



The 'Get Tough Approach' In Juvenile Justice: Comparative Analysis of India and USA

Professor Dr. Anita Ladha^{1*}, Ms. Shruti Jane Eusebius²

^{1*} Professor, Jagran Lakecity University, Faculty of Law

²Research Scholar, Jagran Lakecity University, Faculty of Law & Research Fellow, National Judicial Academy

***Corresponding Author:** Dr. Anita Ladha

* Professor, Jagran Lakecity University, Faculty of Law

ABSTRACT

The Juvenile Justice system in India is governed by the Juvenile Justice (Care and Protection of Children) Act, 2015 which is enacted with the objective of ensuring welfare of the child. The JJ Act has also introduced a differential approach to juvenile delinquency in cases of children between the age of 16 and 18 years and has mandated a different and stricter procedure in such cases. This new procedure which includes the categorisation of offences, conduct of preliminary assessment and transfer of cases for adult trial has been introduced as a consequence to the public outcry against the Nirbhaya gangrape. The procedure introduced in the juvenile justice system by the JJ Act seeks to tackle serious offending by children between the ages of 16 and 18 years, and also seeks to address a perception that such children are given an easy way out and are let off lightly without facing the consequences of their actions. The paper seeks to examine the approach mandated under the JJ Act to identify the procedure and measures envisaged for dealing with delinquency by children between the ages of 16 and 18 years. The paper also seeks to examine the 'get tough approach' as a novel procedural measure in juvenile justice; and studies the approach adopted by the juvenile justice system in USA to identify commonalities and distinctions in the approach of the system in comparison with India.

Key Words: Juvenile Justice; Law relating to Children; Juvenile Delinquency; Child; Child in Conflict with Law; Criminal Justice.

I. INTRODUCTION

The Get Tough Approach is a distinct approach aimed at tackling crime. As the term 'get tough' indicates, the approach involves the adoption of a stricter attitude and stricter measures in response to offending. The Get Tough Approach in juvenile justice law constitutes a fundamental shift in the philosophy of juvenile justice – from a welfaristic and reformation-driven system to a punitive system. This approach in juvenile justice operates on the premise that offending by children needs to be strictly dealt with, as a measure of deterrence. Further, this approach also emphasises on accountability i.e. juveniles be held accountable for their actions and be required to make amends to society for their actions. Harsher law enforcement measures are adopted as a response to offending with the objective of tackling the incidence of crime through deterrent and punitive measures. Emphasis in this approach is placed on crime control and accountability rather than welfare and reformation. India's disenchantment with the juvenile justice system after the Nirbhaya tragedy led to the adoption of a stricter approach to juvenile offending aimed at providing an appropriately stern and deterrent response to violent crimes committed by juveniles. This paper firstly examines the mechanism introduced by the Juvenile Justice (Care and Protection of Children) Act, 2015 ('2015 Act'). Thereafter, the paper analyses the Get Tough approach adopted in USA and contrasts the approach with the mechanism adopted in India to identify commonalities and distinctions. The paper argues that the Get Tough Approach mechanism under the 2015 Act is contrary to the constitutional ethos of India and is violative of the Right to Equality as guaranteed in Articles 14 and 15(3) of the Constitution of India.

II. GET TOUGH IN JUVENILE JUSTICE LAW IN INDIA

A. Juvenile Justice System in India

The juvenile justice system in India is a distinct system providing an alternate mechanism for dealing with cases of juvenile offending and for diversion of cases involving persons under the age of 18 years from the criminal justice system to a system that is devised specifically to deal with children. The juvenile justice system in India as established by the Juvenile Justice Act, 1986 and the Juvenile Justice (Care and Protection of Children) Act, 2000 were welfare based models of juvenile justice.¹ The juvenile justice system in India was based on the premise that children due to young age and immaturity are vulnerable and require greater care. Further, in cases of offending, the system operated on the premise that children were amenable to rehabilitation and reformation, hence the interests of society and justice would be better served if the child is reclaimed through rehabilitation and reformation measures. The juvenile justice system in India adopted an informal system where

¹ Ved Kumari. (2004). *The Juvenile Justice System in India From Welfare to Rights*. First Edition. New Delhi: Oxford University Press, 52-54.



a Juvenile Justice Board ('JJB') which comprised of a judge and 2 social workers/experts in child welfare would examine the matter involving the child who has committed an offence. The process for adjudication of the case was informal with wide discretion given to the JJB to adopt a flexible procedure which serves the interests of the child. The process adopted in the juvenile justice system was distinct from the procedure in the criminal justice system. Informality and child-friendliness were the touchstone of the procedure adopted by the JJBs. The process culminated in the order of the JJB which prescribed rehabilitative measures aimed at reclaiming the child offender as a member of society.

