

INHUMAN SENTENCING OF CHILDREN IN INDIA

Summary

Since the enactment of the Juvenile Justice (Care and Protection of Children) Act 2013 in Jammu and Kashmir, life imprisonment has been abolished as a sentence for children in Jammu and Kashmir, but life imprisonment was reintroduced in the rest of India in December 2015. Corporal punishment may be lawful across India under traditional justice mechanisms, including Pipon.

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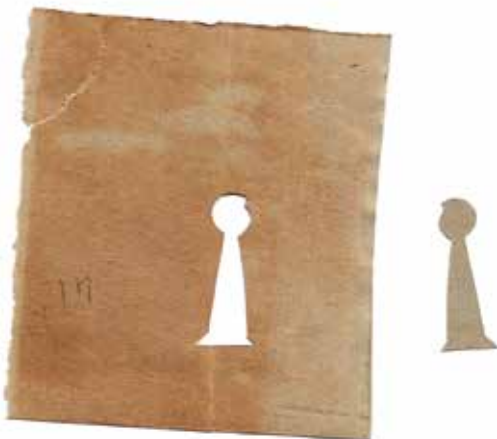
Introduction

India is divided into 28 states and seven union territories. Federal law is applicable in all states and territories except the state of Jammu and Kashmir, which has a degree of autonomy.¹

On the 31 December 2015, India enacted the Juvenile Justice (Care and Protection of Children) Act 2015, which substantially reformed the law on criminal sentencing of children.² Under the Act, a child is defined as any person under the age of 18 years and a child in conflict with the law as any child who is alleged or found to have committed an offence and who had not completed 18 years of age at the time of committing an offence.³ However, children aged 16 or older may be tried and sentenced as adults for “heinous offences”.⁴ A heinous offence is defined as an offence for which the minimum penalty is seven years’ imprisonment or more.

Other relevant legislation includes the Penal Code 1860, the Code of Criminal Procedure 1973. In Jammu and Kashmir, the relevant laws are the Jammu and Kashmir Juvenile Justice (Care and Protection of Children) Act 2013, the Juvenile Justice Rules 2007 and the Ranbir Penal Code. The 2013 Act defines a juvenile as a person under the age of 18 and a juvenile in conflict with the law as a person under the age of 18 at the time of the relevant offence.⁵

In India generally, no one can be held criminally responsible for an act committed while under the age of seven⁶ and



1 Constitution of India, Article 370. Available at: https://www.constituteproject.org/constitution/India_2014?lang=en.

2 The Act repealed and replaced the Juvenile Justice (Care and Protection of Children) Act 2000. See Juvenile Justice (Care and Protection of Children) Act 2015, Section 111(1). Available at: <http://www.prsindia.org/uploads/media/Juvenile%20Justice/Juvenile%20Justice%20Act,%202015.pdf>

3 Juvenile Justice (Care and Protection of Children) Act 2015, Section 2(12) and (13).

4 Juvenile Justice (Care and Protection of Children) Act 2015, Sections 15 and 19(1).

5 Jammu and Kashmir Juvenile Justice (Care and Protection of Children) Act 2013, Section 2(m) and (n).

6 Indian Penal Code 1860, Section 82. Available at: <http://www.advocatekhoj.com/library/bareacts/indianpenalcode/index.php?Title=Indian%20Penal%20Code,%201860>.

no person can be held criminally responsible for an act committed while under the age of 12 while of “immature understanding”. A child is considered to have “immature understanding” when he or she “has not attained sufficient maturity of understanding to judge the nature and consequences of his [or her] conduct on that occasion.”⁷ In Jammu and Kashmir, the minimum age of criminal responsibility is set at seven.⁸

Legality of inhuman sentencing

Death penalty

The death penalty for offences committed while under the age of 18 is explicitly prohibited in all of India.

The Juvenile Justice (Care and Protection of Children) Act 2015, provides that “[n]o child in conflict with the law shall be sentenced to death”⁹ and the term child in conflict with the law refers to any person alleged or found to have committed an offence who had not completed 18 years of age on the date of the commission of the offence.¹⁰

The Jammu and Kashmir Juvenile Justice (Care and Protection of Children) Act 2013 explicitly prohibits the death penalty for juveniles in conflict with the law.¹¹ A juvenile in conflict with the law is defined to include a person under the age of 18 at the time of the relevant offence.¹² Prior to the enactment of this Act, the legality of capital punishment for boys aged 16 or older was unclear, as they were sentenced under the Ranbir Penal Code, which provides for the death penalty.¹³

