

THE LIMITS OF BLENDED SENTENCING: A MIDWAY APPROACH TO JUVENILE REFORM

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Abstract

Recidivism among juveniles remains a critical challenge in the Indian juvenile justice system, raising concerns about the effectiveness of current rehabilitation strategies. The Juvenile Justice (Care and Protection of Children) Act, 2015, introduced a blended sentencing model aimed at balancing deterrence and rehabilitation. However, empirical evidence suggests that the act has not successfully curbed juvenile recidivism, with data indicating higher rates post-2015 than before. This paper critically examines the shortcomings of the preliminary assessment mechanism under Section 15 of the Act, highlighting its arbitrary standards, lack of mandatory psychological evaluation, and potential constitutional inconsistencies.

The study argues that the deterrence-centric approach of the 2015 Act contradicts the core rehabilitative philosophy of juvenile justice. The practice of transferring juveniles to adult courts and correctional facilities often exacerbates criminal tendencies instead of reforming offenders. Through an analysis of global best practices, particularly the risk assessment model used in the U.S., this paper advocates for a shift from a rigid sentencing framework to an indeterminate sentencing system. Such a model, tailored to individual rehabilitation needs, allows for periodic review and ensures juveniles are released only when they have demonstrated sufficient reformatory progress.

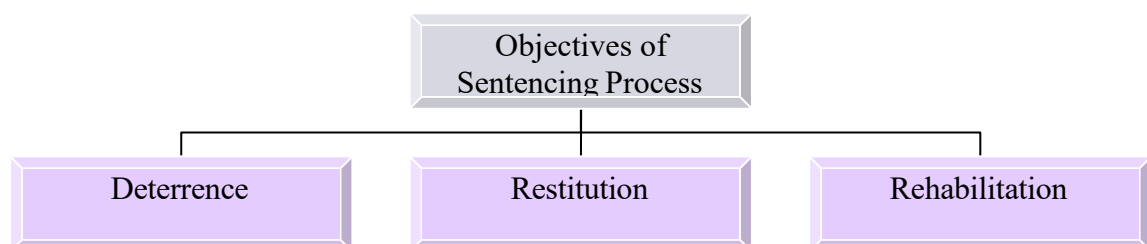
Additionally, the paper underscores the importance of diversion and

early intervention strategies, including community-based rehabilitation, probation, and individualized care plans, as alternatives to institutional confinement. By adopting a restorative model that balances both deterrence and rehabilitation, this study proposes a “midway approach” that can enhance reintegration outcomes while reducing recidivism rates among juveniles. The findings emphasize the necessity of policy reforms that align with the constitutional principles of fairness, equality, and child welfare.

Key words: *Juvenile Recidivism, Juvenile Justice System, Blended Sentencing, Rehabilitation and Reform, Restorative Justice.*

I. INTRODUCTION

Sentencing of the offender is the ultimate test as to whether justice has been done or not. Justice here signifies justice not only for the victim but justice for the offender, society as well as the offender and victim’s family. The philosophy behind sentencing is based on the fulfillment of triple objective, that are: deterrence, restitution and rehabilitation. The deterrence objective is that, the sentence must be deterrent enough to serve as a sufficient fear. This fears incapacities reoffending. Restitution objective is to make good to the loss or harm suffered by the victim.¹ In Indian Juvenile Justice System, rehabilitation is the primary objective. The aim is to rehabilitate and reintegrate the juvenile offender as a law abiding citizen.



¹ N. V. Paranjape, *Criminology and Penology* 143 (Central Law Publications, 2017).

The philosophy behind sentencing has experienced a great shift since the ancient time. In ancient time, the focus was on the offence and not the offender. Each offence had a set of prescribed punishment and that punishment was awarded to whosoever committed that particular offence. There was no reference to the age, gender, or the rehabilitative motive. However, now the situation has changed. Now the focus has shifted, especially in cases of juvenile offender, from offence to the offender. Now rehabilitative motive is the primary consideration. The selection of the nature and the quantum of the sentence is based on objective of rehabilitation.²

Recidivism is one of the greatest challenge to the juvenile justice system as the instance of recidivism signify the failure of the Juvenile justice system to rehabilitate the juvenile. The 2015 JJ act follow a blended sentencing model. But, the crime statistics of last 5 years shows that the act has greatly failed to addressed the problem of juvenile recidivism. The rate of recidivism after the passing of the 2015 act is much higher than it was before it. Though the recidivism rates were lower before 2015, the 2000 JJ act sentencing policy where a maximum that could be given was only 3 years sentence is also problematic and lacks deterrence as evidenced by the 2012 Nirbhaya case. Thus, a midway approach is required to be incorporated. The present study first analyse the concept of preliminary assessment and blended sentencing policy as followed by the Juvenile Justice (care and protection of children) act , 2015 and its drawbacks before proceeding to explore the alternates.

² Harry Willbach, What Constitutes Recidivism, *Nw. U. Sch. L. J. Crim. L. & Criminology*, <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=3120&context=jclc>.

II. UNDERSTANDING THE CONCEPT OF PRELIMINARY ASSESSMENT

A fundamental change in the Indian juvenile justice jurisprudence is brought in by the Juvenile Justice (care and protection of children) Act, 2015 which has by dividing offences into three categories i.e. petty, serious and heinous crime depending on the amount of punishment, has introduced the possibility of trying children between the age group of 16-18 alleged of committing heinous crime as an adult. The main provision dealing with it is section 15.

This section allow trial of a child falling under the age group of 16-18 as an adult if he is alleged of committing a heinous crime. The power to make such decision is entrusted on Juvenile justice board, who while conducting such assessment “may” take assistance of “*experienced psychologists or psycho-social workers or other experts*”³

A. THE PROCEDURE TO BE FOLLOWED

The board which determine the age of the child according to the determination procedure as mentioned in section 94 and such inquiry shall be conducted within 15 days from the days of first production of the child before the board. If the result indicate that the child doesn’t fall under the said age group than the procedure ends and there is no next to proceed to the next step but if result indicate that the child does fall under the said age group of 16-8 years that the board will proceed towards the second step i.e. determining the category of offence alleged. Only if the dual pre-requirements as to age and the category of offence are satisfied, the board will proceed to conduct the preliminary assessment.

