Handbook for Advocates working with Children in Conflict with Law in India

under

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

&

The Juvenile Justice (Care and Protection of Children) Model Rules 2016

Centre for Child and the Law (CCL)
National Law School of India University (NLSIU)

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About the Centre for Child and the Law, National Law School of India University, Bangalore

The Centre for Child and the Law, of the National Law School of India University (CCL-NLSIU) is a specialized research centre working in the area of child rights, since 1996. The main thrust of the work is on Juvenile Justice and Child Protection, Universalisation of Quality Equitable School Education, Child Labour, Protection of Children from Sexual Offences, Justice to Children through Independent Human Rights Institutions, Right to Food, and Child Marriage. The mission of CCL-NLSIU is to institutionalize a culture of respect for child rights in India.

The Juvenile Justice Programme at CCL-NLSIU adopts a multi-disciplinary action-oriented approach and engages in direct field action with children and families in the juvenile justice system, as well as research, teaching, training, and advocacy to positively impact policy, law and professional practice on issues concerning children and their families. The team, consisting of legal researchers, advocates, social workers, (and counselors during one phase), have been working on child protection and offering limited services (including free legal aid), to children in conflict with law in Bangalore Urban and Rural. This multi-disciplinary action-research engagement has shaped and informed other activities undertaken by the team, envisaged in its overall strategic plan. These include curriculum development (including the self-instructional material in Paper IV of the Post Graduate Diploma in Child Rights Law developed by CCL NLSIU and offered by NLSIU through distance mode), teaching, training of stakeholders in child protection, empirical research on legal aid for children in conflict with law, research and advocacy aimed at formulation/reform of law and delegated legislation on juvenile justice, and ongoing efforts aimed at transforming the juvenile justice system towards being child rights friendly. The source of inspiration for conceptualizing this handbook and its content has also been the work undertaken by the team within the juvenile justice system. Other related initiatives undertaken by the team aimed at strengthening access to quality legal aid for children, are as given below.

On 28th June 2012, a report titled 'Ensuring Effective Access to Justice for children in the Juvenile Justice system in Karnataka under the Juvenile

Justice (Care and Protection of Children) Act 2000, prepared by the Juvenile Justice team was submitted to the Hon'ble High Court of Karnataka, while impleading in an ongoing writ petition - W.P. No. 4840/2010. The report, available at https://www.nls.ac.in/ccl/jjdocuments/cclLegalaidKHC28thJune2012.pdf contained detailed recommendations for action by all concerned duty bearers in the State, including the State/District Legal Services Authorities, the Department of Women and Child Development, Juvenile Justice Boards, Academic Institutions and Advocates, aimed at enhancing the access to and quality of legal services to children in Karnataka.

The Juvenile Justice team has conducted two capacity building programs for Legal Aid Lawyers, one from 19th - 21st December 2013 (in collaboration with the Karnataka State Legal Services Authority) and another on 19th and 20th November, 2016 in collaboration with the Madhya Pradesh State Legal Services Authority. These programmes were designed to provide a refreshed understanding of juvenile justice and give practicing advocates the opportunity to introspect upon their litigation experience with children in conflict with law. The programmes were undertaken with the hope that these advocates would become more sensitive and better equipped to face the unique challenges involved in legal practice with children appearing before the JJBs, and that these processes would gradually attract other advocates to this extremely rewarding field of human rights lawyering.

Ms. Manoharan, Program Head of the Juvenile Justice Program also contributed to the Curriculum for Capacity Building of Legal Aid Lawyers prepared by the National Legal Services Authority (NALSA), in furtherance of an order passed by the Hon'ble Supreme Court of India on 10.04.2015, in the case of *Sampurna Behura v. Union of India,* Writ Petition (Civil) No. 473 of 2005. The Supreme Court order directedNALSA to take urgent steps to develop a training program for the legal services lawyers attached to the Juvenile Justice Boards and the Probation Officers.

More recently, an empirical Study on Legal Aid for Children in Conflict with Law in Karnataka has been conducted and a Consultation organized to present the preliminary findings. The study highlights the systemic gaps that result in poor legal services provided to children in conflict with law in the State and builds on the recommendations submitted to the Hon'ble Karnataka High Court in 2012.

Other publications by the Juvenile Justice team at CCL NLSIU on the JJ Act, 2015 and the Protection of Children from Sexual Offences Act, 2012 include:

- *Frequently Asked Questions on The Juvenile Justice (Care and Protection of Children) Act, 2015 and The Juvenile Justice (Care and Protection of Children) Model Rules, 2016* (March 2018).
- *Toolkit to Monitor the Rights of Children Alleged to be in Conflict with Law in Observation Homes* (March 2018).
- *Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues,* (February 2018) available at https://www.nls.ac.in/ccl/jjdocuments/posco2012spcourts.pdf
- Studies on the Working of Special Courts under the POCSO Act, 2012, in the States of Delhi, Assam, Karnataka, Maharashtra, and Andhra Pradesh in 2016-'17 available at https://www.nls.ac.in/ccl/juvenilejustice.html
- *Comparative Table of the JJ Act, 2000 and the JJ Act, 2015*, available at https://www.nls.ac.in/ccl/jjdocuments/comptablejjact.pdf
- *Frequently Asked Questions on the Protection of Children from Sexual Offences Act, 2012 and the Criminal Law (Amendment) Act, 2013,'*(2nd ed, reprint December, 2016).
- *Law on Child Sexual Abuse in India – Ready Reckoner for Police, Medical Personnel, Magistrates, Judges and Child Welfare Committees,* (November 2015).

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Acknowledgements

This Handbook for Advocates working with Children in Conflict with Law was originally conceptualised by Arlene Manoharan, Fellow and Program Head, Program on Juvenile Justice, Centre for Child and the Law, National Law School of India University (CCL-NLSIU), Bengaluru. Subsequently, the structure and design was developed by Swagata Raha, Senior Research Associate (Consultant), CCL-NLSIU. Together, Arlene and Swagata have provided feedback to the authors, edited the content and also proof read the same.

The Handbook was authored by three national level experts who have made a lasting contribution to policy and law on juvenile justice and to the effective implementation of the same at the national level.

Advocate Maharukh Adenwalla is a practicing lawyer at the Bombay High Court. She litigates mainly on issues concerning human rights, with special focus on children's rights. She was appointed by the Mumbai District Legal Services Authority to provide legal assistance to children in conflict with the law for three consecutive years when the Juvenile Justice (Care and Protection of Children) Act, 2000 was in force. She also played a vital role during the 2006 amendments. She has also been conducting trainings for judges, public prosecutors and child protection functionaries and organisations on topics related to juvenile justice and sexual violence.

Advocate Anant Kumar Asthana is a Delhi based lawyer, who primarily works on child related laws, takes up litigation, engages in policy work on children related issues and imparts technical training to various stakeholders.. He was instrumental in setting up a Model Legal Aid Programme for Children in Conflict with Law in the National Capital Territory of Delhi, which was subsequently adopted by the Delhi State Legal Services Authority and has been smoothly running since then. At present he is designated by the Delhi State Legal Services Authority as its Ombudsman Cum Monitoring Consultant for Legal Aid in JJBs and CWCs, whereby he monitors and supervises a team of 24 Legal Aid Lawyers for children.

Swagata Raha has been working as a human rights law researcher since 2005 and has worked with leading civil society organisations in India. As a Senior Research Associate (Consultant) with the CCL-NLSIU, she has designed and conducted capacity building programmes for judges of Special Courts, Juvenile Justice Boards, State Commissions for Protection of Child Rights, and other functionaries within the juvenile justice system. She has written extensively on the laws related to sexual offences against children, human rights institutions, and juvenile justice.

The wealth of experience and nuanced thinking that these authors have infused into the Chapters they have written, has resulted in this publication emerging as one that is undoubtedly a path breaking contribution to the field of juvenile justice. We express our deep gratitude to them for sharing their insights and perspectives, and for making the time to write their Chapters, despite the conflicting demands on their time.

We also express our gratitude to all the individuals who have worked in the Juvenile Justice team at CCL NLSIU over the years, and engaged in work on issues related to children in conflict with law, in various forms and degrees of intensity. These include Adv. Shruthi Revankar, Adv. Geeta Sajjanshetty, Adv. Maya C.P., and Legal Researchers - Shruthi Ramakrishnan, Anjali Shivanand, Aneesha Johnny, Anuroopa Giliyal and Pramod Naikodi; and Social Workers - Arlene Manoharan, Sangappa Vaggar and Monisha Murali; Counselors - Kalpana Purushothaman, Deepa Mani, Ganga Nair; and Mr. Shreyas Rao - a development professional. Their passionate and dedicated engagement with issues relating to children in conflict with law has touched the lives of numerous children and their families. Their work has alsostrengthened the hands of functionaries, triggered transformative processes within the Observation Home and the Juvenile Justice Boards in Bangalore Urban and Rural, andhelped nuance the evolution of ideas and approaches in engaging with children in conflict with law, over time. Additionally, the team's multi-disciplinary and action-research oriented work on this issue hasrichly contributed to the content of the modules in the capacity building programmes conducted by the team for Legal Aid Lawyers in 2013 and 2016. Advocate Maharukh Adenwalla had been invited as a key resource person for the programme conducted Karnataka in December 2013, while she and Advocate Anant Kumar Asthana had both been invited as resource persons for the programme conducted in November 2016 in Madhya Pradesh. The range of initiatives undertaken have significantly informed policy, law, teaching, training and practice with children, as well as the formulation and reform of law, and the reform of the juvenile justice system itself, resulting in CCL-NLSIU being recognized as a resource hub on issues relating to children in conflict with law in India.

The Juvenile Justice Team has crafted and enjoyed a mature working relationship with the Karnataka Legal Services Authority and the Department of Women and Child Development, Government of Karnataka. We would like to acknowledge all the officers with whom we have worked with closely over the years. Some of the functionaries working within the Observation Home for Boys, Bangalore, have also inspired us by their commitment to children, often in very challenging

circumstances - we value their work, and the insights they have shared with us over the years. Through this constructive and yet maturely critical relationships, the team has been able to work freely within the juvenile justice system, while also encouraged to openly share views, concerns and recommendations about the gaps in implementation of law in the State so as to trigger both reform of delegated legislation and reform of the juvenile justice system itself. We deeply appreciate the genuine concern that some of these officers and grass root level functionaries have demonstrated in trying to ensure accountability and action oriented change in the administration of juvenile justice, in the interest of children.

Last, but certainly not the least, many children who have journeyed through the juvenile justice system, and stayed at the Observation Home, Bengaluru, have honoured us by sharing their personal stories of hardship, including those faced with free legal aid lawyers providing them legal services.The hope and trust they have vested in us while doing so, places an obligation on us to do our best to enable them to secure justice, care, protection, treatment, development, rehabilitation and social re-integration. We express our deepest gratitude to each child and/or family member, whose life experience has inspired and informed this Handbook in any way.

We would like to acknowledge the administrative support provided by Pushpa N., Bharti R. C. and Mr. Kushal

Our gratitude is also due to Tata Trusts for their support in enabling the work undertaken by the Juvenile Justice team at CCL NLSIU with children in conflict with law and this publication.

A word of thanks is also due to Prof. Dr. V.S. Elizabeth, Coordinator, CCL-NLSIU.

List of Abbreviations

CACL	Child/ren alleged to be in conflict with law
CCI	Child Care Institution
CCL-NLSIU	Centre for Child and the Law, National Law School of India University, Bangalore
CICL	Child(ren) in Conflict with the Law*
CINCP	Child(ren) in Need of Care and Protection
CJM	Chief Judicial Magistrate
CMM	Chief Metropolitan Magistrate
Cr.P.C	Code of Criminal Procedure, 1973
CWC	Child Welfare Committee
CWPO	Child Welfare Police Officer
DCPU	District Child Protection Unit
DLSA	District Legal Services Authority
FIR	First Information Report
ICCPR	International Covenant on Civil and Political Rights, 1966
ICP	Individual Care Plan
ICPS	Integrated Child Protection Scheme
IPC	Indian Penal Code, 1860
ITPA, 1956	Immoral Traffic Prevention Act, 1956
JJ Act, 2000	Juvenile Justice (Care and Protection of Children) Act, 2000
JJ Act, 2015	Juvenile Justice (Care and Protection of Children) Act, 2015
JJB	Juvenile Justice Board
JJ MR, 2016	Juvenile Justice (Care and Protection of Children) Model Rules, 2016
JMFC	Judicial Magistrate of First Class
NGO	Non-governmental organisation
NHRC	National Human Rights Commission
OH	Observation Home
PO	Probation Officer
POCSO Act	Protection of Children from Sexual Offences Act, 2012
SBR	Social Background Report
SHRC	State Human Rights Commission
SIR	Social Investigation Report
SJPU	Special Juvenile Police Unit
SLSA	State Legal Services Authority
UNCRC	United Nations Convention on the Rights of the Child, 1989
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities, 2006

Introduction

By Arlene Manoharan

Whether a person is actually involved in committing a crime, or is falsely accused of having done so - either way, such situations are generally ones that result in feelings of anxiety, fear and confusion. For a child/adolescent who is still growing and vulnerable, such a situation is naturally all the more challenging. Advocates working with children in conflict with law have a very noble and yet challenging task - one of building trust and faith in a young person who is in a very difficult circumstance, to who the advocate is a complete stranger, all the while ensuring that the legal duty to defend the client and protect all his/her rights and needs is diligently discharged. Approaches and skills adopted and decisions taken by advocates working with such children significantly influence the route these children will take and the experience they will have in their often arduous journey through the justice system. This Handbook provides examples of such an advocate can be instrumental in not only dramatically changing the course of a child's life, but also transforming and holding the juvenile justice system itself accountable to the children, whose best interest it is intended to serve. In this sense, the work that such advocates do in this field, and the results that accrue from it, also plays a vital role in influencing public perception about the juvenile justice system, as to whether or not it delivers the objectives of the laws that govern this area of practice.

A majority of children in conflict with law entering the Juvenile Justice System, hail from poor impoverished families. These children are entitled to justice, care, protection, treatment, development, rehabilitation and social re-integration, as envisaged in the Preamble of the Juvenile Justice (Care and Protection of Children) Act, 2015, (JJ Act, 2015). The Preamble, which lays out the object of the enactment, states that the law is to be implemented *'….by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation…,'* (emphasis added). The jurisprudence on juvenile justice in India that has informed the JJ Act, 2015 as well as the UN Convention on the Rights of the Child, 1989, acceded to by India in 1992, and the range of guidelines brought out by the United Nations on this topic; require advocates working with children in conflict with law to forge competencies that to a large extent, are a radical shift away from what constitutes regular practice in criminal matters. The sections below elucidate this point by capturing the essence of the legal framework governing this area of practice.

The right to legal aid for all persons alleged to be in conflict with law has been enshrined in the Constitution of India. Article 21 of the Constitution of India guarantees an accused the right to a fair trial; Article 22(1) guarantees anyone who is arrested, the right to consult and be defended by a legal practitioner of his choice; and Article 39-A requires the State to provide legal aid through suitable legislation or schemes to ensure that people are not deprived of the opportunity to secure justice due to economic or other disabilities. Under Sections 12(c) and 13, of The Legal Services Authorities Act, 1987, children and persons in custody are entitled to legal aid.

Article 40(1), of the UN Convention on the Rights of the Child, 1989, (UNCRC), which India acceded to in 1992, places an obligation to States Parties -

> to recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others….

Though the JJ Act, 2015 also deals with crimes committed by children it is a socially beneficial legislation, imposing duties on all those involved in administration of the law to align their work with the call arising out of its Preamble and the fundamental principles enshrined in Section 3. Advocates should also adhere to the fundamental principles enshrined under Section 3 of the JJ Act, 2015, -principles that all functionaries and authorities are required to abide by. In particular, advocates working with such children are required to adhere to the principle of best interests, i.e., Section 3(ix), which states – "All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential". The advocate therefore has to ensure that this becomes the guiding force, one that should not be compromised or violated, irrespective of the gravity of the crime the child is alleged to have committed. The term "best interests" has been defined under Section 2(9), of the Act to mean – "the basis for any decision taken regarding the child, to *ensure fulfilment of his basic rights and needs,* identity, social well-being and physical, emotional and intellectual development,"(emphasis added).

The Handbook provides rich information on these aspects, all the while urging the advocate to be mindful that they are human rights lawyers engaging in practice with children under a rehabilitative welfare law. It underscores the fact that advocates have to deepen their understanding of children and adolescents, so that

they are sensitive the child's developmental stage and needs. It also reminds the advocates that despite being rights holders, their child clients, given their unique vulnerable status, are not able to engage with them as 'clients' in the way adults do - and that this puts them at a disadvantage of not being able to have easy access or be in control of the quality or nature of legal aid provided. The onus on the advocate is therefore to ensure that the legal representation provided to the child, results in the child growing to 'full potential', and that the child is able to realize all his 'basic rights and needs'. Therefore the role of the advocate is not just to get the child-client out on bail, as is most often observed in practice. It means that the advocate has to truly advocate for the protection and fulfilment of all the basic needs and rights of the child-client - including protection against torture, right to food, right to rehabilitation, etc.

Duties have also been cast on other functionaries and authorities to ensure that children alleged to be in conflict with law have access to legal aid. Section 3(iii) of the JJ Act, recognises the principle of participation, which is the right of every child to be heard and to participate in all processes and decisions affecting his interest. Such participation is possible by ensuring legal representation to a child in conflict with the law. Duties have been cast on the Juvenile Justice Board, (JJB), under Section 8(3)(c), to ensure that a child unable to afford a private lawyer is represented by or has access to a free legal aid lawyer.This naturally translates to an entitlement for all children alleged to be in conflict with law in Observation Homes to have access to legal aid, and the right to be heard in any matter concerning them. The duty has also been imposed on thepolice officer who deals with a child alleged to be in conflict with law, under Rule 8(3) (vii) of the JJ Model Rules, 2016, to - "inform the District Legal Services Authority(DSLSA) for providing free legal aid to the child". It is also the duty of the Persons in Charge of the Observation Home, under Section 53(1)(viii), to ensure the availability of legal aid for children in conflict with the law. Rule 61(3)(xxxi) of the JJ Model Rules, 2016 also requires the Person in Charge of a CCI to - "co-ordinate with the legal cum Probation Officer in the DCPU or the DSLSA to ensure that every child is legally represented and provided free legal aid and other necessary support". As per Section 108(a), JJ Act, 2015, the Central Government and the State Governments are required to take measures to ensure that provisions of the Act are given wide publicity through media and at regular intervals so as to make the general public, children and their families aware of these provisions. Further, as per Section 108(b), they must also train their officers and other concerned persons periodically, on matters related to the implementation of the Act.

If the child's right to legal aid and access to justice has to be realized in its true sense, then quality legal services, provided in conjunction with psycho-social assistance, should be seen as essential components of and a key feature of a child rights friendly justice system for children. Legal professionals working with children in conflict with law have the unique opportunity to work along with other stakeholders, as appropriate, and to use law constructively as a tool for social engineering, so as to help such children access justice as well as legal entitlements that will enable them to re-integrate into the community, with dignity.

The absence of a cadre of advocates dedicated to working on matters related to children in India is a serious gap in Child Protection. A large majority of children in conflict with law hail from extremely vulnerable backgrounds, and most of the families of these children can ill afford private advocates. There is very little being done to mainstream child rights law into legal education or continuing legal education around the country, or to establish a system wherein clinical legal education is embedded into the curriculum of law colleges/universities. In this context, and given the above mandate for advocates working with children, it is naturally incumbent on academic institutions involved in the teaching of law, as well as the National Legal Services Authority (NALSA) and State Legal Services Authorities (SLSAs), established under the Legal Services Authority, Act, 1987, to devote much more attention to the building of cadres of advocates for children in conflict with law. Moreover, if an advocate working with such children really aims to hone his legal skills and develop a flourishing and fulfilling practice defending children in conflict with law, it would naturally require him to voluntarily engage in continuing legal education in order to be updated with the rehabilitative philosophy of juvenile justice and the applicable law.

The Handbook provides a resource that could be used to inform and bolster similar efforts aimed at building a pool of dedicated and competent advocates for children in conflict with law. It has Chapters written by two advocates with a wealth of litigation experience in work with children in conflict with law - Maharukh Adenwalla and Anant Kumar Asthana. Their contribution provides rich and practical guidance gleaned from their nuanced engagement with human rights law, be it litigation, teaching and training. It also includes Chapters authored by Swagata Raha, Senior Research Associate (Consultant), with CCL-NLSIU, who, given her extensive engagement with legal research on child rights law, provides information about the legal framework governing this area of litigation practice. The Handbook covers a range of topics, including some that currently do not feature in legal education or available resources used to conduct capacity building programs for

such advocates, such as the Chapter on the Transfer System, given that the JJ Act, 2015 is in a nascent stage of implementation. The Handbook includes guidance for how the advocates could deal with unique challenges and ethical dilemmas faced in practice. Advocates are also required to engage with other functionaries such as the Child Welfare Police Officer, Probation Officer, Child Welfare Officer, Counselor, Person in Charge of Child Care Institutions, etc. The Handbook provides insight into how the advocate needs to work in collaboration with these functionaries, while also retaining focus on his primary role as the 'legal representative' of the child, whose duty is to focus on the best interest of his child client - one that involves ensuring the clients 'basic needs and rights' are effectively met.

Purpose of the Handbook

The purpose of this Handbook is to enable advocates and other stakeholders interested in the issue of access to justice for children in conflict with law to:

- Gain a deeper understanding of children in conflict with law and the litigation practice with this unique client group;
- Become more aware of the deeper philosophical underpinnings in juvenile justice and the implications for advocates working with such children;
- Be informed of the domestic and international law and guidelines that should inform the practice of advocates working with these children;

Enable a deeper appreciation for possible career opportunities in the field of child rights law, particularly in juvenile justice.

The intended user

The intended user of this Handbook includes advocates working with children in conflict with law, legal researchers, law teachers, Juvenile Justice Boards, Children's Courts, High Court Committees on Juvenile Justice, National and State Legal Services Authorities, Law teachers, students of law, Training Institutes, and all other stakeholders interested in promoting and protecting the rights of children in conflict with law.

Structure and Design of the Handbook

The Handbook is structured in the following manner:

Chapter 1, on Philosophy and Aims of Juvenile Justice has been written by *Advocate Maharukh Adenwalla.* It deals with the distinct treatment of children in conflict with

law, and introduces the philosophical underpinnings of juvenile justice, as enshrined in international law and guidelines, as well as the Constitution and the JJ Act, 2015.

Chapter 2, on Key Definitions has been written by Swagata Raha, and covers the definitions of key terms and implications for advocates working with children in conflict with law.

Chapter 3, on General Principles has been written by Advocate Maharukh Adenwalla. It explains the fundamental principles enshrined in Section 3, JJ Act, 2015 as well as other principles relevant for this unique field of litigation and how adherence to these, radically alter the way an advocate working with such children is required to practice.

Chapter 4, on Rights of Children Alleged and Found to be in Conflict with the Law is written by Swagata Raha. This Chapter provides a detailed listing of rights that are to be enjoyed by children in conflict with law, while also providing examples of how advocates can use their legal acumen to vigorously ensure these rights are protected.

Chapter 5, on Juvenile Justice Board and Children's Court and Chapter 5 on Child Care Institutions for Children in Conflict with the Law are both written by Swagata Raha. These two Chapters provide an overview of the structures that are to be established for children in conflict with law under the JJ Act, 2015, while detailing the powers and functions of the judicial bodies empowered to adjudicate on matters concerning the, and key procedures that are to be followed while doing so. The Chapter provides concrete examples that could guide the practice of advocates representing such children before these bodies.

Chapter 7, on Apprehension and Production of Child in Conflict with Law before the Juvenile Justice Board; Chapter 8 on Age Determination, and Chapter 9 on Bail are all written by Advocate Anant Kumar Asthana. These Chapters provide guidance on these topics highlighting the rights of children in conflict with law and the distinct procedures that are to be followed by the advocate and other functionaries, while also providing information about applicable case law.

Chapter 10, on the Transfer System and Chapter 11, on Orders that may and may not be passed for Children in Conflict with Law are written by Advocate Maharukh Adenwalla. Chapter 10 provides a nuanced explanation of the transfer system introduced by the JJ Act, 2015, and the vital role that the advocate for a child needs to play in order to ensure his client enjoys the rights enshrined in the UNCRC, the Constitution and the

JJ Act, 2015, itself. Chapter 11 details the sanctions that can and cannot be passed against a child in conflict with law under the Act. It deals with a range of issues including whether or not a victim can determine the quantum of sanctions that may be passed against a child in conflict with law, and what an advocate needs to do while dealing with a child alleged to have committed a sexual offence under the Protection of Children from Sexual Offences, Act, 2012.

As regards design, some of the content has been printed in green. This has been done with the idea of highlighting content that is intended as practical guidance for advocates working with children in conflict with law.

We sincerely hope that the use of this Handbook will help strengthen the hands of advocates, both private and those empanelled by the Legal Services Authority, in their endeavour to secure justice for their child clients. We also hope that it helps to lay the foundation for overhauling the system for provision of legal services to children in conflict with law, (be it the system established under the Legal Services Authority Act, 1987 for provision of free legal aid, legal services provided by non-governmental organizations, or the system of private legal practice), the teaching of law, continuing legal education for Law Faculty, capacity building of legal aid lawyers, Juvenile Justice Boards and Children's Courts, and all those responsible for monitoring of legal services. Ultimately, we hope that these changes contribute to building greater faith amongst children and the wider community that the juvenile justice system actually delivers the rehabilitative outcomes for children that it claims to.

This publication is intended for use as a Handbook on the above topics. It is not intended to be an exhaustive resource on the subject.

1

Philosophy and Aim of Juvenile Justice

By Advocate Maharukh Adenwalla

Lawyers, whether privately engaged or State appointed, working with children in conflict with the law are chiefly concerned with the Juvenile Justice (Care and Protection of Children), Act 2015, (JJ Act, 2015). Nonetheless, it is important for them to know the philosophy of juvenile justice legislation to help better fathom and interpret the different provisions of the law. Such understanding also helps lawyers to sharpen their arguments in the interest of children.

1.1. Distinct treatment of child offenders

That child offenders should be treated differently from adults resulted in the creation of a separate system, namely, the juvenile justice system, to deal with children alleged or found to have committed offences. It is crucial for practitioners to appreciate the rationale for such differentiation, more so today when there is a heightened sentiment to exclude children from the ambit of juvenile justice legislation, which the legislature, to some degree, has succumbed to. Such rationale include, a child criminal is the product of unfavourable environment and is entitled to a fresh chance under better surroundings;[1] prospect of reformation are hopeful;[2] a child does not have the same full knowledge and realization of the nature and consequences of his act as does an adult;[3] "that the young owing to their early stage of human development, require particular care and assistance with regard to physical, mental and social development, and require legal protection in conditions of peace, freedom, dignity and security";[4] and "every child deprived of liberty shall be separated from adults".[5] Other factors include - a child is susceptible to

1 Report of the Indian Jail Committee, 1919-20 available at https://archive.org/details/eastindiajailsco01indi.
2 *Ibid.*
3 *Ibid.*
4 United Nations Standard Minimum Rules for Administration of Juvenile Justice, 1985.
5 United Nations Convention on the Rights of the Child, 1989.

impressions and influences; is unable to cope with challenges; is prone to react disproportionately and / or inappropriately to a situation.

General Comment No. 10 [2007]: Children's rights in juvenile justice, issued by the Committee on the Rights of the Child,[6] is very articulate in this respect -

Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children.[7]

In *Pratap Singh v. State of Jharkhand*,[8] the Supreme Court referring to the *United Nations Standard Rules for Administration of Juvenile Justice*, observed,

…it must be borne in mind that the moral and psychological components or criminal responsibility were also one of the factors in defining a juvenile…The modern approach is to consider whether a child live up to the moral and psychological components of criminal responsibility, that is whether a child by virtue of his or her individual discernment and understanding can be held responsible for antisocial behavior.

In *Court on Its Own Motion v. Dept. of Women and Child*,[9] the Delhi High Court, noted,

It is of utmost importance to take note of the fact that a separate adjudicating and treatment mechanism has been established for persons below 18 years of age who have committed an offence. A child is a part of the society in which he lives. Due to his immaturity, he is easily motivated by what he sees around him. It is his environment and social context that provokes his actions. It is because of this immaturity that they are not supposed to be treated as adult offenders.

Regarding adolescence, brain neuro-science indicates that at such stage of life, the brain is still developing, which is demonstrated in the form of heightened risk-taking and decreased levels of self-regulatory ability. Irresponsible behavior may be attributed to traits related to this age, instead of crediting the same to 'criminal tendency'. Hence, such child requires counseling, and not punishment. Such adolescent traits are a transitory phase, which pass once the person attains

6 Established under the UN Convention on the Rights of the Child, to monitor the implementation of the Convention.

7 Committee on the Rights of the Child, General Comment No. 10 (2007) Children's rights in juvenile justice, para 10.

8 [2005] 3 SCC 551.

9 WP(C)No. 8889 of 2012 decided on 11th May 2012 - https://indiankanoon.org/doc/132059140/.

adulthood. Moreover, adolescence is marked with loosening of parental control. The *Report of the Committee on Amendments to Criminal Law*,[10] under the Chairmanship of Justice J.S. Verma [retired Chief Justice of India], in 2013, while recommending that there was no need to reduce the age of juvenility, referred to neuroscience:

We must take note of the neurological state of the adolescent brain. Studies show that adolescence is a period of significant changes in the brain structure and function which is aptly set out in Laurence Steinberg's 'A Social Neuroscience Perspective on Adolescence Risk-Taking'[11].

To effectively represent a child in conflict with the law, it is imperative that the lawyer has knowledge about the reasons why a child in conflict with the law is treated differently from an adult, though the offence committed may be similar. Such treatment is not lenient, as many believe - it is age-appropriate.

1.2. On the International Platform

There were mainly two different rationales in varied parts of the world for the establishment of a separate system for juveniles: (i) the principle of segregation of children from adult offenders; and (ii) the principle of *parens patriae*, i.e, the state is responsible for all juveniles requiring care and protection.[12] Gradually, the 'welfare' approach [*parens patriae*] shifted to the 'rights' approach, which respects the Constitutional and procedural rights of a juvenile. Juvenile justice has since been acknowledged as part of the human rights discourse. A child in conflict with the law should "be treated in a manner consistent with the promotion of the child's sense of dignity and worth, and which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."[13]

Reference is being made to the United Nations international instruments to show that juvenile justice falls within the human rights sphere, and is so acknowledged globally. Such international instruments have been referred to in the preamble of the JJ Act, 2015 as being the reason for re-enactment of juvenile justice legislation. Some of their clauses are contained in the said Act, and may be relied upon by

10 Available at http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf ; p. 259.

11 Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2396566/

12 VED KUMARI, THE JUVENILE JUSTICE SYSTEM IN INDIA – FROM WELFARE TO RIGHTS, (Oxford University Press, 2004], p.47.

13 UNCRC, 1989, Article 40(1).

lawyers to support their arguments.

That child offenders should be transformed, and not penalized, was a theory advocated by the first international instrument on children's rights, *the Geneva Declaration of the Rights of the Child, 1924*.[14] It places a duty on mankind – "the delinquent child must be reclaimed".

In 1985, *the United Nations Standard Minimum Rules for the Administration of Juvenile Justice*,[15] [the Beijing Rules] spelt out in detail the treatment to be meted to juveniles. It defines "juveniles" as "a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult".[16] It obligates the adjudicating authority to conduct proceedings in a manner that is "conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely".[17] It also extends to a juvenile, the procedural safeguards assured to an adult –

> such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.[18]

Focus of the Beijing Rules is on rehabilitation of the juvenile[19], and it stipulates a "variety of disposition orders"[20] as an alternative to imprisonment – such as care, guidance and supervision orders; probation; community service orders; orders to participate in group counseling and similar activities. The Beijing Rules discourage pre-trial and post-trial detention – "Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time"[21] and "The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period."[22]

In 1990, two international instruments regarding juvenile justice were adopted by

14 Adopted by the League of Nations on 26th September 1924.
15 Adopted by the United Nations General Assembly on 29th November 1985.
16 Beijing Rules, 1985, Rule 2.2(a).
17 Beijing Rules, 1985, Rule 14.2.
18 Beijing Rules, 1985, Rule 7.1.
19 Beijing Rules, 1985, Rules 24.1 and 25.1.
20 Beijing Rules, 1985, Rule 18.
21 Beijing Rules, 1985, Rule 13.1.
22 Beijing Rules, 1985, Rule 19.1.

the United Nations General Assembly[23] - *the United Nations Rules forthe Protection of Juveniles Deprived of their Liberty* [the Havana Rules] and *the United Nations Guidelines for the Prevention of Juvenile Delinquency* [the Riyadh Guidelines]. What is of interest in the present discussion are the Havana Rules. The Havana Rules is the first international instrument that defines 'juvenile' in terms of age – "A juvenile is every person under the age of 18".[24] The aim of the juvenile justice system as reflected under the Havana Rules is to "uphold the rights and safety and promote the physical and mental well-being of juveniles."[25] Furthermore,

> The Rules are intended to establish minimum standards accepted by the United Nations for the protection of juveniles deprived of their liberty in all forms, consistent with human rights and fundamental freedoms, and with a view to counteracting the detrimental effects of all types of detention and to fostering integration in society.[26]

The Havana Rules also castigates pre-trial detention – "Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances"[27], as also post-trial incarceration –

> Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.[28]

The Convention on the Rights of the Child, 1989, [CRC][29] is the international treaty on children's rights that India acceded to in 1992. Articles 37 and 40 of the CRC deal with children in conflict with the law. The UNCRC also reiterates that detention "shall be used only as a measure of last resort and for the shortest appropriate period of time".[30]

State Parties[31] are mandated to ensure that "every child alleged as or accused of having infringed the penal law", has the following, amongst other, guarantees – "to

23 Both on 14th December 1990.
24 Havana Rules, 1990, Rule 11(a).
25 Havana Rules, 1990, Rule 1.
26 Havana Rules, 1990, Rule 3.
27 Havana Rules, 1990, Rule 17.
28 Havana Rules, 1990, Rule 2.
29 Adopted by the United Nations General Assembly on 20th November 1989, to which India acceded on 11th December 1992.
30 UNCRC, 1989, Article 37(b).
31 Countries that are bound by the provisions of CRC as they have ratified / acceded to it.

be presumed innocent until proven guilty according to law"[32]; "to have legal or other appropriate assistance in the preparation and presentation of his or her defence"[33]; "to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance"[34].