B. The Get Tough Approach in India

1. Catalysts for Adoption of the Get Tough Approach

The juvenile justice law in India underwent a transition in 2015 in the aftermath of the Nirbhaya gang rape incident. The intense media furore over the incident and the widespread social movement as a response to the gruesome tragedy was instrumental in driving the change in the law. The social perception was that the minor involved in the incident was the most brutal² and this perception was spurred by media reports³ driving a common view that minors who were closer to the age of majority were becoming increasingly violent and were resorting to heinous crimes.⁴ The children in the age group of 16 to 18 years were viewed as mini-adults who are claiming the benefit of juvenile law as children while committing acts like adults. It was perceived that the law was soft on these children and provided an easy way out which involved a maximum 'punishment' of three years stay in a child care institution.⁵ Furthermore, media reports stated that juvenile offending was on the rise.⁶ The public perception was that the juvenile justice system had failed to tackle juvenile crime and was soft on juveniles who were resorting to a life of crime. Furthermore, it was opined that the existing system was ill-equipped to deal with offending by children between the ages of 16 & 18 years.⁷ The social outcry was reflected in the petition before the Supreme Court in *Subramanian Swamy v. Raju*,⁸ which sought the exclusion of juveniles committing heinous crimes from the purview of the juvenile justice law to enable prosecution of such juveniles in the criminal court. The age criterion in the juvenile justice law in India was also challenged in *Salil Bali v. Union of India*⁹ where the trend of involvement of juveniles in criminal activities was cited as a basis to consider exclusion of juveniles from the ambit of the juvenile justice law in cases of commission of heinous offences. In this case, the Supreme Court while rejecting this plea held that the juvenile justice law in India was aimed at rehabilitation, restoration and reintegration of children into society. Further, the Supreme Court cited the scientific reasons for the adoption of 18 years as the criterion for juvenility.

2. The Get Tough Mechanism in the Indian Juvenile Justice System

The overwhelming public outcry in the aftermath of the Nirbhaya incident spurred the enactment of the 2015 Act.¹⁰ The 2015 Act marks a departure from the welfare model of the earlier statutes of 2000 and 1986 and is

² Business Standard. (March 20, 2020). *Brutality of Nirbhaya Incident Became Focal Point around Which Strong Case Was Built: Investigators*. https://www.business-standard.com/article/pti-stories/brutality-of-nirbhaya-incident-became-focal-point-around-which-strong-case-was-built-investigators-120032001567_1.html. accessed 13 January 2024

³ The Times of India (January 29, 2013). *Most Violent of Nirbhaya's Six Assailants Declared a Minor*. <https://timesofindia.indiatimes.com/india/Most-violent-of-Nirbhayas-six-assailants-declared-a-minor/articleshow/18231183.cms>. accessed 13 January 2024

⁴ WION. (2017). *Indian Kids Are Turning Violent*. <https://www.wionews.com/photos/indian-kids-are-turning-violent-537>. accessed 13 January 2024

⁵ Daily Mail Online. (August 31, 2013) *Delhi Gang Rape: Teenager Found Guilty of Rape and Murder of Woman Jailed for Just 3 Years*. <https://www.dailymail.co.uk/news/article-2407835/Delhi-ganag-rape-teenager-guilty-rape-murder-woman-jailed-just-3-YEARS.html>. accessed 13 January 2024

⁶ Firstpost, (September 9, 2013). *Juvenile Crime up by 34% in Mumbai, Cops Point Finger at Remand Homes*. <https://www.firstpost.com/india/juvenile-crime-up-by-34-in-mumbai-police-say-no-reformation-in-remand-homes-1094109.html>. accessed 13 January 2024

⁷ Rajya Sabha Standing Committee on Human Resource Development. (2015) *Two Hundred and Sixty-Fourth Report The Juvenile Justice (Care and Protection of Children) Bill, 2014*. https://prsindia.org/files/bills_acts/bills_parliament/2014/SC_report-_Juvenile_justice_1.pdf accessed 13 January 2024

