



## PRELIMINARY ASSESSMENT UNDER THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015: CRITICAL EVALUATION

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### ABSTRACT

This article seeks to explore criteria stipulated in The Juvenile Justice (Care and Protection of Children) Act, 2015 for conducting preliminary assessment and its deficiencies in transfer hearing of the children in conflict with law between the age brackets of 16 to 18 years apprehended for commission of heinous offences. Except for broad norms the Act and its accompanying Rules hardly provide any guidance to the courts. In the absence of objective criteria such children are being arbitrarily transferred to the Children courts by the Juvenile Justice Boards. This results in unfair and arbitrary treatment of similarly situated children violating their fundamental right under Article 14 of the Constitution. In this view of the matter there is an urgent need to lay down objective criteria for conducting preliminary assessment and transfer hearing of such children. It urgently requires legislative and judicial intervention for laying down objective and uniform criteria.

### INTRODUCTION

The preamble of the Act indicates the nature and its subject matter. It has been enacted to consolidate and amend the law relating to two categories of children i.e. children in conflict with law and children in need of care and protection. Thus the ambit of the Act is wholesome and caters to both the above categories of children. It also indicates the principles to be borne in mind while enacting the Act. It states that the Act shall cater to be basic needs of children through proper care, protection, development, treatment, social reintegration. Further the adjudication in disposal of the matters concerning the child shall be done by Agencies involved in the implementation of the Act by adopting a child-friendly approach keeping in mind the best interest of child. It further declares that the above categories of Juvenile be rehabilitated through processes provided and institutions and bodies established under the Act.

The constitutional validity of the Act is above reproach. The special law has been enacted in terms of Section 15(3), Article 39 (e & f), Article 45 and Article 47. Thus, the legislature by enacting this Act has discharged its constitutional obligations. Not only that it seeks to comply with International obligations and has modelled the law on the basis of Convention on the Rights of Child, 1992 which was acceded to on 11.12.1992 by India.

### FUNDAMENTAL GUIDING PRINCIPLES

The Act in Section 3 has additionally laid down an interpretative guide for the benefit of the courts and other stake holders. The fundamental guiding principles permeating the scheme of the Act have been laid down in section 3 which are required to be followed by all stakeholders while implementing the provisions of the Act. Notably among them are ‘Principle of Innocence’; ‘Principle of repatriation and restoration’ holding that every child in the juvenile justice system shall have the right to be re-united with his family at the earliest and to be restored to the same socio-economic and cultural status that he was in, before coming under the purview of this Act, unless such restoration and repatriation is not in his best



interest; and 'Principle of fresh start' holding that all past records of any child under the Juvenile Justice system should be erased except in special circumstances.

### **CATEGORIZATION OF CHILDREN IN CONFLICT WITH LAW**

Under the Act there is two- fold division in respect of children in conflict with law. The first division is on the basis of nature of offence i.e. whether the alleged offence is petty, serious or heinous offence. The second division is on the basis of age of the child. The Act has placed children upto the age of 16 years in one bracket and those beyond 16 to 18 years in a separate category. Both the divisions are intertwined as children upto the age of 16 years irrespective of the nature of the offence have been put in one category and are entitled to be proceeded against in inquiry by following a uniform procedure. Even the consequential orders which may follow on recording of finding by the Board that the juvenile/child has committed the offence are also uniform. However, children between the age brackets of 16 to 18 years who are accused of having committed heinous offences are placed in a separate category. The Act has struck a delicate balance between the children falling in this category i.e who have committed heinous offences with deliberate intent than those who came in conflict with law on account of other circumstances.

