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“SUPPLICATION OF DIFFERENTIAL ASSOCIATION THEORY AND JUVENILE JUSTICE IN NEPAL”

-Binda Kumari Thapa*

No one is born criminal, rather the performed behavior and action is an outcome of the sociological factors and the interaction made to the social actors. Thus, criminal behavior is learned and accustomed from sociological factors. It includes the economic status, social status, and other prominent elements influencing the young and sensitive mind of the child. The child is the ultimate hope of the nation and the continuance of human civilization. This significance of their existence enables them to protect the best interest of the child in its best possible approaches. Children and society shared a harmonious relationship in between which makes children growing them following society and its actors with whom they interact with. Nurturing a child contributes a lot to the development of the personality, social, emotional, and psychological behavior of the child.

Differential Association Theory (DAT) reads for the contribution of society as an association and organization in growing a child. It is up to the societal structure and interactions how to develop the young mind of the child. The paper tends to explore the application of differential association theory in juvenile justice for protecting the best interest of a child. Specifically, it deals to explore how social and economic factors enable a child towards delinquency and social deviance. The paper also tends to identify and analyze the position of Nepal in reconciliation of legislative mechanism with the standard of international law in regards to the supplication of Differential Association Theory and Juvenile Justice.

HISTORICAL EVOLUTION OF DAT

Before the introduction of DAT, criminology practiced different kinds of theories, which was not justifiable from the interest of human rights and human civilization. The theories like demonological theory, free will theory were in prevalence during the pre-classical stage.¹ Demonological theory was suffered from the superstition and was guided by the divinity. This theory reads for an individual character to become the criminal via divine power. It analyzes the role of divine power in the

* Ms. Binda Kumari Thapa is a LL.M Student at Kathmandu School of Law.

¹ Hemant, *The Schools of Criminology*, February 2, 2020, Available at Schools of Criminology: Pre-classical, classical, positive, sociological, etc. (thefactfactor.com), Accessed on 3 September 2021, Prof. Patricia BMAH Sombrio, *Demonological Theory*, Available at *Demonological Theory | PDF | Demonology | Hypothesis* (scribd.com), Accessed on 3 September 2021

antisocial behavior of an individual. Similarly, free will theory reads for the pleasure as an ultimate goal of the criminal. Thus, crime is the product of human free will to gain the pleasure. Both of these theories lack the evident analogy, scientific grounds and reasonableness. Thus, these theories were traditional and unscientific.

Amongst the many theories in criminal law DAT is one of the prominent theory having a significant impact in the criminology. It enables the criminal activities of the child is not inherited rather learned from the multiple social factors.² Sociological school of thought regarded the root cause of crime is embedded in society.³ Edwin Sutherland founded the principle of DAT in 1939 for the first time, and was developed in more comprehensive manner in 1947⁴. The theory of DAT is also called as the learning theory.⁵ Edwin is best known for formulating a general Sociological Theory of crime and delinquency, the DAT. ⁶ According to Sutherland, criminal behavior of the children is not an inherent behavior rather he/she imitate from his/her surroundings meaning the associations. Therefore, Edwin Sutherland defined DAT as an instrument to bring the sociological perspective as a focal point or the forefront of the criminology.

BASIC ABSTRACT CONCERNING DAT

The concept of DAT by Sutherland revolves within the notion of societal contributing factors and responsible societal interaction for the social conformity and deviance by each individual. Sutherland rejected the individualistic explanations of crime.⁷ Thus, a theory of DAT reads for no human being is born criminal. It makes an individual aggressive causing the result of crime.⁸ The basic tenet of DAT can be highlighted briefly as:⁹

1. Criminal activities are the product of interaction in the society.

² Katherine S. Williams, *Textbook on Criminology*, Blackstone Press Limited, New York, 3rd edition, 1997

³ Prof. Madhav Pd. Acharya & Asst. Prof. Ganesh Bdr. Bhattarai, *Criminology Penology*, Bhrikuti Academic Publications, 1st edition, 2012, p.2

⁴ J. Robert Lilly, Francis T. Collen, Richard A. Ball, *Criminological Theory: Context and Consequences*, Sage Publications, 2nd edition, 1995, p.47

⁵ Edwin H. Sutherland, *Encyclopedia of Criminological Theory*, SAGE Publications Inc, New York, 2014

⁶ Ronald L. Akers, Christine S. Sellers, *Criminological Theories: Introduction, Evaluation and Application*, Rawat Publication, 4th edition, p.82

