



**TRANSFER SYSTEM, PRELIMINARY ASSESSMENT,
AND TREATING CHILDREN AS ADULTS UNDER
JUVENILE JUSTICE (CARE AND PROTECTION OF
CHILDREN) ACT, 2015 OF INDIA CONTRAVENES
HUMAN RIGHT PROTECTION UNDER UNITED
NATIONS CONVENTION ON THE RIGHT OF THE
CHILD-1989, INTERNATIONAL HUMAN RIGHTS
LAW, AND INDIAN CONSTITUTION**

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Abstract

Delhi's December 16, 2012 Nirbhaya Gang Rape Case changed India's criminal laws. Because the main perpetrator was a child who could not be punished, the Juvenile Justice (Care and Protection of Children) Act, 2000 had to be modified and replaced with the JJ Act, 2015. This article examines whether the “preliminary assessment” & “Transfer System” introduced in JJ Act, 2015 conflicts with International Human Rights law, the Indian Constitution, and the UNCRC, 1989, which India signed & how far it is justified.

Keywords: Preliminary Assessment, Adult treatment, Heinous Offence, Juveniles Justice, UNCRC, Best Interest

1. Introduction

The Nirbhaya Gang Rape Case, which happened in Delhi on December 16, 2012, led to major changes in India's criminal laws. For example, the Juvenile Justice (Care and Protection of Children) Act, 2000 had to be rewritten and replaced with the current JJ Act, 2015 because the main perpetrator was a child who could not be punished properly. According to the new Juvenile Justice (Care and Protection of Children) Act, 2015ⁱ, a 16- to 18-year-old who commits a heinous crime may be tried as an adult in the Children's Court after a preliminary review by the Juvenile Justice Board. In this article, the researchers try to figure out if there are any conflicts or contradictions between the goals of the Juvenile Justice (Care and Protection of Children) Act, 2015 and International Human Rights law, the Indian Constitution, and the UN Convention on the Rights of the Child, 1989ⁱⁱ, which India signed. They also try to figure out if those conflicts and contradictions are fair. The main argument is that treating juveniles like adults when trying and punishing them for any crime violates their rights to equality and non-discrimination, reintegration and the best interest principle, the goal of juvenile justice, the UN Convention on the Rights of the Child (1989), and other international instruments.

In India, older Juveniles between the ages of 16 and 18 years have been accused of violating the law a lot more in the past ten years. Some of the worst crimes, like murder and gang rape,

have been linked to these young people in recent years. To combat it, the new Juvenile Justice (Care and Protection of Children) Act of 2015 provides that adolescents between the ages of 16 and 18 who commit a heinous offence may be punished as adults depending on the circumstances.

The Hon'ble Supreme Court of India upheld the constitutional validity of the JJ Act 2000 insofar as it allows all children in conflict with the law to be dealt with equally under the beneficial juvenile justice system regardless of the seriousness of the offence, and differential treatment of children under the age of 18 was not accepted in *Salil Bali v. Union of India*ⁱⁱⁱ and *Dr. Subramanian Swamy v. Raju*^{iv}.

In 1992, India ratified the UNCRC, 1989, which mandates, in Article 40(3), the establishment of a specific justice system for juvenile offenders under the age of 18. The Indian Parliament passed a law that discriminates against children in conflict with the law (CICL) based on their age and the nature of the crime they are accused of committing, despite the requirement to treat all children under the age of 18 equally regardless of the severity of the crime.

Any discrepancies and contradictions between the Juvenile Justice (Care and Protection of Children) Act, 2015 and the United Nations Convention on the Rights of the Child, 1989:

In 1992, India ratified the UNCRC, 1989, which mandates, in Article 40(3), the establishment of a specific justice system for juvenile offenders under the age of 18. The Indian Parliament passed a law that discriminates against children in conflict with the law (CICL) based on their age and the nature of the crime they are accused of committing, despite the requirement to treat all children under the age of 18 equally regardless of the severity of the crime.

Is the inclusion of the "Transfer System" and "preliminary assessment" in the JJ(CPC) Act, 2015 in violation of the letter and spirit of the UNCRC, 1989?

According to Gauri Pillai and Shrikrishna Upadhyay (2017)^v, the transfer system envisioned by the 2015 Act is also in contradiction with the CRC's anti-discrimination principle. According to the CRC, state parties shall treat all children involved in legal disputes with respect and without engaging in any form of discrimination.

According to Rajya Sabha Parliamentary Standing Committee Report No. 264^{vi}, the provisions of the JJ Act 2015's preliminary inquiry and transfer process contradict the United Nations Convention on the Rights of the Child. It also held that the proposed "transfer mechanism" is in breach of India's obligations under the United Nations Convention on the Rights of the Child.

Is it permissible under international human rights law to try and punish children as adults, as authorized under the Juvenile Justice (Care and Protection of Children) Act 2015?

According to the body of IHL treaties, rules, and guidelines, all persons under the age of 18 who violate the law must be treated within a distinct system, with the ultimate goal of guaranteeing their well-being and reintegration into society. Therefore, it can be argued that the specific provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 do not authorise the trial and punishment of juveniles as adults under international human rights law.