Legal representation is a crucial and integral part of fair trial. A child in conflict with the law is entitled to be defended by a lawyer. In this respect, the Beijing Rules state, "Throughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country."[35] Under the Havana Rules, "Juveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications".[36] The UNCRC also provides for legal assistance to a child in conflict with the law - "Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance".[37] *General Comment No. 10 [2007]: Children's rights in juvenile justice,* too states,

> The child must be guaranteed legal or other appropriate assistance in the preparation and presentation of his / her defence. CRC does require that the child be provided with assistance, which is not necessarily under all circumstances legal but it must be appropriate…The Committee recommends the State parties provide as much as possible for adequate trained legal assistance, such as expert lawyers or paralegal professionals.[38]

The aforementioned international instruments may be innovatively relied upon by lawyers representing children in conflict with the law to ensure constitutional and procedural safeguards, including the right to a fair trial / inquiry; child's best interest; release on bail; speedy disposal of inquiry; appropriate rehabilitative measures and community-based disposition orders.

1.3. Indian Scenario

Prof. VedKumari refers to the Report of the Indian Jail Committee 1919-1920 as

32 UNCRC, 1989, Article 40(2)(b)(I).
33 UNCRC, 1989, Article 40(2)(b)(ii).
34 UNCRC, 1989, Article 40(2)(b)(iii).
35 Beijing Rules, 1985, Rule 15.1.
36 Havana Rules, 1990, Rule 18(a).
37 UNCRC, 1989, Article 37(d).
38 General Comment No.10, para 49.

"[o]ne of the most significant developments in the history of the juvenile justice system in India."[39] The said Report resulted in the enactment of Children Acts in different provinces of British India – the Madras Children Act 1920, the Bengal Children Act 1922, and the Bombay Children Act 1924. For information, special mention is being made of the Mysore Children Act 1943. Children Acts dealt with two categories of children – offenders and vagrants. After independence, State Governments adopted or enacted Children Acts, and the Children Act 1960 had jurisdiction over Union Territories. Provisions in these Children Acts were not similar – the age of a child under the respective Children Acts also varied from State to State. This prompted the Supreme Court, in 1986, to observe,

> 4. …we would suggest that instead of each State having its own Children Acts different in procedure and content from the Children's Act in other States, it would be desirable if the Central Government initiates Parliamentary Legislation on the subject, so that there is complete uniformity in regard to the various provisions relating to children in the entire territory of the country.[40]

The Government of India enacted the Juvenile Justice Act 1986 [JJ Act 1986] – it was a uniform law on juvenile justice applicable throughout the country. The JJ Act 1986 was replaced with the Juvenile Justice [Care and Protection of Children] Act 2000 [JJ Act 2000], to bring juvenile legislation in the country in conformity with the CRC, and the same was amended in 2006 and 2011. Presently, since 15th January 2016, the JJ Act, 2015 is applicable throughout India.

It is important to note that if an offence is alleged to have been committed by a person below the age of 18 years prior to 15th January 2016, such case will be handled by the Juvenile Justice Board [JJB] under the JJ Act 2000, whereas if alleged to have been committed on or after 15th January 2016, the same will be covered under the JJ Act 2015.

At this stage, it would be apt to mention that the minimum age of criminal responsibility [MACR] in India, as given in the Indian Penal Code, is 7 years.[41] General Comment No.10 (2007) on Children's rights in juvenile justice states:

> Children who commit an offence at an age below that minimum cannot be held responsible in a penal law procedure. Even [very] young children do

39 VED KUMARI, THE JUVENILE JUSTICE SYSTEM IN INDIA – FROM WELFARE TO RIGHTS, (Oxford University Press, 2004], p.65.

40 *Sheela Barse v. Union of India,* (1986) 3 SCC 632.

41 IPC, 1860, Section 82.

> have the capacity to infringe the penal law but if they commit an offence when below MACR the irrefutable assumption is that they cannot be formally charged and held responsible in a penal law procedure. For these children special protective measures can be taken if necessary in their best interests.[42]

Hence, a child under seven years of age is exempted from inquiry as a child in conflict with the law, and if intervention is found necessary, such child should be produced before the Child Welfare Committee as a child in need of care and protection. A child above 7 years and under 12 years "who has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct on that occasion" is also so exempt[43] - and such competence of a child to stand inquiry is to be determined by the JJB. The juvenile justice system, thus, deals with those children below the age of 18 years, alleged to have committed an offence, and 'who have attained sufficient maturity" in the context of Section 83 of IPC.

The JJ Act, 2015 has for the first time introduced waiver of a child in conflict with the law in certain stipulated circumstances into the criminal justice system, which child rights practitioners argue is contrary to the philosophy of juvenile legislation, as also the objectives of the JJ Act 2015. As lawyers representing such child in conflict with the law, it is our bounden duty to ensure that a child is not denied the protection of juvenile legislation. Refer to Chapter …on The Transfer System for details.

1.4. Aim of the JJ Act, 2015

The aim of juvenile legislation has been expounded in several judgments of the Supreme Court and High Courts. At the outset, it is important to note that the objective of juvenile justice legislation, in India, down the years has remained the same, irrespective of the legislation in force at the relevant time. In *Bhola Bhagat v. State of Bihar*,[44] the Supreme Court states that in enacting the JJ Act 1986, the effort of the legislature was "to reform the delinquent child and reclaim him as a useful member of the society". In *Pratap Singh's* case, the Supreme Court's 5-judge Constitution Bench described the JJ Act, 1986 as "beneficial legislation" and held:

> It is settled law that the interpretation of the Statute of beneficial legislation must be to advance the cause of legislation to the benefit for whom it is made and not to frustrate the intendment of the legislation.

42 General Comment No. 10, para 31.
43 IPC, 1860, Section 83.
44 [1997] 8 SCC 236.

In *Salil Balil v. Union of India*, the Supreme Court pointed out,

> The essence of the Juvenile Justice [Care and Protection of Children] Act, 2000, and the Rules framed thereunder in 2007, is restorative and not retributive, providing for rehabilitation and reintegration of children in conflict with law into mainstream society.[45]

In *Krishna Bhagwan v. State of* Bihar,[46] the Patna High Court, when referring to the Bihar Children Act, 1982 and the JJ Act, 1986, stated, "The basic approach seems to be curative instead of punitive." The Bombay High Court,[47] when dealing with the JJ Act 2000, stated,

> In the statement of objects and reasons it was set out that the Act proposes amongst others to make the juvenile system meant for a juvenile or the child more appreciative of the developmental needs in comparison to criminal justice system as applicable to adults; to minimise the stigma and in keeping with the developmental needs of the juvenile or the child.

Lawyers, normally, argue on the basis of the provisions contained in a legislation, and pay scant attention to the objective of that legislation. The objective of the JJ Act, 2015 is contained in the title, the preamble and the general principles, and should be relied upon by lawyers, to buttress their arguments on behalf of the child.

The provisions of the JJ Act, 2015 should be read in a manner that enhances its goals – if two interpretations are probable, the correct interpretation is that which is in conformity with the legislation's objectives. In *D. Srinivasan s/o Durai Naicker v. The Secretary Home [Prisons], Government of Tamil Nadu*,[48] the Madras High Court when referring to the JJ Act, 1986 and the JJ Act, 2000, said, "…both the Acts being the benevolent legislation, they have to be interpreted in the manner as to advance the object of the Act."

1.4.1. Title of the Act

The title of the Act throws light not only on the contents of that legislation, but also on its objective. The words deployed in the title should as far as possible be understood in accordance with its meaning as reflected in the Act, or else, as per its ordinary and natural meaning.

What does the title, *The Juvenile Justice [Care and Protection of Children] Act 2015*

45 (2013) 7 SCC 705.
46 AIR 1989 Pat 217.
47 *Imityaz Hussain Mumtiyaz Sheikh*, 2008 [116] BomLR 1645.
48 HC.[MD]No. 147 of 2008 dated 19th June 2008.

portray? Firstly, that it relates to 'juveniles' – children are the focus of the legislation. Under Section 2 (35), "juvenile" means a child below the age of eighteen years. Secondly, the word 'justice' indicates the receiving of dues [legal entitlements] by the concerned persons through the system. The meaning of 'justice' in *Black's Law Dictionary*[49] is: "Proper administration of law. In jurisprudence, the constant and perpetual disposition of legal matters or disputes to render every man his dues." And, in *A Concise Dictionary of Law*[50] : "A moral ideal that the law seeks to uphold in the protection of rights and punishment of wrongs." Thirdly, the insertion of the phrase 'Care and Protection of Children' denotes that juvenile justice is attained through the child's 'care and protection', and not through punishment. Children in need of care and protection, and children in conflict with the law, are dealt with under the same legislation – the JJ Act, 2015 – indicating that the legislation recognises that both these categories of children require 'care and protection'.

In conclusion, the title reflects that in relation to 'children in conflict with the law', the relevant parties, namely, the child, the complainant and society, receive their dues / entitlements through the 'care and protection' of the child. Hence, under the JJ Act, 2015, 'care and protection' of the child is the alternate to punishment, and the same is achieved by administration of the JJ Act, 2015 in its true spirit.

Lawyers should rely on the interpretation of the title to show the intent and objective of the JJ Act 2015, and that 'care and protection' of the child is paramount, even in case of children in conflict with the law.

1.4.2. Preamble

What is meant by the term 'preamble'? According to *Black's Law Dictionary*:

> A clause at the beginning of a constitution and or statute explanatory of the reasons for its enactment and the objects sought to be accomplished. Generally, a preamble is a declaration by the legislature of the reasons for the passage of the statute and is helpful in the interpretation of any ambiguities with the statute to which it is prefixed.

The Supreme Court, in *A. Thangal Kunju Musaliar v. M. Venkitachalam Potti*[51] states, "The Preamble of a statute has been said to be a good means of finding out its meaning and as it were a key for the understanding of it." In *M/s. Burrakur Coal Co. Ltd. v. Union of India*,[52] the Supreme Court observed, "where the object or meaning of

49 Sixth Edition, St. Paul, Minn. West Publishing Co. [1990].
50 Second Edition, Oxford University Press [1990].
51 "AIR 1956 SC 246".
52 "AIR 1961 SC 1961".

the enactment is not clear, the preamble may be resorted to explain it." The Supreme Court referring to both these judgments in *Arnit Das v. State of Bihar*,[53] stated,

> The Preamble is a key to unlock the legislative intent. If the words employed in an enactment may spell a doubt it would be useful to so interpret the enactment as to harmonise it with the object which the Legislature had in its view.[54]

From the aforementioned, it is clear that the preamble plays an important role in interpreting the provisions of a statute.

The Preamble [long title] of the JJ Act, 2015 states:

> An Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, hereinunder and for matters connected therewith or incidental thereto.

The words / phrases of the preamble that pop-up for considering the intention of the legislation are *children in conflict with law*, *children in need of care and protection*, *catering to their basic needs*, *development, child-friendly approach*, *best interest of children* and *rehabilitation*. The preamble indicates that the JJ Act, 2015 deals with matters relating to children in conflict with the law and children in need of care and protection, and that the process should be child-friendly, and that any decision taken should be in the best interest of a child. The emphasis is on identifying the gaps in the developmental needs of a particular child, and on fulfilling the same, with the ultimate goal of such child's rehabilitation, so as to ensure that the child's vulnerabilities are suitably addressed.

The preamble, further, refers to Article 15(3), Article 39(e) and (f), Article 45 and Article 47 of the Constitution, and states, that such Articles impose duties "on the State to ensure that all the needs of children are met and that their basic human rights are fully protected." It also claims to have considered the UNCRC and other international instruments when enacting the JJ Act, 2015.

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53 [2000] 5 SCC 488.

54 *Arnit Das' case* was overruled in *Pratap Singh vs. State of Jharkhand* [(2005) 3 SCC 551] in as much as it had held that the date a juvenile is produced before the court / competent authority is the reckoning date for determining juvenility of an offender. In *Pratap Singh's case*, the Supreme Court held that the reckoning date for juvenility is date of occurrence of offence.

As aforementioned, the preamble denotes that the JJ Act, 2015 is enacted in pursuance of certain constitutional obligations of the state towards children. Article 15(3) is an exception to the fundamental right prohibiting discrimination on grounds of religion, race, caste, sex or place of birth. It acknowledges women and children as a special group requiring special protection, and permits the State to make special laws and provisions to achieve this end. Juvenile justice legislation, hence, is enacted on the basis that children in conflict with the law have distinct characteristics requiring different treatment from that of adults. Article 39(f) is the source of several child-related legislations :

> Certain principles of policy to be followed by the State. - The State shall, in particular, direct its policy towards securing -…(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

By Articles 45 and 47, the State is directed to endeavour to provide for "early childhood care and education to children below the age of six years", and "to raise the level of nutrition and the standard of living and to improve public health", respectively.

The preamble of the JJ Act, 2015 should be the 'mantra' of those working within the juvenile justice system. Treatment within the system should be age-appropriate, with due acknowledgement that the person is a child, with all the traits linked to such age. Often, due to the physical appearance or the manifestation of demeanour or the allegations against the child, the functionaries tend to perceive the child as an adult. It is the child's lawyer's task to constantly bring to the JJB's attention that the person standing before them is a 'child', and the yardstick for assessment should differ from that of an adult. A lawyer representing a child in conflict with the law should always judge his / her actions as per the framework of the preamble - Is the lawyer's conduct towards the child, child-friendly? Is the lawyer acting in a manner so as to enhance the best interest of the child? Is the lawyer, while performing his / her professional duties, also pursuing the rehabilitative interests of the child?

The JJ Act, 2015, defines the terms "child friendly" and "best interest". "Child friendly" means any behaviour, conduct, practice, process, attitude, environment or treatment that is humane, considerate and in the best interest of the child. For example, the child's lawyer

- should take steps to build rapport with the child;
- inform the child that any information shared with his / her lawyer is

confidential;

- take detailed instructions from the child regarding the case in a non-judgmental manner;
- take short dates in the case and attend before the Board on each such date;
- facilitate the child's contact with his / her family, if in the interest of the child;
- make timely and appropriate applications, such as, bail applications, discharge applications, before the Board; explain to the child the goings-on before the Board on each date of hearing;
- patiently respond to the child's queries;
- not compel the child to plead guilty to the charges alleged against him;
- ensure speedy disposal of inquiry.

The lawyer is obligated to treat the child with respect, and "the Board shall satisfy itself that the child in conflict with the law has not been subjected to any ill-treatment by the police or by any other person, including a lawyer or probation officer and take corrective steps in case of such ill-treatment."[55] The Board is also required to ensure "that the child's rights are protected throughout the process of apprehending the child, inquiry, aftercare and rehabilitation.[56] The lawyer is also obligated to ensure that the rights guaranteed to a child under the Constitution, the JJ Act 2015 and other laws, including Supreme Court and High Court judgments, are adhered to.

"Best interest of child" means the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development.[57] For example, during bail arguments, if the child was in school, the lawyer should stress that keeping such child in the Observation Home, deprives him / her of right to education, thereby adversely affecting the best interest of the child. Another example, during arguments on final orders under Section 18(1) of the JJ Act 2015, the lawyer should seek appropriate additional directions under Sub-Section (2) of Section 18 so as to satisfy the needs of that child. The child is centre-stage - any decision to be taken, including by a lawyer, should be tested in accordance with its likely impact on the

55 JJ Act, 2015, Section 14(5)(a).
56 JJ Act, 2015, Section 8(3)(b).
57 JJ Act, 2015, Section 2(9).

child. *General Comment No. 14 [2013] on the right of the child to have his or her interests taken as a primary consideration*,[58] states,

> In criminal cases, the best interests principle applies to children in conflict [i.e. alleged, accused or recognized as having infringed] or in contact [as victims or witnesses] with the law, as well as children affected by the situation of their parents in conflict with the law. The Committee[59] underlines that protecting the child's best interests means that the traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives, when dealing with child offenders.[60]

It further states, "The concept of the child's best interests is complex and its content must be determined on a case-by-case basis." A lawyer too should keep the child's best interest in the forefront when taking a decision in relation to a child in respect of the case, as also otherwise.

"Elements to be taken into account when assessing and determining the child's best interest" are the child's views; the child's identity [sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality]; preservation of the family environment and monitoring relations; care, protection and safety of the child; situation of vulnerability [disability; belonging to a minority group; refugee or asylum seeker; victim of abuse; street child]; child's right to health; child's right to education.[61] Hence, the lawyer should assess and determine the best interest of his / her client in every situation, and the same will vary from child to child. Merely because a child is in conflict with the law does not mean such child should be deprived of his / her other rights - for example, the lawyer should ensure that a child is not denied the right to education or the right to life, fundamental rights under the Constitution and the UNCRC, when in police custody, orthe Observation Home, Special Home, place of safety. The child's developmental needs are to be fulfilled at all times as narrated in the preamble.

'Rehabilitation' is not defined under the JJ Act, 2015. According to *Black's Law Dictionary* it means: "Investing or clothing again with some right, authority or dignity. Restoring person or thing to a former capacity; reinstating; qualifying again." The word 'restore' or 'reinstate' are used while defining 'rehabilitation', but

58 Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, available at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf

59 General Comment No. 10, para 10.

60 *Ibid*, para 28.

61 General Comment No. 14 [2013].

when speaking in the context of children, the appropriate word would be 'improve' or 'enhance', as rehabilitation helps the child surmount the situation that may have resulted in the child's offending. The juvenile justice system is competent to identify the causes for a child's offending, and work towards eliminating the same. The rehabilitation process differs from child to child, and, its extent and method too varies, and is not dependent merely on the gravity of the offence - the circumstances of the child are a crucial factor. For example, a child alleged to have committed murder, may require minimal intervention, whereas, a child alleged to have committed a theft, may require a high degree of intervention due to wide cracks in the fulfillment of his developmental needs.

In *Court on Its Own Motion v. Dept. of Women and Child Development*,[62] the Delhi High Court spoke about the role of rehabilitation within the juvenile justice system:

> It cannot be overlooked that youth offenders often have psychological or social issues that need to be addressed as part of the rehabilitative process. Adult facilities / prison often lack the staff to address the needs of young incarcerated persons. In effect, what will happen is that if the youth is sent to an adult prison, then it is more likely for him to re-offend and escalate into violent behaviour than their peers who go to juvenile system, where rehabilitative services are far more extensive.

The Preamble of the JJ Act, 2000, prior to its amendment in 2006, inter alia, stated "for their ultimate rehabilitation through various institutions established under this enactment", but recognizing that there are also non-institutional modes of rehabilitating a child, the aforementioned portion of the preamble was substituted by the 2006 amendment - "for their ultimate rehabilitation and for matter connect therewith or incidental thereto."

Lawyers should acknowledge that their role within the juvenile justice system is not merely to obtain an acquittal for their client, but also to facilitate the client's optimum growth. For such purpose, the lawyer should coordinate with other stakeholders in the juvenile justice system - social work members on the JJB; probation officers; non-governmental organisations - to ensure the system's positive impact upon the child. When appearing before the JJB, lawyers, mostly, focus all their energies upon the Principal Magistrate [the law], rarely interacting with the social work members [psycho-social intervention].It is crucial for a lawyer to realise that the juvenile justice system adopts the psycho-socio-legal approach, and is not just a legal process, and for the lawyer to network with other stakeholders is a pre-requisite to fulfill the aim and objectives of juvenile justice legislation.

62 WP (C) No. 8889 of 2011 decided on 11.05.2012.

2

Key Definitions

By Swagata Raha[1]

2.1. Child and Child in Conflict with the Law

The term "child" is defined under Section 2(12) to mean" a person who has not completed eighteen years of age". Section 2(13) defines "child in conflict with law" to mean "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."

The above definition combines two distinct categories of children – (i) children alleged to have committed an offence; and (ii) children found to have committed an offence. The distinction should, however, be maintained while providing legal representation to children. For instance, a child alleged to have committed an offence should be presumed innocent at all stages of the legal proceedings. This is particularly relevant in cases of children between 16 and 18 years alleged to have committed a heinous offence and the advocate representing such child should ensure that this principle is not violated during the preliminary assessment envisaged under Section 15(1), JJ Act, 2015.

The above definition makes it clear that the basis of determining the age will be the date on which the offence was committed. Thus, even if a person is apprehended after attaining 18 years, the person will be dealt with as a child alleged to be in conflict with law if the offence was committed before the person completed 18 years. Please refer to Chapter VIII- Age Determination.

2.2. Classification of Offences

The JJ Act, 2015, has introduced a three-fold classification of offences as petty, serious, and heinous. Apart from the difference in proceedings, the classification serves to determine the offences for which a child above 16 years and below 18 years

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can be potentially tried as an adult. Refer to Chapter X - The Transfer System, for a detailed analysis of the types of offences and their interpretation.

Definitions of Petty, Serious, and Heinous Offences

Section 2(45) "petty offences" includes the offences for which the maximum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment up to three years.

Section 2(54) "serious offences" includes the offences for which the punishment under the Indian Penal Code or any other law for the time being in force, is imprisonment between three to seven years.

Section 2(33) "heinous offences" includes the offences for which the minimum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment for seven years or more.

CCL-NLSIU's List of "Heinous Offences" as per the JJ Act, 2015

IPC, 1860: s.121, s.195, s.195A, s.302, s.304B, s.311, s.326A, s.370(2), s.370(3), s.370(4), s.370(5). s.370(6), s.376(1), s.376(2), s.376A, s.376D, s.376E, s.397, s.398

Arms Act, 1950: s.27(2), s.27(3)

Immoral Traffic (Prevention) Act, 1956: s.5B, s.6(1), s.7(1-A), s.9

Unlawful Activities Prevention Act, 1967: s.10(b)(I), s.16(1)(a)

NDPS Act, 1985: s.15(c), s.17(c), s.18(b), s.19, s.20C, s.21(c), s.22(c), s.23(c), s.24, s.25, s.27A, s.29, s.31A

Commission of Sati (Prevention) Act, 1987: .4(1), s.4(2)

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989: s.3(2)(i), s.3(2)(iv), s.3(2)(v)

Maharashtra Control of Organised Crime Act, 1999: s.3(1)(i)**Food Safety and Standards Act, 2006**: s.59(iv)

Protection of Children from Sexual Offences Act, 2012: s.4, s.6, s.14(2), s.14(3)

The definition of 'serious offences' is vaguely worded. Even if it is assumed that the definition implies that serious offences are those for which the maximum punishment is more than three years and less than seven years, this leaves out a considerable number of offences. For instance, those offences which are punishable

with imprisonment not exceeding ten years, (or any other term exceeding seven years,) cannot be classified into any category. Similarly, offences which only prescribe a minimum punishment of any term less than seven years also cannot be classified, since serious offences according to the JJ Act, 2015 are those with imprisonments more than three but less than seven years. For e.g., for the offence of abetting an offence punishable with death or imprisonment for life, Section 115 of the Indian Penal Code prescribes a punishment which *may extend to seven years*. This means that the sentence passed may or may not be three years, since no minimum limit is prescribed, and the offence is therefore not strictly 'serious' as per the Act. There are at least 55 such offences under the IPC, which do not fall under the definitions of serious or heinous offences.[2]

According to Professor Ved Kumari, the definition of "serious offences" should be read as including offences punishable with imprisonment of more than three years, to overcome the overlap between petty and serious offences.[3] She advances the following interpretation to overcome the ambiguity in the definitions:

> "…offences punishable with more than seven years of imprisonment but containing no direction for imposition of minimum seven years of imprisonment, need to be classified as serious offences as these offences cannot be included with the definitions of petty and heinous offences using the definitive words 'maximum' and 'minimum' respectively to set the limit of what cannot be included within those categories. Even though the definition of serious offence refers to offences punishable with imprisonment between three and seven years, it poses problem of classification at both the ends due to use of qualifying words in the other two definitions. No such qualifying word setting the boundaries has been used in the definition of serious offences. It is permissible to expand the boundary set by the definition of a serious offence to include offences punishable with imprisonment for more than seven years as this expansion is favorable to children alleged to have committed such offences."[4]

17-year-old Vineet was driving his father's car at a very high speed, when he rammed into 30-year-old Ashok, who was crossing the road. Ashok died

2 See, following Sections of the IPC: 115, 121A, 122, 123, 130, 132, 194, 232, 238, 240, 251, 255, 304, 305, 306, 307, 313, 314, 315, 316, 326, 327, 328, 329, 331, 333, 363A, 364, 366, 366A, 366B, 367, 372, 373, 377, 382, 386, 388, 389, 394, 395, 396, 399, 400, 412, 413, 436, 449, 450, 454, and 455.

3 VED KUMARI, THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT 2015 – CRITICAL ANALYSES (2017), p.39.

4 *Ibid.*

instantly. Vineet was charged under Section 304, IPC (culpable homicide not amounting to murder). A plea was made by the prosecutor to the Juvenile Justice Board to transfer Vineet to the Children's Court to be tried as an adult.The question arises, as to whether or not an offence under Section 304, IPC constitutes a "heinous offence" under the JJ Act, 2015?

2.3. Child in Need of Care and Protection (CINCP)

Section 2(14), JJ Act, 2015 defines "child in need of care and protection" to mean a child—

(i) who is found without any home or settled place of abode and without any ostensible means of subsistence; or

(ii) who is found working in contravention of labour laws for the time being in force or is found begging, or living on the street; or

(iii) who resides with a person (whether a guardian of the child or not) and such person—

(a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child; or

(b) has threatened to kill, injure, exploit or abuse the child and there is a reasonable likelihood of the threat being carried out; or

(c) has killed, abused, neglected or exploited some other child or children and there is a reasonable likelihood of the child in question being killed, abused, exploited or neglected by that person; or

(iv) who is mentally ill or mentally or physically challenged or suffering from terminal or incurable disease, having no one to support or look after or having parents or guardians unfit to take care, if found so by the Board or the Committee; or

(v) who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child; or

(vi) who does not have parents and no one is willing to take care of, or whose parents have abandoned or surrendered him; or

(vii) who is missing or run away child, or whose parents cannot be found after making reasonable inquiry in such manner as may be prescribed; or

(viii) who has been or is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts; or

(ix) who is found vulnerable and is likely to be inducted into drug abuse or trafficking; or

(x) who is being or is likely to be abused for unconscionable gains; or

(xi) who is victim of or affected by any armed conflict, civil unrest or natural calamity; or

(xii) who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnisation of such marriage;

In *Re: Exploitation of Children in Orphanages in the State of Tamil Nadu,* W.P (Criminal) No. 102 of 2007, in its judgment dated 5 May 2017, the Supreme Court held that the definition of "child in need of care and protection" under Section 2(14), JJ Act is illustrative and not exhaustive and "benefits envisaged for children in need of care and protection should be extended to all such children in fact requiring State care and protection."

The JJ Act, 2015 and Juvenile Justice (Care and Protection of Children) Model Rules, 2016 (JJ Model Rules, 2016), recognise that a child in conflict with the law can also be a CINCP in the following provisions:

- Section 8(3)(g): The JJB can transfer to CWC, matters concerning CICL, stated to be in need of care and protection "at any stage", thereby recognsing that CICL can also be CINCP simultaneously, and there is need for CWC and JJB to be both involved.
- Section 17(2): If child is not found to have committed any offence and is in need of care and protection, the JJB can refer the child to the CWC with appropriate directions.
- Rule 9(3), JJ Model Rules, 2016: A child who has been used by militant groups or other adults for illegal activities may be transferred to CWC after due inquiry, as a child in need of care and protection.
- Rule 57(2), JJ Model Rules, 2016: A child alleged to have committed an offence under Section 78 (using a child for vending, peddling, carrying, supplying or smuggling any intoxicating liquor, narcotic drug or psychotropic substance) can be transferred to the CWC by the JJB, if the child is need of care and protection.

Advocates representing a child alleged to be in conflict with the law should study the child's Social Investigation Report (SIR) and interact with the child and the child's family or guardian to ascertain if the plea to treat the child as a CINCP can be successfully made before the JJB. For instance, if a 12-year-old child is addicted to drugs and is used by an adult gang to peddle drugs, commit robberies, and other crimes, the advocate could make a compelling case before the JJB that the child requires to be transferred to the CWC for care, protection, and rehabilitation, and proceedings should be initiated against the adults under Sections 78 and 83, JJ Act, 2015.

2.4. Best Interest of Child

The Preamble of the JJ Act, 2015 refers to the adoption of a "child-friendly approach in the adjudication and disposal of matters in the best interest of children…." Section 3, which stipulates the fundamental principles that should guide the implementation of the JJ Act, provides for the principle of best interest in clause (iv) and states that:

"All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential."

The phrase "best interest of the child" also appears in the definition of the term "child friendly" under Section 2(15).

The phrase "best interest of child" is defined in Section 2(9) to mean:

> "the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development."

In the context of children in conflict with the law, the references to best interest also appear in the following provisions:

- Section 3(xv) – principle of diversion as per which "measures for dealing with children in conflict with law without resorting to judicial proceedings shall be promoted unless it is in the best interest of the child or the society as a whole."
- Section 26(3) proviso – In case of a child who has run away from a Special Home, Observation Home, or Place of Safety, the JJB can give additional directions regarding special steps deemed necessary for the best interest of the child.
- Section 74(1) proviso- the JJB can authorize disclosure of the child's identity

if it is in the child's best interest after recording reasons in writing.

- Section 95(1) – After completion of inquiry, the JJB can transfer the child to the place the child hails from after due inquiry that it is in the child's best interest to do so. This should be done in consultation with the JJB of the child's home district

The "best interest of the child" also appears in the following provisions of the JJ Model Rules, 2016, relevant to children in conflict with the law:

- Rule 8(1) proviso, JJ Model Rules, 2016: The police should exercise the power to apprehend a child alleged to be in conflict with the law only with regards to heinous offences unless it in the best interest of the child.
- Rule 8(7), JJ Model Rules, 2016: An undertaking should be taken when a child is not apprehended and is placed with parents, guardians or a fit person, in the best interest of the child.
- Rule 11(8), JJ Model Rules, 2016: While place a child in a fit facility or Special Home, the JJB should consider one that is nearest to the child's parent or guardian's place of residence unless it is not in the best interest of the child to do so.

It is important to note that Article 3(1), UN Convention on the Rights of the Child, 1989, requires that a child's best interests should be a primary consideration in all actions concerning the child by courts of law, public or private social welfare institutions, administrative authorities, or legislative bodies. This right is regarded as one of the four general principles of the UNCRC and according to the Committee on the Rights of the Child, is a "threefold concept":[5]

(a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.

5 Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14 (29 May 2013), para 6 http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf

(b) A fundamental, interpretative legal principle: **If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen.** The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.

(c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases." (emphasis added)

In the context of criminal proceedings, the Committee on the Rights of the Child has explained the implications of the best interests principle:

28. In criminal cases, the best interests principle applies to children in conflict (i.e. alleged, accused or recognized as having infringed) or in contact (as victims or witnesses) with the law, as well as children affected by the situation of their parents in conflict with the law. The Committee underlines that protecting the child's best interests means that the **traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives, when dealing with child offenders**.[6] (emphasis added)

The definition and interpretations of the best interest principle should be pressed into service while arguing on behalf of a child alleged to be in conflict with the law, especially when final orders or orders transferring the case to a Children's Court are passed. The order of a JJB transferring a child to the Children's Court could also be challenged if the best interests principle has not been applied and the gruesome nature of the crime was the dominant factor.

6 Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14 (29 May 2013), para 28 http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf Also see, Committee on the Rights of the Child, General comment No. 10 (2007) on children's rights in juvenile justice, para. 10.

2.5. Child friendly

The term "child-friendly" has been defined in Section 2(15) to mean "any behaviour, conduct, practice, process, attitude, environment or treatment that is humane, considerate and in the best interest of the child". The term "child-friendly" appears in the Preamble of the JJ Act, 2015 and the following provisions relevant to children in conflict with the law:

- Section 7(1): An obligation has been placed on the JJB to ensure that the procedures are child friend and the venue is not intimidating to the child and does not resemble regular courts.
- Section 14(5)(b): The JJB should conduct proceedings in a "simple manner as possible and care shall be taken to ensure that the child, against whom the proceedings have been instituted, is given child-friendly atmosphere during the proceedings".
- Section 19(1)(i): If a Children's Court decides to try a child as an adult, it should pass appropriate orders after trial, "considering the special needs of the child, the tenets of fair trial and maintaining a child friendly atmosphere."

It also appears in the following provisions in the JJ Model Rules, 2016 relevant to children in conflict with the law:

- Rules 10(8) and 13(7)(v): While recording the statement of a child during an inquiry under Section 14, JJ Act, 2015, the JJB should address a child in conflict with the law "in a child-friendly manner in order to put the child at ease and to encourage him to state the facts and circumstances without any fear, not only in respect of the offence which has been alleged against the child, but also in respect of the home and social surroundings, and the influence or the offences to which the child might have been subjected to." The same procedure should be followed by a Children's Court which decides not to try the child as an adult.
- Rule 13(7)(iii): When the Children's Court decides not to try the child as an adult, the proceedings should be held *in camera* and "in a child friendly atmosphere…"
- Rule 13(8)(i): If the Children's Court decides to try the child as adult, it should follow the procedure under Cr.P.C of a sessions trial and maintain a child friendly atmosphere.
- Rule 29(2): Child Care Institutions (CCIs) should be child-friendly and should not resemble a jail or a lock-up and according to Rule 38(5), the library should have a child friendly environment.

While an advocate representing a child alleged to be in conflict with the law should try and ensure that the atmosphere within the JJB and Children's Court is child-friendly, the advocate should also be vigilant that the child is not compelled to testify against himself or herself in violation of the constitutional protection under Article 20(3)[7], especially during the preliminary assessment and the trial before the Children's Court.

2.6. Child Welfare Police Officer and Special Juvenile Police Unit

According to Section 2(18), JJ Act, 2015,

"Child Welfare Police Officer" means an officer designated as such under Sub-Section (1) of Section 107

Section 107(1) states:

> In every police station, at least one officer, not below the rank of assistant sub-inspector, with aptitude, appropriate training and orientation may be designated as the child welfare police officer to exclusively deal with children either as victims or perpetrators, in co-ordination with the police, voluntary and non-governmental organisations.

The Special Juvenile Police Unit (SJPU) is "a unit of the police force of a district or city or, as the case may be, any other police unit like railway police, dealing with children and designated as such for handling children under Section 107".[8] The State Governments have been entrusted with the responsibility of constituting SJPUs in every district and city. The SJPU should be "headed by a police officer not below the rank of a Deputy Superintendent of Police or above and consisting of all police officers designated" as Child Welfare Police Officer (CWPO) and "two social workers having experience of working in the field of child welfare, of whom one shall be a woman."[9]

The purpose of a designated CWPO and a SJPU is to ensure that there is a sensitized and dedicated cadre of police officers to deal with children.