³ Juvenile Justice (Care and Protection of Children) Act, 2015, § 15, No. 2, Acts of Parliament, 2016 (India).

The assessment is extensive character and psychological to determine the maturity of the child. For determining it, the board analyses 4 things. That are;

- Mental capacity;
- Physical capacity;
- Ability to understand the consequences of the offence and;
- Circumstance in which alleged crime was committed

For the assessment the board ‘may’ also take the assistance of “*experienced psychologists or psycho-social workers or other experts*”. On the analysis of these 4 criteria, the Board make a final decision as to whether the said child should or shouldn’t be given the benefit of beneficial treatment of being tried as an child under the juvenile justice system.

If the decision of the board is that the child should be tried as adult then u/s 18(3) Board “*may order transfer of the trial of the case to the Children’s Court having jurisdiction to try such offences*”⁴. This decision is appealable under section 101(2), and appeal lies before the court of sessions. Court of session ‘may’ also take the assistance of “*experienced psychologists and medical specialist*”⁵ while determining the appeal.

B. TRIAL BY CHILDREN COURT/SESSION COURT

The role of the Juvenile Justice Board is limited up-to only this determination, once the decision that the child should be tried as adult is made and the child is transferred to the children court than the further

⁴ Juvenile Justice (Care and Protection of Children) Act, 2015, § 18(3), No. 2, Acts of Parliament, 2016 (India).

⁵ Juvenile Justice (Care and Protection of Children) Act, 2015, § 101(2), No. 2, Acts of Parliament, 2016 (India)

power to make decisions regarding that child is assumed by the children court. Section 19 dealing with the power of children court.

After the receipt of the child in conflict with law from the Board, the Children court have two options. It could either decide that the such children should be tried as an adult or it could decide the he/she should not be tried as an adult. If the children court decide that there is no requirement of trying the child as an adult then than the court doesn't have to transfer back the child to the JJB rather it itself may hold the inquiry and decision in accordance to section 18.

But if the Children court decide that the case is such that the child should be tried as an adult that the court is required to conduct the trial in according to the provisions of CrPC and while conducting such trial the court should ensure the special needs of the child is addressed and a child friendly environment is maintained. The court can pass any order it deem fit, however this power is subject to the provision of section 21 which provide that even when the child is tried as an adult, still death penalty and life imprisonment without the possibility of release could not be imposed plus the final order shall also include an individual care plan for the child.

After the decision of the children court the child is send to place of safety where he remain will the age of 21 years, after which he may be sent to jail. Section 19(3) requires that during the stay at the place of safety the child should be subjected to reformative services. After completion of 21 years, the children court prepares a follow up report "*to evaluate if such child has undergone reformative changes and if the child can be a contributing member of the society*⁶", and decide whether to release the child or transfer him to jail.

⁶ Juvenile Justice (Care and Protection of Children) Act, 2015, § 20, No. 2, Acts of Parliament, 2016 (India).

C. CRITICAL ANALYSIS OF THE CONCEPT

The main justification extended for introducing the possibility of trying 16-18 group juvenile as adults that its “strike a balance” between the rights of the child and the rights of the victim. But in reality such a practice is instead increasing the imbalance rather than reducing it. The concept of preliminary assessment is depended on various arbitrary standards and full of loopholes and contradictions, thus, doing more harm than it prevents. Various loopholes and short comings in the concept are examined below

1.NO MANDATORY PRESENCE OF PSYCHOLOGIST

Section 15(1) proviso provides that while conducting the preliminary assessment the Juvenile Justice Board(JJB) “*may take the assistance of experienced psychologists or psycho-social workers or other experts*”⁷. As the word used is “may”, the JJB is not mandatorily required to take the assistance of these experts and is fully empowered under the act to make the assessment by itself even without such expert assistance. But are the JJB member really qualified to make such assessment without any expert assistance? A look at the composition of the JJB could answer this question. Section 4 deals with the composition of the JJB. It provides that the Board should be consisted of 3 members; one magistrate[should be either a metropolitan magistrate or judicial magistrate of first class with atleast 3 year experience⁸] and two social workers. One of the 3 members must be women. Section 4(3) lay down the qualification of social workers and provide that “*No social worker shall be appointed as a member of the Board unless such person has been actively involved in health, education,*

⁷ Juvenile Justice (Care and Protection of Children) Act, 2015, § 15(1) proviso, No. 2, Acts of Parliament, 2016 (India).

⁸ Juvenile Justice (Care and Protection of Children) Act, 2015, § 4(2), No. 2, Acts of Parliament, 2016 (India).

*or welfare activities pertaining to children for atleast seven years or a practicing professional with a degree in child psychology, psychiatry, sociology or law*⁹". Thus a degree in psychology or psychiatry is one of the various options of the degree that the social worker could possess, as "The operative word used in subsection (3) of section 4 is 'or'. This means that the social workers in the board need not compulsorily be a practicing professional with a degree in child psychology or psychiatry"¹⁰ And it's perfectly valid that in JJB bench, neither of the 3 members possess a degree in psychology or psychiatry. Now if such a JJB bench is making an preliminary assessment without the assistance of any expert then could the result reached be said to be reliable enough to make the future of a child depended on it?

Mind of a person is the most complicated thing. Even psychologist or psychiatrist could not be said to make an error free assessment of it. Thus, "*Evaluation of mental capacity is a complex process which cannot be done accurately by the JJB even with the help of experienced psychologists*"¹¹. Then could the member of the Board who are not even professionally qualified for the same be said to be in a position to reach a correct assessment having credible results. Would it be fair to make the future of a child depended on such assessment?

2. ARBITRARY STANDARDS

Under the JJ act 2015 the age group 16-18 could be subject to trial as an adult but provides no reasonable basis for making just determination. If

⁹ Juvenile Justice (Care and Protection of Children) Act, 2015, § 4(3), No. 2, Acts of Parliament, 2016 (India)..

¹⁰ Abhinav Benjamin & Ananth Kamath, *Juvenile Injustice: A Critique on the Constitutionality of Deeming 16-18 Year Old Juveniles as Adults under the Juvenile Justice (Care and Protection of Children) Act, 2015*, 8 CNLU L.J. 182 (2018-19).