⁷ J. Robert Lilly, Francis T. Collen, Richard A. Ball, *Criminological Theory: Context and Consequences*, Sage Publications, 2nd edition, 1995, p.46

⁸ Sue Titus Reid, *Crime and Criminology*, Oxford University Press, Oxford, 12th edition, p. 188

⁹ J. Robert Lilly, Francis T. Collen, Richard A. Ball, *Criminological Theory: Context and Consequences*, Sage Publications, 2nd edition, 1995, p.47

2. An individual learn social deviance i.e. crime from another individual through communication.¹⁰
3. Learning process consists of the techniques of crime and the specific direction motives of the crime.
4. The theory of DAT is not an absolute rule having the universal application. It may varies contextually regarding the intensity meaning involvement of the contact, frequency meaning number of content, duration meaning length of contact and priority.¹¹
5. DAT defines the crime or the criminal activities as an expression of the general needs for an individual in the society.¹¹
6. The situation of development of specific law, which is defined by an individual whether, is favorable or not.¹²

ELEMENTS OF DAT

DAT lies on the primary foundations of three notions. Normative conflict, differential association and differential group organization are the primary elements of DAT. It defines an individual who associate, holds and interact with demonstration of criminal mind prevails with more criminal behavior.¹³ DAT identifies the existence of crime at three tiers along with individual, group and society at large.¹⁴

A. NORMATIVE CONFLICT

From sociological perspective, social solidarity, social harmony and social consensus characterizes the primitive society. Basic values and beliefs are harmonized in primitive society. It means mechanical society holds least probability of the crime having availability of minimum crime techniques and technology.

¹⁰ Robert W. Taylor et.al, *Juvenile Justice Policies, Programs and Practices*, Glencoe Mcgraw-Hill, New York, 2002, p .61

¹¹ Lydia Voigt et.al, *Criminology and Justice*, McGraw-Hill, New York, 1994, p.227

¹² Ibid, p.200

¹³ David Bergeron, *Differential Association Theory*, available at http://criminology.wikia.com/wiki/Differential_Association_Theory, accessed on 5 June 2021

¹⁴ Ross L. Matseuda, *Historical, Conceptual, and Theoretical Issues*, Available at <http://www.soc.washington.edu/users/matsueda/DA.pdf>, Accessed on 5 June 2021

However, with industrialization, advanced division of labor, advanced in technology and market economies, the primitive or the mechanical society turns into the organic one. It enables the segmented group of the people. Thus, more conflicting interest prevails in the organic society concerning their respective interest, values and belief. In primitive society societal harmony is less characterized and coercion is more characterized. Thus, the children in organic society tend to be more vulnerable misleading towards the path of crime.

B. DIFFERENTIAL ASSOCIATION PROCESS

Normative conflict elements of DAT explain for the conflicting interest in organic society creating more prone zone for crime. Similarly, it entails for the justification of social psychological explanation of how normative conflict in society enable the child individual in the criminal activities causing the high degree of social deviance.

It reads for ratio of favorable crime situation versus unfavorable crime situation to determine the criminal behavior. Such sort of criminal act does not exist in vacuum. The broader social organization or an association, which ultimately connects an individual, structures it. It analyzes the individual criminal acts. An association defined reads to identify various kinds of social actors and social organizations which include each social member. These are an individual, families, neighbor, etc.

C. DIFFERENTIAL SOCIAL ORGANIZATION

Differential Social Organization mentions for the group rate of crimes. Society and its factor translate the specific group to either social compliance or the social deviance. Differential social organization determines the extent of crime existence according to organized degree against crime. It comes out of the social disorder and disorganization.

JUVENILE JUSTICE AND THE LEGISLATIVE MECHANISM IN NEPAL

The biological, physiological, psychiatric and psychological theoretical explanations emphasize the point that crime is the result from a physical or a mental factor or are the consequence of suppressed childhood experiences. Rejecting the internal psychological theory, DAT explained how criminals

learn the criminal behaviors and the means of particular criminal activities via communication.¹⁵ Thus, the children get into the contact via mentioned communication by Sutherland. Similarly, the sociologists argue that criminal behavior is learnt and is conditioned by social environment.¹⁶

Where Article 10 (2) b, article 14 and 10 (3) of ICCPR states that juvenile offenders shall be segregated from adult offenders. Concerned juvenile in the legal prosecution shall be provided with appropriate treatment in accordance with the age and legal status. The juvenile shall accord with treatment appropriated to their age and legal status. Additionally, Article 37 and 40 of CRC also directs for the Juvenile Justice, which are binding upon Nepal. Nepal is abided by the primary obligation of both the CRC and ICCPR because it is party to both conventions with its legal protection commitment.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (The Beijing Rule), United Nations Standard Minimum Rules for Non-custodial Measures 1990 (The Tokyo Rules), United Nations Guideline for the Prevention of Juvenile Delinquency 1990 (The Riyadh Guidelines) also reads for the juvenile Justice system. The mentioned laws are soft laws. However, it is the moral obligation and responsibility of the state to respect these rules assuring the juvenile justice. This mechanism creates a strong advocacy for the strong criminal justice system with distinct treatment to the children.