The CWPO and the SJPU have very specific functions to perform vis-à-vis a child in conflict with the law:

- **Production:** Soon after a child alleged to be in conflict with the law is apprehended by the police, such child should be placed under the charge of

7 Article 20(3), Constitution of India, 1950 states: "No person accused of any offence shall be compelled to be a witness against himself."

8 JJ Act, 2015, Section 2(55).

9 JJ Act, 2015, Section 107(2).

the SJPU or the designated CWPO.[10] It is their duty to produce the child before the JJB within 24 hours of apprehension excluding the time necessary for the journey.[11]

- If the child cannot be produced before the JJB or a Member of the JJB because of apprehension at odd hours or distance, the CWPO should keep the child in the Observation Home or a fit facility and then produce the child before the JJB within 24 hours of apprehension.[12]
- **Information to parents and Probation officer:** Under Section 13(2), as soon as possible after apprehension, the designated CWPO or the SJPU should inform:

  (i) the parent or guardian of such child, if they can be found, and direct them to be present at the Board before which the child is produced; and

  (ii) the probation officer, or if no probation officer is available, a Child Welfare Officer, for preparation and submission within two weeks to the Board, a social investigation report containing information regarding the antecedents and family background of the child and other material circumstances likely to be of assistance to the Board for making the inquiry.

  The parent or guardian should be provided the address of the JJB as well as the date and time when they need to appear before the JJB.[13]

- **Preparation of Social Background Report (SBR):** The CWPO or SJPU is also required to prepare a SBR in Form 1 for submission to the JJB and should contact the parents or guardian of the child to collect the best available information.[14]
- The CWPO should "be in plain clothes and not in uniform."[15]

An advocate could bring the breach of these provisions to the notice of the JJB. For instance, if a child is held in a police lock-up for two days before being produced before the JJB, or not handed over to the CWPO upon apprehension, the advocate could inform the JJB.

10 JJ Act, 2015, Section 10(1).
11 JJ Act, 2015, Section 10(1).
12 JJ MR, 2016, Rule 9(6).
13 JJ MR, 2016, Rule 8(2).
14 JJ MR, 2016, proviso to Rule 8(1), Rule 8(5).
15 JJ MR, 2016, Rule 8(4).

2.7. Children's Court

Section 2(20) defines "Children's Court" to mean:

> "a court established under the Commissions for Protection of Child Rights Act, 2005 or a Special Court under the Protection of Children from Sexual Offences Act, 2012, wherever existing and where such courts have not been designated, the Court of Sessions having jurisdiction to try offences under the Act".

Please refer to Chapter V on the role of the Children's Court under the JJ Act, 2015.

2.8. Community Service

The term "community service" has been defined in Rule 2(1)(vi), JJ Model Rules, 2016:

> "community service" means service rendered by children in conflict with law who are above the age of fourteen years and includes activities like maintaining a park, serving the elderly, helping at a local hospital or nursing home, serving disabled children, serving as traffic volunteers etc.

After an inquiry, if a child is found to have committed an offence by the JJB, it can pass various orders under Section 18(1), one of which is to:

(c) order the child to perform community service under the supervision of an organisation or institution, or a specified person, persons or group of persons identified by the Board;

For more information, refer to Chapter XI - Orders that may and may not be passed for Children in Conflict with Law for more details.

2.9. Individual Care Plan

Section 2(1)(ix), JJ MR, 2016, defines individual care plan:

> "individual care plan" is a comprehensive development plan for a child based on age and gender specific needs and case history of the child, prepared in consultation with the child, in order to restore the child's self-esteem, dignity and self-worth and nurture him into a responsible citizen and accordingly the plan shall address the following, including but not limited to, needs of a child, namely:-
>
> (a) health and nutrition needs, including any special needs;
>
> (b) emotional and psychological needs;
>
> (c) educational and training needs; (d) leisure, creativity and play;

(e) protection from all kinds of abuse, neglect and maltreatment;

(f) restoration and follow up;

(g) social mainstreaming;

(h) life skill training.

The JJB should ensure that a final order it passes includes an individual care plan for the child's rehabilitation and follow-up by the PO and DCPU or NGO.[16] For more details, refer to Chapter XI - Orders that may and may not be passed for Children in Conflict with Law for more details.

2.10. Fit Person

Section 2(28) defines a "fit person" to mean

> any person, prepared to own the responsibility of a child, for a specific purpose, and such person is identified after inquiry made in this behalf and recognised as fit for the said purpose, by the Committee or, as the case may be, the Board, to receive and take care of the child;

The JJB's function includes conducting an inquiry to declare fit persons for children in conflict with the law[17] after verifying credentials of the person.[18] On being released on bail, a child alleged to be in conflict with the law can be placed under the care of a fit person.[19] One of the rehabilitative dispositions that can be ordered by the JJB after having found a child to have committed an offence is release of the child on probation of good conduct and place the child under the care of a parent, guardian, or fit person after they execute a bond, with or without surety, for the child's good behavior and well-being.[20]

If a child alleged to be in conflict with the law does not have parents or the parents are not fit to take charge of the child, the advocate could make a representation to the JJB to recognize a responsible family member as a "fit person" in whose custody the child can be placed after being released on bail.

2.11. Aftercare

The term "aftercare" has been defined in Section 2(5), JJ Act, 2015:

> "aftercare" means making provision of support, financial or otherwise, to

16 JJ Act, 2015, Section 8(3)(h).
17 JJ Act, 2015, Section 8(3)(i).
18 JJ Act, 2015, Section 52(1).
19 JJ Act, 2015, Section 12(1).
20 JJ Act, 2015, Section 18(1)(e).

persons, who have completed the age of eighteen years but have not completed the age of twenty-one years, and have left any institutional care to join the mainstream of the society

Section 46, JJ Act, 2015 pertains to "After care of children leaving child care institution" and states that a child leaving a child care institution after completing 18 years of age "may be provided with provided with financial support in order to facilitate child's re-integration into the mainstream of the society in the manner as may be prescribed." The JJ Model Rules allows for aftercare to be provided to a child leaving a CCI till the age of 21 years and in exceptional circumstances for two more years i.e., till the child attains 23 years.[21]

A post-release plan should be prepared by the Probation Officer, Child Welfare Officer, Case Worker, or social worker and submitted to the JJB "two months before a child is due to leave the Child Care Institution, recommending after care for such child, as per the needs of the child."[22] It is the State Government's responsibility to prepare an aftercare programme for children leaving CCIs "by providing for their education, giving them employable skills and placement as well as providing them places for stay to facilitate their re-integration into the mainstream of society."[23] The JJB's functions include ensuring that the rights of the child are protected even during aftercare and rehabilitation.[24] This would entail monitoring the post-release plan to assess "the effectiveness of the aftercare programme, particularly whether it is being utilized for the purpose for which it has been granted and the progress made by the child as a result of such after-care programme.[25]

An advocate representing a child who is found to have committed an offence should bring it to the JJB's attention if no aftercare provision is made in the post-release plan or if the provision is inadequate to facilitate the child's re-integration into society.

21 JJ MR, 2016, Rule 25(2).
22 JJ MR, 2016, Rule 25(4).
23 JJ MR, 2016, Rule 25(1).
24 JJ Act, 2015, Section 8(3)(b).
25 JJ MR, 2016, Rule 25(5).

3

General Principles of Juvenile Justice

By Advocate Maharukh Adenwalla

3.1. Introduction

Juvenile justice is based on principles that are internationally acknowledged, more particularly under the UNCRC, the Beijing Rules and the Havana Rules. Reading of juvenile justice legislation in India, the JJ Act 1986 onwards, reflects these principles, as also others that have been the underlying doctrine since the Children Acts. Some of these principles are based on constitutional, criminal and administrative jurisprudence.

The Juvenile Justice (Care and Protection of Children) Rules, 2007[1] for the first time comprised a chapter[2], titled, Fundamental Principles Of Juvenile Justice And Protection Of Children. These fourteen principles[3] were "fundamental to the application, interpretation and implementation of the Act and the rules".[4] As these principles were in the Model Rules 2007, their inclusion in State rules depended on respective State Governments. For example, Schedule I of the Juvenile Justice (Care and Protection of Children) Karnataka Rules 2010 contained the fourteen principles and more[5], whereas the Maharashtra Juvenile Justice (Care and Protection of Children) Amendment Rules 2011 did not include the same.

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1 JJ MR, 2007.

2 JJ MR, 2007, Chapter II, Rule 3.

3 *Principle of presumption of innocence; Principle of dignity and worth; Principle of Right to be heard ; Principle of Best Interest; Principle of family responsibility; Principle of Safety (no harm, no abuse, no neglect, no exploitation and no maltreatment);Positive measures; Principle of non-stigmatising semantics,, decisions and actions* ; Principle *of non-waiver of rights ; Principle of equality and non-discrimination; Principle of right to privacy and confidentiality; Principle of last resort ; Principle of repatriation and restoration; Principle of fresh start.*

4 JJ MR, 2007, Rule 3(2).

5 *Principle of diversion; Principle of good governance and accountability; Principle of effective administration; and The Principles of Natural Justice.*

The *Fundamental Principles of Juvenile Justice and Protection of Children* were pivotal for the proper administration of juvenile justice. Legislature, rightly, felt that the same should be uniformly applied by State Governments, Juvenile Justice Boards (JJBs), Child Welfare Committees (CWCs) and other authorities / agencies dealing with children, hence, the same has been included in the JJ Act 2015 - Section 3 (*General Principles to be followed in administration of the Act*) in Chapter II (*General Principles of Care and Protection*).

The General Principles of Care and Protection of Children should be appropriately referred to when legally representing a child in conflict with the law. Every provision of the JJ Act 2015 should be interpreted in conformity with the General Principles so as to ensure justice to the child. These principles should also be adhered to by lawyers when defending the child, as also when otherwise dealing with him / her. It is also the duty of the child's lawyer to confirm that all functionaries within the juvenile justice system are guided by these General Principles.

3.2. General Principles of Care and Protection of Children

16 General Principles are included under Section 3 of the JJ Act 2015, all of which were there in the JJ Act, 2000, plus two - *Principle of diversion* and *Principles of natural justice*. Most of these principles are applicable to both, children in conflict with the law, and children in need of care and protection.

In this chapter, we will examine each of these principles, their links with the constitution and other legislations / practices, as also international instruments, and how they may be used in arguments in support of children.

3.3. Principle of Presumption of Innocence

"Any child shall be presumed to be an innocent of any *mala fide* or criminal intent up to the age of eighteen years."[6]

'Presumption of innocence' is a sacred dictum of criminal law. It means that there is an inference in favour of the fact that the accused is innocent, and the prosecution has the burden to prove his / her guilt beyond reasonable doubt. 'Beyond reasonable doubt' is a standard of proof required in criminal proceedings - the court must be entirely convinced, satisfied to a moral certainty that the accused has committed the offence.[7] The 'presumption of innocence' has achieved human rights

6 JJ Act, 2015, Section 3(i).
7 *Black's Law Dictionary* [6th Edition, 2nd Reprint, West Publishing Co., 1990].

status under the Universal Declaration of Human Rights[8] and the International Covenant on Civil and Political Rights[9]. The Supreme Court has observed, "It is now a well settled principle that presumption of innocence as contained in Article 14(2) of the International Covenant on Civil and Political Rights is a human right…"[10] The UNCRC reiterates the same - "Every child alleged as or accused of having infringed the penal law has at least the following guarantees: (i) To be presumed innocent until proved guilty according to law".[11] The Beijing Rules includes 'presumption of innocence' as one of the "basic procedural safeguards" along with the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority.[12]

Regarding 'child in conflict with the law' under the JJ Act, 2015, the presumption extends not only to the child's innocence, but also to the fact that he / she had no "mala fide" or "criminal Intent" even if found by the JJB to have committed the offence.

The scope of the *Principle of presumption of innocence* in the context of children is stipulated under the JJ Act, 2000 - "The juvenile's or juvenile's in conflict with law or child's right to presumption of innocence shall be respected throughout the process of justice and protection, from the initial contact to alternative care, including after care." It goes on to give instances where such presumption will apply: "Any unlawful conduct of a juvenile or a child or a juvenile in conflict with law which is done for survival, or is due to environmental or situational factors or is done under control of adults, or peer groups…"

The fact that a child is presumed not to have "any mala fide" (bad faith) or "criminal intent" is the basis for his / her treatment under juvenile legislation - the offending is due to the circumstances of the child; punishing the child is not the solution; it is the situation of the child that requires to be remedied. It is this absence of "mala fide" or "criminal intent" that differentiates children from adults. It is presumed

8 Universal Declaration of Human Rights, 1948, Article 11(1): "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has all the guarantees necessary for his defence."

9 ICCPR, 1966, Article 14(2): "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

10 *Vinod Solanki v. Union of India* [2008] 16 SCC 537.

11 UNCRC, 1989, Article 40(1)(b)(i).

12 UN Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (Beijing Rules), Rule 7(1).

that a child has no '*mens rea*'.[13] Hence, under juvenile justice legislation persons below eighteen years of age as a rule are not brought into the criminal justice system and punished.

Ved Kumari finds an "apparent conflict" between this principle and the JJ Act 2015, as the Act "provides for selective transfer of children to be treated as adults if alleged to have committed a heinous offence." [14] She further expresses, "This principle is couched in the manner of irrebutable presumption contained in the Evidence Act containing the words 'shall presume'."[15]

An irrebuttable presumption[16] (the rule) has been made rebuttable (the exception) under the JJ Act 2015, in case the child is above sixteen years and is alleged to have committed a heinous offence. It is important for lawyers to note that the prosecution during the preliminary assessment[17] is required to prove beyond a reasonable doubt that such child has 'mala fide' or 'criminal intent' to commit the offence. The prosecution must examine witnesses, or should be called upon by the JJB to do so, to prove the same. And of course, the defense must be given an opportunity to cross-examine the witnesses.

While arguing against transfer of a child into the criminal justice system, the *Principal of presumption of innocence* should be relied upon to say that the child has no 'mala fides' or 'criminal intent', and that the prosecution has failed to rebut[18] the same.

3.4. Principle of Dignity and Worth

"All human beings shall be treated with dignity and worth."[19]

The right to live with human dignity is a fundamental right guaranteed under Article 21 of the Constitution. In *Francis Coralie Mullin vs. Administrator, Union Territory of Delhi*,[20] the Supreme Court observed, "We think that the right to life includes the right to live with human dignity and all that goes along with it, namely,

13 "As an element of criminal responsibility: a guilty mind; a guilty or wrongful purpose; a criminal intent. Guilty knowledge and wilfulness" - *Black's Law Dictionary* [6th Edition, 2nd Reprint, West Publishing Co. 1990].

14 VedKumari, *The Juvenile Justice [Care and Protection of Children] Act 2015 - Critical Analysis* [Universal Law Publishing 2017] pg.48.

15 *Ibid*.

16 Cannot be challenged.

17 JJ Act, 2015, Section 15.

18 "to defeat, refute, or take away the effect of something" - *Black's Law Dictionary* [6th Edition, 2nd Reprint, West Publishing Co. 1990].

19 JJ Act, 2015, Section 3(ii).

20 (1981) 1 SCC 608.

the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live…" The preamble (long) of the JJ Act, 2015, refers to Article 39(f) of the Constitution, a directive principle - "That children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity…" This principle emphasizes that a child's dignity and worth should be upheld within the juvenile justice system, i.e., during apprehension, during inquiry before the JJB, and within child-care institutions, etc. It is the duty of the JJB to ensure the same - "at the time of initiating the inquiry, the Board shall satisfy itself that the child in conflict with law has not been subjected to any ill-treatment by the police or by any other person, including a lawyer or probation officer and take corrective steps in case of such ill-treatment".[21]

Ill-treatment is not limited to physical and emotional abuse; it covers within its ambit, the conditions prevailing in child care institutions. Appalling situations adversely affects the self-worth of a child. The Supreme Court has observed:

> We live in an age when this Court has demonstrated, while interpreting Article 21 of the Constitution, that every person is entitled to a quality of life consistent with his human personality. The right to live with human dignity is the fundamental right of every Indian citizen. And, so, in the discharge of its responsibilities to the people, the State recognises the need for maintaining establishments for the care of those unfortunates, both women and children, who are the castaways of an imperfect social order and for whom, therefore, of necessity provision must be made for their protection and welfare. Both common humanity and considerations of law and order require the State to do so. To abide by the constitutional standards recognised by well accepted principle, it is incumbent upon the State when assigning women and children to these establishments, euphemistically described as 'Care Homes', to provide at least the minimum conditions ensuring human dignity.[22]

21 JJ Act, 2015, Section 14(5)(a).

22 *Vikaram Deo Singh Tomar vs. State of Bihar* (1988) Supp SCC 734.

The Havana Rules state: "Juveniles deprived of their liberty have the right to facilities and services that meet all the requirements of health and human dignity."[23]Further, regarding the staff of such detention facilities, the Havana Rules state, "In the performance of their duties, personnel of detention facilities should respect and protect the human dignity and fundamental human rights of all juveniles."[24]

The UNCRC reaffirms "the dignity and worth of the human person". Regarding children in conflict with the law, it states, "Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person and in a manner which takes into account the needs of persons of his or her age…"[25] Further, "States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth".[26] The "set of fundamental principles for the treatment to be accorded to children in conflict with the law" included in General Comment No.10 reiterates the same: "*Treatment that is consistent with the child's sense of dignity and worth*. This principle reflects the fundamental human right enshrined in Article 1 of UDHR, which stipulates that all human beings are born free and equal in dignity and rights. This inherent right to dignity and worth, to which the preamble of the UNCRC makes explicit reference, has to be respected and protected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies and all the way to the implementation of all measures for dealing with the child."[27]

It is incumbent upon the state to ensure that CCIs are well-maintained and staffed as per the standards enshrined in the JJ Act, 2015 and JJ Model Rules (or the State Rules as applicable) including Section 53, JJ Act, 2015 so as to assure a child a life with dignity within the institution and the community. There should also be checks within the juvenile justice system to prevent or identify cases of ill-treatment of a child within these institutions so that appropriate action may be taken.

It is not only the winning of the child's case that is important. The well-being of the child within the juvenile justice system is also the concern of the child's lawyer, especially when the child has no family support. A lawyer representing a child in

23 UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990 (Havana Rules), Rule 31.
24 Havana Rules, 1990, Rule 87.
25 UNCRC, 1989, Article 37(c).
26 UNCRC, 1989, Article 40(1).
27 General Comment No.10, para 13.

conflict with the law must treat the child with dignity, thereby creating a feeling of self-worth. It is also the lawyer's responsibility to ensure that the child is treated with dignity by others within the juvenile justice system – the Superintendent and other functionaries of the Observation Home and the Place of Safety; the probation officer; etc. It is the duty of the lawyer to bring any ill-treatment of a child to the attention of the JJB. If a child's dignity is being eroded at the hands of the JJB, the lawyer should inform the same to the Chief Metropolitan Magistrate / Chief Judicial Magistrate and / or the Secretary, Women and Child Development of that state, as the case may be, and / or the District Legal Services Authority (DLSA) / State Legal Services Authority (SLSA) and / or the High Court Juvenile Justice Committee. Further, if the living conditions in the observation home are inexcusable, the lawyer should inform the District Child Protection Unit (DCPU) and / or the State Commission for Protection of Child Rights (SCPCR) of the same.

3.5. Principle of Participation

"Every child shall have a right to be heard and to participate in all processes and decisions affecting his interest and the child's views shall be taken into consideration with due regard to the age and maturity of the child."[28]

An environment must be created to enable a child to participate within the juvenile justice system during inquiry before the JJB and during the child's stay in child care institution.While participating in the inquiry, a child may share information which is self-incriminatory - the JJB is prohibited from considering the same under Article 20 (3) of the Constitution,[29] a fundamental right. Hence, if any admission is included in the probation officer's report or mental health report or anywhere else, the same should not be considered by the Board. The 'guilt' or 'innocence' of a child in conflict with the law should be determined only on the basis of evidence recorded in the inquiry.

Before the JJB, a child in conflict with the law is heard through his / her lawyer. Hence, it is imperative that a child has legal representation. If the child is unable to engage the services of a lawyer, it is obligatory upon the JJB to provide him / her with legal representation through the DLSA – "ensuring availability of legal aid for the child through the legal services institutions"[30].

Under Article 22(1) of the Constitution, it is the fundamental right of an accused to be defended by a lawyer – "No person who is arrested shall be…denied the right to

28 JJ Act, 2015, Section 3(iii).
29 "No person accused of any offence shall be compelled to be a witness against himself."
30 JJ Act, 2015, Section 8(3)(c).

consult and to be defended by a legal practitioner of his choice." Article 39A of the Constitution[31], a directive principle, speaks of securing "free legal aid, by suitable legislations or schemes or in any other way", and to ensure the same, the Legal Services Authorities Act, 1987 is enacted, which amongst others, provides for free legal aid to persons in custody and to children.[32] An accused's right to be "defended by a pleader of his choice",[33] and to legal aid at State expense,[34] is also provided for under the Code of Criminal Procedure (CrPC). Recognising that a child may not be able to engage the services of a lawyer, and that legal services should be provided to a child at the earliest, Rule 8(3)(vii) of the Juvenile Justice (Care and Protection of Children) Model Rules 2016[35] directs the police officer apprehending a child to "inform the District Legal Services Authority for providing free legal aid to the child."

Under Article 12(2) of the UNCRC, "…the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law." Article 12 of UNCRC is further articulated in General Comment No.12 (2009) - *The right of the child to be heard*. The Beijing Rules in relation to children in conflict with the law, states, "The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely."[36]

While defending the child, the lawyer must exclusively represent such child's best interest - "the interests of the child and not the interests of other persons (parent[s]), institutions or bodies (e.g. residential home, administration or society)"[37]. Mostly, it is the child's parent(s) who may be instructing the lawyer - it is important for a lawyer to recognize that there may be a conflict of interest between the child and his / her parent(s). The child's lawyer has a duty to ascertain the child's views and give them due weightage, "in accordance with the age and maturity of the child".[38] In case of clashing views, the lawyer should counsel the child as to why the child's course of action is against his / her interest or should attempt to harmonise the

31 Equal justice and free legal aid.
32 Legal Services Authorities Act, 1987, Section 13.
33 Cr.P.C, 1973, Section 303.
34 Cr.P.C, 1973, Section 304.
35 JJ MR, 2016.
36 Beijing Rules, 1985, Rule 14.2.
37 General Comment No.12, para 37.
38 UNCRC, 1989, Article 12(1).

divergent views. If such harmonising is not possible and the child is adamant, both views should be placed before the JJB for appropriate decision making. For example, the child instructs his / her lawyer to apply for bail, but the lawyer believes that release on bail would expose the child to physical danger - in such case, the lawyer should explore finding a 'fit person' under whose care the child may be released, and in the absence of such fit person, should convince the child to wait awhile, but if the child insists, the lawyer should file the bail application and place his/her concern before the JJB, who with the deployment of the machinery at its disposal may arrive at a holistic solution.

To ensure children's participation in child care institutions, their views should be elicited and considered. Mechanisms should be established to enable a child to put forth views and voice complaints. Children's Committees must be set up in "every institution for children".[39] Often children are frightened of voicing their grievances, hence, they should be assured of anonymity. "The Managing Committee shall set up a complaint and redressal mechanism in every institution and a Children's Suggestion Box shall be installed in every institution at a place easily accessible away from the office set up and close to the residence or rooms or dormitories of the children."[40] Corporal punishment within child care institutions is an offence under the JJ Act, 2015.[41] It is not only in child care institutions, suggestion box or grievance redressal box should also be maintained "in the premises of the Board at a prominent place to encourage inputs from children".[42]

It is the obligation of the child's lawyer to facilitate in putting forth the child's views and grievances before the JJB / management of the child care institution. If a child does not have opportunities to do the same, it may lead to an explosive reaction on the part of the child, which may have a detrimental effect on his situation. Further, it is also the lawyer's duty to report abuse or maltreatment at the hands of the management / staff of a CCI to the relevant authorities, including the JJB or the Children's Court, under whose order the child has been so placed.

3.6. Principle of Best Interest

"All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential."[43]

39 JJ MR, 2016, Rule 40.
40 JJ MR, 2016, Rule 39(5).
41 JJ Act, 2015, Section 82- *Corporal punishment*.
42 JJ MR, 2016, Rule 7(vi).
43 JJ Act, 2015, Section 3(iv).

That 'welfare of the child is the paramount consideration' is an oft reiterated philosophy of child rights jurisprudence - in matters related to adoption, custody, guardianship. This philosophy is reflected in the *principle of best interest*. This principle indicates that whenever any decision / action is to be taken in respect of a child, the child should be the focus. It is necessary to ensure that such decision / action positively impacts the child, and is not detrimental to his / her welfare. This principle should be followed in all settings - at home, in schools, in child care institutions, before any adjudicating authority. "Best interest" has also been dealt with in Chapter I.

"Best interest" was deployed in several child-related international instruments before the term was incorporated under Indian law. The United Nations Declaration of the Rights of the Child 1959 speaks of special protection and opportunities / facilities to be provided to a child through legislation wherein "the best interests of the child shall be the paramount consideration."[44] And thereafter, Article 3(1), UNCRC: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." A General Comment has been dedicated to the *principle of best interest* - General Comment No.14 (2013) *on the right of the child to have his or her best interests taken as a primary consideration*. It emphasizes that 'best interest' is a right, a principle and a rule of procedure. It recognizes that 'best interest' is not the same for every child, and requires assessment - "Children are a diverse group, with each having his or her own characteristics and needs that can only be adequately assessed by professionals who have expertise in matters related to child and adolescent development."[45] It further stipulates that a child needs "appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies."[46]

Proceedings of a child in conflict with the law before the adjudicating authority should be such that it is conducive to the best interests of the child.[47] Contact with the juvenile justice system should have a positive impact upon the child - a child who has dropped-out of school should be restored to schooling; a child who is addicted to drugs should be introduced to a de-addiction programme. It is important for the

44 United Nations Declaration of the Rights of the Child, 1959, Principle 2.
45 General Comment No.14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, para 94.
46 General Comment No.15, para 96.
47 Beijing Rules, 1985, Rule 14.2.

Board to portray that the child is not a mere 'case', and that they are concerned with his / her well-being.

The term 'best interest of children' was included in the preamble (long title) to the JJ Act, 2000 - the term was defined not under that Act, but under the Model Rules, 2007.[48] "Best interest of child" is defined under Section 2(9) of the JJ Act 2015: " 'best interest of child' means the basis for any decision taken regarding the child, to ensure fulfillment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development." All children are not in a similar situation; therefore, the child's lawyer must seek unique treatment, flexibility and discretion to ensure the best interest of a child.

A lawyer, in the course of his / her duties, must ensure that a child's best interest is considered. It is essential to recognize that the *principle of best interest* is an overarching principle of juvenile justice, and should be applied at all stages. The first step towards ensuring the 'best interest of a child' is by adhering to the standards of the UNCRC and other international instruments, as also to the provisions of the JJ Act 2015 and the Model Rules 2016 / State Rules. Every provision should be interpreted so as to attain the best interest of a child. A lawyer alone may not be able to assess the best interest of a child - for such purpose assistance of relevant professionals should be taken depending on a particular child's circumstance. The *principle of best interest* should be invoked to support a child's case by describing why the proposed action / decision is against the best interest of that child.

'Child friendly and 'best interest of child' are interrelated. "'Child friendly' includes within its ambit behaviour, conduct, practice, process, attitude, environment or treatment that is in the best interest of the child."[49] Whether any action is child friendly or not should be tested against the best interest of a particular child, hence, in this context, child friendly conduct too may vary from child to child. Rehabilitation, which is the ultimate aim of juvenile justice, is possible only if a child's best interest is comprehensively assessed.A child's lawyer should identify the client's peculiarities / uniqueness, and the consequent appropriate response, and accordingly adapt his / her actions / arguments. For example, if a child has the aptitude for carpentry, the JJB should be requested to pass additional directions in this regard under Section 18(2)(ii) ("attend a vocational training centre") when placing the child under the care of a parent, fit person, fit facility or Special Home.

48 JJ MR, 2007, Rule 2(c): "best interest of the child" means a decision taken to ensure the physical, emotional, intellectual, social and moral development of juvenile or child.

49 JJ Act, 2015, Section 2(15).

3.7. Principle of Family Responsibility

"The primary responsibility of care, nurture and protection of the child shall be that of the biological family or adoptive or foster parents, as the case may be."[50]

A corollary of the *principle of family responsibility* is the child's right to receive care, nurture and protection, primarily from his / her family. The preamble of the UNCRC acknowledges "the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children" and "that the child for the full and harmonizing development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding". In instances where the family is unable to play this all-encompassing role, the State should intervene to provide "the necessary protection and assistance". If a child in his / her best interest is "temporarily or permanently deprived of his or her family environment…shall be entitled to special protection and assistance provided by the State".[51] Though Article 20 is in the context of "alternative care", it should also be applied in the context of children placed in Observation Homes / Special Homes /Place of Safety - the State should assure such children with all the protection / assistance they would be entitled to in a family-setting (nutritious food, quality education, safe environment, etc.)

Regarding children in conflict with the law, the UNCRC assures every child deprived of his liberty "the right to maintain contact with his or her family through correspondence and visits save in exceptional circumstances".[52] Such 'exceptional circumstances' should be construed as those that are not in the interest of the child. "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence"[53], hence, separation of a child from family and home should also be only in 'exceptional circumstances'.

The mode of rehabilitation and social reintegration preferred by the JJ Act 2015 is "through family based care such as by restoration to family or guardian".[54] That the family is the ideal setting for a child, except in circumstances where the same is against the interest of the child, is the underlying theme behind several principles of juvenile justice administration, and these should be kept in view by all stakeholders when decisions are taken in respect of a child.

50 JJ Act, 2015, Section 3(v).
51 UNCRC, 1989, Article 20.
52 UNCRC, 1989, Article 37(c).
53 UNCRC, 1989, Article 1.
54 JJ Act, 2015, Section 39(1).

The *principles of family responsibility, of institutionalization as a measure of last resort,* and *of repatriation and restoration* indicate that, as a norm a child's life with the child's family should not be disrupted, if avoidable and unless separation is in the best interest of the child. These three principles should be relied upon by lawyers when arguing for bail, and during passing of final orders under Section 18(1) of the JJ Act, 2015, as the family is the optimal setting for a child's healthy growth. If the child in conflict with law's vulnerability is exacerbated due to the family's condition, support through 'sponsorship'[55] may improve the child's situation. The child's lawyer, in such case, should apply to the JJB or the Children's Court to "consider the placement of a child under sponsorship".[56]

3.8 Principle of safety

"All measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse and maltreatment while in contact with the care and protection system, and thereafter."[57]

A child's safety is the paramount concern of stakeholders within the juvenile justice system. Safety of the child in conflict with the law is the rationale for several provisions of juvenile justice legislation - not to be kept in police lock-ups / jails; denial of bail in circumstances when release may expose the child "to moral, physical or psychological danger";[58] arrangement of community service by DCPU on completion of inquiry;[59] non-disclosure of child's identity;[60] and arrangements of safety within child care institutions.[61] Ensuring a child's safety within the juvenile justice system is an additional duty of a child's lawyer. The lawyer must keep in mind that the orders / decisions sought do not put the child at risk.

A child in conflict with law's normal life is disturbed due to entry into the juvenile justice system. Because of such entry, 'harm' cannot be completely avoided, but it can indeed be reduced and prevented. The word 'harm' should be broadly construed in the context of the juvenile justice system - emotional strain due to separation from family / familiar environment; education disrupted due to absence from school; ill effect on reputation due to stigma attached to juvenile delinquency,

55 JJ Act, 2015, Section 2(58): "sponsorship" means provision of supplementary support, financial or otherwise, to the families to meet the medical, educational and developmental needs of the child.
56 JJ MR, 2016, Rule 24(5).
57 JJ Act, 2015, Section 3(vi).
58 JJ Act, 2015, Section 12(1), proviso.
59 JJ MR, 2016, Rule 11(5).
60 JJ Act, 2015, Section 74(1).
61 JJ MR, 2016, Rule 21(5)(vi).

etc. It is the task of the juvenile justice system to control the effect of the 'harm' so caused - by assuring the child contact with family / friends;[62] by providing educational facilities within the Observation Home, Special Home and Place of Safety,[63] and ensuring continuation of education on release;[64] by ensuring non-disclosure of identity of the child,[65] and that the child does not suffer any disqualification in future.[66] A child's developmental needs should be nurtured, and not adversely impacted upon, within the juvenile justice system. Curtailing harm that may be caused to the child within the juvenile justice system, and on exiting the same, is also the child's lawyer's responsibility. The lawyer should ensure that the provisions included in the Act and Rules to alleviate hardships to the child are complied with, and should report any shortcomings to the JJB, the Superintendent of the child care institution and / or the relevant authority, as the case may be. This is a significant role of the child's lawyer as often a child has no parent / guardian, or parents / guardian are not in a position to raise these contentions.

'Abuse' and 'maltreatment' are included in the definition of 'violence',[67] ranging from neglect to sexual abuse and torture. Children in conflict with the law face torture and / or physical abuse by the investigating agency and in institutional-settings. The State is the de facto guardian of a child placed in a child care institution, and is liable for his / her well-being, and to take appropriate action against the perpetrator(s), and to take measures to ensure that such abuse does not recur. A legal aid lawyer is appointed by the State. Further, the lawyer is appointed to protect the interest of the child in conflict with the law. Hence, if abuse or maltreatment of a child journeying through the juvenile justice system comes to the lawyer's notice, he / she cannot turn a blind eye to the same, claiming that his / her duty is only to defend the child in the case pending before the JJB. "Every institution shall evolve a system of ensuring that there is no abuse, neglect and maltreatment", and on the same coming to light, it should be reported to the person-in-charge of the institution and the JJB.[68] The child's lawyer should take appropriate steps to stop the abuse or maltreatment, while at the same time not jeopardising the safety of the child - may approach the JJB; may register an FIR; may seek disciplinary action against the perpetrator; and/ormay seek the perpetrator's or the child's transfer from the child care institution.

62 JJ MR, 2016, Rule 74: Visits to and communication with children.
63 JJ MR, 2016, Rule 36: Education.
64 JJ MR, 2016, Rule 7(1)(iii): Functions of the Board.
65 JJ Act, 2015, Section 74: Prohibition on disclosure of identity of children.
66 JJ Act, 2015, Section 24:Removal of disqualification on the findings of an offence.
67 General Comment No.13, para 4.
68 JJ MR, 2016, Rule 76: Abuse and Exploitation of the Child.