¹¹ Shreya Mahajan, How Do Juvenile Justice Boards Decide The Fate Of 16-18 Year Olds? Preliminary Assessment Under Section 15 Of The Juvenile Justice (Care And Protection) Of Children Act, 2015, ILI Law Review Summer Issue 2020.

one argue that the age of person should not be used as a blanket defence when the person is otherwise ‘fully mature’ as an adult then why is the lower limit for such liability set as 16. There are many children below even below the age of 16 years that could have the same or even more level of maturity then a person in age group of 16-18, then why are they allowed to use their age as a blanket defence against prosecution as an adult. Thus such classification lacks “rational nexus”. In *State Of West Bengal v. Anwar Ali Sarkar*¹², it was held that classification lacking a ‘rational nexus’ is a violative of Article 14.

Also as discussed above the act gives the board arbitrary powers to JJB to conduct preliminary assessment without the assistance of a psychologist or psychiatrist. And even if assistance of psychologist or psychiatrist taken, the opinion is not binding on the board. Also neither the JJ act nor the JJ rules clarify the required qualification for them. The section just use the word “experienced” and not explain who would constituted as a experienced psychologist or psychiatrist. It doesn’t prescribe the required qualification and year of experienced that need to be qualified. Furthermore, “maturity” is itself an arbitrary notion. 2015 act or the 2016 model rules doesn’t define what exactly does maturity mean and what are its indicators, etc. thus this make it vulnerable to corruption by biased interpretation by bringing in the elements of subjectivity.

If a child tried as adult is found guilty and is send to place of safety till completion of age of 21 years. U/s 20 the children court is empowered to conduct a “second evaluation” after completion of 21 years, “*to evaluate if such child has undergone reformatory changes and if the child can be a*

¹² State of W. Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75 (India)

*contributing member of the society*¹³". The JJ act or rules nowhere provide the criteria for making such determination and provide wide discretion to the court. Thus, *"This inquiry is highly subjective, and prone to arbitrariness, thereby falling foul of Article 14.60 Further, it could lead to involuntary targeting of children from weaker socio-economic backgrounds, who may not be deemed contributing members of society"*¹⁴".

3.ADULTS FOR LIABILITY BUT NOT FOR RIGHTS

A person below the age of 18 years can't vote or get a driving licence in any case but he could be tried as an adult and be subjected to any punishment that could be given to an adult offender[except death sentence and life imprisonment without possibility of release¹⁵]. Is this actually fair that a person falling in the age group of 16-18 will always be an minor when socio-political rights are to be given but he/she will assume the role of an adult when liability is to be imposed. When "political maturity" of a person is not considered when decision as to his access to right to vote is made then why maturity is judged when deciding criminal liability.

4. VIOLATION OF ARTICLE 14,15(3), PRINCIPLE OF FAIR TRIAL, PRESUMPTION OF INNOCENCE, FRESH STAR

Section 15 violated Article 14 as the differentiation of child in age group of 16-18 could not be said to be based on "intelligible differentia", rather the classification is arbitrary and discriminating as discussed above. It creates a situation where two juveniles charged with same offence could be dealt differently and be given different punishment. For example in the

¹³ Juvenile Justice (Care and Protection of Children) Act, 2015, § 20, No. 2, Acts of Parliament, 2016 (India).

¹⁴ Gauri Pillai & Shrikrishna Upadhyay, *Juvenile Maturity and Heinous Crimes: A Re-Look at Juvenile Justice Policy in India*, 10(1) *Nat'l L. Sch. India Rev.* (2017).

¹⁵ Juvenile Justice (Care and Protection of Children) Act, 2015, § 21, No. 2, Acts of Parliament, 2016 (India).

case *Mumtaz Ahmed Nasir Khan v/s. The State of Maharashtra*¹⁶, two boys [one aged 17 and half and other aged 16 and half] jointly committed murder of a child. The JJB subjected both the juveniles to preliminary assessment and decided that juvenile aged 17 and half would be tried as an adult and juvenile aged 16 and half one will be dealt as child. Can subjecting one juvenile to beneficial measure and denying the other such benefit when both committed the same crime together be said to be equality?

Article 15(3) allows the legislature to make special provisions for the benefit of children. The JJ act based on this article, provides separate special provisions for trial of children, thus save them from being prosecuted under adult criminal justice system. Section 15 of JJ act 2015 dealing with preliminary assessment is in conflict with the whole purpose of the act as “*The purpose of the Act of 2015 is to ensure that children who come in conflict with law are dealt with separately and not like adults*”¹⁷.

Section 19(1)(i) require that the children court while conducting trial should consider “the special needs of the child” and “maintain a child friendly atmosphere”. But in most distort there is no children court set up. Thus such inquiry are conducted by the court of session in place of the children court. The session court, who are already burdened, couldn’t be expected to go extra miles to ensure child friendly atmosphere. And neither are the officials of such court specially trained to understand and address the special needs of the children. The 2015 act has transformed the juvenile court “*from a general rehabilitative social welfare institution into a second*

¹⁶ Mumtaz Ahmed Nasir Khan v. State of Maharashtra, Crim. App. No. 1153 of 2018 (Bombay HC).

¹⁷ Shilpa Mittal v. State of NCT of Delhi, (2020) 2 SCC 787 (India)..

*class criminal court for the juveniles*¹⁸”.

Also section 15 is against the principle of innocence which is one of the most cardinal principle of fair trial. Preliminary assessment is conducted even before determination of guilt and innocence. Thus a decision that the maturity of the child is such he should be tried as an adult, somewhat indicate or point towards the guilt of the child even before actual determination on the merits of the case is done. Also as according to section 15 preliminary assessment is not a trial “therefore is not a detailed, careful and in-depth analysis of the case¹⁹.” Thus, “*preliminary assessment of the Board proceeds on the assumption that the alleged offence has been committed, and is thus a sentencing decision before guilt is established*²⁰”.