### **PROTECTIVE MECHANISM**

The Act has two stages in-built protective mechanism to rehabilitate and reintegrate such children into the society. The law does not lose hope on such children and provides them a chance for reformation. In this regard, at the first stage, the Act provides for conducting a preliminary assessment under Section 15 of the Act by the Board. This assessment is with regard to the mental and physical capacity of such a child to commit the heinous offence, its ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence. On consideration of all the four factors, the Board may either hold that there is a need for trial of such a child as an adult, in which eventuality, it shall transfer the trial of the child to the jurisdictional Children Court. However, if the Board holds otherwise, then it may dispose of the inquiry by itself. In that case it shall follow the procedure for trial in summons case under Cr.P.C. The decision of the Board, however, is appealable under Section 101 (2) of the Act. In case where the trial of the child has been transferred to the Children Court, it shall exercise powers stipulated in section 19 of the Act.

Thus, the above mechanism reflects the first in-built safeguard to protect the children in conflict with law from being transferred to the adult criminal justice system.

The second safeguard is provided by Section 20 of the Act. It operates at a post-conviction stage. It envisages a situation where the children court has imposed a sentence running beyond 21 years of age of the juvenile/child. He is to be lodged in a place of safety till he attains the age of 21 years and thereafter such a person has to be transferred to jail to suffer the remainder of his sentence. However, before doing so an evaluation is to be done by the Children Court in accordance with the procedure prescribed by Section 20 of the Act read with Rule 13 of the Juvenile Justice (Care & Protection of Children) Model Rules 2016. The Children Court shall conduct evaluation either suo-moto or on the basis of follow-up report by the Probation Officer or D.C.P.U. or a Social Worker in order to evaluate if such child has undergone reformatory changes and can he be a contributing member of the society. The Court shall take into consideration the progress reports of the child prepared by the above persons under Section 19(4) of the Act and the evaluation of reports of relevant experts. After evaluation, the Children Court may either decide to release the child on such conditions as it may deems fit or transfer the child to jail to undergo the remainder of his sentence.



### **Time Period for Conducting Preliminary Assessment**

Section 14 of the Act sets out a time line for conducting the preliminary assessment under Section 15 of the Act. Section 14(3) of the Act, inter-alia, stipulates a time line of three months from the date of first production of the child before the Board for disposing of a preliminary assessment in case of heinous offences. However, the moot question is as to the effect of non- adhering to the time line stipulated in Section 14 of the Act on the conduct of inquiry or trial, as the case may be, against the child in conflict with law. The Act does not lay down any clear guidelines in this regard. In the absence of the same, the effect and consequence of non-adherence to the aforesaid time line has to be deduced from the scheme and structure of the Act. To say it figuratively, beads are connected together to form a garland, likewise the provisions of the Act are also connected together to form a functional structure. The practical function of conducting the preliminary assessment within the stipulated time line, has already been elaborated above i.e. if the Board on preliminary assessment transfer the child to the Children Court for his trial as an adult and the Children Court finds him guilty and sentences the child to imprisonment which runs beyond his attaining 21 years of age, then the Children Court is required to review the sentence under Section 20 of the Act to find out if the child has undergone reformation with the help of correctional services provided to him during his institutional stay and if so then the Children Court is required to release him by remitting the remaining part of his sentence. If the Board misses the above time line and conducts preliminary assessment at a later stage due to which the child misses the application of beneficent provision laid down in section 20 of the Act, then the child gets exposed to undergo the entire sentence imposed upon him negating the chief object of the Act. In that situation, the child shall be condemned beyond redemption. It is in this background, the adherence to the time line stipulated in section 14 of the Act for disposing of the preliminary assessment under Section 15 of the Act, has been insisted upon by the legislature.

Even though the jurisprudence under the present Act which came into effect on 15.01.2016 is evolving and expanding and much judicial precedents are not available on the point, the issue may be decided on the first principle interpreting the provisions of the Act in the light of its lofty aims and objectives of the Act. If so interpreted, it implicates that if the Board does not dispose of the preliminary assessment under Section 15 of the Act within the time line stipulated in section 14(3) of the Act, it would be one of the factors to be taken into consideration to retain the child with the Board itself and not to transfer his case to the Children Court to try him as an adult.