3.9. Positive Measures

"All measures are to be mobilized including those of family and community, for promoting the well-being, facilitating development of identity and providing an inclusive and enabling environment, to reduce vulnerabilities of children and the need for intervention under this Act."[69]

This principle mainly deals with preventive measures at the family and community level so that the child is protected from entry into the juvenile justice system. Except for this principle, juvenile justice legislation is very weak in respect of the preventive aspects. The Riyadh Guidelines concentrates on prevention of juvenile delinquency - "comprehensive prevention plans should be instituted at every level of government".[70] It speaks of innovating "methods for effectively reducing the opportunities to commit delinquent acts"[71] and "community involvement through a wide range of services and programmes"[72]. Prior to the Riyadh Guidelines, the Beijing Rules began with the need for Member States to invest in prevention of juvenile crime –

> Member States shall endeavour to develop conditions that will ensure for the juvenile a meaningful life in the community, which, during that period in life when she or he is most susceptible to deviant behaviour, will foster a process of personal development and education that is as free from crime and delinquency as possible.[73]
>
> and
>
> Sufficient attention shall be given to positive measures that involve the full mobilization of all possible resources, including the family, volunteers and other community groups, as well as schools and other community institutions, for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law.[74]

Prevention has been briefly referred to in the context of children in conflict with the law in the National Plan of Action for Children 2016. It states that the majority of the crimes committed by children in conflict with the law "are petty crimes and are

69 JJ Act, 2015, Section 3(vii).
70 Riyadh Guidelines, 1990, Guideline 9.
71 Riyadh Guidelines, 1990, Guideline 9(e).
72 Clause 9(f).
73 Clause 1.2.
74 National Plan of Action for Children, 2016, Clause 1.3.

preventable by proper guidance and counseling to children."[75] When defending a child in conflict with the law, especially those who have committed petty crimes, the lawyer should emphasise before the JJB that the establishment of a robust community preventive programme by the State could have protected the child from crime.

The purpose of the juvenile justice system is to instill a positive influence on the child through appropriate interventions. The *principle of positive measures* also covers the imparting of constructive inputs to equip a child to cope within a community setting. This can be done by appointing qualified, trained and experienced human resources to deal with children. Hence, training of personnel engaging with the juvenile justice system is crucial. Rule 89 of the Model Rules 2016, *Training of Personnel Dealing with Children*, details the manner of training and also the personnel to be so trained, which includes legal services lawyers.

Involvement of the community is effective to facilitate rehabilitation of a child, within and without and outside child care institutions. The JJ Act, 2000, called upon the State Government to "make rules to ensure effective linkages between various governmental, non-governmental, corporate and other community agencies for facilitating the rehabilitation and social reintegration of the child."[76] Currently, under the Model Rules 2016, child care institutions are required to create such linkages, and able performance of this task is considered at the time of such institution's registration.[77] To establish such linkages is also the duty of the probation officer[78] and rehabilitation-cum-placement officer.[79] A child's lawyer should work with the functionaries of the child care institutions, the probation officer and the rehabilitation-cum-placement officer to provide the child with suitable interventions and opportunities and identify relevant schemes that could be availed of.

3.10. Principle of Non-stigmatising Semantics

"Adversarial or accusatory words are not to be used in the process pertaining to a child."[80]

The belief underlying the juvenile justice system is very different from that of the criminal justice system, which is also expressed through its semantics (words). A

75 National Plan of Action for Children, 2016, p.30.
76 JJ Act, 2015, Section 45: Linkages and co-ordination.
77 JJ MR, 2016, Rule 21(5)(viii).
78 JJ MR, 2016, Rules 64(3)(ix) and (xviii).
79 JJ MR, 2016, Rule 65(3)(ii).
80 JJ Act, 2015, Section 3(viii).

parlance distinct from that of the criminal justice system is used in the juvenile justice process. This is based on the notion that the criminal justice parlance is derogatory, accusatory, pejorative, and is not suitable for a child. Hence, juvenile justice legislation uses the word 'apprehend' in lieu of 'arrest', 'child in conflict with the law' in lieu of 'accused', 'inquiry' in lieu of 'trial' and 'found to be in conflict with the law' in lieu of 'convict'. Words such as 'prosecute', 'summon', 'warrant', etc., are not used in relation to a child in conflict with the law under juvenile justice legislation.

The appropriate use of words is not merely restricted to legislation it also applies in dealings with a child within the juvenile justice system as indicated by the words "not to be used in the process pertaining to a child." Accusatory and harsh words spoken to a child would not only dent his / her self-esteem and violate the *principle of dignity and worth*, but would also cause him emotional and mental harm. Towards this end, the Model Rules 2016 cautions the functionaries of the juvenile justice system - 'While communicating with the child, the Board shall use child friendly techniques through its conduct and shall adopt a child friendly attitude with regard to body language, facial expression, eye contact, intonation and volume of voice while addressing the child";[81] "No staff of the Child Care Institution shall use abusive or vulgar language,[82] which would also apply when speaking with a child. 'Mental violence' includes 'verbal abuse'.[83] A child's lawyer should also be careful in words and tone when speaking with a child. The semantics should not be accusatory or hurtful even if provoked. Understanding the reasons for such provocation, and a response by use of kind words is primary in rapport-building.

3.11. Principle of non-waiver of rights

"No waiver of any of the right of the child is permissible or valid, whether sought by the child or person acting on behalf of the child, or a Board or a Committee and any non-exercise of a fundamental right shall not amount to waiver."[84]

A child is bestowed with several rights under the Constitution and different legislations, including the JJ Act 2015. This principle guarantees a child these rights, without exception. The child nor any person / authority can waive the child's rights. On the contrary, those representing the child, as also the JJB, are responsible for assuring a child enjoyment of his / her right.

81 JJ MR, 2016, Rule 6(5): Sittings of the Board.
82 JJ MR, 2016, Rule 66(6): Staff Discipline.
83 General Comment No.13, para 21.
84 JJ Act, 2015, Section 3(ix).

To comprehend the import of the *principle of non-waiver of rights*, it is first essential to understand the meaning of 'waiver'. 'Waiver' is the act of abandoning or refraining from asserting a legal right.[85] 'Waiver' is the intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, or when one dispenses with the performance of something he is entitled to exact or when one in possession of any right, whether conferred by law or by contract, with full knowledge of the material facts, does or forbears to do something the doing of which or the failure of forbearance to do which is inconsistent with the right or his intention to rely upon it.[86] The act of waiver of rights is an intentional or voluntary act, which the child is disabled from performing as he / she does not know the consequences of such waiver. Further, as a child's rights are prime to his / her well-being, no other person / authority can waive the same on the child's behalf.

For example, children in the observation home are entitled to free and compulsory education up to the elementary level under the Right of Children to Free and Compulsory Education Act 2009. In the case of sexual assault on a child by management / staff of Special Home, a child is entitled to action under the Protection of Children from Sexual Offences Act 2012. A child is dependent on the State Government to create opportunities and facilities to enable him / her to avail his / her rights within the juvenile justice system. If a child is not provided an opportunity to enjoy his / her rights, or is unable to do so, it cannot be deemed that he / she has waived them - such child is not estopped from thereafter claiming his / her rights.

An admission by the child before the police that he / she has committed the offence, cannot be credited by the JJB as it would amount to waiver of the right against self-incrimination guaranteed under Article 20(3) of the Constitution. A child's parent declining to engage or accept the services of a lawyer cannot be accepted by the JJB as it would amount to waiver of the child's right to a fair inquiry (trial) guaranteed under Article 21 of the Constitution. A child's lawyer has to respect this principle while performing his / her professional duties. For example, a child is deprived of his / her right to a fair inquiry (trial) on persuasion to plead guilty. There may be some instances when pleading guilty may be in the interest of the child - in such case, pleading guilty may be justifiable. It is important to reiterate that all the principles have to be holistically applied keeping in view that juvenile justice legislation is a child-centric socio-beneficial piece of legislation. It is also the lawyer's responsibility to ensure that a child in conflict with the law is able to avail

85 *A Concise Dictionary of Law* (Second Edition, Oxford University Press, 1999).
86 *Black's Law Dictionary* (Sixth Edition, West Publishing Co., 1990).

his / her Constitutional and legal entitlements - right to humane treatment and conditions in child care institutions, right to education, right to health.

3.12. Principle of Equality and Non-discrimination

"There shall be no discrimination against a child on any grounds including sex, caste, ethnicity, place of birth, disability and equality of access, opportunity and treatment shall be provided to every child."[87]

Equality and non-discrimination are fundamental rights under the Constitution[88] and included under international human rights treaties. UDHR speaks of equality and non-discrimination. Article 1, inter alia, states, "All human beings are born free and equal in dignity and rights." "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."[89] Article 2 gives examples of the grounds on the basis of which distinction should not take place - "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." UNCRC reiterates this principle in the context of children: children should be treated "without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."[90] Equal treatment and non-discrimination are principles underlined in most clauses of General Comment No.10.

'Discrimination' connotes unfair treatment to members of a specified group. The *principle of equality and non-discrimination* implies that juvenile justice legislation should be applied equally to all children within the juvenile justice system - no child should be denied protection of the juvenile justice system, and all children should be treated so as to enhance their 'best interest'. The grounds of discrimination stipulated are not exhaustive as is indicated by the words "on any grounds, including".

Special measures taken for the benefit of a child requiring special assistance does not amount to discrimination - "disable friendly toilets" in child care institutions.[91]Measures should also be taken to prevent societal discrimination

87 JJ Act, 2015, Section 3(x).
88 Constitution of India, Articles 14 and 15.
89 UDHR, 1948, Article 7.
90 UNCRC, 1989, Article 2.
91 JJ MR, 2016, Rule 29(9): Physical infrastructure.

against children / adults who have passed through the juvenile justice system, mostly in the field of education and job opportunities. In this respect, 'after-care' plays an extremely important role.

There is worry that societal prejudices and stereotypes may occur in the administration of the juvenile justice system, if not openly, covertly. A legal aid lawyer should not be affected by such biases when representing a child, and should identify instances portraying such bias, and ensure that the same is remedied.

A child in conflict with the law may face discrimination due to the nature of the offence, and the consequential media-hype - this should not deter a lawyer from taking up the case, and representing such client to the best of his / her ability. Sometimes the going may get tough - Bar Associations are known to have passed resolutions barring members from representing children in conflict with the law - efforts will have to be made to convince the Bar Association that every accused, including a child in conflict with the law, has a right to legal representation and free legal aid.[92] Doubts that justice may be denied to a child due to the oppressive / threatening environment in a particular area, may require the child's lawyer to facilitate transfer of the matter to another district or State as 'justice must be seen to be done'.

3.13. Principle of Right to Privacy and Confidentiality

"Every child shall have the right to protection of his privacy and confidentiality, by all means and throughout the judicial process."[93]

The 'right to privacy' is the 'right to be left alone'. It has been declared a fundamental right by the Supreme Court.[94] Though the 'right to be left alone' of a child in conflict with the law may be forfeited to some extent, this principle ensures a child protection from publicity, especially that which reveals his / her identity, and from undue interference during his / her stay in the observation home, special home and place of safety.

Section 74 of the JJ Act 2015 protects a child against disclosure of his / her identity. Under this Section it is an offence to publish a report in any medium regarding any inquiry or investigation or judicial procedure which discloses "the name, address or school or any other particular, which may lead to the identification of a child in conflict with the law". Similar provision was included in earlier juvenile justice legislations.[95]

92 *Hussainara Khatoon v. Home Secy., State of Bihar* (1980) 1 SCC 98.
93 JJ Act, 2015, Section 3(xi).
94 *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.
95 JJ Act, 2015, Section 36; JJ Act, 2000, Section 21.

Privacy of a child should be protected not only during inquiry, but throughout his / her journey through the juvenile justice system. Towards this end, the infrastructure of child care institutions should consider "the need of a child for privacy",[96] also in the designing of sanitation facilities.[97] During visits from family / friends, the right to privacy of a child should be respected.[98] Personnel attached with child care institutions should also respect the child's right to privacy, and "safeguard all confidential matters concerning juveniles and their families learned as a result of their professional capacity." [99]

'Confidential' is different from privacy. It means "Intrusted with the confidence of another or with his secret affairs or purposes; intended to be held in confidence or kept secret; done in confidence."[100] 'Confidence' relates to 'trust'. In juvenile justice, 'confidence' relates to both information shared by the child and information gathered regarding the child.

Whatever information is obtained regarding a child during the juvenile justice process should not be shared, and should be used only in the interest of the child. A Social Investigation Report (SIR) plays a crucial role in ascertaining the circumstances of the child and in selecting appropriate treatment. It is mandatory for the JJB to seek a SIR[101] from the probation officer[102] or child welfare officer[103] or social worker, and the same is considered at relevant times so that appropriate decisions may be taken. During preliminary assessment, the JJB may ask for mental health assessment from "experienced psychologists or psycho-social workers or other experts"[104] to assist in determining whether such child's inquiry should be conducted by the JJB or the Children's Court. At the time of entertaining a bail application, the JJB or court may ask the investigating agency to file its 'say'.[105] These and other reports "considered by the Committee or the Board shall be treated as confidential."[106] The JJB "may, if it so thinks fit, communicate the substance thereof…to the child or to the child's parent or guardian, and may give…the child or parent or guardian, an opportunity of producing evidence as may be relevant to the

96 Havana Rules, 1990, Rule 32.
97 Havana Rules, 1990, Rule 34.
98 Havana Rules, 1990, Rule 60.
99 Havana Rules, 1990, Rule 87(e).
100 *Black's Law Dictionary* (Sixth Edition, West Publishing Co., 1990).
101 JJ Act, 2015, Section 8(e).
102 JJ Act, 2015, Section 2(48).
103 JJ Act, 2015, Section 2(17).
104 JJ Act, 2015, Section 15(1), proviso.
105 Investigating agency's reply to the child in conflict with law's bail application.
106 JJ Act, 2015, Section 99(1).

matter stated in the report."[107] Under the JJ Act 2015, a "victim shall not be denied access to their case record, orders and relevant papers."[108] The task of conducting the criminal case is that of the State, through the Public Prosecutor's office, and the victim is examined as a prosecution witness by the State. Recent amendments to the Code of Criminal Procedure has broadened the role of a victim in criminal proceedings - right "to engage an advocate of his choice to assist the prosecution";[109] "right to prefer an appeal".[110] A victim would not be able to enjoy such rights if he / she is denied access to copies of the record and proceedings of the case. It is not known who is meant by 'victim' under Section 99(2), but reference may be made to the Code of Criminal Procedure in this respect. The Code of Criminal Procedure has defined 'victim' to mean "a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression 'victim' includes his or her guardian or legal heir."[111]

Should a child in conflict with the law be given access to copies of reports relating to such child that are filed before the JJB? An accused has a 'right to a fair hearing' which contemplates the right to produce evidence in his / her defense, and the same is possible, only if the accused is aware of the evidence or material against him / her which may be considered by the court when deciding a contentious issue. The same applies to a child in conflict with the law. Hence, a child's lawyer should be given copies of such reports filed before the JJB, to enable rebuttal of the same. Treating such reports as gospel truth may adversely affect the child's case. The right of a child in conflict with the law to confront material produced against him / her is also intrinsic to the *principles of natural justice*, which also apply to the juvenile justice system. It is the right of a child in conflict with the law to receive copies of such reports to enable a holistic defense.

Should a victim be given access to reports filed before the JJB in respect of a child in conflict with the law? Section 99 of the JJ Act 2015 is divided into two sub-Sections: (i) relates to confidentiality of reports regarding child in conflict with the law - the rule is that such reports should be treated as confidential, and the exception is that when the JJB 'thinks fit' it may communicate the substance of such reports to the child and child's parent / guardian and another JJB;[112] (ii) relates to documents

109 Cr.P.C, 1973, Section 24(9), proviso.

110 Cr.P.C, 1973, Section 372, proviso.

111 Cr.P.C, 1973, Section 2(wa).

112 Under circumstances stipulated under Section 95 (Transfer of child to place of residence) and Section 96 (Transfer of child between children's homes, or special homes or fit facility or fit person in different parts of India) of the JJ Act 2015, a child's charge may be handed to another JJB, and in such event, the "case file and records of the child shall be sent along with the child." [Rule 81(4) of the Model Rules 2016].

before the JJB that a victim has right to access, and such documents include 'case record', 'orders' and 'relevant documents'. The legislation restricts the persons / authorities with whom confidential reports regarding a child in conflict with the law may be shared and restricts the documents that may be shared with the victim - a victim is not included amongst those with whom such confidential reports may be shared nor is a report related to the child included amongst the documents that may be accessed by the victim. 'Case records' in the context of Section 99(2) are the papers filed by the investigative agency with the chargesheet, the notes of evidence recorded by the JJB and the documents / articles that have been exhibited. 'Orders' are those passed by the JJB. Access to 'case record' and 'orders' are essential to enable a victim to participate in the judicial process - 'relevant documents' may fall within such category. As 'relevant documents' have not been classified under the Act or Rules, it is for the JJB to decide on a case to case basis, after hearing the parties, whether a document is relevant or not, and whether access to the same should be given to the victim. In brief, any report in relation to the alleged offence should be given to the victim, whereas, any report in relation to the child in conflict with the law should not be shared with the victim, except if the JJB 'thinks fit'.

Privacy and confidentiality should be ensured to a child in communicating with his / her lawyer.[113] A child in conflict with law should be allowed to meet with his / her lawyer in privacy in the observation home, special home or place of safety, out of hearing of management / staff of such institution. Any communication made by a child in conflict with the law to his / her lawyer is 'privileged communication' protected from disclosure under Section 126 of the Indian Evidence Act.

3.14. Principle of Institutionalization as a Measure of Last Resort

"A child shall be placed in institutional care as a step of last resort after making a reasonable inquiry."[114]

Though rudimentary, it is important to state that keeping a child in conflict with law in a jail and / or police lockup is prohibited under the JJ Act 2015.[115] Child care institutions are established under juvenile justice legislation for purpose of detaining a child in conflict with the law.

Regarding institutionalisation, UNCRC states, "Arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of

113 Havana Rules, 1990, Rule 18(a).
114 JJ Act, 2015, Section 3(xii).
115 JJ Act, 2015, Section 10(1), proviso.

last resort and for the shortest appropriate period of time."[116] Such principle should be followed pending inquiry and at the time of passing final orders. Placing a child in an institution is disruptive of his / her life. Prolonged detention causes greater difficulty for a child to adjust to community-life.

"Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time."[117] "Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home."[118] "Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases."[119] Section 12 of the JJ Act 2015, *Bail to a person who is apparently a child alleged to be in conflict with law*, is worded so as to meet the aforementioned philosophy - ensuring that children are released on bail at the earliest, irrespective of the nature of the offence; in appropriate cases the child may be released without surety or "under the supervision of a probation officer or under the care of any fit person". Grant of bail is the rule, and rejection, an exception. The JJ Act 2015 also stipulates the extraordinary circumstances in which bail may be rejected - such circumstances are those where release on bail would not be in the interest of the child. A child's lawyer when arguing for bail should strongly rely on the *principle of institutionalization as a measure of last resort*, and the essence of such principle, namely, that a family-setting is best for the over-all development of the child (*Principle of best interest* and *Principle of family responsibility*). Moreover, detention disturbs the child's other rights, such as, right to education, right to socialize with members of one's family and friends.[120] On grant of bail with surety, if a child is unable to procure surety, the lawyer should seek "for modification of the conditions of bail."[121]

Regarding 'disposition measures' (final orders), the Beijing Rules state, "The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period."[122] The commentary explains this clause as follows: "Progressive criminology advocates the use of non-institutional over institutional treatment. Little or no difference has been found in terms of the success of institutionalisation as compared to non-institutionalisation. The many adverse

116 UNCRC, 1989, Article 37(b).
117 Beijing Rules, 1985, Rule 13.1.
118 Beijing Rules, 1985, Rule 13.2.
119 Havana Rules, 1990, Rule 2.
120 *Francis Coralie Mullin v. Administrator, Union Territory of Delhi* (1981) 1 SCC 608.
121 JJ Act, 2015, Section 12(4).
122 Beijing Rules, 1985, Rule 19.1.

influences on an individual that seem unavoidable within any institutional setting evidently cannot be outbalanced by treatment efforts. This is especially the case for juveniles, who are vulnerable to negative influences. Moreover, the negative effects, not only of loss of liberty but also of separation from the usual social environment, are certainly more acute for juveniles than for adults because of their early stage of development." Though the "minimum necessary period of time" is not expressed in the wording of the principle, the sentiment is reflected in Section 18(1) of the JJ Act 2015.[123] Section 18(1) has seven 'dispositional orders' from clauses (a) to (g), and only clause (g) relates to institutionalisation- placement in a special home / place of safety "for such period, not exceeding three years". That the period of detention should not exceed three years is sacrosanct, and has been reiterated under the Model Rules 2016: "In no case, the period of stay in the special home or the place of safety shall exceed the maximum period provided in clause (g) of sub-Section (1) of Section 18 of the Act."

It is important to point out that a dispositional order under clause (f) does not amount to institutionalization as a child is "placed under the care and supervision of any fit facility for ensuring the good behavior and child's well-being for any period not exceeding three years." It is a supervisory order, and not a detention order.

If the JJB on completion of inquiry concludes that a child is found to be in conflict with law, the child's lawyer should rely on the *principle of institutionalisation as a measure of last resort* to argue that the child should not be sent to a special home. In support of such arguments, the lawyer should also refer to UNCRC, the Beijing Rules and the Havana Rules. The lawyer should demonstrate that the child can be appropriately rehabilitated by passing a dispositional order under any other clause of Section 18(1), and if necessary, an additional order may be passed under Section 18(2). For example, when contending that a child should be allowed to go home on advice or admonition,[124] the lawyer should rely on the fact that the child was regularly attending school, was an average student and had no history of truancy from home or substance addiction, which shows that the parents were inculcating good tendencies in the child, and monitoring the child's activities, therefore, the child's development would be better taken care of at home than in an institution. *Principle of repatriation and restoration* may also be referred to. The focus should be on portraying before the JJB that there are dispositional alternatives available, other than placing a child in a special home / place of safety. The JJB should be asked to

123 Orders regarding child found to be in conflict with law.
124 JJ Act, 2015, Section 18(1)(a).

record in the final order as to why the other dispositional orders are not suitable in that matter. If an order is passed to send the child to the special home / place of safety, the lawyer should try to ensure that such detention is for the shortest period of time. The lawyer's role does not end then - he / she, thereafter, may seek early release from detention under Section 97 of the JJ Act 2015.[125] The Model Rules 2016, too provides for such release under orders of the JJB "after hearing the child and his parents or guardian".[126]

3.15. Principle of Repatriation and Restoration

"Every child in the juvenile justice system shall have the right to be re-united with his family at the earliest and to be restored to the same socio-economic and cultural status that he was in, before coming under the purview of the Act, unless such restoration and repatriation is not in his best interest."[127]

Often, a child in conflict with law's family may not be residing within the jurisdiction of the JJB. In such case, on completion of inquiry, the child should as soon as possible be sent to the village, city or country where his / her family resides. This is 'restoration' and 'repatriation' in the context of juvenile justice legislation.

"Restoration to family or guardian" is the preferred process of rehabilitation and social reintegration under juvenile justice legislation.[128] The term 'repatriate' means to send (someone) back to their own country, and it is used in similar perspective under juvenile justice legislation. "Where the child is a national of another country, the Board or the Committee shall inform the State Government immediately on the production of the child before the Board or the Committee which may initiate the process for repatriation of the child in consultation with Ministry of Home Affairs and Ministry of External Affairs, as the case may be",[129] and "the expenses for the repatriation of the child to another country shall be borne by the State Government concerned."[130] 'Restoration' refers to returning a child to a family-setting. Though, the term 'restoration' has been chiefly used in relation to children in need of care and protection, the same may be aptly applied to children in conflict with the law, more particularly alongside the *principle of institutionalisation as a measure of last resort*. Regarding arguments at time of bail or selection of a disposition measure, the present principle complements the *principle of institutionalization as a measure of last*

125 Release of a child from an institution.
126 JJ MR, 2016, Rule 82.
127 JJ Act, 2015, Section 3(xiii).
128 JJ Act, 2015, Section 39(1).
129 JJ MR, 2016, Rule 81(5).
130 JJ MR, 2016, Rule 81(7).

resort, the essence being that reuniting with family is in the best interest of the child. As separation from family is only in exceptional circumstances, most dispositional measures encourage child's reuniting with family, with or without supervision. If the JJB selects placement of a child in a special home as the dispositional order, such child should be kept in a special home "located nearest to the place of residence of the child's parent or guardian".[131]

There may be cases where reuniting with family may not be in the best interest of the child. In such instance, if the child is found to have committed an offence, an innovative and appropriate dispositional order will have to be chosen for rehabilitation for the child. Same will be the situation, when the child is to be released on bail. If the JJB finds the child not to have committed any offence, it can only "pass order to that effect"[132] or "it may refer the child to the Committee with appropriate directions."[133] At this stage it is important to mention that the concern of the juvenile justice system is not mere adjudication - irrespective of the final decision, the juvenile justice process is equipped to connect the child with supportive services within the community. Along with the probation officer, the child's lawyer too has an important role to play as to whether reuniting with the family is in the best interest of the child, and if not, in consultation with the child and others, ascertain the next best option. A child should not be denied his / her right to bail or release only because it is not in the best interest of the child to be reunited with family. The lawyer should facilitate the exploring of an out-of-the-box acceptable solution - every such case does not require transfer of the child to the Child Welfare Committee. Suitable solutions should be sought through discussion among the probation officer, counselor / social worker, non-governmental organizations, child's lawyer and child - the aim of such discussions being the linking of the child to a support structure within the community.

3.16. Principle of Fresh Start

"All past records of any child under the Juvenile Justice system should be erased except in special circumstances."[134]

The aim of the juvenile justice system is to impart positive inputs to enable the child to lead an enriched life, and not to hamper the child's future. As the juvenile justice system is rehabilitative in nature, and not punitive, the child should be enabled a 'fresh start' with no baggage. Though it may not be possible for legislation to handle

131 JJ MR, 2016, Rule 11(8).
132 JJ Act, 2015, Section 17(1).
133 JJ Act, 2015, Section 17(2).
134 JJ Act, 2015, Section 3(xiv).

the societal victimization faced by a child due to his / her stint within the juvenile justice system, it can ameliorate such child's return to the community by enabling his / her reintegration. One such mode is by destroying the records of conviction, and another, by removal of any disqualification attached to the conviction.

The JJ Act, 2015 thus provides that "a child who has committed an offence and has been dealt with under the provisions of this Act shall not suffer disqualification, if any, attached to a conviction of an offence under such law."[135] Similar provisions were there under the JJ Act, 2000,[136] and the JJ Act, 1986.[137] For example, juvenile justice legislation disqualifies a person to be eligible for appointment as a member of the Board who has been convicted for an offence of moral turpitude, but such disqualification will not apply if such person was a child on the date of commission of such offence.

The JJ Act, 2015,[138] (as did the JJ Act, 2000,[139]) also provides for destruction of the relevant records of conviction of a child after a prescribed period. The period so prescribed by the Model Rules, 2016 is "till the expiry of the period of appeal or for a period of seven years, and no longer".[140] The objective being that such records should not be deployed in future against such person. The Beijing Rules state, "Records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the same offender."[141] This clause of the Beijing Rules should not be restricted in deployment only to adult offenders - such records should also not be used in subsequent juvenile proceedings.

In view of the *principle of fresh start,* it is unacceptable for a child who has been apprehended for a second or third time for separate offences, to be labeled a 'habitual offender'. When a child re-enters the juvenile justice system, one should accept that the needs of the child were not previously correctly assessed, or, that the response was inappropriate and greater effort and energy should be expended on such case. It is the duty of the child's lawyer to bring the present principle to the attention of the JJB and other functionaries when they refer to the child's past while taking decisions.

The proviso to Section 24(2) of the JJ Act, 2015, however allows retention of records of conviction in respect of a child whose matter has been dealt with as an adult by

135 JJ Act, 2015, Section 24(1).
136 JJ Act, 2000, Section 19(1).
137 JJ Act, 1986, Section 25.
138 JJ Act, 2015, Section 24(2).
139 JJ Act, 2000, Section 19(2).
140 JJ MR, 2016, Rule 14.
141 Beijing Rules, 1985, Rule 21.2.

the Children's Court. Such child also suffers disqualification on conviction,[142] thereby denying him / her protection under the *principle of fresh start*. Such disqualification also does not conform withthe object of juvenile justice legislation. A child without exclusion requires to be protected from any adverse effect due to his / her time within the juvenile justice system.

The phrase "except in certain circumstances" contained in the present principle, allows the JJB to retain records of a child in conflict with the law only in situations where the same is in the interest of the child.

3.17. Principle of Diversion

"Measures for dealing with children in conflict with law without resorting to judicial proceedings shall be promoted unless it is in the best interest of the child or the society as a whole."[143]

The juvenile justice system is a 'diversion' from the criminal justice system. The philosophy is restorative and rehabilitative rather than punitive and retributive. Since, the enactment of Children Acts, India had adopted a distinct system for children alleged / found to have committed offences. On the international platform, the Beijing Rules advocated, "Efforts shall be made to establish, in each national jurisdiction, a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice".[144] The UNCRC too promotes "the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law".[145]

The UNCRC goes further, to say, "Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected."[146] The UNCRC also states that 'arrest' of a child "should be used only as a measure of last resort".[147] The UN General Comment No. 10 further states - "Given the fact that the majority of child offenders commit only minor offences, a range of measures involving removal from criminal / juvenile justice processing and referral to alternative (social) services (i.e. diversion) should be a well-established practice that can and should be

142 JJ Act, 2015, Section 24(1), proviso.
143 JJ Act, 2015, Section 3(xv).
144 Beijing Rules, 1985, Rule 2.3.
145 UNCRC, 1989, Article 40(3).
146 UNCRC, 1989, Article 40(3)(b).
147 UNCRC, 1989, Article 37(b).

used in most cases."[148] It states that 'diversion' is "not limited to children who commit minor offences".[149] And that, "In addition to avoiding stigmatization, this approach has good results for children and is in the interests of public safety, and has proven to be more cost-effective."[150]

It is important however to take note of certain cautions regarding 'diversion,' which are as follows: "Diversion (i.e. measures for dealing with children, alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings) should be used only when there is compelling evidence that the child committed the alleged offence, that he / she freely and voluntarily admits responsibility, and that no intimidation or pressure has been used to get that admission and, finally, that the admission will not be used against him /her in any subsequent legal proceeding".[151]

Other than the *principle of diversion*, the word 'diversion' is not included in the JJ Act, 2015, nor in the JJ Model Rules, 2016, though shades of 'diversion' are contained in the said Model Rules - "No First Information Report shall be registered except where a heinous offence is alleged to have been committed by the child, or when such offence is alleged to have been committed jointly with adults."[152] Additionally, "that the power to apprehend shall only be exercised with regard to heinous offence, unless it is in the best interest of the child."[153] Similar provisions were also there in the erstwhile JJ Model Rules, 2007.[154]

Other than those provisions mentioned above, regarding no FIR and no arrest in certain situations, 'diversion' is reflected in juvenile justice legislation at different stages of the process. The traits inherent in children distinguish them from adults, and it is this premise that a separate system to deal with child offenders is founded. Such distinction is the reason for children's 'diversion' from the criminal justice system. The concern of the juvenile justice system is not the offence alone, but also the offender - what is 'it' that resulted in a child offending, and what should be done to address the 'cause' of such offending. The juvenile justice system prevailing in India, therefore, adopts a multi-disciplinary approach as is evident from the diverse composition of the JJB. Positive inputs and influences through intervention drawn from expertise informed from a range of disciplines, specific to the needs of a

148 General Comment No.10, para 24.
149 General Comment No.10, para 25.
150 *Ibid.*
151 General Comment No.10, para 27.
152 JJ MR, 2016, Rule 8(1).
153 JJ MR, 2016, Rule 8(1), proviso.
154 JJ MR, 2007, Rule 11(7) and (11).

particular child, is the focus. Denying any child the protection of the juvenile justice system is contrary to the *principle of diversion*.

'Diversion' from prisons to child care institutions, and from institutional-setting into family-setting / community-setting, i.e., 'diversion' from detention, is also reflected in the provisions of the law relating to bail and final orders. 'Diversion' into family-setting / community setting is also emphasized with insertion of the Chapter, titled, *Rehabilitation and Social Reintegration*, in the JJ Act, 2000,[155] and the JJ Act, 2015.[156] The child's lawyer when arguing for bail or for a non-institutional disposition order should therefore rely on the *principle of diversion*.

The essence of this principle is that child should be relieved ('diverted') of avoidable pressures inherent in judicial proceedings. Absolute 'diversion' from the juvenile justice system is not the prerogative of the police - it is for the JJB to ascertain after hearing the relevant parties, the extent of intervention depending on the needs / interest of the child and the nuances of a particular case. It is vital to acknowledge that it is the 'circumstances of the child' that should ascertain the extent of intervention. Unfortunately, in practice, it is the 'nature of the offence' that alone determines the same.

3.18. Principles of Natural Justice

"Basic procedural standards of fairness shall be adhered to, including the right to a fair hearing, rule against bias and the right to review, by all persons or bodies, acting in a judicial capacity under this Act."[157]

In *Canara Bank v. Debasis Das*,[158] the Supreme Court described the concept of 'natural justice'."Rules of natural justice are not codified canons. But they are principles engrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values…Natural justice are those rules that have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial or administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice." The judgment further states, "Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law." Natural justice "may be implied from the nature of the duty to be

155 JJ Act, 2000, Chapter IV.
156 JJ Act, 2015, Chapter VII.
157 JJ Act, 2015, Section 3(xvi).
158 (2003) 4 SCC 557.

performed under a statute." "What particular rule of natural justice should be implied and what its context should be in a given case must depend on a great extent to the facts and circumstances of that case, the framework of the statute under which the enquiry is held."

Two basic *principles of natural justice* are that 'no man shall be a judge in his own cause' (an individual adjudicating the matter should not be an interested party to the proceedings, i.e., affected by the outcome – any such interest may raise suspicion of bias when passing an order) and 'hear the other side' (all parties should be given an opportunity to be heard prior to the adjudicating authority making any decision – 'justice should not only be done but manifestly be seen to be done'). The JJB is required to read the *principles of natural justice* into the different provisions of the JJ Act, 2015, and the Rules framed thereunder, to ensure justice to the child in conflict with the law.