Trial of children as an adult is also against the principle of fresh start and “*violate the principle of right to privacy and confidentiality* ²¹ ”. The principle of fresh start as mentioned u/s 3 of the JJ act 2015 provides that all the past records of the child under juvenile justice system should be deleted except in special circumstance to ensure that the child could leave his criminal past behind and make a fresh start in life. A child tried as adult and later transferred to jail u/s 20, moves out of the juvenile justice system thus he will carry his criminal past all through his life and this stigma attached will always be a hindrance in his reintegration back to the society.

5. CLASSIFICATION OF THE OFFENCE ITSELF FAULTY

One innovative feature of the 2015 JJ act is the classification of offences. The act classifies offences into three categories based upon the punishment

¹⁸ Shreya Mahajan, supra note 11.

¹⁹ Ibid.

²⁰ Juvenile Justice (Care and Protection of Children) Act, 2015, § 20, No. 2, Acts of Parliament, 2016 (India).

²¹ Abhinav Benjamin & Ananth Kamath, supra note 10.

of the crime. Offences punishable with maximum 3 year of punishment are petty offences, offences punishable with a minimum 3 year and a maximum of 7 year are serious offences and the offences that are punishable

Offences classified

Petty offences
Section 2(44)

Serious offences
Section 2(54)

Heinous offences
Section 2(33)

with minimum sentence of 7 years are heinous offences. But the act fails to classify a 4th category of offences for those there is no minimum sentence or the minimum sentence is less than 7 year but the maximum sentence is more than 7 year. Thus, these offence are falling somewhere between the serious and heinous offences and not totally in any of the 3 category. Thus, a void was created and the act itself was leading to a lot of confusions. Which were resolve only recently by the supreme court in the case ***Shilpa Mittal v. State of NCT of New Delhi*** ²², where the court recognised that a gap has been left by the legislature. The bench held that the void should be filled an interpretation in favour of the children as “*the purpose of the Act of 2015 is to ensure that children who come in conflict with law are dealt with separately and not like adults*” ²³ thus such 4th category of offences should be deal as serious offences rather than heinous one. Same view was given legislative approval by implementation of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2021.

Thus, apart from other loopholes in the concept, the categorization on which the preliminary assessment is depended is itself faulty. Even if the new clarified position is followed, the results generated couldn't be said to be fully satisfactory. As now a child charged u/s 109 BNS[earlier 307 IPC] i.e attempt to murder could not be tried as adult as sec 109 BNS having no

²² Shilpa Mittal v. State of NCT of Delhi, supra note 17.

²³Shilpa Mittal v. State of NCT of Delhi, supra note 17, para 30.

minimum punishment but only a maximum punishment of 10 years would be a serious offence thus outside the scope of section 15 of JJ act 2015. But, offences like purchase/production of commercial quantity of NDPS that is punishable with minimum 10 year rigorous imprisonment under NDPS act will be dealt as a heinous crime thus having the possibility of trying the child as an adult. Is dealing in narcotic substances actually a graver offence than attempt to murder?

Thus, trying a child as an adult based upon the result of preliminary assessment which is, as discussed above in detail, a concept full of various loopholes and errors must be avoided. As faulty assessment could adversely effect the future of a child and increase the rate of recidivism. Instead other alternate should be searched as trial of a child as adult could never be said to yield positive results. As correctly noted by Bombay High Court in *Mohamed Huzaiifa Javed Ahmed vs. The State Of Maharashtra*²⁴ by trying children as adult “*merely on the premise that the offence is heinous and that it lends to the societal volatility of indignation, we are bracing for juvenile recidivism.*”

III.. “GET TOUGH” APPROACH: BLENDED SENTENCING

The 2015 JJ act provides a “blended sentencing” model for juvenile in 16-18 age groups who are found to have committed heinous crime and after conducting preliminary assessment, a decision has been taken to try them as an adult. Such juveniles are detained in the place of safety till they attain the age of 21 years and after that decision regarding their transfer to adult jails is made. After juvenile tried as an adult completes the age of 21 years, children court u/s 20 evaluate whether he has undergone sufficient reformatory changes so as to become a “contributing member of the

²⁴ Mohamed Huzaiifa Javed Ahmed vs. The State Of Maharashtra (CRIMINAL APPEAL NO. 1153 of 2018, Bombay High Court)

society”. If the results are positive, he/she is released otherwise he is sent to the adult prison for completing the remaining period of the sentence. Thus a juvenile in such a setup spends certain part of his sentence in place of safety [that comes under Juvenile justice system] and remaining part of the sentence in jail[that comes under criminal justice system]. Thus, a kind of blend of two justice system is made.

This blended sentencing model was introduced by the 2015 Act for discarding the 2000 Act sentencing model. Under 2000 Act sentencing model, the maximum sentence that could be given is just for 3 years. Such sentencing model was criticised for being too lenient, especially after 2012 Nirbhaya case which caused a public outcry for demanding stricter measures. To satisfy this demand, 2015 act incorporated blended sentencing model u/s 20 with the objective of increasing deterrence. To establish that though the act follow an deterrent approach, it has not yet abandoned its rehabilitative objective, the act don't make transfer to adult jails, after the expiry of 21 year age, suo moto applicable rather gave the juvenile another chance to redeem himself by giving children court power to make evaluation of child to see whether he has become a contributing member to a society or not. But this was rather a haste and not properly analysed decision as, in the absence of prescription the JJ act or rules of any criteria or parameter to make the determination, such evaluations are highly subjective and arbitrary. Making the decision, as to transfer of juvenile to jail, depended on such a subjective and arbitrary standard is not only unjustified and discriminatory but also against the rehabilitative motive of the juvenile justice system. Also empirical studies conducted by various researchers have provided evidence that the transfer of juvenile to jails have negative influence on the rehabilitation of the juvenile and increase the rates of recidivism. Thus defeat the whole purpose of the act.

The rehabilitative changes achieved in the juvenile during his period of stay in the place of safety, slowly erode once he is transferred to jails and some in contact with hardened criminals.

A 1996 study by Podkopacz and Feld²⁵, found that the recidivism rate of adolescents transferred to adult courts was higher than that of adolescents who remained in the juvenile Justice system. Similarly another 1997 study titled “*The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long Term*” by Lawrence Winner found that juvenile transferred to criminal justice system were rearrested more quickly and more times for other crimes after release than the average.

