examination, fear of retaliation from culprit, etc. also act as a hindrance in process of reporting rape cases, but, its effects are catastrophic as it can be

<sup>26</sup> Project 39A, *Death Penalty India Report*, National Law University, Delhi, Available at: <https://www.project39a.com/dpir>, (Accessed on 30 May 2022).

<sup>27</sup> Allen, W. D. (2007). The Reporting and Underreporting of Rape. *Southern Economic Journal*, 73(3), pg.623-641. <http://www.jstor.org/stable/2011915>.

<sup>28</sup> Sable, R. Marjorie et al. (2006) Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students. *Journal of American College Health*, Vol. 55(3), pg.157-162, Available at: <https://pubmed.ncbi.nlm.nih.gov/17175901/>, (Accessed on 30 May 2022).

<sup>29</sup> Rajeev Kumar, *Death Sentence for Rape?*, *Indian Bar Review*, Vol. XLII (1) 2015.



seen through the fact that 85.2% of rape cases go unreported, and, this figure is much worse if we include cases of marital rape/assault which leads the figure upto 90.1%.<sup>30</sup> So, the question still remains the same, whether giving death sentence to the culprit will resolve all these issues? Or, do we need robust societal, legal, and judicial framework to provide necessary safeguard to the victims of rape?

### **Women Empowerment: A way forward-**

In rape cases, certainty not severity of punishment will ensure the necessary safeguard to the victim combined with the speedier justice delivery system. However, the menace of delayed delivery of justice to the victim is well-known to the Courts as well, thus, we have instances like that of Alwar (Rajasthan) where the whole proceeding was concluded in 9-days by the Fast Track Court on 12<sup>th</sup> April, 2006, convicting the rape accused for 7-years rigorous imprisonment. Similarly, in Jodhpur, fast track Court concluded the trial in record 16-days in the matter involving rape of German woman.<sup>31</sup> Thus, by driving oneself through spirited attitude, the prevalence of delayed justice can be curtailed which will also protect one's right to speedy trial which is a facet of right to life vide Article-21 of the Constitution.<sup>32</sup>

Furthermore, since victim is primary witness against the accused in rape cases, they need to be protected in order to provide justice in true nature and spirit as accused can easily eliminate, or threaten the victim in absence of robust 'witness protection program'. Though the draft of "Witness Protection Scheme" has been approved by the Supreme Court in 2018,<sup>33</sup> but, it seems to have no effect on the conviction rate nor it gets required funding to ensure proper implementation of black letters of law since there is no specified budgetary allocation in the scheme, which is why, even if this scheme entails detailed safeguards to the witnesses by dividing them in three-categories,<sup>34</sup> it all comes to stand still in absence of implementation aspect, and police attitude.

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<sup>30</sup> International Institute for Population Sciences (IIPS) and ICF. 2017. *National Family Health Survey (NFHS-4), 2015-16: India*. Mumbai: IIPS, pg.563-600, Available at: <https://dhsprogram.com/pubs/pdf/FR339/FR339.pdf>, (Accessed on 14 June 2022).

<sup>31</sup> *Supra* Note 23 at 124.

<sup>32</sup> *Hussainara Khatoon v. Home Secretary, State of Bihar*. 1979 AIR 1360.

<sup>33</sup> *Mahendra Chawla v. Union of India*, W.P. (Cr.) No. 156 of 2016.

<sup>34</sup> Witness Protection Scheme, 2018 (Ministry of Home Affairs), s.4.

Present definition of rape contained under section-375 of the IPC need to be made gender neutral to ensure its application holistically on all offenders irrespective of his/her gender. Moreover, identity disclosure of the victims also hinders the reporting of such cases even though such things are protected from publication vide section-228A of the IPC, but, this prohibition is not applicable on High Courts/Supreme Court. Neither we see Court's action against those who discloses the identity of the victim, nor, this provision prohibits disclosure of the names of victim's family through which one can easily ascertain the victim's name especially those who are living in the neighborhood.

### **Conclusion:**

Jeremy Bentham once said “*Witnesses are the eyes and ears of justice*” *highlighting the importance of witness*” testimony in trial of an accused. But, in sensitive cases like that of rape, India lacks on its implementation aspect as highlighted above. Moreover, instead of making the existing legal framework robust, legislatures keeps on increasing the severity of punishment every time when unfortunate cases like Nirbhaya or Damini happens, but, can we say that this attitude really helped in extending the fruits of justice to the victims? The answer to this question is “NO”, because, India is suffering from procedural ineptness whether it is in terms of time taken by Courts in concluding trial, witness protection program, police and societal attitude, accurate reporting of cases, and so on. These problems must not be tackled through prevailing attitude, instead, we have to create awareness amongst masses regarding stigmatization of rape victims, developing the framework of fast track Courts, and implementing the present procedural and substantive laws truly. In civilized society, awarding death penalty is not an answer to the question of justice, the answer lies in conviction and reformative aspect of the offender, otherwise, “If we do an eye for an eye and a tooth for a tooth, we will be a blind and toothless nation”.<sup>35</sup>

Thus, it can be concluded that the sentencing in rape cases must be stern so that to create “deterrence” in the mind of prospective offender, however, at the same time, it should be tempered with mercy where mitigating factors can be considered through sympathetic view in

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<sup>35</sup> Martin Luther King, Jr. at the Sixteenth Street Baptist Church, Birmingham (Alabama), 03 May 1963, Available at: <https://www.nps.gov/articles/16thstreetbaptist.htm>, (Accessed on: 07 June 2022).

order to implement the policy of “reformation”, and “rehabilitation”,<sup>36</sup> keeping in mind the civilized notion of democratic setup.

After release of youngest convict in Nirbhaya gang rape case, law was passed to try even those who belong to age group of 16-18 years and punish them on equal footing as that of an adult, and consider them as “child in conflict with law.”<sup>37</sup> But, it is to be noted that merely making provisions harsher will not serve any fruitful purpose till the concerned authorities probe into issue of why the crimes reported against so-called “child in conflict with laws” between the age group of 16-18 years is increasing? Thus, it requires study and research covering the socio-economic and mental conditions of such offenders, and merely increasing quantum of punishment appears to be more mechanical than well-thought step towards curbing juvenile crimes.<sup>38</sup> Moreover, this step is considered as complete violation of India’s international obligation with respect to Convention of Rights of Child, 1989, which defines children as anyone below the age of 18-years vide Art.1. And, Art.37 clearly prohibits imposition of neither capital punishment on children nor life imprisonment “without possibility of release,”<sup>39</sup> since India is one of the signatories to the said convention, India’s step to amend JJ Act stand in complete derogation with the international standards vis-à-vis obligations which needs to be corrected.

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<sup>36</sup> *State of Karnataka v. Raju*, AIR 2007 SC 3225.

<sup>37</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, Act No. 2 of 2016, Ref. s.2(13) read with s.15(1).

<sup>38</sup> *Malik’s Law of Juvenile Justice in India*, The Delhi Law House, pg. 2-5, 2<sup>nd</sup> Ed.

<sup>39</sup> Ref. United Nations Convention on the Rights of the Child, 1989, (ratified by India in 1992) Art.37, Available at: <https://www.unicef.org/child-rights-convention>, (Accessed on 24 June 2022).