The term 'fair trial' includes within its purview the right of an accused, to adjudication by a competent authority, to defend himself / herself, to be furnished with copies of documents that are considered by the adjudicating authority, to cross-examine witnesses, to prove his / her innocence by opportunities to adduce evidence and make arguments, to ensure absence of bias against him / her. "To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance," is the right of a child in conflict with the law under the UNCRC.[159] Section 14(5) of the JJ Act, 2015 stipulates the steps to be taken by the Board to ensure a 'fair' inquiry, which includes, giving every child "the opportunity of being heard and participate in the inquiry."[160]

The 'right to review' is the right to challenge an order passed. This right is based on the fact that no person or authority is infallible, and the aggrieved party should have a right to test such decision. Under the UNCRC, a child found to have committed an offence has the right "to have this decision and any measures imposed in consequence thereof reviewed".[161] Such right is also included in different provisions of the Beijing Rules. The 'right to review' gains greater significance when the adjudicating authority has discretion – application of such discretion requires to be tested against arbitrariness and *mala fides*. Under the JJ Act, 2015, any person aggrieved by the order of the JJB or the Children's Court has the right to challenge

159 UNCRC, 1989, Article 40(2)(b)(iii).
160 JJ Act, 2015, Section 14(5)(c).
161 UNCRC, 1989, Article 40(2)(b)(v).

such order in appeal before the Children's Court or the High Court, respectively.[162] An order may also be challenged in revision before the High Court.[163] The *principle of natural justice* entails that no order should be passed in appeal / revision without giving all sides an opportunity to be heard, and the same is expressed under the Act - no order shall be passed by the High Court in revision "prejudicial to any person without giving him a reasonable opportunity to be heard."[164]

The powers of the JJB to re-examine an order passed are limited to correction of "clerical mistakes" or errors arising from "any accidental slip or omission".[165] A similar provision is there in the Code of Criminal Procedure.[166] Respecting the *principle of best interest*, "the Board may, on an application received on this behalf, amend any orders passed by itself, as to the institution to which a child is to be sent or as to the person under whose care or supervision a child is to be placed under this Act",[167] but only after hearing the views of all concerned.[168]

Legal representation is crucial in ensuring that a child enjoys the right to fair inquiry (trial). It is the duty of the lawyer to also ensure that the child enjoys the protection of the *principles of natural justice* – in particular, that the matter is heard by a duly constituted JJB, copies of documents necessary for a comprehensive defense are furnished, material / defense witnesses are examined, provided with opportunity to cross-examine witnesses, and orders passed against the child's interest are challenged. When interpreting a provision under juvenile justice legislation, the *principles of natural justice* should be kept in mind.

Legal aid for a child in conflict with the law should not only be available at the JJB level. A child should be able to access legal representation to prefer appeals / revisions at the Children's Court / High Court level. The SLSA / DLSA should nominate lawyers for such purpose, and filing of appeals / revisions should be facilitated by the child's lawyer at the JJB.

3.19. Other principles

It is important to mention other principles that are inherent in juvenile justice legislation, though not included in Section 3 - *principle of rehabilitation* and *principle of socio-legal approach*.

162 JJ Act, 2015, Section 101: Appeals.
163 JJ Act, 2015, Section 102: Revision.
164 JJ Act, 2015, Section 102, proviso.
165 JJ Act, 2015, Section 104(2).
166 Cr.P.C, 1973, Section 362.
167 JJ Act, 2015, Section 104(1).
168 JJ Act, 2015, Section 104(1), proviso.

***Principle of rehabilitation*:**

The focus of the juvenile justice system is not to penalize the child, but to assess and meet the developmental needs of the child to enable him / her to lead a full life within the community.

The entire juvenile justice process is geared towards the child's rehabilitation. Child care institutions should be equipped with services to meet the goal of 'rehabilitation' - observation homes,[169] special homes[170]. Rehabilitative services that a child care institution should offer is described under Section 53 of the JJ Act, 2015, and includes, "basic requirements such as food, shelter, clothing and medical attention as per the prescribed standards; (ii) equipment such as wheel-chairs, prosthetic devices, hearing aids, braille kits, or any other suitable aids and appliances as required, for children with special needs; (iii) appropriate education, including supplementary education, special education, and appropriate education for children with special needs: Provided that for children between the age of six to fourteen years, the provisions of the Right of Children to Free and Compulsory Education Act, 2009 shall apply; (iv) skill development; (v) occupational therapy and life skill education; (vi) mental health interventions, including counselling specific to the need of the child; (vii) recreational activities including sports and cultural activities; (viii) legal aid where required; (ix) referral services for education, vocational training, de-addiction, treatment of diseases where required; (x) case management including preparation and follow up of individual care plan; (xi) birth registration; (xii) assistance for obtaining the proof of identity, where required; and (xiii) any other service that may reasonably be provided in order to ensure the well-being of the child, either directly by the State Government, registered or fit individuals or institutions or through referral services." A child care institution's registration may be withheld or cancelled if it fails to provide such rehabilitation and reintegration services.[171]

Though the word 'rehabilitation' has not been defined under the JJ Act, 2015, it has been amply described in its provisions. The terms 'rehabilitation' and 'reintegration' are connected - rehabilitation aids in enhancing a child's life, which in turn results in the child's reintegration into the community. The types and extent of rehabilitative services depends on the circumstances of a child, hence, the importance of an 'individual care plan'. The definition of 'individual care plan' under the JJ Model Rules, 2016 is all-inclusive: "'individual care plan' is a

169 JJ Act, 2015, Section 47.
170 JJ Act, 2015, Section 48.
171 JJ Act, 2015, Section 41(7).

comprehensive development plan for a child based on age and gender specific needs and case history of the child, prepared in consultation with the child, in order to restore the child's self-esteem, dignity and self-worth and nurture him into a responsible citizen and accordingly the plan shall address the following, including but not limited to, needs of a child, namely:- (a) health and nutrition needs, including any special needs; (b) emotional and psychological needs; (c) educational and training needs; (d) leisure, creativity and play; (e) protection from all kinds of abuse, neglect and maltreatment; (f) restoration and follow up; (g) social mainstreaming; (h) life skill training."[172]

Rehabilitation of a child in conflict with the law is the core task of the juvenile justice system. For successful closure of a case, the child's lawyer's focus should not merely be on acquittal of the client - it is the lawyer's duty to ensure the child receives rehabilitative services. For rehabilitation, it is essential that the developmental gaps in a child's life are identified with the assistance of appropriately skilled professionals. As such identification is primary; assistance should be taken of professionals within and outside of the juvenile justice system. It is the duty of the child's lawyer to ensure that the best possible expertise is deployed to accomplish this end. Assessment of developmental needs should not wait till arriving at a finding that the child has committed the offence - the process should start from the first day the child is produced before the JJB and should be done in consultation with the Probation Officer, the child and the child's parent(s) / guardian, where such parent/s, guardians have the child's interests at heart, Social Workers, and governmental / non-governmental agencies. Once the developmental gaps have been identified, an Individual Care Plan should be prepared through a consultative process, and implemented through suitable personnel. An Individual Care Plan should be followed during the child's stay in the Observation Home / Special Home, and even in the community on his / her release. A child's lawyer should get involved in this entire process, and put forth the views of the child for consideration, especially when the child has no parent / guardian.

Concerted efforts towards a child's rehabilitation 'protects' the child from re-entering / entering the juvenile justice system / criminal justice system, respectively, in future. Generally a lawyer's engagement with a client ceases once a matter is disposed of, but in case of a child in conflict with the law, the child's lawyer should maintain channels of communication, especially when a rapport has been built. Such contact will assure the child advice and support whenever required, right through the juvenile justice process, including at the time of after care.

172 JJ MR, 2016, Rule 2(ix).

***Principle of socio-legal approach*:**

The purpose of the juvenile justice system is to assess the developmental gaps in a child's life and to respond to the same through psycho-social interventions, besides judicial adjudication of the case.

The composition of the JJB stipulated under juvenile legislation[173] denotes the socio-legal approach - a judicial officer and two social workers, "of whom at least one shall be a woman, forming a Bench".[174] "In the event of any difference of opinion among the members of the Board in the interim or final disposal, the opinion of the majority shall prevail,"[175] reflects the significance of the social work members. If the opinion of the social work members differs from that of the judicial officer, their opinion will hold. The attitude of the judicial officer and social work members will be demarcated by their professional training, and may conflict in certain situations. The judicial officer's approach could be strictly legalistic, whereas, the social work member may better understand the peculiarities attached to childhood and adolescence. The framing of the child's lawyer's arguments should be holistic, so as to engage the different professional sensitivities and trainings. It is crucial for the lawyer to draw the social work members into the discussion, and provide them with an opportunity to portray their views. If a judicial officer is dismissive of the social worker members' opinion, the lawyer should explain the same through the provisions of the law, namely, the JJ Act, 2015 and the Rules framed thereunder, for the said officer to understand and accept such opinion.

Intervention by the social work member is crucial at most stages of the proceedings - their presence results in a holistic response. In fact, the JJ Act, 2015 makes it compulsory for a social work member to be present at the time of transfer of a juvenile case to the Children's Court and at the time of final disposal.[176] That the JJB is fully constituted is paramount for a rounded outcome of the case. Where only one social work member has been appointed, and there is difference of opinion, the opinion of the judicial officer will prevail, and the interests of the child may suffer. Neglect in appointment of two social work members should worry the child's lawyer - he / she should take steps to ensure the filling of such vacancies for an all-inclusive and speedy outcome. The SLSA / DLSA should also ensure that vacancies on the JJB are filled at the earliest in the interest of children.

173 The JJ Act, 2000 and the JJ Act, 2015.
174 JJ Act, 2015, Section 4(2).
175 JJ Act, 2015, Section 7(4).
176 JJ Act, 2015, Section 7(3), proviso.

3.20. Conclusion

To satisfy the object of juvenile justice legislation, a child's lawyer requires to play a manifold role, which may seem burdensome, but is much needed for successful culmination. As aforementioned, his / her role should not be limited to legal representation before the JJB, but should go beyond, to ensure that the child enjoys his / her rights within the juvenile justice system and that the child's developmental needs are met to give his / her future a boost.

A lawyer's main function is to ensure that the child's rights are safeguarded and promoted within the juvenile justice system, and to achieve this end, he / she should deploy every beneficial provision under the law. Merely because a particular structure or programme envisaged under the JJ Act, 2015 is not set up, it does not mean that the lawyer should not seek such relief during arguments - to evoke such provisions may result in highlighting and rectifying an administrative lacunae. Through individual cases, a child's lawyer should attempt to operationalise the different provisions of juvenile justice legislation, and in turn the system, in the interest of children.

To ably play this all-encompassing role, the child's lawyer should keep informed the SLSA / DLSA about the structural maladies afflicting the juvenile justice system, due to which the child's interest is hindered. Hence, the child's lawyer is also required to network with structures within and outside of the juvenile justice system.

4 Rights of Children Alleged and Found to be in Conflict with the Law

By Swagata Raha[1]

4.1. Introduction

The Constitution of India recognizes the unique status of children in many of its provisions. Several Articles contained in Part III and Part IV of the Constitution – Fundamental Rights and Directive Principles of State Policy, respectively, – are also applicable to children. The Constitution particularly empowers the State to frame special laws for children under Article 15(3). Specific obligations are placed on the State to ensure that children are protected from exploitation, and receive free and compulsory education.[2] While fundamental rights are enforceable and justiciable, directive principles are non-enforceable, yet provide guidance for good governance.

The Constitution also prohibits traffic in human beings and forced labour, and the employment of children below 14 years in hazardous employment in Articles 23 and 24, respectively. In Article 39 (e) and (f), obligation is cast on the State to ensure that tender age of children is not abused and "children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment." These directive principles are referred to in the Preamble of the JJ Act, 2015 and hold deep significance for children in conflict with the law and would require the State to ensure that they are not stigmatized, isolated, and deprived of rehabilitative services and opportunities.

In addition to the above provisions, the other fundamental rights in the Constitution such as the right to fundamental freedoms (Article 19), the right to freedom of religion (Article 25), etc., apply to them as well.

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2 Constitution of India, Article 24 and 21A.

The Supreme Court has, through judicial activism, elevated some directive principles to the status of fundamental rights. The right to education, for instance, was a directive principle that was held to be a constituent of the right to life under Article 21, before Article 21A was introduced.

Role of the Supreme Court in Enhancing Rights of Children in Conflict with the Law

The Supreme Court can be directly approached under Article 32 and the High Court under Article 226, to seek relief for a violation of fundamental rights. In 1986, in *Sheela Barse* v. *Union of India*,[3] the Supreme Court's attention was drawn to the large number of children, including children with mental and physical disabilities, who were languishing in jails in different states of the country. The Court expressed its disapproval at this state of affairs, stating that not only was keeping a child in jail illegal, exposure to the baneful influences of jail had the effect of coarsening a child's conscience and alienating him from the society, all of which is also highly detrimental to the development of the child. Taking note of the dismal conditions in which the Juvenile Courts were functioning, the Supreme Court recommended the Central Government to enact uniform legislation in force throughout India for the protection of children in conflict with the law. The Juvenile Justice Act, 1986 was enacted pursuant to this, as also to the adoption of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) by the international community.[4]

The writ jurisdiction of the Supreme Court and High Courts has been invoked several times to draw attention to the rights violations of children in conflict with the law. For instance, in *Court on Its Own Motion v. Dept. of Women and Child Development*,[5] the Delhi High Court received a letter pointing out that many times when the accused persons are arrested by the Police and even when they happen to be children, they are lodged in Tihar Jail and subjected to the hardship of the adult criminal justice system. The Court issued directions that when a person suspected to be a child has been lodged in a jail, he/she shall be kept separately from all other prisoners and be produced before the JJB. The Investigating Officers (IO), while making arrest, should reflect the age of the prisoner arrested in the Arrest Memo. The court

3 (1986) 3 SCC 596 & (1986) 3 SCC 632. .

4 Adopted by the General Assembly on 29th November 1985.

5 Court on Its Own Motion v. Dept. of Women and Child Development, WP (Civil) No. 8889 of 2011 May 11, 2012 (A.K. Sikri and R.S. Endlaw) (High Court of Delhi).

also ordered the introduction of "Age Memo" on the line of "Arrest Memo" to facilitate this process. When a young person, appears to be below 18 years of age or where his arrest memo age states his age to be 18-21 years, is arrested and produced before the Magistrate, it will be the duty of the Magistrate also to order ascertainment of age of such a person. The Court also declared that when any police officer receives a complaint that a juvenile has been treated as an adult, he or she should record the statement of such complainant and then to register a DD Entry and cause corrective steps to be taken.

In *Sampurna Behura v. Union of India,*[6] a case that was ongoing since 2005, the apex court directed all State Governments to establish authorities under the JJ Act, fill vacancies, train officials, and develop curriculums. The Supreme Court's intervention highlighted the non-existence of key institutions like SCPCRs, CWCs and JJB's, all of which are a prerequisite for the implementation of the JJ Act in several States. Notably, the court through its orders has signified the importance of capacity building of stakeholders, transparency and accountability of State Governments through submission of quarterly reports and training for legal aid lawyers and probation officers.

The JJ Act, 2015 is the principal legislation governing the apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social-reintegration of children in conflict with the law.[7] The title of the Act and its preamble indicate the essence of the juvenile justice system - that the child in conflict with the law too requires care and protection in the same manner as a child in need of care and protection; that such child's basic needs require be catered to; that a child-friendly approach is to be adopted; that a child's best interest should be considered when taking any decision; and that the goal of the juvenile justice system is the child's rehabilitation.

Differences between the Juvenile Justice System and the Criminal Justice System Excerpts from *Dr. Subramanian Swamy v. Raju*[8]

Note: This judgment was in the context of the JJ Act, 2000. The relevant provisions in the JJ Act, 2015 and JJ Model Rules, 2016 are indicated in brackets.

1. FIR and charge-sheet in respect of juvenile offenders is filed only in 'serious

6 *Sampurna Behura v. Union of India,* W.P. (Civil) No. 473 of 2005 decided on 09.02.18.
7 JJ Act, 2015, Section 1(4)(i).
8 (2014) 8 SCC 390.

cases', where adult punishment exceeds 7 years. **[Note: Under Rule 8(1), JJ MR, 2016, an FIR should be lodged only in case of heinous offences, i.e., offences for which the minimum punishment is imprisonment for seven years or more.]**

2. A juvenile in conflict with the law is not "arrested", but "apprehended", and only in case of allegations of a serious crime. **[Note: The JJ Act, 2015 has replaced "juvenile in conflict with the law" with "child in conflict with the law.]**

3. Once apprehended, the police must immediately place such juvenile under the care of a Welfare Officer, whose duty is to produce the juvenile before the Board. Thus, the police do not retain pre- trial custody over the juvenile. **[Note: Under Section 10(1), JJ Act, 2015 the police should hand the apprehended child over to the designated Child Welfare Police Officer or the Special Juvenile Police Unit.]**

4. Under no circumstances is the juvenile to be detained in a jail or police lock-up, whether before, during or after the Board inquiry. **[Note: This is provided for under the proviso to Section 10(1), JJ Act, 2015]**

5. Grant of Bail to juveniles in conflict with the law is the Rule. **[Note: This is provided for under Section 12(1), JJ Act, 2015]**

6. The JJ board conducts a child-friendly "inquiry" and not an adversarial trial. This is not to say that the nature of the inquiry is non-adversarial, since both prosecution and defence submit their cases. Instead, the nature of the proceedings acquires a child-friendly colour. [**Note: Section 7(1), JJ Act, 2015 requires the JJB to ensure that procedures are child-friendly and Rule 9(7), JJ Model Rules, 2016 requires that when witnesses are for examination, inquiries are "not conducted in the spirit of strict adversarial proceedings".**

7. The emphasis of criminal trials is to record a finding on the guilt or innocence of the accused. In case of established guilt, the prime object of sentencing is to punish a guilty offender. The emphasis of juvenile 'inquiry' is to find the guilt/innocence of the juvenile and to investigate the underlying social or familial causes of the alleged crime. Thus, the aim of juvenile sentencing is to reform and rehabilitate the errant juvenile. [**Note: Under Section 8(3)(h), final orders passed by the JJB when the matter is disposed, should include an Individual Care Plan for the child's rehabilitation and follow-up by the Probational Officer, DCPU, or a NGO.]**

8. The adult criminal system does not regulate the activities of the offender once s/he has served the sentence. Since the JJ system seeks to reform and rehabilitate the juvenile, it establishes post- trial avenues for the juvenile to make an honest living.

Article 51(1)(c) of the Indian Constitution directs the State to 'foster respect for international law and treaty obligations.' Article 253 of the Constitution vests the Parliament with the power to enact laws to implement treaties ratified by India. In the case of *Vishaka v. State of Rajasthan*[9], the Supreme Court held that, in the absence of domestic law provisions, reliance can be placed on international law as well as international norms if they are not in contravention of any existing domestic law and the Constitution.

India has ratified the International Covenant on Civil and Political Rights, 1966 (ICCPR), the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women, 1976 (CEDAW), the Convention on the Rights of the Child, 1989 (UNCRC), and the Convention on the Rights of the Persons with Disabilities, 2006 (UNCRPD). Of these instruments, the ICCPR and the UNCRC expressly recognise the rights of children in conflict with the law, including children alleged or found to be in conflict with law.

The United Nations has been active in the development of international standards on juvenile justice, contained in several instruments, such as, the Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990 (Havana Rules). The preamble of the JJ Act, 2015 refers to the UNCRC, Beijing Rules, and Havana Rules and "other related international instruments". This would include instruments such as the United Nations Guidelines for the Prevention of Juvenile Delinquency, 1990, (the Riyadh Guidelines), the Guidelines for Action on Children in the Criminal Justice System, 1997(Vienna Guidelines), etc.[10]

The rights of children in conflict with the law under domestic and international human rights law (IHRL) are detailed in the Sections below.

9 AIR 1997 SC 3011.

10 The Beijing Rules, Riyadh Guidelines, Havana Rules, and Vienna Guidelines are available at https://www.unodc.org/pdf/criminal_justice/Compendium_UN_Standards_and_Norms_CP_and_CJ_English.pdf

4.2. Right to Equality and Non-Discrimination

Article 14 of the Indian Constitution encapsulates the right to equality before the law and equal protection of laws. Article 15(1) prohibits discrimination on grounds of religion, race, caste, sex or place of birth, and Article 15(3) allows the State to make special provisions for children. The Juvenile Justice Act, 1986 was passed [later replaced by the Juvenile Justice (Care and Protection of Children) Act, 2000] pursuant to this provision. The Juvenile Justice (Care and Protection of Children) Act, 2000, which has now been replaced by the JJ Act 2015 were both enacted in furtherance of Articles 15(3), 39, 45 and 47.

In the wake of the Delhi gang-rape case of 2012 in which a young woman was brutally raped by a gang comprising adults and one child aged 17.5 years, the constitutionality of the JJ Act, 2000 which allowed all persons below 18 years to be dealt with as children irrespective of the nature of the offence, was challenged. In *Salil Bali v. Union of India*[11], the constitutionality of the JJ Act, 2000 was upheld and the Supreme Court observed:

> The essence of the Juvenile Justice (Care and Protection of Children) Act, 2000, and the Rules framed thereunder in 2007, is restorative and not retributive, providing for rehabilitation and re-integration of children in conflict with law into mainstream society. The age of eighteen has been fixed on account of the understanding of experts in child psychology and behavioural patterns that till such an age the children in conflict with law could still be redeemed and restored to mainstream society, instead of becoming hardened criminals in future.

The Supreme Court, in many instances, has been very vocal regarding the need to protect child rights particularly with regard to their special vulnerable status. In *Salil Bali v. Union of India*[12], the Supreme Court held that "children are amongst the most vulnerable Sections in any society. They represent almost one-third of the world's population, and unless they are provided with proper opportunities, the opportunity of making them grow into responsible citizens of tomorrow will slip out of the hands of the present generation."[13]

Children alleged or found to be in conflict with the law should not be discriminated against "on any grounds including sex, caste, religion, ethnicity, place of birth or disability and equality of access, opportunity and shall be provided to every

11 (2013) 7 SCC 705.
12 *Salil Bali v. Union of India*, (2013) 7 SCC 705 at para 51.
13 *Ibid.*

child."[14] Further, the principle of fresh start under Section 3(xiv), JJ Act, 2015, which requires that "All past records of any child under the Juvenile Justice system should be erased except in special circumstances", also flows from the principle of equality and non-discrimination as it is premised on the equal treatment of all persons irrespective of their involvement in the juvenile justice system. A child who has committed an offence and has been dealt with under the JJ Act will also not suffer disqualifications attached to convictions under Section 24(1), JJ Act, 2015. However, a child who is above 16 years, and found to be in conflict with the law by the Children's Court for a heinous offence after trial as an adult, will not enjoy this protection.[15]

It can also be argued that the right to equality and non-discrimination would not allow children to be treated disadvantageously based on the nature of the offence and thus the transfer system provided under the JJ Act, 2015 violates the right to equality and non-discrimination. Further, the retention of the records of children who have been convicted by the Children's Court after being tried as an adult would violate the right to equality and non-discrimination.

Edited excerpts from CCL-NLSIU's Submission to the Department – related Parliamentary Standing Committee on Human Resource Development (on 21 October 2014) regarding the "Transfer System"

Article 14 prevents equal treatment of unequal persons just as much as it prevents the unequal treatment of equals. Children and adults being on unequal footing with respect to their psychological development cannot be treated the same. Subjecting children to the same criminal justice system as adults would be premised on the flawed assumptions that children and adults can be held to the same standards of culpability and that children are capable of participating in legal proceedings in a like manner. Research in developmental psychology explains the difference in cognitive capacity and psychosocial maturity between children including adolescents and adults that influence their decision-making in anti-social situations.[16] Whether the juvenile understood the consequences of the offence or whether he or she had the mental and physical capacity to commit the offence is a narrow and non-holistic approach to respond to serious/heinous crimes. It fails to take into

14 JJ Act, 2015, Section 3(x): Principle of equality and non-discrimination.

15 JJ Act, 2015, Section 24(1), proviso.

16 Elizabeth Cauffman and Laurence Steinberg, "(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults," *Behav. Sci. Law* 18: 741 at 742-743 (2000)

account the ongoing process of development and its impact on children, especially adolescents. According to Andrew Von Hirsch, Honorary Professor of Penal Theory and Penal Law at Cambridge University,"

> [y]oung adolescents, the reasoning must be, cannot reasonably be expected to have a fully fledged comprehension of what people's basic interests are and how typical crimes affect those interests – because achieving this kind of understanding is a developmental process. Developing that understanding calls both for cognitive skills and capacity for moral reasoning which develop over time – and does so precisely during the period of adolescence…"[17]

While the cognitive levels of a 16 or 17 year old may match that of an adult, findings show that they lack psychosocial maturity levels as compared to adults.[18] Adolescents are more prone to peer influence, are less likely to focus on future outcomes, are less risk-averse than adults, and evaluate risks and benefits differently.[19] Further, their ability to understand legal processes and make decisions relating to their case is not the same as adults.

These findings are endorsed by neuroscientists who state that the prefrontal cortex, known as the CEO of the brain which is responsible for important functions such as planning, reasoning, judgment, and impulse control, is the slowest to mature. The maturation process begins at around the age of 12 years and goes up to the age of 25 years. With the advances of neuroscience and studies by the Research Network on Adolescent Development & Juvenile Justice at the MacArthur Foundation, USA it is now known that the human brain undergoes key physical changes during the ages of 16 and 18, and continues to evolve physically right until the mid-20s. The evolution of the brain between these ages has to do with risk-assessment behavior that is directly tied to what we term as "maturity." Persons between these ages have been shown incontrovertibly to underestimate risk, be susceptible to negative influence, and lack foresight. These are factors that predispose them to poor decision-making and justify the treatment of persons between 16-18 years within the juvenile justice system.

17 Andrew Von Hirsch, "Proportionate Sentences for Juveniles: How Different than for Adults?" *Punishment & Society* 2001 3: 221 at 225

18 Elizabeth Cauffman and Laurence Steinberg, "(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults," *Behav. Sci. Law* 18: 741 at 759 (2000)

19 Elizabeth S. Scott and Laurence Steinberg, "Adolescent Development and the Regulation of Youth Crime", *The Future of Children,* VOL. 18 NO. 2, FALL 2008, p.15 at 20-21

The proposed transfer system incorrectly assumes that all children between 16 and 18 years accused of heinous crimes are competent to stand trial as adults

Adolescence is a period in which youth have "a relatively unstable sense of self" that influences trial-related decisions.[20] The CCL NLSIU team's experience in direct engagement with children at the Observation Home, Bangalore has shown us many instances where children routinely say what they are asked to say – either by the police, by their lawyers, or by their families without fully understanding the implications of what it means. A 15 year old boy pleaded guilty to charges of chain snatching and theft because he was homesick and wanted to go home on bail. He believed that pleading guilty would help him get out faster and that his case would be closed. He was found guilty and sent to the Special Home for a year. A 17 year old suffered from severe post-traumatic stress and turned severely suicidal after his lawyer kept pressuring him to deny his role in a murder while the boy wanted to and repeatedly told the JJB that he was guilty. Innumerable boys plead with their lawyers to get them bail rather than admit to drug/substance abuse which will get them referred for de-addiction services which they are apprehensive about – demonstrating their immaturity and inability to make choices that will empower them in the long run.

Arbitrariness inherent in any assessment of reformation

Whether or not a person has "undergone reformative changes" or "can be a contributing member of the society" is a decision that is highly subjective and prone to arbitrariness. This will inevitably result in the targeting of marginalized communities in India. Data already shows that more than half the children apprehended for offences come from families with an annual income of less than Rs. 25,000 while only 0.55% of the children apprehended come from families with an annual income of more than Rs. 3,00,000.[21] Undoubtedly, the provisions of the JJ Bill will result in class, caste and religion-based targeting of children under the garb of assessing their potential contribution to society and extent of reformation. Such discrimination is also contrary to Article 2 of the UN Convention on the Rights of the Child which

20 Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers, 2 April 2012, pp. 14-15 available at http://www.modelsforchange.net/publications/330.

21 *Crime in India, 2013*, Compendium, National Crime Records Bureau (2014), pg 4. Available at http://ncrb.gov.in/CD-CII2013/compendium%202013.pdf

prohibits discrimination of any kind, including religion, property and other status.

Violation of the test of procedural fairness under the Indian Constitution

It assumes that an accurate assessment of mental capacity/maturity for the purpose of transfer is possible when this is in fact not true. Elizabeth S. Scott and Laurence Steinberg, former members of the John D. and Catherine T. MacArthur Foundation Research Network on Adolescent and Juvenile Justice have cautioned against a case-to-case approach in determining maturity[22]:

> The problem with individualized assessments of immaturity is that practitioners lack diagnostic tools to evaluate psychosocial maturity and identity formation on an individualized basis. Recently, courts in some areas have begun to use a psychopathy checklist, a variation of an instrument developed for adults, in an effort to identify adolescent psychopaths for transfer or sentencing purposes. This practice, however, is fraught with the potential for error; it is simply not yet possible to distinguish incipient psychopaths from youths whose crimes reflect transient immaturity. For this reason, the American Psychiatric Association restricts the diagnosis of psychopathy to individuals aged eighteen and older. Evaluating antisocial traits and conduct in adolescence is just too uncertain.

Evaluation of mental capacity is a complex process which cannot be done accurately by the JJB even with the help of experienced psychologists. Such assessments will be fraught with errors and arbitrariness and will allow inherent biases to determine which child is transferred to an adult court. When psycho-social maturity or mental capacity cannot be measured or assessed accurately, it will be a travesty of justice if children alleged to be in conflict with the law are transferred to an adult criminal court and ultimately sent to an adult prison based on such a flawed assessment.

Though the ICCPR[23] does not prescribe any age, the Human Rights Committee (HRC) has observed that States have obligations to persons below the age of 18 years, even if they have attained majority under domestic law, owing to their status

22 Elizabeth S. Scott and Laurence Steinberg, "Adolescent Development and the Regulation of Youth Crime", *The Future of Children,* VOL. 18 NO. 2, FALL 2008, p.15 at 24-25

23 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 Mar. 1976.

as minors that entitles them to protection.[24] Drawing from Article 6(5), ICCPR, the HRC has observed that "all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice".[25]

Article 2, UNCRC states:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

The Committee on the Rights of the Child (CRC) has emphasized upon the attention that needs to be paid to address the discriminatory treatment of children in conflict with the law:[26]

> Many children in conflict with the law are also victims of discrimination, e.g. when they try to get access to education or to the labour market. It is necessary that measures are taken to prevent such discrimination, inter alia, as by providing former child offenders with appropriate support and assistance in their efforts to reintegrate in society, and to conduct public campaigns emphasizing their right to assume a constructive role in society (art. 40 (1)).

Further, in the context of the exclusion of 16 and 17 year olds from juvenile justice, it has stated:

> States parties which limit the applicability of their juvenile justice rules to children under the age of 16 (or lower) years, or which allow by way of exception that 16 or 17-year-old children are treated as adult criminals,

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24 Human Rights Committee, General Comment 17, Article 24 (Thirty-fifth session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 23 (1994) para 4.

25 Human Rights Committee, General Comment 21, Article 10 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 33 (1994), para 13 (emphasis added).

26 Committee on the Rights of the Child, General Comment No. 10, Children's rights in juvenile justice (Forty-fourth session, 2007), U.N. Doc. CRC/C/GC/10 (2007), para 7.

change their laws with a view to achieving a non-discriminatory full application of their juvenile justice rules to all persons under the age of 18 years.[27]

A decision to transfer the child could be challenged by an advocate as being violative of the fundamental right to equality and the guarantee of procedural fairness recognized under Article 21 on the right to life as well as the UNCRC. Denial of education or employment opportunities to children who exit the juvenile justice system after being found to have committed an offence could also be challenged on grounds that it violates the principle of fresh start under Section (xiv), JJ Act, 2015, and the right to equality and non-discrimination.

4.3. Privilege against self-incrimination

Article 20(3) of the Constitution recognizes the privilege against self-incrimination and prohibits compelling an accused person to be a witness against himself. Article 40(2)(b)(ii), UNCRC recognizes the right of a child in conflict with the law to not "be compelled to give testimony or to confess guilt". According to the CRC, the term "compelled" should not be narrowly construed to mean only physical force[28]:

> The age of the child, the child's development, the length of the interrogation, the child's lack of understanding, the fear of unknown consequences or of a suggested possibility of imprisonment may lead him/her to a confession that is not true. That may become even more likely if rewards are promised such as: "You can go home as soon as you have given us the true story", or lighter sanctions or release are promised.

The Supreme Court has held that "*the expression* "to be witness against himself" in Article 20(3) of the Constitution "means more than the court process" and includes "[a]ny giving of evidence, any furnishing of information, if likely to have an incriminating impact ensures the description of being witness against himself."[29] The right against self-incrimination covers every stage where information is furnished and material is collected[30] and the protection extends to any person accused of an offence.[31] Children alleged to be in conflict with law are thus entitled to the right against self-incrimination at all stages including the preliminary assessment.

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27 *Ibid,* para 38.
28 CRC GC 10, para 47.
29 Nandini Satpathy v. Dani (P.L.), 1978 AIR 1025.
30 *Ibid.*
31 *Ibid.*

Rule 8(3)(iii), JJ MR safeguards the constitutional privilege against self-incrimination and prohibits the police from compelling a child to confess guilt and states that a parent or guardian may be present during the police interview. Further, the child cannot be asked to sign any statement.[32]Rule 7.1, Beijing Rules, recognizes the right of juveniles to remain silent, the right to counsel, and the right to presence of a parent or guardian, as basic procedural safeguards, regarded as essential for a "fair and just trial" under various international human rights instruments.

An advocate representing a child alleged to be in conflict with the law should explain the privilege to the child and that it is applicable at all stages of the legal process. The implications of sharing incriminating information about the offence and the child's involvement should be communicated to the child. For instance, information about the manner in which an offence was committed with a psychologist for the purpose of a preliminary assessment could be used to transfer the child to the Children's Court for trial as an adult. This privilege can be invoked, directly or through a legal representative, during the preliminary assessment, even though "preliminary assessment is not a trial"[33] because of its extension to all processes.

The CRC has also emphasized the importance of ensuring the child's access to a legal or appropriate representative and the presence of a parent or guardian during the questioning.[34] It emphasized an "independent scrutiny of the methods of interrogation to ensure that the evidence is voluntary and not coerced, given the totality of the circumstances, and is reliable." It stated that the following aspects should be considered by a judicial body assessing the voluntary nature and reliability of a child's confession: "age of the child, the length of custody and interrogation, and the presence of legal or other counsel, parent(s), or independent representatives of the child."