If the blended model is so defective, should be move back to the sentencing model that was provided in the JJ act of 2000? No, 2000 act sentencing model is also not the correct solution as it lacks deterrence. As evidenced by 2012 Nirbhaya rape case, maximum sentence of 3 years could not be said to be adequate for all cases. In certain cases the crimes are so grave and the rehabilitative needs of the juvenile are so vast and varied that they could not be met in span of 3 year and a detention beyond such period is required. But, the 2000 act provides no provision for such extended detention. Under it the juvenile had to be released after 3 year, whether he has under gone sufficient reformation or not.

Now if both the models have drawbacks than which other alternative model to be followed?

IV. THE MIDWAY APPROACH

The 2000 JJ act followed a rehabilitative approach where the maximum punishment in any case could only be 3 years. The 2015 JJ act, considering

²⁵ Marcy Rasmussen Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86(2) J. Crim. L. & Criminology 449 (1996).

the increasing rate of heinous crimes by the juveniles, abandoned the traditional rehabilitative approach in favour of a deterrent “get tough” approach towards the juveniles to increase “offender accountability and deterrence”. But the crime statistics of last 5 years show that such approach is not yielding any positive results. Rather it is leading to more problems than it solves. So if both the two extremes are not cultivating positive results, there is need find a middle ground that could better address the issue. Thus a midway approach could be the restorative model that balance the deterrence and rehabilitative needs and work towards restoring and reintegrating the juveniles back to the society as a law abiding citizen.

What changes are required to be done to shift to the restorative model from the current deterrent model?

A. INDETERMINATE SENTENCING IN PLACE OF DETERMINATE SENTENCING

In both, 2000 Act and 2015 act, determinate sentencing framework is followed. That is, the sentence is predetermined by the JJB/Children court as the case may be and is not depended on the amount of rehabilitative change achieved in the juvenile. Under 2000 act, once a sentence is passed the juvenile is not released before its completion and can't be detained further after its completion. For example, If a sentence of 2 years is passed then the juvenile has to complete 2 years in the observation homes and couldn't be released before it, even though he has been rehabilitated before such completion. Similarly, he could not be detained further 2 years even if progress of the juvenile is negative and more time in detention is required for his rehabilitation. Thus, the term of the sentence is “mandatory” and “predetermined”. Similarly under 2015 act if a child is tried as an adult and then committed to the place of safety then he is supposed to stay in there only still the age of 21 and could not be released before it. only after the

completion of 21 year age , is the evaluation of the progress of the juvenile is made by the children court and as disused in previous chapter, such evolutions are “highly subjective” and “arbitrary”.

Instead of this predetermined blended sentencing model for children committing heinous crime, indeterminate sentencing model should be applied. Under the indeterminate sentencing model, the children committing heinous crime would be subjected to an “open ended” sentence without any fixed term. Here the juvenile would be subjected to continuous assessment to ascertain his progress. On such periodic assessment, changes could be made to the Individual care plan of the child according to the changed rehabilitative needs of the child. Here the Individual care plan will also be periodically revised to correspond to the special needs of the juveniles, thus improving the scope of rehabilitation and reducing the potential recidivism. The sole focus in such model will be on achieving rehabilitation. Under such model the juvenile will be released only when he is rehabilitated and shows the required positive changes. Hence, “*an indeterminate sentence seeks to release the juvenile offender only when he is rehabilitated, in contrast to a determinate sentence which prescribes a mandatory fixed period for a crime, irrespective of reformation*²⁶”. In 1977 itself, in **Hiralal Mallick v. State of Bihar**²⁷, Supreme court has said that it’s high time that the reformatory nature of the sentencing be emphasised on. The sentencing should have features like “*flexibly, humanity, restoration and periodic review*²⁸.”

Indeterminate sentencing model emphasise on “treatment” rather than on punishment. The stay of the juvenile in the juvenile home is seen as a

²⁶ Gerald R. Wheeler, *Juvenile Sentencing and Public Policy: Beyond Counterdeterrence*, 4(1) Policy Analysis 35 (1978).

²⁷ Hiralal Mallick v. State of Bihar, (1977) 4 SCC 44 (India).

²⁸ Ibid, para 26.

treatment. As soon as the treatment [of criminal tendencies] is complete and the juvenile is cured [of potential criminality and recidivism] he is released. Unlike determinate sentencing that look at the past crime, the determinate sentencing looks at the future potential of the juvenile and “*emphasises on the mental health and future welfare of an individual, rather than on the act committed*”²⁹ . Here there is no “time-bound program” of reformation, rather flexibility is provided so that each child could reform at his one pace. Indeterminate sentencing “*not only minimises the chances of excessive confinement, but also ensures public safety by protecting the society from the release of offenders with recidivistic tendencies before such tendencies have been modified*”³⁰ .In **Graham v. Florida**³¹ , US court has recognised that children have “*a unique potential for rehabilitation*”. Thus indeterminate sentencing could prove to be a positive step towards it.

In determinate sentencing model, the juveniles are not very eager to work for their own reformation as they know that positive changes or not, they are bound to stay in the facility for the decided period. But Indeterminate sentencing work as an incentive for the juvenile to reform. Here the juvenile himself actively contribute for his reformation knowing the same could help his release earlier. Thus, now juvenile play an active role in his reformation “*motivated by the knowledge that alterations in behaviour and reduction in recidivist tendencies would prompt faster release*”³².

It should be noted here that under the indeterminate sentencing model the whole sentence is to be completed in the place of safety itself without any

²⁹ Abhinav Benjamin & Ananth Kamath, supra note 10.

³⁰ Use of the Indeterminate Sentence in Crime Prevention and Rehabilitation, 7(2) Duke L.J. 65 (1958)

³¹ Graham v. Florida, 560 U.S. 48 (2010).