⁸ (2014) 8 SCC 390

⁹ (2013) 7 SCC 705

¹⁰ Live Law. (March 11, 2016). *Juvenile Justice Act 2015; an Emotional Aftermath of the Dreaded 'Nirbhaya Incident'; a Step Backward*. <https://www.livelaw.in/juvenile-justice-act-2015-emotional-aftermath-dreaded-nirbhaya-incident-step-backward/>. accessed 13 January 2024.



quoted as a legislation seeking to introduce a deterrent element in the juvenile justice law.¹¹ The 2015 Act introduces a differential procedure for dealing with children based on age and nature of offence. Firstly, the 2015 Act categorises offences into three categories – petty¹², serious¹³ and heinous¹⁴ offences which is based on the quantum of punishment attracted. Secondly, the 2015 Act provides for different procedures which are to be adopted based on the age and category of offence. The informal procedure in the previous juvenile justice legislations is adopted under the 2015 Act for cases of petty and serious offences committed by juveniles of all age groups as well as for cases of heinous offences by children under the age of 16 years.¹⁵ However, in cases of heinous offences committed by children between 16 to 18 years, the 2015 Act mandates undertaking of a preliminary assessment procedure. The preliminary assessment assesses the juvenile's physical and mental abilities to commit the offence, the juvenile's comprehension of the consequences of such act, and the circumstances surrounding commission of the offence.¹⁶ This assessment is undertaken to determine whether the juvenile is to be tried as a minor by the JJB, or the juvenile should be tried as an adult and his/her case should be transferred to the criminal justice system for trial.¹⁷

The determinant factors required to be considered in the preliminary assessment are physical capacity, mental capacity, the circumstances surrounding the commission of the offence (including immediate and cumulative circumstances), and juvenile's ability to comprehend the consequences (personal, social and legal) of the offence. The assessment of physical capacity envisages the assessment of the physical ability of the juvenile to undertake the act involved in the offence. Mental capacity requires an assessment of the mental health and the decision making abilities of the juvenile.¹⁸ The assessment of the determinant factors is based on interactions of the juvenile with the JJB and experts as well as on the information gleaned from the Social Investigation Report and Social Background Report.¹⁹

III. GET TOUGH APPROACH IN JUVENILE JUSTICE LAW IN USA

A. Juvenile Justice in USA

The juvenile justice system in USA which was established in the early 19th century was founded on the doctrine of *parens patriae* with the state adopting the role of the "superparent" who is duty bound to ensure welfare of the child. Emphasis was placed in this system on protecting children from corrupting influences in society including adult criminals and redeeming children who are in the clutches of such influences. Welfare of the child was the driving factor in operation of the juvenile justice system. The juvenile courts were authorised to direct treatment, supervision, and care for juvenile offenders with the goal of rehabilitation and reformation. The juvenile justice system processes were informal to ensure a conducive environment to ensure the welfare of the child. Measures adopted were aimed at reformation of the child rather than imposition of punishment on the child for his actions.

B. Get Tough Approach in USA

1. The Rationale for the Get Tough Approach

The get tough approach shift was introduced in the juvenile justice system in USA as a result of the growing public perception that the juvenile justice system was soft on juvenile offenders. The public perception was fuelled by media reports which threw the spotlight on high-profile cases where juveniles were involved in violence.²⁰ The media reports spurred a public concern and fear regarding increase in violence and aggression

¹¹ First Post. (December 23, 2015) *Rajya Sabha Passes Juvenile Justice Bill: 16-Year-Olds Can Now Be Tried as Adults for Rape and Murder*, <https://www.firstpost.com/india/juvenile-justice-bill-after-heated-debate-public-outcry-new-law-passed-in-rajya-sabha-2555978.html>. accessed 13 January 2024.; Supra Note 9 pp.10.

¹² The Juvenile Justice (Care and Protection of Children) Act, 2015, sec. 2(45).

¹³ The Juvenile Justice (Care and Protection of Children) Act, 2015, sec. 2(54).

¹⁴ The Juvenile Justice (Care and Protection of Children) Act, 2015, sec. 2(33).

¹⁵ The Juvenile Justice (Care and Protection of Children) Act, 2015, sec. 15.

¹⁶ Ibid.

¹⁷ The Juvenile Justice (Care and Protection of Children) Act, 2015, sec. 18(3).

¹⁸ National Commission for Protection of Child Rights, *Guidelines for Conducting Preliminary Assessment under Section 15 of the Juvenile Justice (JJ) Act, 2015*, (NCPCR, 2023). https://ncpcr.gov.in/uploads/16813797786437d1c2bea2a_GUIDELINES%20FOR%20CONDUCTING%20PRELIMINARY%20ASSESSMENT.pdf accessed 13 January 2024.