Although the term "may" is used with respect to the presence of the child's parent or guardian during a police interview under Rule 8(3)(v), JJ Model Rules, 2016, it could be argued that it would be procedurally unfair to interview a child in the absence of a supportive adult or legal representative. A person below 18 years may not have the developmental maturity to withstand police interrogation and may not even know that a lawyer could be requested for or the presence of the parent or guardian can be demanded.

32 JJ MR, 2016, Rule 8(3)(vi).
33 JJ Act, 2015, Section 15(1) Explanation.
34 CRC GC 10, para 58.

4.4. Right to consult a lawyer and to legal aid

Article 22(1) of the Constitution entitles an arrested person to consult with a lawyer and to be defended by a lawyer of his choice. Further, Article 39-A of the Constitution requires the State to provide free legal aid to ensure that citizens are not prevented from accessing the legal system due to economic or other disabilities. Children alleged to be in conflict with the law have a right to be heard in all legal and judicial proceedings and free legal aid should be made available to them if they are unable to afford legal representation.

The JJ Act, 2015 and JJ Model Rules, 2016, recognize the right of children in conflict with the law to legal aid. It is the JJB's responsibility to ensure the availability of legal aid through legal services institutions.[35] It should ensure that the LPO in the DCPU and the SLSA or DLSA provide free legal services to the child if the child does not already have an advocate representing him.[36] It is also the duty of the police to inform the DLSA for providing free legal aid to the child.[37]

Under Article 14(3)(d), ICCPR every accused has a right "to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it." Article 14(3)(b), ICCPR stipulates "adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing" as a minimum guarantee.

Article 39(d), UNCRC entitles children deprived of liberty to "prompt access to legal and other appropriate assistance[38]" and "legal or other appropriate assistance in the preparation and presentation of his or her defence[39]".The "right to counsel" and "free legal aid"[40] is also recognized under the Beijing Rules[41] and the Havana Rules.[42] The Basic Principles on the Role of Lawyers recognize the important role played by lawyers in the administration of justice, the right of person to seek a lawyer of their choice during criminal proceedings, free legal aid, and the duty of

35 JJ Act, 2015, Section 8(3)(c).
36 JJ MR, 2016, Rule 7(1)(ix).
37 JJ MR, 2016, Rule 7(3)(vii).
38 UNCRC, 1989, Article 39(d).
39 UNCRC, 1989, Article 4 (2)(b)(ii).
40 Beijing Rules, 1985, Rule 15.1.
41 Beijing Rules, 1985, Rule 7.1.
42 Havana Rules, 1990, Rule 18(a).

the government to ensure that prompt access to a lawyer is ensured and in any case not later than 48 hours of the arrest or detention.[43]

The CRC has highlighted the implication of the ICCPR and UNCRC provisions related to legal representation:

> the child and his/her assistant must have adequate time and facilities for the preparation of his/her defence. Communications between the child and his/her assistance, either in writing or orally, should take place under such conditions that the confidentiality of such communications is fully respected in accordance with the guarantee provided for in article 40 (2) (b) (vii) of CRC, and the right of the child to be protected against interference with his/her privacy and correspondence (art. 16 of CRC).

Access to the child client, especially if the child is being detained in the OH or the Place of Safety, is necessary for effective legal representation. An advocate representing the child should ensure that sufficient time is allowed by the staff of the OH for communication with the child in private.

4.5. Non-retroactive juvenile justice

Article 20(1) of the Constitution prohibits the retrospective application of law in respect of offences. It states,

> No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

Section 2(13), JJ Act, 2015, states:

> "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**

Section 5, JJ Act, 2015 pertains to inquiry after a person ceases to be 18 years of age. It states,

> Where an inquiry has been initiated in respect of any child under this Act, and during the course of such inquiry, the child completes the age of eighteen years, then, notwithstanding anything contained in this Act or in any other

43 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Clauses 6 and 7.

law for the time being in force, the inquiry may be continued by the Board and orders may be passed in respect of such person as if such person had continued to be a child.

Article 40(2)(a), UNCRC prohibits the retrospective application of juvenile justice and states: "No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed".

Since the JJ Act, 2015 came into force on 15 January 2016, any child alleged to have committed an offence before the Act came into force should be dealt with in accordance with the JJ Act, 2000. Any provision in the State Rules which provides for the treatment as an adult, of a person apprehended after he completed 18 years for an offence he committed as a child, would violate the constitutional and IHRL prohibition on retrospective application of law related to offences and punishments.

4.6. Procedural safeguards

There are several procedural safeguards applicable to children in conflict with the law such as production before the JJB within 24 hours, presumption of innocence, information about the apprehension and the charges, etc. Rule 7, Beijing Rules lists the procedural safeguards available to children in conflict with the law:

> Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.

4.6.1. Production before JJB within 24 hours

Article 22(2), Constitution requires the production within 24 hours before a Magistrate of a person arrested or detained in custody. This protection applies in full force to children alleged to be in conflict with the law and the police is duty-bound to produce them before the JJB within 24 hours as per Section 10(1), JJ Act, 2015 and Rules 8(3)(i) and 9(1), JJ Model Rules, 2016.

The CRC has also emphasized the significance of producing a child promptly and the right to legal assistance:[44]

> Every child deprived of his/her liberty has the right to prompt access to legal

44 GC 10, paras 82-83.

and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his/her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Every child arrested and deprived of his/her liberty should be brought before a competent authority to examine the legality of (the continuation of) this deprivation of liberty within 24 hours.

Failure to adhere to this essential safeguard is a constitutional violation as well as a breach of the procedures stipulated under the JJ Act, 2015 and JJ Model Rules, 2016. Advocates should bring this to the attention of the JJB, as it is their duty under Section 8(3)(b) to ensure that "the child's rights are protected throughout the process of apprehending the child, inquiry, aftercare and rehabilitation".

4.6.2. Information about charges

Rule 8(3)(iii), JJ MR, 2016, obligates the police to "inform the child promptly and directly of the charges levelled against him through his parent or guardian". Copy of the FIR, if registered, or the police report, should be given to the parent or guardian.[45] The CWPO or the SJPU should inform the parent or guardian of the child about the child's apprehension as soon as possible and direct them to be present when the child is produced before the JJB.[46] The address of the JJB and the time of production should be conveyed to them.[47] Rule 10(5) requires the CWPO to produce witness statements and other documents prepared during investigation within a month of the first production of a child who has completed 16 years and has allegedly committed a heinous offence, a copy of which should be given to the child, parent, or guardian.

Article 40(2)(b)(ii), UNCRC requires the child "to be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians." The Committee on the Rights of the Child has emphasized that the child should be informed of the charges even in cases that are diverted and that an oral explanation should be provided of the charges as handing over an official document is not sufficient. It stated:

> It is the responsibility of the authorities (e.g. police, prosecutor, judge) to make sure that the child understands each charge brought against him/her.

45 JJ MR, 2016, Rule 8(3)(iii).
46 JJ Act, 2015, Section 13(1)(i).
47 JJ MR, 2016, Rule 8(2)(i).

> The Committee is of the opinion that the provision of this information to the parents or legal guardians should not be an alternative to communicating this information to the child. It is most appropriate if both the child and the parents or legal guardians receive the information in such a way that they can understand the charge(s) and the possible consequences.[48]

An advocate should ensure that the child fully understands the charge against the child and such information is given to the parents or legal guardian. Such understanding is critical for their meaningful participation during the inquiry or preliminary assessment before the JJB and trial before the Children's Court.

4.6.3. Bail as a matter of right

All children alleged to be in conflict with the law are entitled to bail irrespective of whether the offence is bailable or non-bailable.[49] Bail can be denied only if the JJB has reasonable grounds to believe that the release would bring the child into association with any known criminal or expose the person to moral, physical or psychological danger or the child's release would defeat the ends of justice.[50]

> In *Ravi-ul-Islam v. State*[51], in a revision petition, the Delhi High Court considered the denial of bail to a CICL charged under the Narcotic Drugs and Psychotropic Substances Act, 1985 and relying on apex court decisions that considered the JJ Act 2000, a beneficial legislation for the benefit of juveniles held that:
>
> Bail has to be granted to a juvenile, notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any other law for the time being in force which includes the NDPS Act also except for the conditions mentioned in Section 12 itself which, if one examines the same, are also to prevent any damage to the juvenile. The idea behind Section 12 being that the juvenile must be released on bail unless releasing him on bail would be detrimental to him or would entirely defeat the ends of justice.
>
> The gravity of the offence cannot be the sole basis for denying bail.[52] In *Ashu Kumar v. State of Uttar Pradesh*[53], the Allahabad High Court was of the view that

48 CRC, GC 10, para 48.
49 JJ Act, 2015, Section 12(1).
50 JJ Act, 2015, Section 12(1), proviso.
51 Crl Rev P, No. 896/2005 decided on 05.05.2006 available at http://delhicourts.nic.in/may06/RAVI-UL-%20ISLAM%20VS.%20STATE.htm
52 *Ashu Kumar v. State of Uttar Pradesh,* Criminal Revision No. 10 of 2014 decided on 26 May 2015 decided by the Allahabad High Court.
53 *Ashu Kumar v. State of Uttar Pradesh,* Criminal Revision No. 10 of 2014 decided on 26 May 2015 decided by the Allahabad High Court.

the denial of bail by the JJB because he was charged with rape did not meet the justifications stated in law. Even though the District Probation Officer had opposed the bail application, the High Court opined that his view was not supported by any material which indicated that the child would fall into the company of known criminals, or be subjected to physical or psychological danger or that the grant of bail would defeat the ends of justice. The High Court also held that a bail application of a child in conflict with the law could not be opposed on the ground of gravity of the offence when the parents were willing to reform him.

In *Talwinder Singh v. State of Punjab,*[54] a child in conflict with the law charged under Section 4, Protection of Children from Sexual Offences Act, 2012 had been denied bail by the JJB because he "may try to tamper with evidence and may also attempt to win over the prosecution witness which would certainly defeats the ends of justice." However, there was no reference to any material that justified these presumptions. Bail was also denied by the Sessions Court based on the gravity of the offence. The Punjab and Haryana High Court held that the orders of the JJB and the Sessions Court were against the spirit of the Act and did not meet any of the three grounds based on which bail can be denied. Refer to Chapter IX – Bail for more information.

4.6.4. Presumption of Innocence

The principle of presumption of innocence is recognized as a "fundamental principle" which should be adhered to by the JJB and other agencies while implementing the Act. Section 3(i), JJ Act, 2015 states, "Any child shall be presumed to be an innocent of any mala fide or criminal intent up to the age of eighteen years." Article 40(2)(b)(i), UNCRC recognizes the right of "every child alleged or accused of having infringed the penal law to be presumed innocent until proven guilty according to law." The Committee on the Rights of the Child in General Comment No.10 (2007) *Children's rights in juvenile justice*[55] has elaborated on this guarantee and underlined that an understanding of child development is important so that the presumption is applied in practice:

> The child has the right to be treated in accordance with this presumption and it is the duty of all public authorities or others involved to refrain from prejudging the outcome of the trial. States parties should provide information about child development to ensure that this presumption of innocence is

54 2015 SCC OnLine P&H 10833, 18 May 2015, Punjab and Haryana High Court.
55 CRC/C/GC/10, 25 April 2007, para 42.

respected in practice. Due to the lack of understanding of the process, immaturity, fear or other reasons, the child may behave in a suspicious manner, but the authorities must not assume that the child is guilty without proof of guilt beyond any reasonable doubt.

Although the POCSO Act, 2012 provides for the presumption as to certain offences under Section 29 and presumption of culpable mental state under Section 30, these presumptions should not apply in cases involving a child alleged to be in conflict with the law. Section 34(1), POCSO Act unequivocally states that the JJ Act, 2000 will apply if offences under the POCSO Act are committed by a child. The JJ Act, 2000 has been repealed and re-enacted and the JJ Act, 2015 occupies the field related to juvenile justice. Section 1(4)(i), JJ Act, 2015 states that it is the overriding law with respect to "apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law". These provisions read together with Section 3(i), JJ Act, 2015 would imply that a child alleged to have committed an offence under the POCSO Act will be presumed innocent and the presumptions under the POCSO Act will not apply. An advocate representing a child alleged to have committed an offence under the POCSO Act should resist arguments or attempts to apply the presumption of guilt under the POCSO Act against the child in conflict with the law. An advocate should zealously ensure that the presumption of innocence is respected at every stage. For instance, the JJB's decision to transfer the child to the Children's Court based on the assumption that the child has shown no remorse for the alleged offence would grossly violate the presumption of innocence and should be challenged. For detailed explanation of the principle of presumption of innocence refer to Chapter III – General Principles.

4.6.5. Right to be dealt with under the special law for children in conflict with law

Article 40(3), UNCRC mandates States Parties to "promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law…" The JJ Act, 2000 was enacted pursuant to this obligation. The reference to the UNCRC also appears in the Preamble of the JJ Act, 2015.

A person who is or was below 18 years at the time of the alleged commission of the offence should be dealt with as a "child in conflict with the law" as per the JJ Act, 2015.[56] Even if a person is apprehended after he attains 18 years, the procedure

56 JJ Act, 2015, Section 6(1).

under the JJ Act will be followed if the offence was allegedly committed when the person was below 18 years. In recognition of this right, Section 34(1) of the POCSO Act, 2012 provides for all children alleged to have committed offences under the Act to be dealt with as per the JJ Act, 2000.

The JJB is expected to conduct "regular inspection of jails meant for adults to check if any child is lodged in such jails and take immediate measures for transfer of such a child to the observation home". Article 10(1)(b), ICCPR requires "accused juvenile persons" to be separated from adults, while Article 10(1)(c), ICCPR prescribes segregation of juvenile offenders from adults and treatment appropriate to the age and legal status of juveniles. According to Article 14(4), ICCPR, the procedures with respect to juveniles should take into account "their age and the desirability of promoting their rehabilitation."

An advocate whose child-client has been treated as an adult by the police and kept in the jail may consider petitioning the High Court under Article 226, Constitution of India, to seek relief against such deprivation of liberty. The matter should also be brought to the attention of the JJB seeking its intervention for the deprivation of the child's rights during apprehension.

> A plea of juvenility can be raised at *any stage* and before *any court.*[57] It can even be raised after a case has been finally disposed and even after the person has ceased to be a child. For instance, a claim of juvenility can be raised in appeal before the Supreme Court even if it had not been raised at any stage before the trial court or the High Court.

In *Abuzar Hossain v. State of West Bengal,*[58] the Supreme Court summarized the position on the claim of juvenility in the context of the JJ Act 2000. The following principles stated in the case will also apply to the JJ Act 2015:

> A claim of juvenility may be raised at any stage even after the final disposal of the case. It may be raised for the first time before this Court as well after the final disposal of the case. The delay in raising the claim of juvenility cannot be a ground for rejection of such claim. The claim of juvenility can be raised in appeal even if not pressed before the trial court and can be raised for the first time before this Court though not pressed before the trial court and in the appeal court.
>
> For making a claim with regard to juvenility after conviction, the claimant

57 JJ Act, 2015, Section 9(2), proviso.
58 (2012) 10 SCC 489.

must produce some material which may *prima facie* satisfy the court that an inquiry into the claim of juvenility is necessary. Initial burden has to be discharged by the person who claims juvenility…..

The court where the plea of juvenility is raised for the first time should always be guided by the objectives of the 2000 Act and be alive to the position that the beneficent and salutary provisions contained in the 2000 Act are not defeated by the hypertechnical approach and the persons who are entitled to get benefits of the 2000 Act get such benefits. The courts should not be unnecessarily influenced by any general impression that in schools the parents/guardians understate the age of their wards by one or two years for future benefits or that age determination by medical examination is not very precise. The matter should be considered *prima facie* on the touchstone of preponderance of probability.

Advocates should acquaint themselves with the age-determination procedures under the JJ Act and take steps to verify the age of their adult clients. A plea of juvenility should be raised at the earliest possible stage to prevent the handling of children as adults and violations of their rights under the juvenile justice system. Refer to Chapter VIII on Age Determination.

4.6.6. Right to fair and speedy inquiry

A duty has been cast on the JJB to ensure fair and speedy inquiry under Section 14(5), JJ Act, 2015. In furtherance of this, the JJ Act, 2015 prescribes the time frame within which the inquiry should be completed,[59] and mandates the termination of proceedings in petty offences if the inquiry remains inconclusive after six months.[60] Under Section 19(1)(i), JJ Act, 2015, the Children's Court is required to adhere to the tenets of a fair trial when trying a child as an adult.

An advocate should ensure that the matter should not be unnecessary delayed so that it can be disposed within the timeline stipulated under the JJ Act, 2015. For more information, refer to Chapter XI.

4.7. Right to Life

Article 21, Constitution of India, guarantees that a person cannot be "deprived of his life or personal liberty except according to a procedure established by law." Although couched negatively, its expansive interpretation by the Supreme Court

59 JJ Act, 2015, Section 14(2).
60 JJ Act, 2015, Section 14(4).

has led to the recognition of several positive rights such as the right to education,[61] right to food,[62] right to privacy,[63] right to speedy trial,[64] right against handcuffing,[65] and protection against custodial torture.[66]

Further, Articles 46 and 47 require the State to safeguard the educational and economic interests of weaker Sections, and raise the nutritional levels and public health, respectively. For children in conflict with the law living in CCIs, it would imply that their right to education, nutrition, and health should be respected, protected and fulfilled. The minimum standards of care within Child Care Institutions stipulated under Section 53, JJ Act, 2015 and Rules 29-38 of the JJ Model Rules, 2016 pertaining to physical infrastructure, sanitation and hygiene, nutrition and diet scale, medical care, mental health, education, vocational training, and recreational facilities should be ensured to children alleged or found to be in conflict with the law. Advocates representing such children should bring to the attention of the JJB or the Children's Court, as the case may be, poor living conditions within the Observation Home, Special Home, or Place of Safety, as apart from impinging upon the right to life of dignity, such breach would also impact the overall rehabilitation of the child. The Children's Court, in particular, can be urged to pass directions to strengthen the institutional mechanism within the Place of Safety.[67]

4.8. Right to Education

Article 21-A, of the Constitution recognises the right to free and compulsory education to children between six and fourteen years. Children cannot be deprived of their fundamental right to education because of their detention in a custodial institution like the OH, Place of Safety, or Special Home. There is a constitutional obligation on the State to ensure that children below 14 years in these CCIs are compulsorily provided free education. Further, Article 350-A, a special directive, requires the State to provide adequate facilities for instruction in mother-tongue during primary education to children belonging to linguistic minority groups. This constitutional obligation would also apply to children living in the CCIs.

Children alleged to be in conflict with the law are socially disadvantaged owing to

61 *Mohini Jain v. State of Karnataka,* AIR 1992 SC 1858; *J.P. Unnikrishnan v. State of Andhra Pradesh,* (1993) 1 SCC 645.
62 *PUCL v. Union of India,* (2007) 12 SCC 135.
63 *Justice K. Puttaswamy v. Union of India,* WP (Civil) No 494 of 2012 decided on 24.08.2017 by the Supreme Court.
64 *Sheela Barse v. Union of India,* (1986) 3 SCC 632.
65 *Prem Shankar Shukla v. Delhi Administration,* AIR 1980 SC 1535.
66 *Sunil Batra v. Delhi Administration,* AIR 1980 SC 1597.
67 JJ MR, 2016, Rule 13(8)(vi)(b).

the stigma that immediately attaches to them and their families when an F.I.R. is registered against them. Their right to education is often disrupted when they are detained in a custodial institution or the information about their involvement in an offence spreads.

The right to education of a child alleged and found to be in conflict with the law and between the age of six to fourteen years, that is guaranteed under the Right of Children to Free and Compulsory Education Act, 2009 (RTE Act), will also have to be protected by the JJB.[68] Under the RTE Act, the appropriate government is responsible for ensuring that children belonging to weaker Section or disadvantaged group "are not discriminated against and prevented from pursuing and completing elementary education on any grounds".[69] The RTE Act defines "child belonging to disadvantaged group" to mean

> a child with disability or a child belonging to the Scheduled Caste, the Scheduled Tribe, the socially and educationally backward class or such other group having disadvantage owing to social, cultural, economical, geographical, linguistic, gender or such other factor, as may be specified by the appropriate Government, by notification.[70]

The implementation of the right to education is one of the means of preventing juvenile delinquency[71] as well as promoting reintegration of children in conflict with the law.[72] According to the CRC, one of the principles that should be observed in cases of deprivation of liberty of children is:

> Every child of compulsory school age has the right to education suited to his/her needs and abilities, and designed to prepare him/her for return to society; in addition, every child should, when appropriate, receive vocational training in occupations likely to prepare him/her for future employment

The JJB should pass orders for re-admission or continuation of the child in school if the child has been barred or suspended because of the pending inquiry or for having lived in a CCI for any length of time.[73] For instance, if a child in conflict with the law is dismissed from school for having spent six month in an Observation Home or Special Home, the advocate representing the child should urge the JJB to direct the

68 JJ Act, 2015, Section 8(3)(b) read with Section 53(1)(iii) and JJ MR, 2016, Rule 7(iii) and Right of Children to Free and Compulsory Education Act, 2009, Section 3.
69 RTE Act, 2009, Section 8(c).
70 RTE Act, 2009, Section 2(d).
71 General Comment No.10, para 16.
72 General Comment No.10, para 23.
73 JJ MR, 2016, Rule 7(1)(iii).

school to re-admit him. The child should not be stigmatized and denied education because of his detention in a child care institution or the allegations against him. Additionally, with a view to ensure the child's reintegration, the advocate should request the JJB or the Children's Court dealing with the matter as a JJB would, to pass additional orders under Section 18(2), JJ Act, 2015, requiring the child to attend school or attend a vocational training centre.

4.9. Right to child friendly procedures and ambience

The JJ Act, 2015 and JJ Model Rules, 2016 mandate the police, JJB, and the Children's Court to follow child friendly procedures while dealing with a child.

Article 14.2, Beijing Rules states,

> The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely.

Child-friendly procedures to be followed by the police

The JJ Act, 2015 and the JJ Model Rules, 2016, specify procedures that should be followed by the police apprehending a child alleged to be in conflict with the law, some of which are as follows:

- The child should not be sent to a police lock-up or kept in a jail, and should be transferred to the Child Welfare Police Officer (CWPO) at the earliest.[74]
- If the child is denied bail by the police, the child should be sent to an Observation Home till the time of production before the Board, which should be done within 24 hours of apprehension.[75]
- The child should not be handcuffed, chained or otherwise fettered and no force or coercion should be used against the child.[76]
- The child should be interviewed at the SJPU or child friendly premises or at a child friendly corner in a police station.[77] The atmosphere should not such that the child does not feel it is a police station or that the child is under custodial interrogation.[78]

74 JJ Act, 2015, Section 10(1); JJ MR, 2016, Rule 8(3)(i).
75 JJ MR, 2016, Rule 8(3)(i).
76 JJ MR, 2016, Rule 8(3)(ii).
77 JJ MR, 2016, Rule 8(3)(v).
78 JJ MR, 2016, Rule 8(3)(v).

- The child's parent or guardian may be present during the police interview.[79]
- The CWPO should be dressed in plain clothes and not in uniform.[80]

An advocate representing a child alleged to be in conflict with the law should verify whether these procedures were adhered to by the police. The breach should be brought to the attention of the JJB, but it should also be ensured that the child and the child's family are protected against reprisals. In case of regular use of force against children alleged to be in conflict with the law, a complaint could be addressed to the National Human Rights Commission or State Human Rights Commission. A submission could also be made to the High Court Committee on Juvenile Justice as well. A writ petition could be filed before the High Court if the police torture results in loss of life or limbs.

Child-friendly procedures to be followed by the JJB

According to the JJ Act, 2015, the venue should not be intimidating and should not resemble regular courts.[81] The sitting arrangement should facilitate face-to-face interaction with the child.[82] The JJB should not sit on a raised platform and there should be no barriers like witness box or bars between the JJB and the child.[83] The JJB should also ensure that the proceedings are conducted in a simple manner and a child-friendly atmosphere is maintained during the proceedings.[84] In their communication as well, the JJB should deploy child-friendly techniques and attitudes in respect of their body language, facial expression, eye contact, intonation and volume of voice while interacting with the child.[85] While recording the child's statement, the JJB should speak in a child-friendly manner to put the child at ease and enable the child to state the facts and circumstances fearlessly about the offence alleged, home and social surroundings and the influences that the child may have been subjected to.[86]

Child-friendly procedures to be followed by the Children's Court

The JJ Model Rules, 2016, prescribes the procedures to be followed when the child is not tried as an adult, and when the child is tried as an adult. The proceedings should be held *in camera if* it decides not to try the child as an

79 JJ MR, 2016, Rule 8(3)(v).
80 JJ MR, 2016, Rule 8(4).
81 JJ Act, 2015, Section 7(1).
82 JJ MR, 2016, Rule 6(4).
83 JJ MR, 2016, Rule 6(6).
84 JJ Act, 2015, Section 14(5)(b).
85 JJ MR, 2016, Rule 6(5).
86 JJ MR, 2016, Rule 10(8).

adult.[87]The Children's Court should address the child in a child-friendly manner to put the child at ease and encourage the child to fearlessly state the facts and circumstances of the offence as well as the home, social surroundings and influences on the child when the child is not tried as an adult.[88] The proceedings should not be conducted in an adversarial manner while examining witnesses and the powers under Section 165, Indian Evidence Act should be exercised.[89]

If the Children's Court decides to try the child as an adult, it should maintain a child friendly atmosphere[90] and ensure that the final order includes an Individual Care Plan for the child.

Neither the JJB nor the Children's Court can try a child jointly with a person who is not a child, even if they are co-accused in the same case.[91] Further, if during inquiry, a person alleged to be CICL is found to be an adult after age determination, he cannot be tried along with a child.[92] Based on this provision, a child transferred to the Children's Court by the JJB cannot be tried with other adults.

An advocate representing a child should appeal to the JJB and the Children's Court to apply these procedures and ensure that an Individual Care Plan is a part of the final orders. Care should be taken, however, to ensure that children above 16 years and below 18 years, alleged to have committed a heinous offence, are not manipulated into incriminating themselves before the JJB or the Children's Court.

4.10. Right to be heard

Article 12, UNCRC is one of the four general principles of the UNCRC and states:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an

87 JJ MR, 2016, Rule 13(7)(iii).
88 JJ MR, 2016, Rule 13(7)(v).
89 JJ MR, 2016, Rule 13(7)(iv).
90 JJ Act, 2015, Section 19(1)(i).
91 JJ Act, 2015, Section 23(1).
92 JJ Act, 2015, Section 23(2)

appropriate body, in a manner consistent with the procedural rules of national law.

Article 40(2)(b)(iv), UNCRC encompasses the right "to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality". Article 40(2)(b)(vi), UNCRC requires the child to be provided free assistance of an interpreter if the child cannot or understand or speak the language.

The Committee on the Rights of the Child emphasizes the obvious relation between the right to be heard and the right to a fair trial.[93] It also clarifies that a child should be able to communicate directly if it is in the child's best interest to do so. The right to participate is applicable at all stages and not just during the adjudication process. The Committee also underlined the significance of considering the child's views at every stage as well as when arriving at the final disposition:

> Alleging that the child is criminally responsible implies that he/she should be competent and able to effectively participate in the decisions regarding the most appropriate response to allegations of his/her infringement of the penal law. It goes without saying that the judges involved are responsible for taking the decisions. But to treat the child as a passive object does not recognize his/her rights nor does it contribute to an effective response to his/her behaviour. This also applies to the implementation of the measure(s) imposed. Research shows that an active engagement of the child in this implementation will, in most cases, contribute to a positive result.[94]

Section 3(iii), JJ Act, 2015, recognises the right of every child to be heard and participate in decisions and processes affecting her or his interest. The child's views should be considered having regard to the child's age and maturity. The right to be heard requires the JJB to ensure the informed participation of the child and the child's parent or guardian in every step of the process. This would entail explaining the procedures, processes and their implications on the child at every step to ensure that the child and the child's parent or guardian are able to participate and make decisions during the legal process. The JJB has a mandatory obligation to ensure the child's right to be heard.[95] Fulfillment of this right requires that qualified and experienced interpreters and translators are provided to the child to enable the child to understand and participate in the proceedings.[96]

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93 CRC, GC 10, para 44.
94 CRC, GC 10, para 45.
95 JJ Act, 2015, Sections 14(5)(c) and 3(iii).
96 JJ Act, 2015, Section 8(3)(d); JJ MR, 2016, Rule 7(1)(i).

Advocates representing a child alleged or found to be in conflict with the law should ensure that the child's right to be heard is facilitated before the JJB and the Children's Court. This can be done by explaining the processes in detail and seeking the child's views on decisions related to the case. Care should also be taken to ensure that the child's interests and rights are protected, especially when the views of the child are in conflict with that of the parent/guardian. An advocate representing a child who is being tried as an adult by the Children's Court should ascertain if the child is competent to stand trial and understands the legal procedures. This right should also be balanced with the privilege against self-incrimination, especially in relation to children above 16 years alleged to have committed a heinous offence. During the preliminary assessment by the JJB or the trial before the Children's Court they should not be encouraged to incriminate themselves.

4.11. Right to Privacy

The UNCRC and the Beijing Rules protect the right to privacy of all children in conflict with the law. Article 40(2)(b)(vii), UNCRC recognizes the right of a child alleged to have infringed the penal law "[t]o have his or her privacy fully respected at all stages of the proceedings." The Commentary to Rule 8, Beijing Rules which provides for the protection of privacy of juveniles recognizes that:

> Young persons are particularly susceptible to stigmatization. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as "delinquent" or "criminal". Rule 8 also stresses the importance of protecting the juvenile from the adverse effects that may result from the publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted). The interest of the individual should be protected and upheld, at least in principle.

The identity of a child in conflict with the law must be protected and the child's name, address, school or any identifying information cannot be published in any newspaper, magazine, news-sheet or audio-visual medial or other form of communication without prior written permission from the JJB.[97] Such disclosure is permissible only if it is in the best interest of the child.[98] Advocates representing children in conflict with the law should take steps to initiate a complaint if this provision is violated. Disclosure of a child's identity will inevitably impede the child's rehabilitation and reintegration and could also render the child vulnerable to violence from the public, especially in cases that have been sensationalized.

97 JJ Act, 2015, Section 74(1).
98 JJ Act, 2015, Section 74(1), proviso.

In furtherance of the child's right to privacy, Section 99(1) states that all reports related to the child considered by the JJB or CWC should be treated confidential and the substance thereof may be communicated to the child or the child's parent or guardian if the JJB or CWC deems it fit. However, in the case of children in conflict with the law, fair trial standards will apply and the child and the child's representative should be provided with all materials that the JJB or the Children's Court will consider while arriving at any decision.

To ensure that the child's right to privacy is protected and the principle of fresh start is implemented, the JJB is required to direct the police and the Children's Court its registry, to destroy records of conviction after the expiry of the appeal or after seven years.[99] However, the records of a child found to be in conflict with the law by the Children's Court after a trial as an adult should be retained.[100] Violations of the principle of fresh start should be brought to the attention of the JJB or the Children's Court, as the case may be.

4.12. Best interest principle

Section 3(iv), JJ Act, 2015, states:

> Principle of best interest: All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.

Article 3(1), UNCRC states:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The CRC has identified the best interest principle as a key foundation of the juvenile justice system. It states:

> Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal

99 JJ Act, 2015, Section 24(2) and JJ MR, 2016, Rule 14.
100 JJ Act, 2015, Section 24(2), proviso.

> justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.[101]

The CRC has also emphasized that the best interest principle should be applied by courts/judges when they adjudicate upon cases involving children in conflict with the law. including cases of heinous offences. It states:

> In cases of severe offences by children, measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered, including considerations of the need of public safety and sanctions. In the case of children, such considerations must always be outweighed by the need to safeguard the well-being and the best interests of the child and to promote his/her reintegration.[102]

The above exposition of the best interest principle should be pressed into service by advocates representing children before the JJB or the Children's Court to ensure that all children are retained within the juvenile justice system or that orders are passed keeping in view the rehabilitative objectives. For instance, based on the best interest principle, the JJB should be urged to not transfer a child above 16 years alleged to have committed a heinous offence to the Children's Court for trial as an adult. Similarly, the Children's Court should be urged to deal with the matter as a JJB would under Section 19(1)(ii), JJ Act, 2015, and pass rehabilitative orders under Section 18(1) and (2), if the child is found to have committed an offence.

Refer to Chapter II – Key Definitions and Chapter III – General Principles for an elaboration of the best interest principle in the context of children in conflict with the law.

4.13. Protection from torture and ill-treatment

Article 37(a), UNCRC prohibits a child from being subjected to torture or other cruel, inhuman or degrading treatment or punishment. Under the JJ Act, 2015, the JJB should ensure that the child has not been subjected to any ill-treatment by the police or by any other person, including a lawyer or Probation Officer.[103] Section 75(1), JJ Act, 2015 prescribes punishment for cruelty to child. It states:

> Whoever, having the actual charge of, or control over, a child, assaults, abandons, abuses, exposes or wilfully neglects the child or causes or procures

101 GC 10, para 10.
102 GC 10, para 71.
103 JJ Act, 2015, Section 14(5)(a).

> the child to be assaulted, abandoned, abused, exposed or neglected in a manner likely to cause such child unnecessary mental or physical suffering, shall be punishable with imprisonment for a term which may extend to three years or with fine of one lakh rupees or with both

The JJB can order the registration of a FIR if any offence has been committed against a child. This would include cruelty by the police or any person having the actual charge of, or control over a child.

The JJ Act, 2015 prohibits corporal punishment with the aim of disciplining within child care institutions by persons-in-charge or employed in the institution.[104] The breach of this provision will attract criminal proceedings and if found guilty, a person will be liable to a fine of Rs 10,000 on first conviction.[105] Subsequent offences will make the person liable for imprisonment which may extend to three months or fine or both.[106] A person convicted of corporal punishment will also be liable for dismissal from service and will be disbarred from working directly with children thereafter.[107] If the management of the institution does not cooperate with orders of the CWC or JJB or court or State Government, then the person-in-charge of the management will be liable for punishment with imprisonment for a minimum term of three years imprisonment and fine which may extend to Rs 1 lakh.[108]

The advocate can make a plea to the JJB should direct that the medical examination report which should be prepared within 24 hours of admission of a child to a Child Care Institution,[109] is submitted to the JJB immediately after preparation so that bodily injuries, if any, can be ascertained and action can be initiated. Since CICLs have the right not to be detained in a police lockup or jail under any circumstance,[110] the advocate should make necessary inquires when the child is produced for the first time to determine if the child was kept in a lockup.