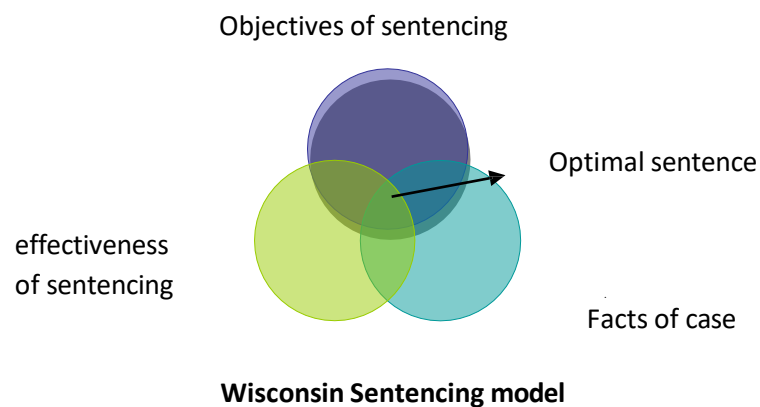
³² Jeffrey E. Butler, *A Study on the Issue of Indeterminate Sentencing Versus Determinate Sentencing*, 30 Juv. & Fam. Ct. J. 43 (1979).

transfer to the adult jails. As discussed above, sending transferring juvenile to jails have criminogenic effects. Thus, the restorative model works on the principle of total separation of juveniles from adults, whether it be for trial or for housing. A juveniles is no case is to be mingled with the adults offenders. If the situation is so the juvenile has completed the age of 21 years and the progress of the juvenile under the indeterminate sentencing model is such that still he could not be released then in such a case he should be continued to be detained in the place of safety itself though in a separate part.

Under determinate sentencing model, the staff of the juvenile homes assume a very important role. They are supposed to monitor the progress of the juvenile and report it to the JJB, who would conduct the periodic assessment to decide about the release of the child. Staff should received proper training to prepare such progress reports. The juvenile should be given regular counselling by a qualified psychologist or physiatrist with atleast 5 year prior experience of dealing with children. If possible, the same psychologist or physiatrist shall evaluate the child all through the process of his reformation. The reports of such counselling along with the progress reports submitted by the juvenile home staff shall be considered by the JJB while making the determination.

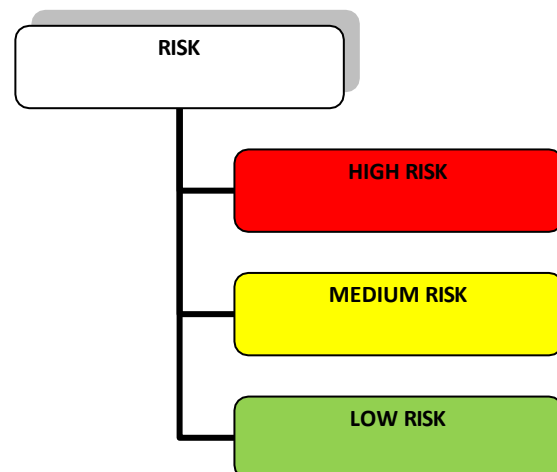
Indeterminate sentencing is better suited for dealing with child in conflict with law /juveniles committing serious or heinous crime. The child in conflict with law committing petty crime should be diverted to probation or admonition instead of detention. Only rarely, when the same is in the best interest of the juvenile, should juvenile committing petty crime should be detained in any institutional facility. In such a cases some initial sentence could be imposed though the same could be later reduced and increased according to the rehabilitative requirements and the progress of

the juvenile. How to decide this initial sentence? For this a reference could be made to Wisconsin Sentencing model. This model provides that judges are supposed to follow a three point analysis to find the “optimal sentence”. The three element to be analysed are: first is the ‘objective of sentencing’, second is ‘facts of case’ and last is the ‘effectiveness of sentencing options’. The at the point of intersection of all these element we get, what is called “the optimal sentence”³³



B. RISK ASSESSMENT AS AN ALTERNATIVE TO PRELIMINARY ASSESSMENT

As discussed earlier, the preliminary assessment method provided u/s 15 of JJ act 2015 is arbitrary, subjective, full of loopholes and constitutionally ultravires, thus should be discarded. Now if not this method, then what other method could be alternatively employed?



³³ Sentencing Commission Findings Underscore the Need to Work Toward Equal Treatment of All Wisconsin Residents, *Wisconsin Lawyer*, <https://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=80&Issue=9&ArticleID=1359>.

Risk assessment tool as used by the US juvenile justice system seems a much better option than the preliminary assessment method. Risk assessment method as the name suggests, estimated the risk.

Risk of what? It estimates Risk of continued delinquency in the juvenile if no intervention is made. Based on this risk of reoffending or recidivism, it classifies the juveniles into three categories that are: juvenile at high risk of reoffending, juvenile at moderate risk of reoffending and juvenile at low risk of reoffending. Risk assessment guide the intervention plan by pointing out which areas may be the prime targets for intervention to reduce the likelihood that adolescents will commit crimes again.

Based on what factors such assessment is made? Risk assessment tool make assessment based on factors like age of juvenile when first offense committed, history of violence, history of supervision failure, parental involvement, substance abuse, deviant peer relations, neighbourhood criminality etc.

Based on these factors the risk assessment tool make an assessment two things: the likelihood of the juvenile reoffending if no intervention is introduced and second is the seriousness of the harm that would occur if the juvenile reoffend. Seriousness of the harm is understood in relation to the type of crime committed, for example murder cause more serious harm to the society than forgery of a document. Based on assessment these two things, juvenile are

		Severity/Consequence		
		Slightly harmful (1)	Harmful (2)	Extremely harmful (3)
Likelihood	Highly unlikely (1)	Trivial risk (Score 1)	Tolerable risk (Score 2)	Moderate risk (Score 3)
	Unlikely (2)	Tolerable risk (Score 2)	Moderate risk (Score 4)	Substantial risk (Score 6)
	Likely (3)	Moderate risk (Score 3)	Substantial risk (Score 6)	Intolerable risk (Score 9)

categorised into three categories, such could be sub-divided into further subcategories, for example law risk could be further divided in trivial risk and tolerable risk. Based on this a scale of risk could be made. This position of the juvenile in such scale of risk could guide the intervention plan by pointing out which areas may be the prime targets for intervention. Juvenile at low risk are very less likelihood to reoffend, thus instead of detention, probation or admonition is a better option. Similarly the juvenile at high risk of reoffending require high level of intervention though comprehensive plan for institutional care, counselling, etc.