### **ASSESSMENT NORMS OR FACTORS**

Section 15 of the Act mandates the Board to conduct preliminary assessment in respect of the following factors:-

- i. Mental capacity of the child to commit such offence
- ii. Physical capacity of the child to commit such offence.
- iii. Child's ability to understand the consequences of the offence.
- iv. Circumstances in which he allegedly committed the offence.

While assessing the afore cited factors, the Board or the Children Court, as the case may be, shall be guided by the overarching principles stipulated in section 3 of the Act.

Before taking up the interpretation of the aforesaid norms/guiding factors, a brief reference to some of the judicial precedents available on the point may be noticed first.



The Hon'ble Supreme Court of India in *Shilpa Mittal v State of NCT of Delhi and Another*<sup>1</sup>, has underpinned the importance of section 15 of the Act and held the Children's Court constituted under the Act of 2015 has to determine whether there is actually any need for trial of the child as an adult under the provisions of Cr. PC and pass appropriate orders in this regard.

Reference to scientific or psychological tests available to test the mental maturity of a child have been made by the Punjab and Haryana High Court in *Bholu v CBI*<sup>2</sup>.

A procedural due process must be followed in assessment proceedings. It requires effective legal assistance and opportunity of hearing to a child. Its absence may vitiate the process. The Division Bench of Rajasthan High Court in *Smt. Durga Bherulla Meena v State of Rajasthan*<sup>3</sup>, also highlighted the significance of fourth factor in the assessment proceedings as one of the reasons which weighed with the court to retain the child before the Board.

The Hon'ble Delhi High Court in *Pradeep Kumar v State of NCT of Delhi*<sup>4</sup> highlighted the importance of assistance of experienced psychologist or psycho-social worker or other experts.

The Karnataka High Court in *Puneet S. v State of Karnataka*<sup>5</sup> has held that the main object of Section 15 is to ascertain and assess the total capacity of the child on the basis of the facts and on the basis of the expert's opinion if necessary as contemplated under the said provisions. It is not a mechanical power entrusted to the Board.

The Bombay High Court in *Mumtaz Ahmed Nasir Khan and Others v State of Maharashtra and Others*<sup>6</sup> advocated the adoption of Kent's norms (norms laid down in the case of *Kent v US*<sup>7</sup> for want of better evaluative criteria in conducting assessment proceedings. It advocated the adoption of the following factors in conducting the evaluation proceedings:

- (1) The seriousness of the alleged offense to the community and whether protecting the community requires a waiver:
- (2) Was the alleged offence committed in an aggressive, violent, premeditated, or willed manner?
- (3) Was the alleged offense committed against persons or against property, with a greater weight attached to offenses against persons, especially if personal injury resulted.
- (4) The prosecutive merit of the complaint; that is, is there evidence upon which the court may be expected to return a guilty verdict?
- (5) The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults.
- (6) The sophistication and maturity of the juvenile by consideration of his home, environmental situation, emotional attitude, and pattern of living:
- (7) The record and previous history of the juvenile, including previous contacts with the law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation or prior commitments to juvenile institutions.

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<sup>1</sup> AIR 2020 SC 405

<sup>2</sup> 2019 (1) RCR (Cri) 603

<sup>3</sup> 2019 Cri LJ 2720 (Raj)

<sup>4</sup> (2019) 260 DLT 641 (Delhi)

<sup>5</sup> 2019 (4) AKR 662

<sup>6</sup> 2019 (4) Bom CR (Cri) 261 (Bombay)

<sup>7</sup> 383 U.S. 541 (1966)



- (8) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by using the procedures, services, and facilities currently available to the juvenile court.

It further clarified that the preliminary assessment is not a trial; it is an exercise to assess the child's capacity to commit and understand the consequences of the alleged offence.