Life imprisonment

The Juvenile Justice (Care and Protection) Act 2015 has effectively reintroduced life imprisonment as a possible sentence for children who commit serious offences while they are aged 16 or older. The Act specifically prohibits sentencing anyone to life imprisonment without the possibility of parole for an offence committed while under the age of 18,¹⁴ but other forms of life imprisonment are lawful under the Penal

Code.¹⁵

A person serving life imprisonment for an offence for which the death penalty is a lawful penalty or who has benefited from a commutation of a death sentence may not be released from prison unless he or she has served at least 14 years’ imprisonment.¹⁶ For life sentences which do not fall within this category, release may be ordered at an earlier date.¹⁷ Under the Juvenile Justice (Care and Protection of Children) Act 2015, where a person is sentenced to detention for an offence committed while under the age of 18 and is still detained at the age of 21, the Children’s Court must determine whether the child has “undergone reformatory changes and if [he or she] can be a contributing member of society”. Where the Children’s Court decides that this requirement is met, it can decide to release the child subject to conditions or order the rest of the sentence be served.¹⁸

In Jammu and Kashmir, no person who was under the age of 18 at the time of an offence may be sentenced to imprisonment “for any term which may extend to imprisonment for life”.¹⁹

Corporal punishment

Corporal punishment is not a lawful sentence under the Penal Code 1860 or the Juvenile Justice (Care and Protection of Children) Act 2000. However, it is possible that corporal punishment is lawful under traditional justice systems, such as the Pipon system.²⁰

Inhuman sentencing in practice

CRIN has been unable to obtain statistical information relating to the sentencing of children to life imprisonment or corporal punishment. At the time of writing, the Juvenile Justice (Care and Protection of Children) Act 2015 had just entered into force and so it was unclear what the prevalence of life imprisonment of children under the Act would be.

7 Indian Penal Code 1860, Section 83.

8 Ranbir Penal Code, Section 82.

9 Juvenile Justice (Care and Protection of Children) Act 2015, Section 21.

10 Juvenile Justice (Care and Protection of Children) Act 2015, Section 2(13).

11 Jammu and Kashmir Juvenile Justice (Care and Protection of Children) Act 2013, Section 17(1). For information, the draft version of the Bill is available online at: <http://jlegislative-council.nic.in/Governor/BILLS%20TRANSMITTED/Bill%20No.8.pdf>.

12 Jammu and Kashmir Juvenile Justice (Care and Protection of Children) Act 2013, Section 2(n).

13 Ranbir Penal Code, Section 53.

14 Juvenile Justice (Care and Protection of Children) Act 2015, Section 21.

15 Indian Penal Code, Section 53(1).

16 Criminal Procedure Code, Section 433A. Available at:

17 Criminal Procedure Code, Section 432.

18 Juvenile Justice (Care and Protection of Children) Act 2015, Section 20.

19 Jammu and Kashmir Juvenile Justice (Care and Protection of Children) Act 2013, Section 17(1).

20 For more information on the legality of corporal punishment in India, see Global Initiative to End All Corporal Punishment of Children, Country report for India, October 2015. Available at: <http://www.endcorporalpunishment.org/progress/country-reports/india.html>.

Progress towards prohibition and elimination

Law reform needed

Throughout India, legislation should be enacted to ensure that no child is tried or sentenced as an adult and to ensure that the prohibition on life imprisonment for children is re-enacted and that no one may be sentenced to corporal punishment for an offence committed while under the age of 18. In Jammu and Kashmir, legislation should be enacted to explicitly prohibit corporal punishment of children, defined as persons convicted of an offence committed while under the age of 18.

National campaigns

A large number of national and international organisations campaigned against the enactment of the Juvenile Justice (Care and Protection of Children) Act 2015. The Juvenile Justice team at the Centre for Child and the Law at the National Law School of India and HAQ Centre for Child Rights were active nationally in campaigning against these reforms.²¹

Law reforms underway

At the time of writing, the Juvenile Justice (Care and Protection of Children) Act 2015 had just entered into force.

National and international law conflicting with inhuman sentencing

The Constitution

A number of provisions under the federal Constitution 1949 Constitution protect the physical integrity of all persons. The following articles of the Constitution are also applicable in Jammu and Kashmir.²²

Preamble:

We, the people of India, having solemnly resolved to constitute India into a sovereign socialist secular democratic republic and to secure to all its citizens:....

Fraternity assuring the dignity of the individual and the unity and integrity of the Nation...