Why is risk assessment a better option than preliminary assessment? Risk assessment is a better alternative than preliminary assessment as

- Risk assessment unlike preliminary assessment is objective and not subjective. Preliminary assessment evaluates criteria like physical capacity, mental capacity, etc, which are vulnerable to corruption by subjective interpretation. Risk assessment on the other hand evaluates criteria like past criminal record, seriousness of crime committed etc. Such criteria, unlike physical or mental maturity of a person, are very objective. Thus risk assessment is objective and free for arbitrariness
- The result of preliminary assessment is that it creates a possibility of a juvenile being tried as an adult. If the decision of the preliminary assessment is such that the juveniles should be tried as an adult, this somewhat put a negative connotation regarding his potential of being reformed. In risk assessment on the other hand, even if the juvenile is found to be at high risk, no negative connotation regarding his potential of reformation is placed. Risk assessment recognised that juveniles are “not not

chronic offenders, most youths' behaviours can be changed, and most youths' risk levels can be reduced".

Thus, Risk assessment is a better alternative than preliminary assessment. It should be noted that as risk assessment involves an "comprehensive in-depth evaluation", it requires specialized training for staff and other personnel.

V. EARLY INTERVENTION AND DIVERSION

Sometimes processing a juvenile through Juvenile Justice System could do more harm to the him then good. Thus, the better solution would be to use a range of intervention and diversion techniques as alternatives to trial/inquiry to treat a juvenile, especially in cases when the juvenile is accused of a minor violation/crime and is a first time offender. This diversion could be pre-adjudication [when diversion at any stage of proceeding before final adjudication] or post-adjudication[when diversion is made after the conclusion of the trial/inquiry]. Admonition and probation are the best example of post adjudication diversion. Here though the juvenile is held guilty, no sentence is imposed on him or even if imposed its enforcement is suspended. Such diversion prove to be a better incentive for the juvenile to discard his criminal ways and live as a law abiding citizen. By diversion or intervention, the juvenile is saved from stigmatization. Here, instead of being placed in a institutional setup where the child could came in negative association of the other juveniles, he is place in the safe environment of his own house and made to undergo reformation there only. Many studies shows that diversion in place of incarceration greatly reduce recidivism rate. Mark R. Pogrebin and Paul B. Stretesky in their article "*Rejection, Humiliation, and Parole: A Study of*

*Parolees' Perspectives*³⁴ ” has discussed the negative effects of incarnation/detention with the help of empirical data that shows a reduced rate in recidivism in the offenders that are subjected to diversion or intervention.

It should be noted that diversion doesn't mean non reformation even though a diverted juvenile is not placed in a institutional placement, he still could be subjected to reformatory facilities and processes like de-addiction program, counselling etc. thus, a diverted juvenile is subjected a “family and community based treatment”. Scott W Henggeler in his study “*Multisystemic Therapy: Clinical Foundations and Research Outcomes*” found that institutional placement of juvenile increases recidivism rates. He instead adverted for a home based model where juvenile is subjected to Multisystemic Therapy that is an “intensive family and community based treatment”. According to him, Multisystemic therapy “*address known risk factors (i.e., at individual, family, peer, school, and community levels) strategically and comprehensively*”³⁵ and in a better way than incarceration and detention in institutional facilities.

In India, if a child is found to be in conflict with law then u/s 18 JJ act 2015, JJB is empowered to order the child to participate in group counselling, perform community services, attend school, undergo de-addiction program, attend school, vocation training , therapeutic centre, etc, instead of ordering institutional placement. Though the act provides various diversion options, the experience past the years has been that the JJB are

³⁴ Mark R. Pogrebin & Paul B. Stretesky, *Rejection, Humiliation, and Parole: A Study of Parolees' Perspectives*, *Symbolic Interaction* (June 30, 2015), <https://doi.org/10.1002/symb.164>.

³⁵ Scott W. Henggeler, *Multisystemic Therapy: Clinical Foundations and Research Outcomes*, 21(2) *Psychosocial Intervention* 181 (2012), <https://doi.org/10.5093/in2012a12>.

more inclined towards putting the juvenile in detention/institutional placement rather than utilising diversion options. Perhaps, this is one of many reasons why juvenile recidivism rate in India is increasing every year

VI. CONCLUSION AND SUGGESTIONS

The prime objective of the juvenile justice system is reformation and rehabilitation of the young offender as a law abiding citizen. Instance of recidivism in child in conflict with law points towards the failure of the juvenile justice system to achieve this objective. One of the main reason of passing the JJ Act 2015, overruling the earlier 2000 act was to check the rate of recidivism. But NRCB data of the past some years shows that the 2015 act has greatly failed to achieve this objective, the recidivism rates after the passing of the 2015 act are much higher than that they were before it.

For instance, if the NCRB data of the state of Delhi is seen, in 2015 the number of juveniles apprehended in Delhi under IPC & SLL crime was 3039, out of which 243 juveniles had past record of conviction. That is, the rate of recidivism among juveniles in Delhi in the year 2015 was 7.99%. In 2019, the total number of juveniles apprehended under IPC & SLL crime was 3256, out of which 697 were convicted in past as well. That is, the rate of recidivism among juveniles in Delhi increased to 21.4% in 2019. Similar is the status in the recent 2020 and 2021 NCRB reports. This drastic rise in the rate brings to light the issue of increasing instances of recidivism among juveniles.

Recidivism contributes to a significant portion of these ever-rising crime rate. These recidivists points towards the inefficiency of the justice system and indicate the need for fundamental changes.

There are different philosophies extended to deal with the issue of recidivism. One such philosophy is the approach of incapacitation. It provides that the recidivists should be cut out from the society so that they doesn't have any chance to commit any criminality. The best measure to do is to lock them in jails for a long period of time. But as discussed earlier these lengthy sentence has damaging effect on the mental as well as physical health of the juvenile offender. Instead of being a solution, they become a cause of recidivism. And also lengthy sentences raise human rights concerns. Lengthy sentences decreases the chances of rehabilitation and results in the institulisation of the juvenile. The word "institulisation" is used in the negative connotation, that is, here it signify the over dependence of a juvenile on the institutional facilities that he becomes unfit to survive in the world outside thus, act as an impediment in the social reintegration of the juvenile.