¹⁹ Verma, A. (2020). 'Unshrouding the Enigma behind conducting Preliminary Assessment under the Juvenile Justice (Care & Protection of Children) Act 2015'. *Journal of Indian Law Institute*, 62, 263-281 at pp. 267; Ibid.

²⁰ Brannen et al. (2006) 'Transfer to Adult Court: A National Study of How Juvenile Court Judges Weigh Pertinent Kent Criteria.' *Psychology, Public Policy, and Law* 12(3) 332–55. <https://doi.org/10.1037/1076-8971.12.3.332>.



on the part of youth. The resultant public outrage was focussed on increase in offending by a certain age group of minors (youth) and the failure of the State in protecting society from such offenders.²¹ The public perception was that the violent offending by juveniles needed stricter approaches, and the present juvenile justice system was lenient towards juvenile offenders thereby adopting a permissive approach to juvenile offending.²² The need for control over criminal youth and a stricter approach to juvenile offending was the driving force for the adoption of the get tough approach. Public fear spurred by media reports regarding the increase in juvenile offending by youth, the perceived failure of the system in tackling crime, the public outcry for accountability for offending and for the need for imposition of harsh sanctions on violent offenders spurred the adoption of the get tough approach. The focus shifted from protection and welfare of juveniles to the protection of society from offenders and the accountability of juveniles for their actions.

2. The Get Tough Mechanism in USA

The get tough approach in USA was adopted by introduction of a system of transfer whereby juveniles would be transferred to the adult criminal justice system for trial. Transfer of juveniles was effected through three methods – judicial waiver, prosecutorial waiver and legislative waiver.²³

a) Judicial Waiver

Judicial waiver was the common method of transferring a juvenile to the adult criminal justice system. This method of waiver vested a discretion in ~~the hands of~~ the judge to determine whether the juvenile should be transferred to the criminal justice system. The parameters to consider while exercising the judicial discretion transfer have been laid down by the Supreme Court of USA in *Kent v. United States*²⁴ which are –

- Seriousness of the offence, and whether waiver is required to protect the community
- Whether the offence was committed in an aggressive, wilful, premeditated or violent manner
- Offence against persons or property; greater weight being given to cases where personal injury has resulted.
- The *prima facie* merit of the case
- Desirability of having a trial in one court, in cases where offence involves adult accused as well.
- Sophistication and maturity of the juvenile
- Past history and antecedents of the juvenile
- Prospects for protection of the public and likelihood of rehabilitation of the juvenile

Juvenile court judges are also required *vide Kent v. United States* to hold a hearing before making a decision regarding the transfer of the juvenile to the adult court. In the assessment of the case of the juvenile while determining whether the juvenile should be transferred to the adult court for trial, the court is required to weigh the needs of the juvenile in terms of rehabilitation along with the needs and interests of society including protection of society. The major criterion that is weighed while determining the necessity for transfer are – the potential risk to community (dangerousness); maturity of character and sophistication in commission of offence (maturity-sophistication); and amenability to rehabilitation (amenability).²⁵ While the exercise of judicial discretion requires a balancing of the criterion, this balancing is done on the basis of the judge's individual belief and perception as to the relative importance of the criterion. Notably, the factor of dangerousness is the major criteria which determines the necessity of transfer. While striking the balance, the commission of the offence and its impact on society have been the primary considerations while deciding whether the juvenile is to be tried as an adult. The amenability of the juvenile to intervention and rehabilitation has been a minor and low priority consideration in this decision. The factual elements of the personal characteristics of the juvenile, family background, past antecedents, nature of offence, manner of commission of offence etc. would be considerations which are taken into account while determining the issue of transfer.²⁶ The interests of the society in ensuring crime free environment and the protection of society have been the paramount considerations indicating a shift from the objective of welfare to objectives of crime control, deterrence and punitive action. This shift marks a departure from the *parens patriae* model which is focussed on the juvenile and his interests, rather than the nature of the crime and the interests of society. Emphasis is placed on

²¹ Angell, K. M. (2004). 'The Regressive Movement: When Juvenile Offenders Are Treated As Adults, Nobody Wins.' *Southern California Interdisciplinary Law Journal* 14, 125–149.