Article 15 (Prohibition of discrimination)

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste sex, place of birth or any

of them...

(3) Nothing in this article shall prevent the State from making any special provision for women and children.”

Article 21 (Protection of life and personal liberty):

No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 39 (Principles of policy):

The State shall, in particular, direct its policy towards securing - ...

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.:

International human rights treaties

India has ratified or acceded to the following international human rights treaties:

- Convention on the Rights of the Child (in 1992)
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (in 2005)
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (in 2005)
- International Covenant on Civil and Political rights (in 1979)
- Convention on the Elimination of All Forms of Racial Discrimination (in 1968)
- International Covenant on Economic, Social and Cultural Rights (in 1979)
- Convention on the Rights of Persons with Disabilities (in 2007)

India has signed but not ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (in 1997) and has neither signed nor ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty.

Treaty Bodies' communications and complaints procedures

India has not ratified or acceded to any international complaints or communications mechanisms.

21 For more information on the work of these organisations, visit their respective websites at: <https://www.nls.ac.in/ccl/juvenilejustice.html> and <http://haqrc.org/>.

22 The Constitution (Application to Jammu and Kashmir) Order 1954.

Status of treaties

India's legal system has generally developed from English common law, with the notable exception of the state of Goa, which follows a civil law tradition. Under the common law system, treaties must be incorporated into law through an Act of Parliament. Article 253 of the Constitution accordingly states:

“Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.”

The Convention on the Rights of the Child has not been incorporated into domestic law but it can be used to interpret legislation, including concerning children's rights. The courts have used the Convention in this way in a number of significant decisions.²³

Recommendations from human rights treaty monitoring bodies

Committee on the Rights of the Child

(Concluding observations on the combined third and fourth periodic reports of India, 7 July 2014, CRC/C/IND/CO/3-4, paras. 47 and 48)

“The Committee notes the legal prohibition of corporal punishment in all educational and care institutions. However, it remains concerned that:

- (a) Such prohibition in educational institutions only applies to children between 6 and 14 years;
- (b) Corporal punishment is still lawful in non-institutional care settings;
- (c) Corporal punishment as a disciplinary measure and as a sentence for a crime is not prohibited throughout the State party;
- (d) Despite the State party's efforts, corporal punishment continues to be widely used within the family, alternative care and school settings and within the penal system.

“With reference to the Committee's general comment No. 8 (2006) on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment and its general comment No. 13 (2011) on the right of the child to freedom from all forms of violence, the

Committee recommends that the State party:

- (a) Explicitly prohibit all forms of corporal punishment of children under 18 years in all settings throughout its territory;
- (b) Introduce comprehensive and continuous public education, awareness raising and social mobilisation programmes, involving children, families, communities and traditional and religious leaders, on the harmful effects, both physical and psychological, of corporal punishment, with a view to changing the general attitude towards this practice;
- (c) Ensure that legal proceedings are systematically initiated against those responsible for ill-treating children and that they are duly prosecuted;
- (d) Promote positive, non-violent and participatory forms of child-rearing and discipline;
- (e) Strengthen existing complaints mechanism with a view to ensuring that they are confidential and child-friendly.”

(Concluding observations on the second periodic report of India, 16 February 2004, CRC/C/15/Add.228, paras/ 78, 79 and 80)

“The Committee notes the enactment of the Juvenile Justice (Care and Protection of Children) Act, 2000 but remains concerned that no minimum age of criminal responsibility is fixed in the new Act and that the minimum age of 7 years found in the Penal Code is still in force. The Committee is further concerned that the Supreme Court has decided that the date of the commission of one offence is irrelevant for determining whether the alleged offender is a juvenile (CRC/C/93/Add.5, box 8.7). The Committee is further concerned that the mechanisms to enforce the Act have not been set up in most states and that the Act does not apply to the State of Jammu and Kashmir. In addition, the Committee expresses its concern at the fact that deprivation of liberty is not used only as a measure of last resort. Finally, the Committee is deeply concerned that the Prevention of Terrorism Act, 2002 allows for the prosecution of children by special courts and that the procedure used in these cases does not respect articles 37, 40 and 39 of the Convention.

“The Committee recommends that the State party take all appropriate measures to implement a juvenile justice system that is in conformity with the Convention, in particular articles 37, 40 and 39, and with other United Nations standards in this field, such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, and the Vienna Guidelines for Action on Children in the Criminal Justice System.

²³ For more information on the status of the Convention on the Rights of the Child in Indian law and the use of the Convention in Indian courts, see CRIN, Access to justice for children: India, December 2014. Available at: www.crin.org/node/32226.