4.14. Right to be Protected from Sexual Offences

Article 19(1), UNCRC requires States Parties to:

> take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation,

104 JJ Act, 2015, Section 82(1).
105 JJ Act, 2015, Section 82(1).
106 JJ Act, 2015, Section 82(1).
107 JJ Act, 2015, Section 82(2).
108 JJ Act, 2015, Section 82(3).
109 JJ MR, 2016, Rule 34(3)(i).
110 JJ Act, 2015, Section 10(1), proviso.

including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Rule 87(d), Havana Rules requires personnel of detention facilities for children in conflict with the law to "ensure the full protection of the physical and mental health of juveniles, including protection from physical, sexual and emotional abuse and exploitation," and to "take immediate action to secure medical attention whenever required".

The POCSO Act, 2012, criminalizes penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, aggravated sexual assault, sexual harassment against a child and using a child for pornographic purposes. The term 'child' is defined to mean a person below 18 years.[111] Penetrative sexual assault or sexual assault by a person on the management or staff of a Child Care Institution would constitute aggravated penetrative sexual assault or aggravated sexual assault.[112] The POCSO Act places a mandatory duty to report a sexual offence against a child, upon any person who has apprehension that an offence is likely to be committed or has the knowledge that the offence has been committed.[113] Failure to report the commission of an offence is a punishable offence[114] and the penalty is higher, if the failure is on the part of a person-in-charge of any institution.[115]

The JJ Model Rules, 2016, require CCI's to develop a system to ensure that no abuse, neglect and maltreatment takes place within the CCI.[116] This would entail sensitizing the staff on recognizing abuse, neglect, and maltreatment and responding to them. The following steps should be followed within an OH, Special Home, or Place of Safety, to address physical, sexual or emotional abuse including neglect of children in conflict with the law:

- **Report:** Any staff member who has such information should immediately report to the Person-in-charge.[117]If the incident reveals the commissions of a sexual offence, the staff member should inform the police or SJPU in accordance with the obligation of mandatory reporting under the POCSO Act.,[118]

111 POCSO Act, 2012, Sections 2(d), 3, 5, 7, 9, 11, and 13.
112 POCSO Act, 2012, Sections 5(d) and 9(d).
113 POCSO Act, 2012, Section 19(1).
114 POCSO Act, 2012, Section 21(1).
115 POCSO Act, 2012, Section 21(2).
116 JJ MR, 2016, Rule 76(1).
117 JJ MR, 2016, Rule 76(2)(i).
118 POCSO Act, 2012, Sections 19(1) and 21.

- **Alert JJB and Management Committee:** The Person-in-charge should place a report on the allegations before the JJB.[119] Information should also be sent to the Chairperson of the Management Committee and place a copy of the report of the incident and action taken at the next meeting.[120]
- **Investigation Order:** The JJB should direct the local police or SJPU to register a case, take cognizance, and investigate.[121]If any other crime has been committed in respect of the children in the CCI, cognizance should be taken by the JJB investigation should be ordered into them by the police or SJPU.[122]For instance, if while inquiring into an allegation of sexual abuse, facts emerge indicating the prevalence of corporal punishment, investigation should be ordered into the sexual abuse as well as the allegation of corporal punishment.
- **Counselling and legal aid:** The JJB should provide legal aid and counselling to the child victim and take steps to complete the inquiry.[123]
- **Transfer:** The child should be transferred by the JJB to another CCI, Place of Safety, or fit person, as the case may be.[124]
- **Involve Children's Committee and experts:** The JJB can consult the Children's Committee in the CCI to inquire about abuse and exploitation. It can also seek assistance of NGOs, child rights experts, mental health experts, or crisis intervention centres in dealing with these matters.[125]

Incidence of child sexual abuse within an Observation Home, Special Home or Place of Safetyshould be brought to the attention of the JJB by the advocate representing the said child.. The advocate should also ensure that adequate support and protection is provided to the child who has been subjected to sexual abuse.

4.15. Right to rehabilitative dispositions

Article 40(4), UNCRC requires States to ensure the availability of several options of disposition apart from institutionalization to deal with children in conflict with law:

> A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training

119 JJ MR, 2016, Rule 76(2)(ii).
120 JJ MR, 2016, Rule 76(2)(vi).
121 JJ Act, 2015, Section 30(xvi); JJ MR, 2016, Rule 76(2)(iii).
122 JJ MR, 2016, Rule 76(2)(vii).
123 JJ MR, 2016, Rule 76(2)(iv).
124 JJ MR, 2016, Rule 76(2)(v).
125 JJ MR, 2016, Rule 76(2)(viii).

programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

The JJ Act, 2015, provides for a range of rehabilitative dispositions under Section 18(1) and (2). While disposing the matter, the JJB and the Children's Court should ensure that the final order includes an ICP for the child's rehabilitation.[126] A child found to be in conflict with the law by the Children's Court after a trial as an adult is entitled to "reformative services including educational services, skill development, alternative therapy such as counselling, behaviour modification therapy, and psychiatric support shall be provided to the child during the period of his stay in the place of safety."[127]

An advocate should ensure that the orders of the JJB and Children's Court are rehabilitative in nature. Refer to Chapter XI: Orders that may and may not be passed for Children in Conflict with Law for more details.

4.16. Institutionalisation as a measure of last resort

According to the Beijing Rules, detention pending trial shall only be used as a measure of last resort[128] and whenever possible, it should be replaced by alternative measures, like close supervision, intensive care or placement with a family or in an educational setting or home.[129] Such detention should also be for the least period of time possible.[130] While in detention pending trial, the juvenile should be kept separate from adults.[131] In case of institutionalisation, priority should be given to 'open' over 'closed' institutions.[132] Further, juveniles should be provided with care, protection and all necessary individual assistance (whether social, educational, vocational, psychological, medical or physical) that may be required in view of their age, sex and personality.[133] Parents or guardians of the juvenile should have a right of access to their institutionalised child.[134]

The Havana Rules also provide that detention before trial should be limited to exceptional circumstances.[135] The Rules provide that juveniles should have the right

126 JJ Act, 2015, Sections 8(3)(h) and 19(2).
127 JJ Act, 2015, Section 19(3), proviso.
128 Beijing Rules, 1985, Rule13.1.
129 Beijing Rules, 1985, Rule13.2.
130 Beijing Rules, 1985, Rule13.1.
131 Beijing Rules, 1985, Rule13.4.
132 Beijing Rules, 1985, Rule 19.1.
133 Beijing Rules, 1985, Rule13.5.
134 Beijing Rules, 1985, Rule 26.5.
135 Havana Rules, 1990, Rule 2.

to free legal aid, the right to be provided with opportunities to pursue work with remuneration, and to continue education or training, as are compatible with the interests of the administration of justice.[136] According to the Vienna Guidelines, placement of children in closed institutions should be minimized and corporal punishment should be prohibited. Further, an independent body should be established to monitor compliance with UN standards and report regularly on conditions in custodial facilities.[137]

4.17. Prohibition against imposition of death penalty or life imprisonment without the possibility of release

The JJB or the Children's Court cannot impose death penalty or life imprisonment without the possibility of release for any offence i.e., parole.[138] Article 6(5), ICCPR prohibits the imposition of death penalty on persons who were below 18 years at the time of commission of the crime. Article 37(a), UNCRC prohibits capital punishment as well as life imprisonment without possibility of release for offences committed by persons below 18 years.

Refer to Chapter XI-Orders that may and may not be passed for Children in Conflict with Law.

136 Havana Rules, 1990, Rule 18.
137 Vienna Guidelines, 1997, Guideline 21.
138 JJ Act, 2015, Section 21.

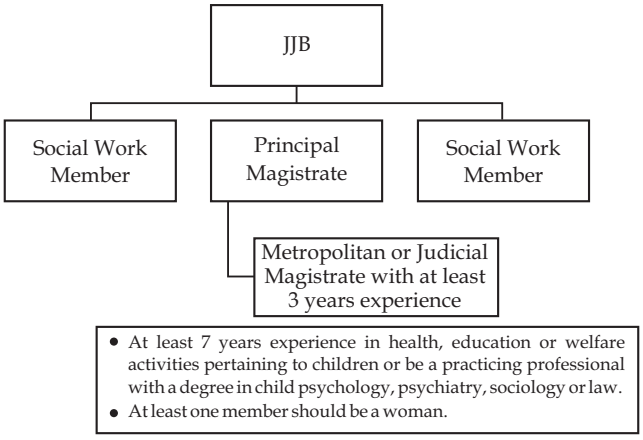
5

Juvenile Justice Board and Children's Court

By Swagata Raha[1]

5.1. Structure of JJB

State Governments have been vested with the responsibility of constituting one or more JJBs in every district.[2] The composition of the JJB is unique in that it comprises a judicial member and two non-judicial members who sit as equals and function together as a bench of Magistrates.[3] The composition of the JJB reflects the legislative intention that the juvenile justice system should be "more appreciative of the developmental needs" of children in contrast to the adult-oriented criminal justice system.[4]The purpose is to provide for a multi-disciplinary inquiry that focuses both on the crime, as well as the needs of the child and the circumstances which may have led to the commission of the offence, so as to facilitate the social re-integration and rehabilitation of the child into the community.



1 Senior Research Associate (Consultant), Centre for Child and the Law, NLSIU Bangalore.
2 JJ Act, 2015, Section 4(1).
3 JJ Act, 2015, Section 4(2).
4 Statement of Objects and Reasons, The Juvenile Justice (Care and Protection of Children) Act, 2000.

Eligibility of Members

The members of the JJB will be selected based on recommendations of a Selection Committee constituted under the JJ Model Rules 2016.[5] The eligibility criteria for membership of the JJB are[6]:

- Age should not be less than 35 years;
- At least seven years' experience in health, education or welfare activities pertaining to children or a practicing professional with a degree in child psychology, psychiatry, sociology or in the field of law;
- No past record of violation of human rights or child rights;
- No convictions for offences involving moral turpitude or conviction has been reversed or full pardon granted for such offence;
- No removal or dismissal from government service or service at an undertaking or corporation owned by the government;
- No indulgence in child abuse or employment of child labour or any other violation of human rights or immoral act

Upon selection, the Member should not hold any full-time occupation that will prevent the Member from giving necessary time and attention the Board or be associated with any CCI, directly or indirectly during the tenure or have any other conflict of interest.[7] The Member should also not hold any office in any political party during the tenure or be insolvent.[8]

5.2. Powers of JJB

The JJB has the power to exclusively deal with proceedings under the JJ Act, 2015 related to children in conflict with the law, in their jurisdiction except as otherwise provided in the Act.[9] The provision conferring such power upon the JJB is a non-obstante clause and will thus override any other law in force. The powers conferred upon the JJB can also be exercised by the High Court and the Children's Court under Section 19, or while hearing appeals, revision, or otherwise.[10]

The JJB's power should be read together with Section 1(4)(i) of the JJ Act, 2015,

5 JJ MR, 2016, Rule 4(2).
6 JJ Act, 2015, Section 4(4) and JJ MR, 2016, Rule 4(3).
7 JJ MR, 2016, Rule 88(5)(i and ii).
8 JJ MR, 2016, Rule 88(5)(iii and iv).
9 JJ Act, 2015, Section 8(1).
10 JJ Act, 2015, Section 8(1).

which pertains to the application of the Act. It states:

> "Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all matters concerning ….children in conflict with law, including –
>
> (i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law;"

The proceedings could relate to bail, detention, preliminary assessment, inquiry into the child's involvement in the offence, prosecution, rehabilitation and social re-integration of children in conflict with the law or amendment of any order passed. [11]

Functioning as a Bench, the JJB has the powers available to a Metropolitan Magistrate or Judicial Magistrate of First Class under the Code of Criminal Procedure.[12]

Position of the Principal Magistrate vis-à-vis Members

The Principal Magistrate's opinion will prevail if there is no majority in the interim or final disposal.[13] The presence of the Principal Magistrate is mandatory during final orders and while passing orders transferring a child to the Children's Court for trial as an adult.[14]However, such orders cannot be passed by the Principal Magistrate independently and at least one member of the JJB should be present.

Socio-legal Decision Making

In an appeal decided by the Special Judge under the POCSO Act in Greater Bombay[15], the order passed by the Principal Magistrate of a JJB under Section 18(3), JJ Act, 2015 was set aside because it contravened the procedure laid down in Section 7(3), which mandates the presence of at least two members. In this case, the order transferring the child to the Children's Court for trial as an adult was signed only by the Principal Magistrate and thus the socio-legal approach that should be taken by the Board was not considered.

The court held that the expression "my view" in the order "shows that this decision was arrived at by a single member i.e., the Ld. Principal Magistrate,

11 JJ Act, 2015, Section 1(4)(i).
12 JJ Act, 2015, Section 4(2).
13 JJ Act, 2015, Section 7(4).
14 JJ Act, 2015, Section 7(3), proviso.
15 The case title is not being included to suppress the identity of the child in conflict with the law. Criminal Appeal No. 435/2017 decided on 17.07.2017 by Special Judge Rekha N. Pandhare, Special Judge under the POCSO Act, 2012 at Greater Bombay.

Juvenile Justice Board which is not in consonance with Section 7 of the Act." The matter was remanded to the JJB and it was directed to rehear and provide a fair opportunity to the child while making an inquiry and passing the order under Section 18(3).

5.3. Atmosphere of the JJB

According to the JJ Act 2015, the venue should not be intimidating and should not resemble regular courts.[16] The sitting arrangement should facilitate face-to-face interaction with the child.[17] The JJB should not sit on a raised platform and there should be no barriers like witness box or bars between the JJB and the child.[18] The JJB should also ensure that the proceedings are conducted in a simple manner and a child-friendly atmosphere is maintained during the proceedings.[19] In their communication as well, the JJB should deploy child-friendly techniques and attitudes in respect of their body language, facial expression, eye contact, intonation and volume of voice while interacting with the child.[20] An advocate should be vigilant and intervene if stigmatizing language or tone is used by the JJB while interacting with the child.

5.4. Functions of the JJB

The responsibilities and functions of the JJB can be categorized as follows:

(a) Responsibilities towards the CICL:

The JJB should:

- Ensure the informed participation of the child and the child's parent or guardian in every step of the process.[21]
- Ensure that the child's rights are protected throughout the process of apprehending the child, during inquiry, aftercare, and rehabilitation.[22]
- Ensure the availability of legal aid through legal services institutions.[23]
- Order the police to register a FIR for offences committed against any

16 JJ Act, 2015, Section 7(1).
17 JJ MR, 2016, Rule 6(4).
18 JJ MR, 2016, Rule 6(6).
19 JJ Act, 2015, Section 14(5)(b).
20 JJ MR, 2016, Rule 6(5).
21 JJ Act, 2015, Section 8(3)(a).
22 JJ Act, 2015, Section 8(3)(b).
23 JJ Act, 2015, Section 8(3)(c).

CICL under this Act or any other law in force, on the basis of a complaint.[24] It can also order the police to register a FIR for offences committed against any CINCP based on a written complaint from the CWC.[25]

- Pass orders for re-admission or continuation of the child in school if the child has been disallowed because of the pending inquiry or for having lived in a CCI for any length of time.[26].
- Maintain a suggestion box or grievance redressal box at a prominent place within the JJB premises, to encourage inputs from children and adults.[27] The box should be operated by a nominee of the Principal Magistrate. The JJB should also review the Children's Suggestion Book at least once a month.[28]
- While recording the child's statement, speak in a child-friendly manner to put the child at ease and enable the child to state the facts and circumstances fearlessly about the offence alleged, home and social surroundings and the influences that the child may have been subjected to.[29]

(b) Procedural aspects

The JJB should:

- Ensure that an SIR is prepared and submitted within 15 days from the date of first production of the child before the Board, to ascertain the circumstances in which the alleged offence was committed. For this purpose, the JJB should direct a Probation Officer, or if such officer is not available, the Child Welfare Officer or a social worker to prepare the SIR.[30]
- Adjudicate and dispose cases in accordance with the inquiry procedure stipulated in the Act.[31]
- Provide the services of a qualified and experienced interpreter or

24 JJ Act, 2015, Section 8(3)(k).
25 JJ Act, 2015, Section 8(3)(l).
26 JJ MR, 2016, Rule 7(1)(iii).
27 JJ MR, 2016, Rule 7(1)(vi).
28 JJ MR, 2016, Rule 7(1)(viii).
29 JJ MR, 2016, Rule 10(8).
30 JJ Act, 2015, Section 8(3)(e); JJ MR, 2016, Rule 10(2).
31 JJ Act, 2015, Section 8(3)(f).

translator to the child if the child fails to understand the language used in the proceedings.[32] The panel of such experts should be maintained by the DCPU for the JJB to draw from.[33] They should be paid a minimum of Rs 1500 per day and in case of a translator, the amount should not exceed Rs 100 per page.[34]

- Transfer to the CWC, matters concerning a CICL, who appears to be in need of care and protection at any stage, thus recognizing that a CICL can also be a CINCP simultaneously, and that both the CWC and JJB may have to be involved.[35] For instance, such an order can be passed after due inquiry if a child has been used by militant groups or by other adults to conduct illegal activities.[36] The JJB can also a transfer a child found not guilty to the CWC, if the child requires care and protection.[37] Refer to Chapter 2, Section 2.3.
- Interact with other JJBs to facilitate speedy inquiry and disposal of cases including in matters where a child is sent to a JJB in another district or State for inquiry or rehabilitation.[38]
- Deploy services of student volunteers or NGOs for para-legal and other tasks such as contacting the parents of the CICL and gathering social and rehabilitative information about the child.[39]

(c) Inquiry related:

- The JJB should conduct inquiry for declaring fit persons for CICLs.[40]
- While disposing the matter, the JJB should ensure that the final order includes an ICP for the child's rehabilitation.[41] Follow up by the Probation Officer or DCPU or NGO should also be mentioned in the final order.[42]

(d) Monitoring:

32 JJ Act, 2015, Section 8(3)(d).
33 JJ MR, 2016, Rule 7(1)(i).
34 JJ MR, 2016, Rule 7(1)(i).
35 JJ Act, 2015, Section 8(3)(g).
36 JJ MR, 2016, Rule 9(3).
37 JJ Act, 2015, Section 17(2).
38 JJ MR, 2016, Rule 7(1)(iv).
39 JJ MR, 2016, Rule 7(1)(x).
40 JJ Act, 2015, Section 8(3)(i).
41 JJ Act, 2015, Section 8(3)(h).
42 JJ Act, 2015, Section 8(3)(h).

The JJB should:

- Conduct at least one inspection visit every month of residential facilities for CICL and recommend action to the DCPU and State Government for improvement in quality of services.[43] This would entail monthly visits to the OH, Special Home, and the place of safety, as well as any fit institution in which a CICL is being kept. The JJB should issue directions if it notices any lapses or make suggestions for improvements, seek compliance and recommend action against employees found in dereliction of duty to the DCPU.[44]
- Undertake regular inspections of jails for adults to check if any child is being kept there and take immediate action for transfer of such a child to the OH.[45]
- Issue a rehabilitation card to CICLs to monitor their progress if required.[46]
- Ensure that Children's Committees within the CCIs for CICLs functions smoothly to further children's participation in the management of the CCIs.[47]

5.5. Jurisdiction of JJB

The JJB can continue with the inquiry of a case even if the child involved attains 18 years of age.[48] This is because the JJ Act prescribes the manner of treatment and orders that can be passed in respect of a child alleged to have or found to have committed an offence based on the child's age when the offence was committed. The age on the date on which the child was apprehended or on the date of final orders are not relevant for the application of the Act.

A Magistrate before whom a child or a person appearing to be a child is produced should, without any delay, record the opinion about the age of the person produced being a child and forward the child immediately to the jurisdictional JJB along with records of the proceedings.[49]

It is important to note that the JJB has the authority to decide whether it will retain

43 JJ Act, 2015, Section 8(3)(j).
44 JJ MR, 2016, Rule 7(1)(v).
45 JJ Act, 2015, Section 8(3)(m).
46 JJ MR, 2016, Rule 7(1)(ii).
47 JJ MR, 2016, Rule 7(1)(vii).
48 JJ Act, 2015, Section 5.
49 JJ Act, 2015, Section 9(1).

jurisdiction over children between 16 and 18 years alleged to have committed a heinous offence or transfer them to the Children's Court for trial as an adult.[50]

5.6. Transaction of business and procedures of the JJB

Sittings

According to the JJ MR 2016, the JJB should "sit on all working days for a minimum of six hours commensurate with the working hours of a Magistrate Court".[51] This would suggest that the JJB should work full time. However, this depends on the pendency in the district. If it is less and if the State Government issues an order, it could sit for a period less than that stipulated in the Rules.[52]

The JJB should conduct its sittings within the premises of the OH or in a place within the proximity of the OH or "a suitable premise" within any CCI meant for CICLs.[53] The JJB cannot under any circumstances hold its sitting in any court or jail premises.[54]

If the JJB is not sitting, a child in conflict with the law can be produced before an individual member.[55] For instance, if a child needs to be produced on a day that the JJB does not have its sitting like a Sunday or after sitting hours, he can be produced at the residence of a member of the JJB. One JJB member should always be accessible in case of emergency to provide instructions to the SJPU or local police.[56] A monthly duty roster of the members who will be available every day, including Sundays and holidays, should be prepared by the Principal Magistrate.[57] This roster should be circulated in advance to all police stations, CJM/CMM, District Judge, District Magistrate, CWCs, DCPU and SJPU.[58]

Quorum

The JJ Act does not specify a quorum for interim decisions of the JJB, and so such orders can be passed even if a member is absent.[59] However, at least one social worker member and the Principal Magistrate should be present at the time of final

50 JJ Act, 2015, Sections 15(2) and 18(3).
51 JJ MR, 2016, Rule 6(7).
52 JJ MR, 2016, Rule 6(7).
53 JJ MR, 2016, Rule 6(1).
54 JJ MR, 2016, Rule 6(1).
55 JJ Act, 2015, Section 7(2).
56 JJ MR, 2016, Rule 6(8).
57 JJ MR, 2016, Rule 6(8).
58 JJ MR, 2016, Rule 6(8).
59 JJ Act, 2015, Section 7(3).

disposal or when the decision to transfer a child to the Children's Court for trial as an adult is made.[60]

As stated above, the majority opinion will prevail when there is a difference of opinion. Where there is no majority opinion, then the opinion of the Principal Magistrate will prevail.[61]

5.7. Inquiry by JJB

Petty offences should be disposed of by the Board through summary proceedings, as per the procedure prescribed under the Code of Criminal Procedure, 1973.[62] The final report in petty or serious offences should be filed before the JJB within two months from the time the police receive information, except in cases in which was not reasonably known that the person involved was a child.[63] Inquiry of serious offences and of heinous offences for children below 16 years on the date of alleged commission of offences should be disposed of by the Board, by following the procedure for trial in summons cases under the Code of Criminal Procedure, 1973.[64]Preliminary assessment should be carried out only for children above 16 years alleged to have committed a heinous offence.[65]

Offence	Nature of Proceedings before JJB	Final Report from Police	Time limit for disposal
Petty	Summary	Within 2 month from the time police receives information. Extension in cases in which it was not reasonably known that the person involved in the offence was a child.	4 months from date of production + maximum of 2 months extension; termination thereafter
Serious	Trial in Summons Case	Within 2 month from the time police receives information. Extension in cases in which it was not reasonably known that the person involved in the offence was a child.	4 months from date of production + 2 months extension + further extension granted by CMM/ CJM for reasons in writing.

60 JJ Act, 2015, Section 7(3) proviso.
61 JJ Act, 2015, Section 7(4).
62 JJ Act, 2015, Section 14(5)(d).
63 JJ MR, 2016, Rule 10(6).
64 JJ Act, 2015, Section 14(5)(e) and (f)(i).
65 JJ Act, 2015, Section 14(5)(f)(ii).

Offence	Nature of Proceedings before JJB	Final Report from Police	Time limit for disposal
Heinous	Preliminary Assessment (16-18 years)	Statements of witnesses and other documents prepared during investigation to be produced within 1 month.	3 months
	Trial in Summons Case (Children above 7 years and below 16 years; children above 16 and below 18 years who are not transferred after preliminary assessment)	Not specified	4 months from date of production + 2 months extension + further extension granted by CMM/ CJM for reasons in writing.

Time-frame

An inquiry should be completed within four months from the date of first production of the child before the JJB, unless the period is extended.[66] The period can be extended for a maximum period of two more months based on the circumstances of the case and after recording the reasons for the extension.[67] Further, in case of serious and heinous offences, the Chief Judicial Magistrate or the Chief Metropolitan Magistrate can grant further extension of time for reasons given in writing.[68] If the inquiry for petty offences remains inconclusive even after six months (four months of the stipulated period plus two months of the extended period), the proceedings will stand terminated.[69]

Nature of Inquiry

While examining witnesses and conducting the inquiry, the JJB should ensure that the proceedings are not conducted strictly "adversarial". They must use the power available to judges under Section 165 of the Indian Evidence Act to put any question to any person at any time or order any document to be produced.[70] The proceedings have to be child-friendly as mentioned in Chapter 3.

66 JJ Act, 2015, Section 14(2).
67 JJ Act, 2015, Section 14(2).
68 JJ Act, 2015, Section 14(4), proviso.
69 JJ Act, 2015, Section 14(4).
70 JJ MR, 2016, Rule 9(7).

Presence of the Child during Inquiry

The JJB can dispense with the attendance of the child, if it is satisfied that the child's presence is not essential for the purpose of the inquiry.[71] It can limit the child's attendance for the purpose of recording the statement and can continue the inquiry even in the absence of the child.[72] The JJB should however, bear in mind the fundamental principles of participation and natural justice and ensure that the child's right to be heard is not compromised.[73]

If the child is required to attend the proceedings before the JJB, the child will be entitled to travel reimbursement for self and one escort as per actual expenditure incurred. The payment can be made by the JJB or DCPU, as the case may be.[74] For instance, if a CICL is released on bail and returns to his home in a different city, the JJB should reimburse the travel expenses incurred by the child and his guardian for all the hearings that they have to attend.

Presence of a Parent or Guardian during inquiry

The JJB can require a parent or guardian having the actual charge of the child to be present at any proceeding in respect of the child if it thinks it fit.[75] The JJB should also ensure that persons unconnected to the case are not present when the case is in progress.[76] However, persons in whose presence the child feels comfortable should be allowed to attend the sitting.[77]

Prohibition on joint proceedings

The JJB cannot jointly hold proceedings of a child with a person who is not a child, even if they are co-accused in the same case.[78] Further, if during inquiry, a person alleged to be CICL is found to be an adult after age determination, he cannot be dealt with along with a child.[79]

5.8. Review of Pendency of Inquiry of JJB

The Chief Judicial Magistrate or the Chief Metropolitan Magistrate should review the pendency of the cases of the JJB once in every three months.[80] The number of

71 JJ Act, 2015, Section 91(1).
72 JJ Act, 2015, Section 91(1).
73 JJ Act, 2015, Section 3(iii) and (xvi).
74 JJ Act, 2015, Section 91(2).
75 JJ Act, 2015, Section 90.
76 JJ MR, 2016, Rule 6(2).
77 JJ MR, 2016, Rule 6(3).
78 JJ Act, 2015, Section 23(1).
79 JJ Act, 2015, Section 23(2).
80 JJ Act, 2015, Section 16(1).

pending cases, duration and nature of the pendency and the reasons for the pendency should also be reviewed every six months, by a high level committee consisting of:

- Executive Chairperson of the State Legal Services Authority – Chairperson
- Home Secretary
- Secretary responsible for implementation of the Act in the State
- Representative from a voluntary organization or NGO nominated by the Chairperson.

The JJB has to furnish information about pendency periodically to the Chief Judicial Magistrate or Chief Metropolitan Magistrate and the District Magistrate, on a quarterly basis, in the form prescribed by the State Government.[81] It should maintain a 'Case Monitoring Sheet', in Form 11 of the JJ MR, 2016, of every case and every child for this purpose.[82]

If the pendency is high, the Chief Judicial Magistrate or the Chief Metropolitan Magistrate can direct the JJB to increase the frequency of its sittings, or recommend the constitution of additional JJBs.[83] The State Government could also constitute additional JJBs in a district based on the pendency, area or terrain of the district, population density, or any other consideration.[84]

5.9. Establishment of Children's Court

A Children's Court has been defined under two legislations - i.e. courts established under the Commissions for Protection of Child Rights Act, 2005 and a Special Court under the Protection of Children from Sexual Offences Act, 2012, where they exist.[85] Where they do not exist, the Sessions Court having jurisdiction to try offences under the JJ Act would come within the ambit of a Children's Court.

The responsibility for establishing a Children's Court under the Commission for Protection of Child Rights Act, 2005, (CPCR Act) is with the State Government. The State Government must in concurrence with the Chief Justice of the High Court notify at least a court in the State or specify, for each district, a Court of Session to be

81 JJ Act, 2015, Section 16(3).
82 JJ MR, 2016, Rule 12(1).
83 JJ Act, 2015, Section 16(1).
84 JJ MR, 2016, Rule 6(7).
85 JJ Act, 2015, Section 2(20).

a Children's Court to try offences against children or violation of child rights.[86] Under the Protection of Children from Sexual Offences Act, 2012, (POCSO Act), the State Government should designate for each district a Sessions Court to be a Special Court in consultation with the Chief Justice of the High Court. If a Sessions Court has been notified as a Children's Court under the CPCR Act, or a Special Court has been designated for similar purposes under any other law for the time being in force, then, such court will be deemed to be a Special Court.

5.10. Responsibility of the Children's Court after Child is Transferred by JJB

The Children's Court is required to decide whether there is a need for trial of the child as an adult as per provisions of the CrPC.[87] If it decides that there is no need for trial as an adult, it can conduct the inquiry as a JJB and pass orders under Section 18(1).[88] The Children's Court should record its reasons while arriving at a conclusion as to whether the child should be treated as a child or an adult.[89] The Act and the Model Rules do not explain the procedure that needs to be followed by the Children's Court to arrive at this decision.

Age appeal: The Children's Court should decide the appeal, if filed against the JJB's order declaring the age of the child, before proceeding with the case.[90] For instance, if a child is declared to be 16 years and is transferred to the Children's Court for trial by the JJB, the Children's Court should consider the appeal, if it is filed; contesting the age that has been declared by the JJB, before it decides whether there is need for trial of the child as an adult.

Conflict with the Act regarding appeal against preliminary assessment: The JJ MR 2016 states that if an appeal against the order of the JJB passed after the preliminary assessment is filed, it should be disposed by the Children's Court first before it proceeds with the case.[91] This provision, however, is in conflict with Section 101(2) of the JJ Act 2015 which requires appeals against the order of a JJB passed after preliminary assessment to be filed before a Sessions Court and not Children's Court.

5.11. Procedures to be followed by Children's Court if child is not tried as an adult

86 Commissions for Protection of Child Rights Act, 2005, Section 25.
87 JJ Act, 2015, Section 19(1)(a); JJ MR, 2016, Rule 13(1).
88 JJ Act, 2015, Section 19(1)(b).
89 JJ MR, 2016, Rule 13(6).
90 JJ MR, 2016, Rule 13(2).
91 JJ MR, 2016, Rule 13(3).

- **Nature of proceedings:** The Children's Court should conduct an inquiry as a Board if it decides that there is no need for the trial of the child as an adult.[92] It should follow the procedure for trial in summons case under the CrPC in such a situation.[93]
- **Child-friendly measures:**
  - o Proceedings should be conducted *in camera,* in a child-friendly atmosphere.
  - o The Children's Court should address the child in a child-friendly manner to put the child at ease and encourage the child to fearlessly state the facts and circumstances of the offence as well as the home, social surroundings and influences on the child.[94]
- **Prohibition on joint trials:** The Children's Court should ensure that a child alleged to be in conflict with the law is not jointly tried with a person who is not a child.[95]
- **Non-adversarial:** The proceedings should not be conducted in an adversarial manner while examining witnesses and the powers under Section 165, Indian Evidence Act should be exercised.[96] This provision empowers judges to put questions in any form, at any time, to any witness. The parties cannot object to the questions put by the judge or cross-examine the witness with respect to the answer given to the judge's question, without the court's permission.
- **ICP:** An Individual Care Plan prepared by the Probation Officer, CWO or recognized voluntary organization based on interactions with the child and family wherever possible, should accompany the dispositional order passed by the Children's Court.[97]
- **Dispositions:** If the child is found to have committed an offence, the Children's Court can pass orders stipulated in sub-Sections (1) and (2) of Section 18.[98]

92 JJ MR, 2016, Rule 13(7)(i).
93 JJ MR, 2016, Rule 13(7)(ii).
94 JJ MR, 2016, Rule 13(7)(v).
95 JJ MR, 2016, Rule 13(7)(iii).
96 JJ MR, 2016, Rule 13(7)(iv).
97 JJ MR, 2016, Rule 13(7)(v).
98 JJ Act, 2015, Section 19(1)(ii); JJ MR, 2016, Rule 13(7)(vii).

5.12. Procedures to be followed if child is tried as an adult

- **Procedure:** The Children's Court should follow the procedure for trial by sessions under the CrPC if it decides to try the child like an adult.[99]
- **Prohibition on joint trials:** The Children's Court should ensure that a child alleged to be in conflict with the law is not jointly tried with a person who is not a child.[100]
- **Considerations:** The Children's Court should consider the special needs of the child, the tenets of fair trial and maintain a child friendly atmosphere while trying a child as an adult.[101]
- **Orders that cannot be passed:** Children's Court cannot impose death penalty or life imprisonment without the possibility of release for any offence.[102]
- **ICP:** An Individual Care Plan prepared by the Probation Officer, CWO or recognized voluntary organization based on interactions with the child and family wherever possible, should form part of the final order passed by the Children's Court.[103]
- **Placement and Reformative Services**: If the child is found to be involved in the offence, the child could be sent to the Place of Safety till the child attains 21 years.[104] Reformative services including educational services, skill development, alternative therapy such as counselling, behaviour modification therapy, and psychiatric support should be provided to the child during the period of stay in the place of safety.[105]
- **Tracking of Progress and Reformation Assessment:**
    - The progress of the child should be evaluated by the Probation Officer, DCPU or social worker on a yearly basis and a report should be submitted to the Children's Court for review.[106]
    - The purpose of the tracking is also to ensure that no ill-treatment is meted out to the child.[107]

99 JJ MR, 2016, Rule 13(8)(i).
100 JJ Act, 2015, Section 23.
101 JJ Act, 2015, Section 19(1)(a).
102 JJ Act, 2015, Section 21.
103 JJ MR, 2016, Rule 13(8)(ii).
104 JJ MR, 2016, Rule 13(8)(iii).
105 JJ Act, 2015, Section 19(3), proviso.
106 JJ Act, 2015, Section 19(4 and 5).
107 JJ Act, 2015, Section 19(4).