The 2000 JJ act followed a rehabilitative approach where the maximum punishment in any case could only be 3 years. The 2015 JJ act, considering the increasing rate of heinous crimes by the juveniles, abandoned the traditional rehabilitative approach in favour of a deterrent "get tough" approach towards the juveniles to increase "offender accountability and deterrence". But the crime statistics show that such approach is not yielding any positive results. Rather it is leading to more problems than it solves. So if both the two extremes are not cultivating positive results, there is need to find a middle ground that could better address the issue. Thus, a midway approach could be the restorative model that balance the deterrence and rehabilitative needs and work towards restoring and reintegrating the juveniles back to the society as a law abiding citizen. Under restorative model, following the rehabilitative objective, transfer of the juvenile to adult criminal justice is not allowed

neither for trial nor for completing the detention sentence. At the same time, to satisfy the deterrence objective, indeterminate sentencing system is followed.

Punishment is selected Based upon the individual care plan and social investigation report that not only contain background of the offender but suggestions for best reformation plan for offender. For example, in case of some juveniles there is not requirement of infliction of physical punishment but only causing some humiliation will do. For such juveniles instead of awarding imprisonment, awarding community service as punishment is better. Community service increases the sense of responsibility towards the society. Thus, detention/Imprisonment should only be used as a measure of last resort. For first time offenders, imprisonment instead of reforming further corrupts the him, detention centres act as a breeding ground for hardened criminals. Studies show that those who were given sentence for lesser period of detention show better chances of reformation than those with longer sentences. Thus, alternatives to detention like probation, admonition, community services, monetary punishment etc should be awarded.

Under restorative model, sentencing is based on the theory of individualisation. That is the juvenile is assessed based on his own individual qualities and requirements. Selection of punishment is according to what is best for his reformation. Punishment should be such that the offender himself plays a part in his own reformation. There is a need for self reflection, increasing self respect and willingness to improve. Willingness to change his ways to become a law abiding citizen. Indeterminate sentencing work as an incentive for the juvenile to reform. Here the juvenile himself actively contribute for his reformation knowing the same could help his release earlier. Thus, now juvenile play an active

role in his reformation “*motivated by the knowledge that alterations in behaviour and reduction in recidivist tendencies would prompt faster release*³⁶.”

Thus, the study could be concluded by saying that recidivism is result of failure of JJB to correctly assess the child to give him the most appropriate punishment and of the society to provide to the needs of a juvenile that he has to resort to criminality again and again. Thus, what is required is combined group effort to deal with the issue efficiently. Community participation should be encouraged.

On the basis of the study it could be concluded that hypothesis that Recidivism is the consequence of multiple factors seems proved. Without addressing these factors no juvenile legislation could be successfully implemented. The problem of recidivism in child in conflict with law could be resolved only if juvenile legislations are implemented having an individualistic approach that adequately deals with socio-economic, family, institutional and other factors associated to recidivism. The present juvenile justice system lacks this individualistic approach. Hence, changes are required

On the basis of the study, following suggestions are forwarded:

- I. The division of crimes into the 3 categories solely on the basis of amount of prescribed punishment should be avoided. Along with the prescribed punishment, parameters like the nature, the targeted victim of the crime, etc should also be taken into account for such categorisation.
- II. Blended sentencing model that includes a possibility of transfer of the juvenile to the jail/prison, where he could come he the

³⁶ Jeffrey E. Butler , supra note 32.

association with hardened criminals, is criminogenic and decreases the possibility of rehabilitation and reformation of the juvenile. Thus, increases the rate of recidivism. Hence, blended sentencing model should be discarded and replaced for indeterminate sentencing model that balances both the interests of rehabilitation and deterrence.

- III. In indeterminate sentencing model too, whatever the length of the sentence is according to the rehabilitative needs of the child in conflict with law, the whole sentence must be completed under the setup of the juvenile justice system only. No transfer to the criminal justice system shall be allowed. If after the child in conflict with law completes the age of 21 years but further detention is still required for his proper rehabilitation. Then such child in conflict with law could be detained in a separate part of the place of safety itself.
- IV. As discussed in Chapter 3 and 4, children court/session courts are not properly trained to deal and address the special needs of the children, trial by such court could go against the best interest of the child in conflict with law. Thus, in all cases trial should be conducted by JJB only, as it is specially trained to cater to the varied needs of the children. However, recognising that certain cases require strict sanctions, the sentencing power of the JJB could be increased accordingly to deal with such cases.
- V. Section 15 JJ Act 2015, preliminary assessment is arbitrary, subjective and discriminatory. Such method shall be discarded for an alternative like risk assessment method that is comparatively

objective. Parameters for such risk assessment tool shall be decided accordingly to maintain objectivity.

VI. As risk assessment method entrust the juvenile home staff and personnel with a significant task of monitoring and preparing progress report of the juvenile, staff should be provided with special training for it. counselling session with psychologist/psychiatrist with a prescribed experience and qualification shall be mandatory. Similarly unlike preliminary assessment method, where taking assistance of the psychologist/psychiatrist by JJB while conducting the assessment is optional, in risk assessment method taking such expert assistance shall be mandatory. Also though section 4 of the *Juvenile Justice (care and protection of children) Act, 2015* require that member of JJb should be specially trained to understand and address the needs of children and to deal with them within 60 days of their appointment, but the act doesn't prescribe as to what minimum training must be mandatorily provided. Thus, the JJ act or the JJ model rules must also provide what minimum standard training is compulsory.

VII. The concept of Individual care plan as provided under JJ act 2015 is an important rehabilitative tool/device. Such plans should not be made in a routine manner, but shall be made comprehensive enough to address the unique and varied needs of a particular child in conflict with law so that all factors[as discussed in Chapter 2] that influence or encourage recidivism are sufficiently intervened and countered. Expert assistance should be taken while preparing such plans. Such plans must be periodically

revised to ensure that they are in line with the changing rehabilitative needs of the juvenile

VIII. Various diversion and intervention option given to the JJB u/s 18 should be creatively employed in place of detention/incarceration. Sometimes processing a juvenile through Juvenile Justice System could do more harm to the him then good. Thus, following the principle of diversion and the principle of institutionalisation as a measure of last resort, the endeavours should be made to divert the juvenile pre or post the proceedings.