Criminal prosecution is harmful for the development of the children in long-term. Thus, juvenile shall be provided with the distinct treatment. Criminal liability of the children arises from the family and the community making them obliged to correct it. Criminal justice system shall broaden the juvenile justice system as an instrument to reinforce the loyalty of the children towards his/her community. Thus, instead of punishment, they have to be corrected via developmental and restorative justice mechanism.

In consideration of varying social factors, social actors and from the sociological perspective, Nepal expressed its full commitment via introduction of various national legislative mechanisms and adopts the defined international standards and protocols concerning the juvenile justice. Juvenile Justice

¹⁵ Ross L. Matseuda, *Historical, Conceptual, and Theoretical Issues*, available at <http://www.soc.washington.edu/users/matsueda/DA.pdf>, accessed on 5 June 2021

¹⁶ Ram Ahuja, *Criminology*, Rawat Publications, Jaipur and New Delhi, 2004, pp.56-57

being the very sensitive aspect of Justice System is necessary to examine under DAT and Nepal seems to be in positive and progressive standard in realization of DAT theory. It can be justified as:

CHILDREN ACT, 2048

The Act provisioned for the physical, mental and intellectual development of the children. The same Act mentioned these have to be accomplished via protecting the rights and interest of the child.¹⁷ In addition, in consideration of best interest of a child, section 55(1) of the same Act established for the officer hearing cases and procedures concerned the cases of Juvenile delinquency. This section tends for the establishment of juvenile court to hear the cases concerning juvenile delinquency. However, the principle established by this section is not an absolute rule because it holds an exceptional rule. Thus, if a child in engagement with an adult commits crime then such Juvenile Court is not applicable.¹⁸

THE ACT RELATING TO CHILDREN, 2075

The Act Relating to children 2075 as a sequence of Children Act 2048 was introduced with more progressive and protective provision. It entails for respecting, protecting, promoting and fulfilling the right of the children to maintain the best interest of a child.¹⁹ Section 30 provides for the formation of the juvenile court to hear and settle an offence of juvenile delinquency.²⁰ The rationale behind this provision is to maintain the just, fair and reasonable justice mechanism.

AFFILIATION IN BETWEEN DAT AND JUVENILE JUSTICE

According to Sutherland in his book Principles of Criminology, an individual become criminals when he/she meet the harsh and inconsistent social influence throughout their lifetime. As a consequence, that individual gets acquaintances with the criminal norms. No children are born criminal inherently. It is rather they get to learn the deviance from society itself. Children in the society set their behavior with preference for crime as 'culturally transmitted'. It was, in effect, to say

¹⁷ Children's Act 2048, Preamble, Available at Children's Act, 2048 (1992) (ccwb.gov.np), Accessed on 6 September 2021

¹⁸ Children's Act 2048, Section 55 (1) and 55 (2), Available at Children's Act, 2048 (1992) (ccwb.gov.np), Accessed on 6 September 2021

¹⁹ The Act Relating to Children 2075, Preamble, Available at The-Act-Relating-to-Children-2075-2018.pdf (lawcommission.gov.np), Accessed on 6 September 2021

²⁰ Ibid, Section 30

that criminal behavior is learned through social interactions.²¹ He called this process 'differential association'.²² In eastern society, collectivism prevails the individualism; thus, family plays a significant role in shaping conformity with societal values, beliefs and morals resisting social deviance.