²² Torbet, P.M.. (1998). 'Track II -- getting tough on juvenile crime: A paradigm shift for juvenile justice?'. <https://ojdp.ojp.gov/sites/g/files/xyckuh176/files/conference/track2.html>. Accessed July 28, 2023

²³ McLatchey, S. F. (1999). 'Juvenile Crime and Punishment: An Analysis of the 'Get Tough' Approach.' *University of Florida Journal of Law and Public Policy* 10(2). 401–21.

²⁴ 383 U.S. 541 (1966)

²⁵ Supra Note 22.

²⁶ Supra Note 25.



punishment and accountability on the part of the juvenile rather than the rehabilitation of the juvenile. It is pertinent to note that while the parameters to be considered while exercising the discretion of judicial waiver are specified, no guidelines have been laid down with regard to the weightage to be given to the various criterion.²⁷ This weighing of factors may be influenced in part by the judge's individual beliefs regarding the efficacy of the measures available in the juvenile justice system and the possibilities of reformation.

b) Prosecutorial Waiver

Prosecutorial waiver as a method of transfer is exercised by the prosecutor. The transfer of the juvenile to the adult court in such cases is a unilateral decision made by the prosecutor to charge the juvenile and try him/her as an adult before the adult court. The discretion of transfer rests solely on the prosecutor; such discretion being unbridled. The juvenile is not afforded a hearing prior to the decision of the prosecutor. Furthermore, the prosecutor is not required to justify the decision of waiver. However, the transfer may be questioned in a retransfer hearing where the prosecutorial waiver is challenged.

This system of waiver is justified on the grounds that the juvenile does not have a constitutional right to be tried or treated as a juvenile; and that this right is merely a statutory right which can be restricted or withdrawn by the statute itself. Hence, such transfer of juvenile to the adult court by the prosecutor is constitutional.²⁸

c) Legislative Waiver

Legislative waiver is the system of transfer of juveniles to adult court on the basis of criteria laid down in the statute. It is an automatic system of waiver as the stakeholders in the juvenile justice system are not involved in the waiver decision. Cases which meet the criteria laid down in the governing law are automatically transferred to the adult court for trial, and there is no discretion to consider other factors in the waiver. It operates on the presumption that in cases where the criteria are met, the juvenile is not amenable to reformation and rehabilitation.

The system of transfer of juveniles to adult court was indicative of the shift of the orientation of the juvenile justice system in USA from the *parens patriae* model of welfare to a crime control model.²⁹ While the rationale for the introduction of the get tough approach was to tackle violent offending by juveniles, operationally the ambit of the transfer extended to non-violent crimes.³⁰ Furthermore, the transfer mechanism also resulted in a broad base of offenders from varied age groups under the age of majority thereby casting a wide net subjecting a larger group of juveniles to the transfer system.³¹ Notably, concerns have been raised regarding the disproportionate impact of the transfer mechanisms on juvenile from minority sections of society.³² The transfer mechanism by judicial waiver was based on criterion which weighed the offence, the juvenile's traits and the interests of society. Notably, in this balancing act, the past offences though minor offences were considered as basis for determining transfer.³³

The transfer mechanism in USA has resulted in juveniles being sentenced to imprisonment in adult jails. This measure results in the exposure of juveniles to adult convicts. This has a threefold consequence. Firstly, this results in exposure to violence in adult jails. This will result in desensitising juveniles towards violence. Secondly, juveniles in adult jails are more likely to be victims of violence. Thirdly, the incarceration of juveniles with adults convicts results in the adult convicts becoming the peer group for the juvenile and may negatively influence the juvenile and his personality. Cumulatively, this results in exposure to violence and may result in juveniles becoming more violent as a result of their surroundings and influences.³⁴ Notably, juveniles who have been incarcerated in adult prisons have an increased likelihood of recidivism.³⁵ This outcome makes the transfer mechanism counter-productive to the goal of crime control.

The transfer mechanism denies the juvenile with the support mechanism that is available under the juvenile justice system including counselling and rehabilitation programmes. As a result, the juvenile after completion of imprisonment is released on the street without receiving any rehabilitative support or any other measures for social reintegration.³⁶ Furthermore, incarceration of the juvenile results in the disruption of their social and

²⁷ Supra Note 22.

²⁸ Supra Note 25.

²⁹ Supra Note 22.

³⁰ Supra Note 25.

³¹ Supra Note 22.

³² Supra Note 23.

³³ Supra Note 25.

³⁴ Supra Note 25.

³⁵ Supra Note 23.