#### **ABSENCE OF OBJECTIVE CRITERIA**

The four factors which are required to be satisfied by the Board before transferring the case of a child to the Children Court for his trial to be conducted as an adult has been highlighted above. However, the Legislature neither in the body of the Act nor in the accompanying rules has laid down the relevant criteria to be considered in evaluation of each of the four factors/norms. It has left to the judicial wisdom to fill the contents of the same bearing in mind the aims and objects of the Act.

#### **Mental capacity of the child to commit such offence**

Taking up the first factor, it refers to the mental capacity of the child to commit such offences. The Act neither defines the term 'mental capacity' nor does it lay down any concrete criteria to assess the same. The dictionary meaning of 'mental capacity' is sufficient understanding and memory to comprehend in a general way the situation in which one finds oneself and the nature, purpose, and consequence of any act or transaction into which one proposes to enter<sup>8</sup>. Black's Law Dictionary<sup>9</sup>, defines 'mental capacity' as the mental ability to understand the nature and effect of one's acts.

The question would arise as to how the mental capacity of a child is to be evaluated. The basis of juvenile court is the doctrine of *parens patriae* in which the state and the society served as a substitute or surrogate parent of the delinquent child and the actions of the court are aimed at rehabilitation rather than punishment. The emphasis of the juvenile court is towards determining appropriate treatment and rehabilitative care for wayward youth rather than distilling punishment. Evaluation of capacity of a juvenile to stand trial as an adult offender is a second stage in the scheme of the present Act. It is a sensitive exercise to be performed by the Board requiring it to discharge its role in all earnestness and sensitivity. Evaluation of juvenile incompetency due to development immaturity and other factors to stand trial as an adult is new under the present Act. It is further of interest to notice that the mental incapacity of the juvenile to commit an offence has to be distinguished from the 'cognition test' to distinguish between right and wrong laid down under IPC. Juveniles in conflict with law may not have serious cognitive disorganization and yet may be immature unable to foresee the long term consequences of their act. Mental maturity of a juvenile may be evaluated with the aid of an expert. It is a branch of forensic psychiatry and an expert may adopt different qualitative test to assess the mental maturity of a juvenile. These forensic assessments are psychological evaluations assisting the court in answering the question. In *Kent v United States*<sup>10</sup> a sixteen year old Moris Kent was transferred from juvenile court to the adult criminal court system. It has been held by the Supreme Court of United States that waiving a juvenile to adult court requires providing of basic due process rights to the juvenile as afforded to adults. It has also drawn up the evaluation criteria for waiving a juvenile to the adult criminal court. Though this criteria was specified in the Code of District of Columbia. However, later on, it was adopted by the other states and used in waiver hearing. Recently, the High Court of Bombay

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<sup>8</sup> Available at : <https://www.merriam-webster.com/medical/mental%20capacity> (Last visited on 15 March 2024)

<sup>9</sup> 7<sup>th</sup> Ed., 1999, p.199

<sup>10</sup> 383 U.S. 541 (1966)



in case *Mumtaz Ahmed Nasir Khan*<sup>11</sup> has recommended adoption of the aforesaid evaluative criteria in transfer hearing under Section 15 of the Act. Even though the criteria laid down in Kent's case may not completely coincide with the criteria laid down in Section 15 of the Act, notwithstanding that in the absence of any guideposts specified in the Act as well as the accompanying rules, the attempt made by the Hon'ble Bombay High Court in this direction is path breaking.