This theory suggests that the distinction between the lawbreakers and the law-abiding lies not in their personal fiber but in the content of what they have learned.²³ Intimate pair plays a significant role in shaping the human behavior thus; such behaviors are learned with the process of expressed communication predominantly in intimate groups. Social organization and its context in which individuals are embedded regulate criminal involvement.²⁴ A study done in Ghana has shown that, the juveniles who associate extensively with delinquent friends are more likely to be involved in delinquent behavior than those who do not associate themselves in such groups. Interaction, contact and communication of a juvenile with other delinquent enable the juvenile delinquency.²⁵

FACTORS HAVING SIGNIFICANT ROLE IN DELINQUENCY ARE:

1. Time spent in the company of peers,
2. Significant of friends companion to the respondents, and
3. Commitment towards the loyalty of particular group of friends²⁶

The role of Supreme Court in Nepal in reconciling the relationship of Juvenile justice and DAT theory can be highlighted as:

JUDICIAL OBSERVATION AND JUVENILE LAWS

In the case of juvenile delinquency like *Bablu Godiya vs. Banke District Court et.al*²⁷, *Raj Kumar Rai v. Kathmandu District Court*²⁸, *Ashish Adhikari v. Nepal Government*²⁹, *Keshav Khadka v. Dhankuta District*

²¹ J. Robert Lilly Francis T. Cullen, Richard A. Ball, *Criminological Theory, Context and Consequences*, 3rd edition, Sage Publications, p.39

²² Ronald L. Akers and Christine S. Sellers, *Criminological Theories, Introduction, Evaluation, and Application*, Jaipur and New Delhi, 4th edition, p.59

²³ J. Robert Lilly Francis T. Cullen, Richard A. Ball, *Criminological Theory: Context and Consequences*, Sage Publications, 2nd edition, 1995, p. 47

²⁴ J. Robert Lilly Francis T. Cullen, Richard A. Ball, *Criminological Theory, Context and Consequences*, 3rd edition, Sage Publications, p.39

²⁵ Thomas Antwi Bosiakoh, 'Differential Association Theory and Juvenile delinquency', volume 2, 2010, p.195, p.204.

²⁶ Mark Warr, *Age, Peers, and Delinquency*, *Criminology* 31', 1993, pp. 17-40

²⁷ *Bablu Godia case, Bablu Godia V. Banke District Court*, 2057, WN 3390

*Court*³⁰, Supreme Court has defined the landmark jurisprudence which enables the different treatment to the juvenile as compared to the adult accused. These cases have played a significant role to eliminate the negative psychological effects on the children. Case of *Bablu Godia* has explicitly referred the section 42(3) of Children Act 2048, which reads to keep the juvenile in the juvenile reform home. Habeas Corpus writ was issued in this case and Supreme Court ordered the mandamus in name of the respondent.

The Supreme Court in these cases has progressively inclined to the different treatment to the children who are accused of crime. This is in standard of both the national and international laws which reads for state obligation to promote the establishment of laws, institution, authorities and procedure to apply for the children in conflict with the penal laws. This is provided in article 40 of the CRC.³¹ Thus, the Supreme Court has recognized the rights of child who are accused of delinquency. Examining the verdict from psychological perspective it will promote the dignity of children and their worth easing then for re-integration in the society.

DAT theory plays an imperative role in Juvenile Justice System as it identifies the actual offender, helps to depart the child from such criminal group via which they adapted criminal behaviors. It will grace and foster the child with the reformative treatment. The vary significance of DAT is adopted, maintained and promoted by the verdict of Supreme Court in this case.

²⁸ Raj Kumar Rai v. Kathmandu District Court , Supreme Court 2001,WN 92

²⁹ Ashish Adhikari v. Nepal Government, Supreme Court 2000, WN 3391

³⁰ Keshav Khadka v. Dhankuta District Court, Supreme Court 2000, WN 3684

³¹ Convention on the Rights of the Child, Article 40, Available at [Convention on the Rights of the Child \(unhcr.org\)](https://www.unhcr.org/), Accessed on 8 September 2021

ANALYTICAL ANNOTATIONS

TABULA RASA AND SOCIAL EPISTEME : According to the theory of Tabula Rasa a child is born with a blank slate³² and grows him/her in accordance with the available environment adapting in that vary environment. This theory can be analyze that no-one is born criminal. They have born with purity and innocence having absolute neutral knowledge, understanding and perception towards the society and being of each individual.³³ It means the society prepares nurtures and fills the mind of children with the information. ³⁴ The social interaction, activities of social actors and the events in the society construct the content in their mind and they receive and activate the respective cognitive system in brain. Gradually it got entitled with the values of society, religion and morale values via informal instruction and education communication process.³⁵ That cognitive system forms two types of the behavior i.e. social conformity and social deviance. If a child react as to the social deviance then this creates the juvenile delinquency ultimately. Children indoctrinate the content in the mind via empirical mechanism. ³⁶

³² Robbie Duschinsky, Tabula Rasa and Human Nature, Available at https://www.researchgate.net/publication/259425824_Tabula_Rasa_and_Human_Nature, Accessed on 5 June 2021, P. 509