³⁶ Supra Note 25.



familial connects.³⁷ As a result a juvenile released from jail is ill-equipped to adjust and adapt to mainstream society. Additionally, the stigmatising effect of incarceration makes reintegration difficult thereby in turn increasing the likelihood of recidivism.³⁸ Transfer, trial and incarceration have lifelong consequences - social, economic, and personal, for the juvenile.³⁹

IV. COMMONALITIES & DISTINCTIONS

A. Commonalities in the Get Tough Approach in USA and India

An analysis of the juvenile justice systems in USA and India with regard to the adoption of the Get Tough Approach reveals that the development of the juvenile justice jurisprudence has several commonalities. Firstly, the adoption of the Get Tough Approach in both countries has been driven chiefly by public perception fuelled by media reports. In both countries this social outcry has been triggered by incidents of commission of violent offences by juveniles which have been reported by the media. The common public perception in USA and India was that juvenile crime is on the rise and the existing juvenile justice system is not successful or ill-equipped to tackle or prevent the increase in juvenile crime.

Secondly, the emergence of the perception of youth as a class of "superpredators"⁴⁰ is common to both USA and India. The common social perception was of the threat posed by youth who were on the cusp of adulthood as a specialised class of offenders who had the physical ability of an adult and were committing violent crimes. The suitability of the juvenile justice system as a forum to tackle this class of offenders was questioned, and the measures available under the juvenile justice system were deemed to be soft and ineffective in dealing with these offenders. The idea of superpredators was the chief ground which triggered the adoption of the Get Tough Approach in USA and India.

Thirdly, the transfer of juveniles to adult court by judicial waiver is adopted both in USA and India. Both systems incorporate the mechanism through which the judge, subsequent to a hearing exercises his discretion to determine whether the juvenile should be tried as a juvenile or should be sent to the adult court for trial. In both systems, the exercise of this discretion by the judge is circumscribed by guidelines which seek to balance the interests of the state with the interests of the juvenile.

Fourthly, emphasis is placed in both systems on the nature of offence and modus of commission of crime. In India, this emphasis is apparent in the fact that the preliminary assessment procedure is applicable to heinous offences. Furthermore, the nature of offence and the manner of the commission of the offence are factors that are considered in the preliminary assessment to determine whether the juvenile should be tried as an adult or not. In USA, the nature of offence becomes a relevant factor in determining the potential threat that the juvenile poses to society thereby becoming an element to determine 'dangerousness'. The commission of offence is a factor that is considered in criteria of 'sophistication – maturity'. These two criteria i.e. dangerousness and sophistication- maturity are the criterion which are given greater weightage by courts while determining whether to transfer the juvenile to adult court.⁴¹

B. Distinctions in the Get Tough Approach in USA and India

The Get Tough Approach in USA and India are distinct firstly in the fact that the system adopted in USA has not circumscribed the age limits for application. Juveniles of varied age groups are transferred to adult courts for trial in USA and for a varied nature of offences, both violent and minor offences. Conversely, in India, the transfer mechanism is applicable only to juveniles who are within the age group of 16 to 18 years of age and who are alleged to have committed a heinous offence. Consequently, the Get Tough Approach applies to a smaller subset of juveniles in India and the limits of the application of this approach are circumscribed by the 2015 Act. The second distinction between the two approaches is that while USA has three mechanisms of transfer i.e. judicial waiver, prosecutorial waiver and statutory waiver; India has adopted a system of similar to judicial waiver whereby the JJB conducts a preliminary assessment and determines whether the juvenile should be tried as an adult.

V. CONSTITUTIONAL & STATUTORY CONSIDERATIONS

A. International Law & the Juvenile Justice Law in India

The rights of the child are an important facet of law which finds iteration and recognition in International Law as well as in domestic legislation. Child rights form a subset of human rights law which recognise children as

³⁷ Supra Note 23.

³⁸ Supra Note 23.

³⁹ Supra Note 23.

⁴⁰ Howell, J. C. (2013) 'Preventing and Reducing Juvenile Delinquency: A Comprehensive Framework.' Sage Knowledge. <https://doi.org/10.4135/9781452274980>. Accessed 12 January 2024.