### **Physical capacity of the child to commit such offence**

The second criterion relates to physical capacity of the child to commit offence. This factor is comparatively easier to determine. The Board is required to find out the nature of the acts constituting the offence in question. It is to be examined as to whether all the acts constituting the offence have been done by the child or whether he is physically capable of committing those acts. If the answer is in affirmative, the child has the physical capacity to commit the offence. However, in cases involving multiple accused and multiple acts, the physical capacity of the child to commit the offence in question is required to be examined. The general principle of penal liability is that each individual is liable for his own *actus reus*. This principle, however, is displaced in cases where crime has been committed by more than one person. In such cases, principle of constructive penal liability is attracted holding all members of a group liable for the consequences produced by the *actus reus* of others provided *mens rea* is shared by all of them. This principle of constructive penal liability is primarily reflected in sections 34-38, 114, 149, 396 and 460 IPC. This artificially constructed transfer of intent may not always be attributed to a child when he is found to be involved in cases involving group crimes. In such cases, the role played by the child in commission of the offence, is significant in order to decide whether a child should be transferred to the Children Court by treating him as an adult or retained as a child. Generally, in constructive criminal liability, the child should not be attributed sharing of common intention on account of other over arching principles delineated in Section 3 of the Act. In situations when the child has been attributed only peripheral role or mere presence at the scene of occurrence, he should be treated as a child and should not be transferred to the Children Court to be tried as an adult. The reasons for this are as follows:-

- a) Children lack maturity and have under developed sense of responsibility leading to recklessness, impulsivity and heedless risk taking. These signature qualities of youth are transient in nature.
- b) Children are more vulnerable to negative influences and outside pressures.
- c) They have limited control over their own environment and lack the ability to extricate themselves from horrific and crime producing settings.
- d) A child's character is not as well formed as an adult's. His traits are less fixed and always amenable to change.
- e) Incurability is generally inconsistent with youth.

The afore cited factors have been drawn from the decision of US Supreme Court rendered in the case of *Miller v Alabama*<sup>12</sup>.

### **Child's ability to understand the consequences of the offence**

The third factor is as regards the child's ability to understand the consequences of offence. More often than not the juvenile may not have the ability to foresee the consequences of his acts/actions. A juvenile may lack psycho-socio maturity though he may be having the mental and physical capacity to

<sup>11</sup> *Mumtaz Ahmed Nasir Khan and Others v State of Maharashtra and Others*, 2019 (4) Bom CR (Cri) 261 (Bombay)

<sup>12</sup> 132 S.Ct 2455 (2012)



commit the offence. Take for instance, a juvenile X is friendly with a minor girl Y and they both run away from home. X may possess the mental and physical capacity to commit the offence of kidnapping but he may lack the ability to understand the consequences of the act.

Take another example, X, a juvenile is in relationship with his classmate Y, a minor girl and they both indulge in consensual sexual intercourse. They may not have ability to understand the consequences of the offence. This factor has to be ascertained from entire gamut of facts and material on record.

#### **Circumstances in which he allegedly committed the offence**

The last factor is the circumstances in which the juvenile allegedly committed the offence. This factor is also significant in transfer hearing and in the given circumstances the Board may decide to retain the child with itself instead of transferring its case to Children Court to be tried as an adult. The circumstances in which the offence has been committed may entitle the child to be retained under the juvenile system instead of being transferred to the Children Court to be tried as an adult. For instance, X, a minor girl is being sexually exploited by Y, for over a period of time. X finding herself trapped murders Y, perceiving no other way to end her exploitation. The circumstances in which the offence was committed may entitle her to be retained before the Board.

#### **CONCLUSION**

It thus transpires that the criteria stipulated in The Juvenile Justice (Care and Protection of Children) Act, 2015 for conducting preliminary assessment of the children in conflict with law between the age brackets of 16 to 18 years apprehended for commission of heinous offences is deficient. The broad norms laid down are vague and introduce subjectivity leaving the fate of such children to objective opinion of Juvenile Justice Boards. Neither the Act nor its accompanying Rules provide any guidance to the Boards/courts. In the absence of objective criteria such children are being arbitrarily transferred to the Children courts by the Juvenile Justice Boards. This results in unfair and arbitrary treatment of similarly situated children violating their fundamental right under Article 14 of the Constitution. In this view of the matter there is an urgent need to lay down objective criteria for conducting preliminary assessment and transfer hearing of such children. It urgently requires legislative and judicial intervention for laying down objective and uniform criteria.