³³ Ariks Samuel Bashayi, Tabula Rasa Theory: A Basis for Creativity and Inventions in Education, Available at <https://www.globalacademicgroup.com/journals/resourcefulness/ARIKS%20SAMUEL%20%2026.pdf>, Accessed on 5 June 2021

³⁴ Rommel L. Ormita and Ma. Cecilia E. Valencia, Available at file:///C:/Users/k/Downloads/An_Analysis_of_John_Lockes_Tabula_Rasa.pdf, Accessed on 5 June 2021

³⁵ Subhani, Muhammad Imtiaz and Osman, Ms. Amber, Human Mind is a Tabula Rasa, Munich Personal RePEc Archive, 2011, available at https://mpra.ub.uni-muenchen.de/34733/1/MPRA_paper_34733.pdf, accessed on 5 June 2021, Accessed on 5 June 2021, pp. 514- 515, p. 518

³⁶ Subhani, Muhammad Imtiaz and Osman, Ms. Amber, Human Mind is a Tabula Rasa, Munich Personal RePEc Archive, 2011, available at https://mpra.ub.uni-muenchen.de/34733/1/MPRA_paper_34733.pdf, accessed on 5 June 2021

RATIONALE JUSTIFICATION OF DAT FROM HUMAN RIGHT LENS: Each child's holds the right to live with dignity and right to freedom as their human right. It is protected in legislative mechanism, national and international standards. Sutherland's DAT is a noteworthy work in the field of generalizing sociological theory of crime and delinquency. It analyzes the sociological factors in shaping the individual character whether is deviant or compliance to the prevailing societal values and belief. If the ratio between obeying laws and defying laws tilted in wrong direction, the individual is likely to deviate. It is the serious concern of the society, which is hampering a lot to maintain social, peace and order. Nihilism is not the position whereby crime occurs. However, the entire society, its association and the interaction enable an individual to frame it. It thus makes the society obliged to reform and mould the children. Since DAT, resist prosecuting children in criminal prosecution it protects the human right of the children to live with dignity via positive re-integration in the society.

POSITION OF NEPAL IN REALIZATION OF JUVENILE JUSTICE: Laws concerning juvenile in Nepal focuses on the protection and reformation of children who are prone and vulnerable to juvenile delinquent. The related Act of children and commitment of Nepal towards the compliance of international law is to respect, protect, promote and fulfill the rights of the children in vulnerable zone and at the time of prosecution whereby a child is engaged as an accused. In Nepal, foundational value of confidentiality concerning their name is practiced throughout the investigation and prosecution process concerning juvenile justice. It prevents the long-term physical and psychological demoralization, defamation of the juvenile. Thus, DAT theory contributes and enables the convenient situation of juvenile delinquency in the society. Nepal therefore, ultimately results to reformative system of Justice System via DAT.

CHILDREN DO NOT HAVE ANY PRE-CONCEIVED *MENS REA*: Referring to the techniques of crime of DAT theory, it endorses that learning criminal behavior shall be followed by *Mens Rea* (Intention). Given that a child may not have any concrete motive, thus, a crime committed by juvenile is termed as delinquents. This assumption endorse that it is unfair to keep children in the prison under conviction of crime. Society holds the absolute power to mould the children irrespective of their interest. The reformatory approach as advocated by DAT enable children to adapt the values, belief, morals and traditions as entrenched by the society. It will protect and promote the ultimate interest of the community at large in the society creating social order and peace. The ultimate justification of the DAT theory is children do not have the concrete ill intention to commit the crime; they are manipulated either, or pressurized with undue influence. Therefore, they have to given with different treatment under DAT theory.

CONCLUSION

To conclude, DAT theory is a connotations of dualistic approach with two basic philosophies i.e. the philosophy of re-integration and restorative justice mechanism. Furthermore, the principle of re-integration involves the rehabilitation, re-socialization and reunion in all stages of the proceedings. State in this situation has to act as *Parens Patriae* for protecting the best interest of the children. This enables the positive psychological development of the child towards the society and a nation as a whole.

Ultimately DAT spirits for the segregation of the children from general criminal proceeding and adults accused which let them grow in the environment as per their convenience. Nepal seems to have progressively realized the value and norms of basic human right spirit via adopting DAT theory in practice. Thus, theoretically Nepal has radiant legislative mechanism and the landmark jurisprudence from the judiciary itself. Nepal stands strongly in regards to the DAT theory that it has been contributing in the harmonious development of the children's personality.