⁴¹ Supra Note 22.



a distinct section of society which vested with rights which are essential for their human identity, and for their protection and care. The United Nations Convention on the Rights of the Child, 1989 (UNCRC) forms the international law standard on the rights of the child.⁴² The UNCRC rests on the fundamental principles of protection, survival, development and participation;⁴³ and recognises the rights of the child which are applicable to all children irrespective of the gender, race, colour, religion etc.⁴⁴ The UNCRC requires the best interests of the child be the paramount consideration in all actions, decisions and processes undertaken.⁴⁵ The UNCRC emphasises on the welfare and best interests of the child⁴⁶ and protection of children harm⁴⁷. The import of the UNCRC is that children form a distinct section of society, and are entitled to special rights on account of their vulnerability along with the rights that are vested in them as a human being. India as a signatory to the UNCRC is bound by the UNCRC as an International Law standard. Further to its obligations under the UNCRC, the 2015 Act has been enacted specifically alluding to India's obligations under the UNCRC. While the 2015 Act recognises the principles of diversion,⁴⁸ best interests of the child,⁴⁹ and institutionalisation as a measure of last resort⁵⁰, the provision for transfer of juveniles for trial to the criminal justice system runs contrary to the aforementioned avowed principles.

B. Right to Equality & the Get Tough Approach

The Constitution of India as the bedrock of Indian jurisprudence upholds the values of justice, liberty, equality and fraternity as the foundation of Indian social order. The Constitution guarantees to all persons "equality before law and equal protection of the laws"⁵¹ The mandate of equality requires that "equals be treated equally"⁵² and that any classification made should not be arbitrary and should be based on an intelligible differentia. The intelligible differentia should have a rational nexus to the objectives of the statute.⁵³ Notably, the classification of all juveniles under the age of 18 years as a group for the application of the provisions of the juvenile justice law was held to be constitutional and in keeping with India's international law obligations.⁵⁴ In this context, it is pertinent to examine the transfer mechanism in India through the lens of Articles 14 & 15(3). The 2015 Act provides for classification and identification of juveniles based on the age and nature of offence. The 2015 Act carves out an exception to the procedure adopted in case of juveniles between the ages of 16 years and 18 years who are alleged to have committed a heinous offence. This classification is based on nature of offence and the age group. Further, it must be noted that the stated objectives of the 2015 Act are "*catering to their basic needs through proper care, protection, development, treatment, social re-integration*"⁵⁵ The objectives of the 2015 Act are welfare, protection and rehabilitation. This begets the question as whether the classification made under the 2015 Act amounts to intelligible differentia. Further, as the classification does not correspond to the stated objectives of the 2015 Act, and is in contrast to the fundamental principle of equality and non-discrimination⁵⁶ it must be considered whether such classification made has a rational nexus to the objectives of the Act.

Further, the Constitution permits the enactment of special provisions for children.⁵⁷ Such special provisions can be made for the benefit of children. These special provision would operate as an affirmative action providing protective discrimination in favour of children.⁵⁸ In this context, it must be noted that the 2015 Act introduced the Get Tough Approach by the provisions of preliminary assessment and transfer. However, these provisions are made to serve the interests of the State and society by crime control and strict action. These provisions are not made to benefit the juvenile. Hence, it may be argued that the get tough approach adopted in the 2015

⁴² Gainborough, J. and Lean, E. (2008) 'Convention on the Rights of the Child and Juvenile Justice', *The Link*, 7 no.1, 1-12.

⁴³ *Ibid.*

⁴⁴ United Nations Convention on the Rights of the Child, 1989, Art. 12.

⁴⁵ United Nations Convention on the Rights of the Child, 1989, Art. 3.

⁴⁶ See United Nations Convention on the Rights of the Child, 1989, Art. 2(2), 8, 9, 24, 26, and 27.

⁴⁷ See. United Nations Convention on the Rights of the Child, 1989, Art. 19, 20, 32, 33, 34, and 36

⁴⁸ The Juvenile Justice (Care and Protection of Children) Act, 2015, sec.3(xv).

⁴⁹ The Juvenile Justice (Care and Protection of Children) Act, 2015, sec.3(iv).

⁵⁰ The Juvenile Justice (Care and Protection of Children) Act, 2015, sec.3(xii).

⁵¹ Constitution of India, 1950 Art. 14

⁵² *Motor General Traders v. State of A.P.*, (1984) 1 SCC 222

⁵³ *R.K. Garg v. Union of India*, (1981) 4 SCC 675

⁵⁴ *Supra* Note 10.

⁵⁵ Juvenile Justice (Care and Protection of Children) Act, 2015, Statement of Objects and Reasons,

⁵⁶ Juvenile Justice (Care and Protection of Children) Act, 2015, sec. 3(x)

⁵⁷ Constitution of India, 1950 Art. 15(3).