Definition of Juvenile, Child, Child in Conflict with Law under the United Nations Convention on the Right of Child, 1989, Juvenile Justice (Care and Protection of Children) Act,2015

Article-1 of the United Nations Conventions on the Right of the Child,1989 provides that “for the purposes of the present Convention, a Child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier” Article 1 of the UNCRC is not a "escape clause" that States can use to deny some CICL the protections against loss of liberty provided by the UNCRC, according to Schabas and Sax (2006)^{vii}. The Committee on the Rights of the Child also firmly declared that all persons under the age of 18 must be dealt with in General Comment No.24, paragraph 29^{viii}

Section 2 of the [Juvenile Justice \(Care and Protection of Children\) Act, 2015](#) defines in **Sub Section (12)** “child” means a person who has not completed eighteen years of age; and also defined in **Sub Section (13)** “child in conflict with law” means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence and defined in **Sub Section (35)** “juvenile” means a child below the age of eighteen years;

The goal of reintegration takes precedence above the goal of punishment.

Article 14(4) of the International Covenant on Civil and Political Rights (ICCPR) states that processes for juveniles must "take into account their age and the need to promote their rehabilitation," demonstrating that juvenile justice is essentially rehabilitative rather than punitive.

The Beijing Rules changed the purpose of juvenile justice to include supporting the "well-being of the juvenile," providing a fair response based on the "circumstances of the offender and the crime," and avoiding a "punitive-only" approach^{ix}.

According to Bueren (1998)^x, the UNCRC shifted the emphasis from rehabilitation to thorough reintegration of the child offender into society. A system that respects children's dignity, nurtures in them a respect for human rights, and is motivated by the primary purpose of "supporting the child's reintegration and child's adoption of a positive role in society" is required, according to Article 40 of the UNCRC.

States must adopt "specifically applicable" laws, institutions, and processes for minors who allegedly or really violate the law, according to UNCRC Article 40(3). According to UNCRC Article 40(4), states must create a variety of non-detention dispositional options.

According to CRC General Comment No. 24^{xi}, which relates the concept of best interests to juvenile justice, a solely punitive approach is incompatible with the aims of child justice outlined in article 40(1) of the Convention. (General Comment 24: Paragraph 76 of the CRC) . "Primary consideration should be given to the child's best interests and the need to promote the child's reintegration into society," according to the law. (CRC, General Comment 24, paragraph 76)^{xii}.

Separation from adult detainees increases the effectiveness of special treatment.

When a child is sentenced as an adult, he or she is likely to be detained in a prison with adults. This will thwarted the explicit policy of keeping children and adult inmates apart under the Standard Minimum Rules for Treatment of Prisoners, 1955^{xiii}, the ICCPR^{xiv}, the

Beijing Rules, the Havana Rules, and the UNCRC. The Beijing Rules and the UN Convention on the Rights of the Child emphasized the necessity to separate children and adults, and the Commentary to the Rules warned that administrative convenience could not be used as a defense for such detention owing to the dangers posed by "criminal contamination."^{xv}

The JJ (CPC) Act, 2015 of India specifies that a juvenile offender can be sent to adult prison after 21 years if the children's Court determines that the child has not made reformative adjustments to become a contributing member of society^{xvi}.

The prohibition of the death penalty and life imprisonment

International Human Rights Law strongly condemns small executions. Article 6(5) of the ICCPR prohibits the death sentence for under-18s. Article 37(a) of the UN Convention on the Rights of the Child outlaws the death penalty and life in prison without parole (Schabas and Sax, 2006)^{xvii}, but it does not outlaw all incarceration.

Section -21 of India's Juvenile Justice (Care and Protection of Children) Act, 2015, forbids the death sentence for Juveniles but allows life imprisonment with release. International customary law now prohibits the death penalty under the UN Convention on the Rights of the Child.

Deprivation of liberty of the Child is always a last resort.

According to the IHRL, the gravity of the offense does not always justify depriving a child in dispute with the law of his or her liberty. Due to the disproportionately negative impacts of institutionalization on children, they should only be arrested, detained, or imprisoned "as a last resort and for the shortest acceptable period of time." Even if the alleged offense is terrible, diversion from the criminal process is a possibility.

The Juvenile Justice (Care and Protection of Children) Act of 2015 of India clearly violates international human rights law, the 1989 UN Convention on the Rights of the Child, and Indian constitutional law by implementing the transfer system, conducting preliminary assessments, and treating children as adults under certain circumstances with respect to children in conflict with the law aged 16 to 18 years involved in heinous offenses.

Child Right to Presumption of Innocence and Right to remain Silent.

When a juvenile is transferred to the adult system, two important components may be jeopardized: the right to a fair trial and the assumption of innocence. "Everyone accused of a criminal offence shall have the right to be presumed innocent until and unless proven guilty in a court of competent jurisdiction," states Article 14(2) of the ICCPR. According to Article 14(3)(g) of the ICCPR, the accused has the right not to testify against himself or confess guilt. These standards also apply to minors who have been charged with a crime. (HRC, General Comment, Paragraph 32)

2. Conclusions

According to International Human Rights Law and the UN Convention on the Rights of the Child, children under the age of 18 who are suspected of committing a crime cannot be prosecuted as adults. This would be a violation of the equality principle, which gives all individuals under the age of 18 to juvenile justice rights. Furthermore, it would contradict the basic objective of the juvenile justice system, which is to ensure reintegration. The Juvenile

Justice (Care and Protection of Children) Act of 2015 undercuts the CRC-emphasized assumption that best interests in this context mean that reintegration always takes precedence over retribution. India demonstrated its willingness to comply with the UNCRC by enacting important legislative revisions on juvenile justice between 2000 and 2006. Its flagrant disregard for the UNCRC and General Comment No. 10 in 2015 appears to have been more of a political decision to please an outraged majority that was in favour of swift action.

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