“In addition, the Committee recommends that the State party:

- a) amend the Juvenile Justice (Care and Protection of Children) Act, 2000 to set a minimum age of criminal responsibility that shall be higher than that fixed in the Penal Code and reflect internationally accepted norms, and consider this age as the age when the offence was committed;
- b) extend the application of the Juvenile Justice (Care and Protection of Children) Act, 2000 to the State of Jammu and Kashmir;
- c) amend the Prevention of Terrorism Act, 2002 so that it fully respects articles 37, 40 and 39 and other related provisions of the Convention when it is applied to children; 21
- d) take all necessary steps to establish, as a measure of urgency, the executing state mechanisms necessary for the full implementation of the Juvenile Justice (Care and Protection of Children) Act, 2000....”

(Concluding observations on the initial report of India, 23 February 2000, CRC/C/15/Add.115, paras. 79, 80 and 81)

The Committee is concerned over the administration of juvenile justice in India and its incompatibility with articles 37, 40 and 39 of the Convention and other relevant international standards. The Committee is also concerned at the very young age of criminal responsibility – 7 years – and the possibility of trying boys between 16 and 18 years of age as adults. Noting that the death penalty is de facto not applied to persons under 18, the Committee is very concerned that de jure, this possibility exists. The Committee is further concerned at the overcrowded and unsanitary conditions of detention of children, including detention with adults; lack of application and enforcement of existing juvenile justice legislation; lack of training for professionals, including the judiciary, lawyers and law enforcement officers, in relation to the Convention, other existing international standards and the 1986 Juvenile Justice Act; and the lack of measures and enforcement thereof to prosecute officials who violate these provisions.

“The Committee recommends that the State party review its laws in the administration of juvenile justice to ensure that they are in accordance with the Convention, especially articles 37, 40 and 39, and other relevant international standards such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the Vienna Guidelines for Action on Children in the Criminal Justice System.

“The Committee recommends that the State party abolish by law the imposition of the death penalty on persons under 18. The Committee also recommends that the State party consider raising the age of criminal responsibility and ensure that persons under 18 years are not tried as adults. In accordance with the principle of nondiscrimination contained in article 2 of the Convention, the Committee recommends article 2 (h) of the 1986 Juvenile Justice Act be amended to ensure that boys under 18 years are covered by the definition of juvenile, as girls already are. The Committee recommends that the 1986 Juvenile Justice Act be fully enforced and that the judiciary and lawyers be trained and made aware of it....”

Human Rights Committee

(Concluding observations on the third periodic report of India, 4 August 1997, CCPR/C/79/Add.81, para 20)

“The Committee expresses concern at the lack of compliance of the Penal Code with article 6, paragraphs 2 and 5, of the Covenant. Therefore: the Committee recommends that the State party abolish by law the imposition of the death penalty on minors and limit the number of offences carrying the death penalty to the most serious crimes, with a view to its ultimate abolition.”

Universal Periodic Review

Second cycle

During the second cycle of the Universal Periodic Review of India, the State took note of but did not accept recommendations from 10 States to abolish or continue its moratorium on the death penalty.²⁴ The State accepted a recommendation from Liechtenstein to “[i]ntroduce legislation to prohibit the corporal punishment of children in all settings.”²⁵

First cycle

During the first cycle of the Universal Periodic Review, no recommendations were made specifically concerning the death penalty, life imprisonment or corporal punishment of children.²⁶

²⁴ Ireland, Slovakia, Spain, Chile, France, Belgium, Italy, Switzerland, Argentina, Norway, Portugal. For full list of recommendations, see Report of the Working Group on the Universal Periodic Review: India, 9 July 2012, A/HRC/21/10.

²⁵ Report of the Working Group on the Universal Periodic Review: India (Addendum), 17 September 2012, A/HRC/21/10/Add.1, p. 5.

²⁶ Report of the Working Group on the Universal Periodic Review: India, 23 May 2008, A/HRC/8/26.

About CRIN (www.crin.org)

Our goal: A world where children's rights are recognised, respected and enforced, and where every rights violation has a remedy.

Our organisation: CRIN is a global research, policy and advocacy organisation. Our work is grounded in the United Nations Convention on the Rights of the Child.

Our work is based on five core values:

- We believe in rights, not charity
- We are stronger when we work together
- Information is power and it should be free and accessible
- Societies, organisations and institutions should be open, transparent and accountable
- We believe in promoting children's rights, not ourselves.

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