⁵⁸ *Independent Thought v. Union of India*, (2017) 10 SCC 800.



Act is contrary to the provisions of Article 15(3) of the Constitution of India as it is a special provision made in detriment rather than to benefit the juvenile.

C. Right to be Treated as a Juvenile – Constitutional & Statutory Perspectives

India as a signatory to the UNCRC is bound by the provisions of the UNCRC. In contrast, USA has signed but has not ratified the UNCRC. Notably, child rights has not been implemented systemically in USA. While children are guaranteed the rights as enshrined in the Fourteenth amendment, no distinct provision has been incorporated in the Constitution of USA regarding children and their rights and interests. The right to be treated as a juvenile is a statutory right and has been held to not be an absolute right. It has been held to be a statutory right which can be restricted/ withdrawn by the statute itself. Hence, the juvenile in USA does not have a constitutional right to be treated as a juvenile.

It is notable that further to its obligations under the UNCRC, India has put in place a rights based system for children including juveniles in conflict with law. The 2015 Act provides statutory recognition to the rights of the child. Furthermore, the Constitution of India gives special recognition to children as a distinct section of society which requires special protection and action by the state to enforce their rights and interests. The State is empowered under Article 15(3) to make special provisions for children; and the State is duty bound to protect children from abuse, provide facilities and opportunities for the health development of children in conditions of freedom and dignity, and protect children and youth from exploitation, and abandonment – moral and material.⁵⁹ The constitutional ethos as evident from the aforementioned provisions recognises children as a distinct section of society which requires special provisions and care. Further, the emphasis is on the protection of the child and on the provision of the necessary requirements and environment that is conducive for the development and growth of children. Protection of children is an intrinsic element of the constitutional ethos. In this light, the right to be treated as a juvenile may be considered as an element of the constitutional ethos of India and would have constitutional basis in India. Hence, the right of the juvenile in India to be afforded care and protection as a child has constitutional basis, and statutory provisions which deny this right are contrary to the constitutional ethos of Indian Constitution.

VI. CONCLUSION

The Get Tough approach was a system adopted as a consequence of social pressure. It resulted in the introduction of crime control features into the erstwhile welfare systems of juvenile justice in India. Its efficacy is subject to debate as it has been noted to have created more issues than it resolves. Several concerns persist which require to be looked in to. Firstly, the classification of juveniles in age group of 16 to 18 years who alleged to have committed a heinous offence as a separate group, and the transfer of such juveniles for trial as an adult is contrary to the Constitution of India. The denial of the rights and the beneficial provisions enacted for children is contrary to the constitutional ethos.

Secondly, the transfer system has a potential for inclusion of racial, caste, economic and religious bias in the decision making. This bias may be systemic as well as individualistic (judge's bias). Judge's personal views and implicit bias may influence their decision regarding transfer thereby introducing individualistic bias in the transfer system. Judges may subconsciously be influenced by previous cases dealt by them, as well as the social background of the juvenile. Systemic bias may be engendered as the juveniles from economically and socially marginalised sections of society may not possess the resources to challenge or defend themselves effectively in the transfer process as well as in the trial. As a result greater number of juveniles from these sections may be tried and incarcerated as adults. This potential increase in incidence of trials of juveniles from marginalised sections may also influence the judge's opinion while exercising the discretion to transfer the juvenile to adult court. *Thirdly*, the association of juveniles with adults increases the likelihood of recidivism. *Fourthly*, the get tough approach would have significant and lifelong social, familial consequences for the juvenile and would have a stigmatising effect which would be contrary to the Fundamental Principles of Positive Measures⁶⁰, Repatriation and Restoration⁶¹ and Fresh Start⁶². The need of the hour is for effective intervention programmes both preventive and remedial to address the issue of juvenile offending. Punitive measures may not suffice, and it would be in the interests of society and the child to have a middle tier which provides for specialised approach to deal specifically with these cases of juvenile offending with a restorative approach. The objective of the 2015 Act needs to be kept at the forefront while devising approaches to juvenile offending. The best interest of the child must be the paramount consideration in all measures undertaken. The measures must also resound the constitutional ethos of India.

⁵⁹ Constitution of India, 1950 Art. 39.

⁶⁰ Juvenile Justice (Care and Protection of Children) Act, 2015. Sec. 3(vii).

⁶¹ Juvenile Justice (Care and Protection of Children) Act, 2015. Sec. 3(xiii).

⁶² Juvenile Justice (Care and Protection of Children) Act, 2015. Sec. 3(xiv).