- The psycho-social progress of the child will have to be assessed with the help of psycho-social experts.[108]
- The Children's Court can also direct the periodical production of the child and at least once every three months to assess the progress made and the facilities provided by the institution for implementation of the individual care plan.[109]
- When the child attains the age of 21 years, the Children's Court will have to provide for a follow up by the Probation Officer, DCPU or a social worker or by itself, to evaluate if the child has undergone reformative changes and if the child can be a contributing member of the society.[110]
- The Children's Court should also interact with the child to assess whether the child has undergone reformative changes and if the child can be a contributing member of society.[111]
- The periodic reports of progress of the child and evaluation of relevant experts should be taken into consideration and based on this the Children's Court could decide whether the child should be released or whether the child should complete the remainder of the term in jail.[112]
- Based on the progress reports, the Children's Court could direct that the institutional mechanism be strengthened if it is found to be inadequate.[113]

- **Decisions following reformation assessment:** Based on the assessment, as per Rule 13(8)(vi)(c) the Children's Court can:

  "(ca) Release the child forthwith;

  (cb) Release the child on execution of a personal bond with or without sureties for good behaviour

  (cc) release the child and issue directions regarding education, vocational training, apprenticeship, employment, counselling and other therapeutic interventions with a view to promoting adaptive and positive behaviour, etc.;

108 JJ MR, 2016, Form 13.
109 JJ MR, 2016, Rule 13(8)(v).
110 JJ Act, 2015, Section 20(1); JJ MR, 2016, Rule 13(8)(vi).
111 JJ MR, 2016, Rule 13(8)(vi).
112 JJ Act, 2015, Sections 20(1) and 20(2)(ii).
113 JJ MR, 2016, Rule 13(8)(vi)(b).

(cd) release the child and appoint a monitoring authority for the remainder of the prescribed term of stay. The monitoring authority, where appointed shall maintain a Rehabilitation Card for the child in Form 14"

or, as per Section 20(2)(ii) direct the child to complete the remainder of the term in jail.

- **Monitoring Authority (MA):** The Children's Court can appoint a Probation Officer, Case Worker, Child Welfare Officer, or fit person as a monitoring authority.[114]
- **Monitoring Process:**
  - In the first quarter, the child should meet the MA on a fortnightly basis or at such intervals as may be directed by the Children's Court.[115] Time and venue of the meeting will be fixed by the MA in consultation with the child.
  - MA should forward its observations on the child's progress on a monthly basis to the Children's Court.[116]
  - Recommendations for further follow up should be made by the MA at the end of the first quarter.[117]
  - After release, if the child is found to be indulging in criminal activities or associating with people with criminal antecedents, the child should be brought before the Children's Court for further orders.[118]
  - After the first quarter, the child should meet the MA at such intervals as may be directed by the Children's Court based on the recommendations made by the MA at the end of the first quarter and the MA should forward its report to the Children's Court which should review it every quarter.[119]
  - If it is found that the child no longer requires to be monitored, the MA should place the detailed report with recommendations before the Children's Court which should issue further directions either terminating the monitoring or for its continuation.[120]

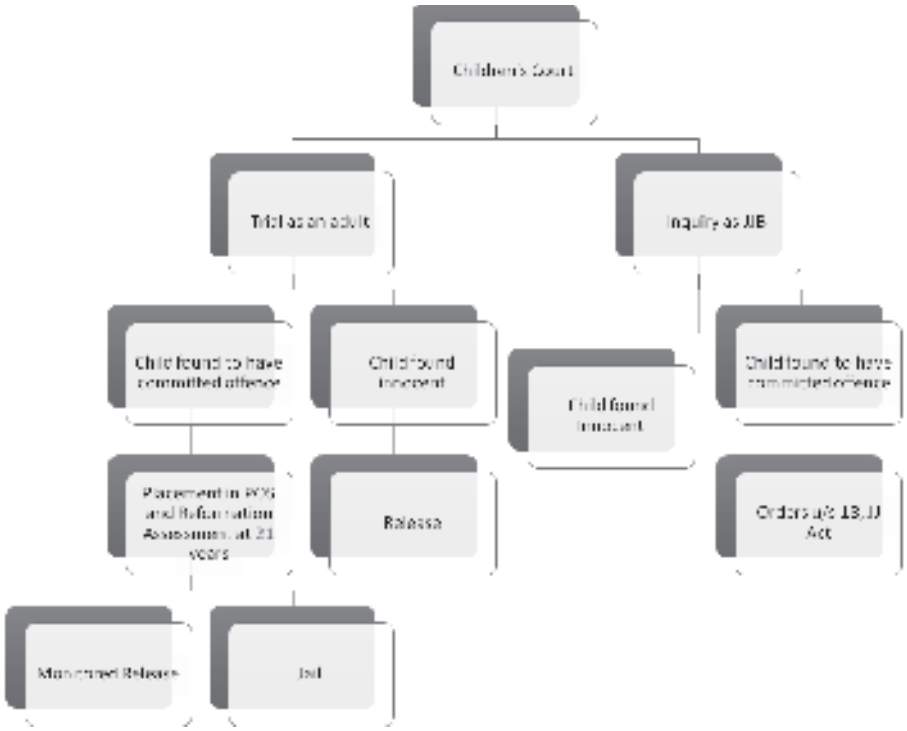
114 JJ MR, 2016, Rule 13(8)(vii)(a).
115 JJ MR, 2016, Rule 13(8)(vii)(c).
116 JJ MR, 2016, Rule 13(8)(vii)(c).
117 JJ MR, 2016, Rule 13(8)(vii)(d).
118 JJ MR, 2016, Rule 13(8)(vii)(e).
119 JJ MR, 2016, Rule 13(8)(vii)(g).
120 JJ MR, 2016, Rule 13(8)(vii)(f).

5.13. Appellate Function of Sessions Courts and Children's Courts

The JJ Act states that appeals from orders of the JJB will lie before the Children's Court while that passed after the preliminary assessment will lie before the Sessions Court.[121] The Sessions Court can take the assistance of experienced psychologists and medical specialists while deciding the appeal against a JJB's order passed after the preliminary assessment.[122] To ensure fairness however, the experts engaged by the Sessions Court have to be different from those the JJB had engaged to conduct the preliminary assessment.[123]

While Children's Court may be designated Sessions Court, all Sessions Courts are not Children's Courts. This distinction should be borne in mind in the context of appeals from orders passed after the preliminary assessment. A Children's Court cannot hear the appeal against a transfer order passed by the JJB as that would vitiate the fairness of the trial against the child by the same court, if the appeal fails.

Procedure to followed by Children's Court after Child is Transferred by JJB



121 JJ Act, 2015, Section 101(1) and (2).
122 JJ Act, 2015, Section 101(2).
123 JJ Act, 2015, Section 101(2).

6 Child Care Institutions for Children in Conflict with the Law

By Swagata Raha[1]

6.1. Observation Homes (OH)

An Observation Home is a child care institution "for temporary reception, care and rehabilitation of any child alleged to be in conflict with law, during the pendency of an inquiry."[2] The State Government should establish and maintain Observation Homes in every district or group of districts, either by itself, or through voluntary organisations or NGOs.[3] There should be separate OH for boys and girls and age-based segregation with consideration to physical and mental status and nature of offence committed.[4]

If due to odd hours or distance, a child cannot be produced before the JJB or a single member, the CWPO should keep the child in the OH or fit facility and produce the child before the JJB within 24 hours of apprehension.[5] A child who is denied bail can be directed to be placed in an OH.

6.2. Special Homes

A Special Home is an institution for "housing and providing rehabilitative services" to children who have been found to have committed an offence and ordered to be sent to such an institution by the JJB or the Children's Court.[6] The State Government should establish and maintain Special Homes in every district or group of districts, either by itself, or through voluntary organisations or NGOs.[7]

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1 Senior Research Associate (Consultant), Centre for Child and the Law, NLSIU Bangalore.
2 JJ Act, 2015, Section 47(1).
3 JJ Act, 2015, Section 47(1).
4 JJ MR, 2016, Rule 29(1)(i).
5 JJ MR, 2016, Rule 9(6).
6 JJ Act, 2015, Section 2(56).
7 JJ Act, 2015, Section 47(1).

There should be separate Special Homes for girls above 10 years and boys between 11 to 15 years and 16 to 18 years.[8] Children in the Special Home should be segregated based on nature of offences and their mental and physical status.[9]

6.3. Place of Safety

A 'Place of Safety' is a child care institution meant for children alleged or found to be in conflict with the law.[10] It cannot be a police lockup or jail.[11] It can be established separately or attached to an Observation Home or Special Home.[12] The State Government should establish at least one place of safety in the State.[13] The person in-charge of the place of safety should be willing to receive the child based on an order of the JJB or Children's Court.[14]Persons can be kept in a place of safety during the pendency of inquiry and ongoing rehabilitation after having been found guilty.[15]

Separate arrangement and facilities should be made for children or persons whose inquiry is underway and children or persons convicted.[16]

There are six situations in which a person can be ordered to be sent to a place of safety by the JJB or Children's Court:

(a) for children in the age group of 16 to18 years alleged to have committed heinous offence pending inquiry[17];

(b) for children in the age group of 16 to 18 years found to be involved in heinous offence upon completion of inquiry[18];

(c) for persons above 18 years alleged to have committed offence when they were below the age of 18 years pending inquiry[19];

(d) for persons above 18 years found to be involved in offence upon completion of inquiry;[20]

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8 JJ MR, 2016, Rule 29(1)(ii)(a).
9 JJ MR, 2016, Rule 29(1)(ii)(b).
10 JJ Act, 2015, Section 49(1).
11 JJ Act, 2015, Section 2(46).
12 JJ Act, 2015, Section 2(46).
13 JJ Act, 2015, Section 49(1).
14 JJ Act, 2015, Section 2(46).
15 JJ Act, 2015, Section 2(46).
16 JJ Act, 2015, Section 49(2).
17 JJ Act, 2015, Sections 19(3) and 49(1); JJ MR, 2016, Rule 29(1)(iii)(a).
18 JJ Act, 2015, Sections 19(3) and 49(1); JJ MR, 2016, Rule 29(1)(iii)(b).
19 JJ Act, 2015, Section 6(2); JJ MR, 2016, Rule 29(1)(iii)(c).
20 JJ Act, 2015, Section 49(1); JJ MR, 2016, Rule 29(1)(iii)(d).

(e) for children as per the orders of the Board under clause (g) of sub-Section (1) of Section 18 of the Act whose conduct and behavior is such that in the JJB's opinion it would not be in the child's interest, or the interest of other children to keep the child in a Special Home[21];

(f) for a person whose claim of being a child is being inquired into and is required to be kept in protective custody.[22]

When the Place of Safety and the Special Home is not established in the District where the child's family lives or in the District where the concerned JJB/Children's Court has jurisdiction in the child's case, this results in the denial of the child's right of contact with family, and/or, the child may not be produced before the Children's Court on a regular basis,as often escorts and/or transport may be unavailable to bring the child to the JJB or the Children's Court. All this may impact the reformation assessment when the child attains 21 years of age. In such situations, the advocate can make an application for video-conferencing. Attention of the Children's Court and the JJB can also be drawn to the lack of rehabilitative services within the Place of Safety. A submission could also be made to the High Court Committee and Juvenile Justice about this implementation gap.

6.4. Fit facility

A "fit facility" is defined to mean "a facility being run by a governmental organisation or a registered voluntary or non-governmental organisation, prepared to temporarily own the responsibility of a particular child for a specific purpose, and such facility is recognised as fit for the said purpose, by the Committee, as the case may be, or the Board, under sub-Section (1) of Section 51". The JJB or CWC after due inquiry into the suitability of the facility and the organization to take care of a child, can recognized them as a fit facility.[23] Recognition can also be withdrawn by them for reasons recorded in writing.[24]

Upon finding a child to be in conflict with law, the JJB can under Section 18(1)(f), "direct the child to be released on probation of good conduct and placed under the care and supervision of any fit facility for ensuring the good behaviour and child's well-being for any period not exceeding three years". Based on the JJB's recommendation and bearing the child's best interest, the State Government can transfer a child from the Special Home or fit facility to a fit facility or Home within

21 JJ Act, 2015, Section 18(1)(g) proviso; JJ MR, 2016, Rule 29(1)(iii)(e).
22 JJ Act, 2015, Section 9(4).
23 JJ Act, 2015, Section 51(1).
24 JJ Act, 2015, Section 51(2).

the State with prior intimation to the concerned JJB.[25] A child can be transferred outside the State only after consultation with the concerned State Government.[26] The total duration of the child's stay cannot be increased by such transfer.[27]

If a child is suffering from a disease requiring prolonged medical treatment or physical or mental complaint that will respond to treatment, the JJB can send the child to a recognized fit facility for required treatment.

If the child requires therapeutic treatment, an advocate can request for a list of recognized/ registered organizations providing such therapeutic services in the District from the District Child Protection Unit, and move an application before the JJB for an order to send the child to such a facility. If such facility has not been registered/recognized as a fit facility, the advocate could even request the JJB to recognize as a "fit facility"[28].

6.5. Procedure to be followed if a child runs away from a Child Care Institution

The police can take charge of any child who has run away from an Observation Home, Special Home, or place of safety, or from the care of a person or institution under whom the child was placed by an order of the JJB/Children's Court.[29] The child should then be produced within 24 hours before the JJB which passed the original order or the JJB closest to where the child was found.[30] The JJB should determine the reasons why the child ran away and then pass orders for the child to be sent back the same place or any other similar place or person.[31] It can also give additional directions regarding any specific steps that may have to be taken for the best interest of the child.[32]

No additional proceedings should be initiated in respect of such child.[33] For instance, if a child runs away from an Observation Home due to sexual abuse perpetrated by a person working in the home, the JJB could decide to send the child to a different institution instead. It could also order counselling and medical assessments for the best interest of the child and direct the police to register a FIR.

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25 JJ Act, 2015, Section 96(1).
26 JJ Act, 2015, Section 96(2).
27 JJ Act, 2015, Section 96(3).
28 JJ Act, 2015, Section 2(27), read with 51(1).
29 JJ Act, 2015, Section 26(1).
30 JJ Act, 2015, Section 26(2).
31 JJ Act, 2015, Section 26(3).
32 JJ Act, 2015, Section 26(3) proviso.
33 JJ Act, 2015, Section 26(4).

7

Apprehension and Production of Child in Conflict with Law before the Juvenile Justice Board

By Advocate Anant Kumar Asthana

7.1. Introduction

Children are not "arrested" because they are not to be treated as criminals, but they can be "apprehended". The JJ Act 2015 does not use word "arrest" anywhere, instead words "apprehension" or "apprehended" have been used in Section 1(4)(i), Section 6(1), Section 8 (3) (b), Section 10(1), Section 12(1), Section 12(2) and in Section 13(1). Further "Principle of non-stigmatising semantics" under Section 3(viii) of the JJ Act 2015 prohibits use of accusatory words in the processes pertaining to a child.

The State, in its' *parens patriae* role, does not arrest children, but whenever there is a need, it does take care of them and restricts their liberties in their best interest.. For this purpose, the JJ Act, 2015 uses the word "apprehension" instead of "arrest". Power to apprehend is to be exercised in the interest of child. For lawyers representing children, it is important to comprehend this philosophical difference between "Arrest" and "Apprehension". When put to practice, both appear to be the same but their purpose and intent is different.

Although the JJ Act, 2015, does not deal with power of police to apprehend a child alleged to be in conflict with law, the JJ Model Rules, 2016 have regulated exercise of such power by police by making express provisions in this regard. The intention behind seems to be curtailment of the power of the police in depriving the liberty of the child.

The proviso to Rule 8(1), JJ Model Rules, 2016, states:

> "Provided that power to apprehend shall only be exercised with regard to heinous offences, unless it is in the best interest of the child. For all other cases involving petty and serious offences and cases where apprehending the child is not necessary in the interest of the child, the police or the Special Juvenile Police Unit or Child Welfare Police Officer shall forward the information

regarding the nature of offence alleged to be committed by the child along with his social background report in Form 1 to the Board and intimate the parents or guardian of the child as to when the child is to be produced for hearing before the Board."

Since the language adopted in this provision is confusing, it has given rise to two ways of interpreting it.

One view advocates that the clause - "unless it is in the best interest of the child," should be read in relation to the clause -"with regard to heinous offences", meaning thereby that the power of apprehension can also be exercised in cases of petty and serious offences if it is in the interest of child. The reasoning offered to substantiate this view is that there may be cases of children involved in petty or serious offences where the police may need to apprehend a child, if there is no one to look after the child. There may be several other circumstances under which apprehending a child may be in the child's best interest, for example, if the parents of child are using the child for illegal activities like theft, etc. Such offences may be petty or serious, but children definitely cannot be left with such parents and must be taken under the State's protection by allowing the police to exercise the power of apprehension.

An alternate view however, advocates that the clause - "unless it is in the best interest of the child," should be read in relation to the clause - "be exercised", meaning thereby that the power of apprehension can be exercised in case of heinous offenses, only if it is in the best interest of child. This view is fortified by arguing that the second line of proviso to JJ Model Rule 8(1), mentions (1) petty offences, (2) serious offences and (3) for cases where apprehension is not necessary in the interest of child, where a separate procedure to be adopted by police is provided. Advocates of this view argue that taking into account the language adopted in the second line of proviso to Rule 8(1), the clause "unless it is in the best interest of the child" should be read in relation to the clause "be exercised". Further argument advanced in this regard is that scheme of Model Rules, 2016 is intended to curb and limit the power of the police to apprehend a child. Thus such power has to be read only in cases of heinous offences. This view proposes that while power to apprehend has to be exercised in cases of heinous offences only, but it may not be exercised if it is not in the interest of child. So the police has been given discretion with regard to exercise of power of apprehension in heinous offences.

Since the language adopted in proviso to Model Rule 8(1) is indeed confusing, no authoritative and conclusive opinion on interpretation of this rule is possible.

There is however, no power of apprehension in cases of petty and serious offences. For cases of (1) petty offences and (2) serious offences and (3) for cases where

apprehension is not necessary in the interest of child, proviso to Rule 8(1) in its second line provides a separate procedure to be adopted by the police.

This arrangement is explained below in a table format for easy comprehension-

Category of Offence	Petty	Serious	Heinous
Status of power of Police to apprehend (First view)	Apprehension possible only if it is in the interest of child	Apprehension possible only if it is in the interest of child	Apprehension Must
Status of power of Police to apprehend (Second view)	No Apprehension	No Apprehension	Apprehension possible only if it is in the interest of child

7.2. Production of Child before Board in cases where apprehension has been made

Relevant provisions in the JJ Act in this regard is provided in Section 10 (1) and Section 13 (1) of the JJ Act, 2015 which are as below-

Section 10. (1) As soon as a child alleged to be in conflict with law is apprehended by the police, such child shall be placed under the charge of the special juvenile police unit or the designated child welfare police officer, who shall produce the child before the Board without any loss of time but within a period of twenty-four hours of apprehending the child excluding the time necessary for the journey, from the place where such child was apprehended:

Section 13. (1) Where a child alleged to be in conflict with law is apprehended, the officer designated as Child Welfare Police Officer of the police station, or the special juvenile police unit to which such child is brought, shall, as soon as possible after apprehending the child, inform —

(I) the parent or guardian of such child, if they can be found, and direct them to be present at the Board before which the child is produced; and

(ii) the probation officer, or if no probation officer is available, a Child Welfare Officer, for preparation and submission within two weeks to the Board, a social investigation report containing information regarding the antecedents and family background of the child and other material circumstances likely to be of assistance to the Board for making the inquiry.

Further relevant provisions in this regard are provided in following Rules in the JJ MR, 2016 -

> **Rule 8 (2)** When a child alleged to be in conflict with law is apprehended by the police, the police officer concerned shall place the child under the charge of the Special Juvenile Police Unit or the Child Welfare Police Officer, who shall immediately inform:
>
> **(i)**the parents or guardian of the child that the child has been apprehended along with the address of the Board where the child will be produced and the date and time when the parents or guardian need to be present before the Board;
>
> **(ii)** the Probation Officer concerned, that the child has been apprehended so as to enable him to obtain information regarding social background of the child and other material circumstances likely to be of assistance to the Board for conducting the inquiry; and
>
> **(iii)**a Child Welfare Officer or a Case Worker, to accompany the Special Juvenile Police Unit or Child Welfare Police Officer while producing the child before the Board within twenty- four hours of his apprehension.**Rule 9. Production of the child alleged to be in conflict with law before the Board.- (1)** When the child alleged to be in conflict with law is apprehended, he shall be produced before the Board within twenty-four hours of his being apprehended, along with a report explaining the reasons for the child being apprehended by the police.

A perusal of above-said provisions makes it abundantly clear that the power to apprehend has to be justified before through a report. Since often it is seen that power to apprehend is randomly exercised by police, it is imperative for lawyers representing such children to insist before the Board that police be asked to produce such a report explaining the reasons for apprehension. Lawyers can also rely on the Rule 10 (1) where it has been prescribed that-

> **Rule 10. Post-production processes by the Board.- (1)**On production of the child before the Board, the report containing the social background of the child, circumstances of apprehending the child and offence alleged to have been committed by the child as provided by the officers, individuals, agencies producing the child shall be reviewed by the Board…

Whenever a child alleged to be in conflict with law is apprehended, it is necessary for the police to justify before the JJB, as to why such power of apprehension has been exercised. Rule 8(1) requires the police to provide the circumstances under

which child was apprehended. Rule 9(1) confirms this requirement in more emphatic terms:

> When the child alleged to be in conflict with law is apprehended, he shall be produced before the Board within twenty-four hours of his being apprehended, along with a report explaining the reasons for the child being apprehended by the Police.

It is thus clear that it is for police to first provide reasons for apprehending a child. Lawyers representing children alleged to be in conflict with law must insist before JJB that such duty of justifying exercise of power of apprehension must be discharged by the police on the date of first production of child. Arbitrary apprehensions by the police are not uncommon. It must be kept in mind that the question of seeking bail comes only after the JJB is satisfied that the police have exercised its power of apprehension, keeping in view best interest of child. On production of the apprehended child, the JJB is mandated to review such report of the police under Rule 10(1) and then proceed to pass orders listed further. If the police cannot justify or satisfy the Board about the lawful exercise of its power of apprehension, instead of seeking bail, lawyers must insist that the child be released by the JJB under Rule 8(7), JJ Model Rules, 2016, which is the normal procedure for police in cases in which the child is not apprehended by the police.

7.3. Procedure to be adopted in cases where child is not apprehended

In this Section, the procedure which needs to be adopted in cases where a child is not apprehended by the police, is dealt with.

The proviso to Rule 8(1) states:

> …For all other cases involving petty and serious offences and cases where apprehending the child is not necessary in the interest of the child, the police or the Special Juvenile Police Unit or Child Welfare Police Officer shall forward the information regarding the nature of offence alleged to be committed by the child along with his social background report in Form 1 to the Board and intimate the parents or guardian of the child as to when the child is to be produced for hearing before the Board.

This above-said rule should be read along with Rule 8(7) which states:

> When the child is released in a case where apprehending of the child is not warranted, the parents or guardians or a fit person in whose custody the child alleged to be in conflict with law is placed in the best interest of the child, shall

furnish an undertaking on a non-judicial paper in Form 2 to ensure their presence on the dates during inquiry or proceedings before the Board.

Thus, when a case does not warrant exercise of power of apprehension by police, an undertaking on a non-judicial paper in Form-2 should be obtained from the parents or guardians and such undertaking along with Social Background Report of the child in Form-1 and information regarding the nature of offence alleged to have been committed (which means F.I.R. or DD Entry as the case may be), should be forwarded to the JJB. The parents/ guardians of the child should be informed as to when the child is to be produced for hearing before the JJB.

Further, the procedure to be adopted by the Board in such cases is provided under Rule 9(4) which states:

> Where the child alleged to be in conflict with law has not been apprehended and the information in this regard is forwarded by the police or Special Juvenile Police Unit or Child Welfare Police Officer to the Board, the Board shall require the child to appear before it at the earliest so that measures for rehabilitation, where necessary, can be initiated, though the final report may be filed subsequently.

7.4. Safeguards and Rights Available to the Child at the Time of Apprehension

Certain important safeguards and rights available to children at the time of apprehension are provided in the proviso to Section 10(1), JJ Act, 2015 and under Rule 8(3) and (4), of JJ Model Rules, 2016:

> **Proviso to Section 10(1)** Provided that in no case, a child alleged to be in conflict with law shall be placed in a police lock up or lodged in jail.
>
> **Rule 8(3)** The police officer apprehending a child alleged to be in conflict with law shall:
>
> **(i)** not send the child to a police lock-up and not delay the child being transferred to the Child Welfare Police Officer from the nearest police station. The police officer may under sub-Section (2) of Section 12 of the Act send the person apprehended to an observation home only for such period till he is produced before the Board i.e. within twenty-four hours of his being apprehended and appropriate orders are obtained as per rule 9 of these rules;
>
> **(ii)** not hand-cuff, chain or otherwise fetter a child and shall not use any coercion or force on the child;
>
> **(iii)** inform the child promptly and directly of the charges levelled against

him through his parent or guardian and if a First Information Report is registered, copy of the same shall be made available to the child or copy of the police report shall be given to the parent or guardian;

(iv) provide appropriate medical assistance, assistance of interpreter or a special educator, or any other assistance which the child may require, as the case may be;

(v) not compel the child to confess his guilt and he shall be interviewed only at the Special Juvenile Police Unit or at a child-friendly premises or at a child friendly corner in the police station, which does not give the feel of a police station or of being under custodial interrogation. The parent or guardian may be present during the interview of the child by the police;

(vi) not ask the child to sign any statement; and

(vii) inform the District Legal Services Authority for providing free legal aid to the child.

(4) The Child Welfare Police Officer shall be in plain clothes and not in uniform.

7.5. Remedy against violation of such safeguards

The swiftest and most effective remedy against denial of such safeguards and rights is to approach the JJB and file a complaint. The JJB may be reminded of its responsibility in this regard under Section 8(3)(b) of "ensuring that the child's rights are protected throughout the process of apprehending the child, inquiry, aftercare and rehabilitation".

Further under Section 14(5)(a), JJ Act, 2015, there is further reiteration of the responsibility of the Board in this regard:

> at the time of initiating the inquiry, the Board shall satisfy itself that the child in conflict with law has not been subjected to any ill-treatment by the police or by any other person, including a lawyer or probation officer and take corrective steps in case of such ill-treatment.

The remedy available under Section 14(5)(a) seems to be a rather weak, as it prescribes to take "corrective steps." It is for this reason that an application under Section 8(3) and Section 14(5)(a) must go along with Section 8(3)(k). Section 8(3)(k) is a much stronger remedy as it empowers the Board to order for registration of an F.I.R. if a complaint made is regarding the alleged commission of an offence against a child in conflict with law.

8 Age Determination

By Advocate Anant Kumar Asthana

8.1. Introduction

Age determination is one of the most critical areas in legal practice, on matters related to Juvenile Justice. A significant proportion of litigation on juvenile justice in superior courts is on age determination and on the claim of being a child.

The Juvenile Justice (Care and Protection of Children) Act, 2015, (JJ Act, 2015), is a beneficial legislation and its benefits are available to children only. Therefore, in order to determine whether or not any person can be a beneficiary of this Act, age determination is essential.

Since the JJ Act, 2015 also provides for the possibility of transfer of a child aged 16-18 yearsalleged to have committed a heinous crime, to a Children's Court to be tried as an adult, age determination in such cases becomes an extremely significant proceeding.

It needs to be kept in mind that despite best efforts of the legislature, the law on age determination continues to be vexed and highly complicated.

8.2. Legal Framework on Age Determination

Section 94 of the JJ Act, 2015 provides the primary legal framework for age determination. However, the law on other ancillary issues is also provided under Section 9.

Prior to the enactment of JJ Act 2015, the law concerning age determination was contained in Section 49 of the JJ Act, 2000 and under Rule 12 of the Juvenile Justice (Care and Protection) of Children, Model Rules 2007. Wherever State Governments had made their own State Rules under the JJ Act, 2000, the rule corresponding to JJ Model Rule 12 would apply.

8.2.1. Relevant date for age determination

The JJ Act, 2000 was amended in 2006, in order to lay down the law on relevant date to reckon the age of juvenility. Prior to August 2006, this used to be an area of confusion because the definition of "juvenile in conflict with law" did not provide for the relevant date on which juvenility had to be ascertained. The definition under Section 2(l), JJ Act, 2000, prior to the amendment used to be-

> "juvenile in conflict with law" means a juvenile who is alleged to have committed an offence.

Various Courts interpretedthis provision differently, leading to utter confusion regarding the relevant date on which age could be determined. Some High Courts considered the date of commission of offence, some considered the date of registration of the F.I.R. and some even went on to consider the date of arrest or the date of the child's production before the Juvenile Justice Board.

This confusion was settled by the Supreme Court in ***P****ratap Singh v. State of Jharkhand,* [(2005) 3 SCC 551] and subsequently re-affirmed in *Hari Ram v. State of Rajasthan,*[(2009) 13 SCC 211.In these cases, the Supreme Court held that the relevant date for determination of age is the "date of commission of offence", so far as it is concerned with a child alleged to have committed an offence. The judgment in *Pratap Singh Case* led to the amendment on this aspect in year 2006.

The Juvenile Justice (Care and Protection of Children) Act, 2000 was therefore amended in 2006, by which the definition of juvenile in conflict with law was amended to reflect the judgment. After this amendment, the definition of juvenile in conflict with law in Section 2(l), was-

> "juvenile in conflict with law" means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence.

This position continues to be the same even under the JJ Act, 2015 which defines "child in conflict with law," under Section 2 (13), as below-

> "child in conflict with law" means a child who is alleged or found to have committed an offence and who has not completed eighteen year of age on the date of commission of such offence.

Section 5 and Section 6 of the JJ Act, 2015, are also relevant and need to be taken note of, because they provide for the situations where a child has attained the age of eighteen years and ceases to be a child adult during the pendency of proceedings, or has been apprehended after ceasing to be a child. Even if a person ceases to be a

child, the person shall be entitled to the benefits of the JJ Act, 2015, if on the date of commission of offence such person had not completed the 18th year of age. Advocates litigating on age therefore need to keep these two provisions in mind.

8.2.2. Procedure for determination of age

Section 94 of the JJ Act, 2015 prescribes the procedure for age determination. This Section is placed under Chapter X "Miscellaneous" of the Act, because it applies for all kind of children under the Act, be they "children in need of care and protection" or "child in conflict with law". This Chapter discusses the implications of these legal provision for a child alleged to be in conflict with law, with recommendations for advocates working with such children. The Section is extracted below for easy reference-

> Section 94. Presumption and determination of age:
>
> (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under Section 14 or Section 36, as the case may be, without waiting for further confirmation of the age.
>
> (2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining —
>
> (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;
>
> (ii) the birth certificate given by a corporation or a municipal authority or a panchayat;
>
> (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board: Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.
>
> (3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.

Age Determination under Section 94(1), JJ Act, 2015

If a JJB is satisfied based on appearance, that the person produced before it is definitely a child, there is no need to look for any other evidence. A mere recording of such observation is sufficient. Advocates should however, bear in mind that this provision can only be used to declare someone to be a child and cannot be used to declare someone to be an adult.

Section 94(1) allows a JJB to declare someone to be a child based on "appearance," and no further process for determination of age is contemplated in such a scenario.The intention behind this provision is that time should not be wasted in calling for documents of age, in cases where a person looks to be a child, merely on appearance. The only requirement for application of 94(1) is that the person produced is a child must be "obvious". In cases where the element of obviousness is not there, due process of age determination as prescribed in Section 94(2) should be followed.

In practice however, it has been observed that this provision is not used and JJBs or CWCs tend to look for a document to declare the age. Advocates must insist for application of Section 94(1) for declaration of age when persons produced are obviously children. Attention of the JJBs and CWCs must be drawn to the language of the Section 94(1) which clearly mentions "proceed with the inquiry under Section 14 or Section 36, as the case may be, without waiting for further confirmation of the age". Section 94(1) is profound in the sense that if age can be declared based on appearance only, recording of such observation is sufficient and no further confirmation needs to be availed in this regard.

Age Determination under Section 94(2), JJ Act, 2015.

Only when age cannot be declared under Section 94(1), age should be decided by the JJB under Section 94(2) which provides a detailed scheme of documents that need to be considered.

Age determination is not an inquiry under Section 94(2)

It is pertinent to take note of the fact that word "inquiry" does not appear in Section 94. This is crucial because the judgment of Supreme Court in *Ashwani Kumar Saxena v. State of M.P.* [(2012) 9 SCC 750] is based on interpretation of word "inquiry". This judgment was given when JJ Act, 2000 was in force and therein word "inquiry" was used. Under the JJ Act, 2015, the word "inquiry" has been removed from provisions pertaining to age declaration and it can be argued that *Ashwani Kumar* is no more a relevant case law on age determination as far as it concerns with age determination under Section 94 being "merely an inquiry". Effort should be to allow proper

evidence when age is being determined under Section 94(2) and not let it be treated as merely an inquiry.

Section 94(2) uses the phrase "by seeking evidence". Therefore, parties are entitled to lead evidence and be allowed to cross-examine witness as well.

Hierarchy of admissible documents on age under Section 94(2)

It is evident from a bare reading of Section 94(2) that only few documentary evidences are admissible for determination of age. Matriculation or equivalent Certificate from the concerned examination Board, (if available) and date of birth certificate from the school are accorded first priority as evidence. Only in the absence of these educational documents, the birth certificate given by a corporation or a municipal authority or a panchayat should be considered.

The use of the phrase -"if available," implies that if the document of matriculation or equivalent certificate from the concerned examination Board is available, it becomes the first priority document. It is only when these are not available that the JJB should look for any other document. The second priority document is "the date of birth certificate from the school". The JJ Act, 2015 does not specify the type of school. The JJ Model Rules, 2007 had specified "school certificate from school first attended," which is not the case anymore under the JJ Act, 2015. Any certificate of birth from any school, which is authentic and most reliable in view of the JJB is sufficient for declaration of age.

Law as under JJ Act, 2000 and Rule 12 of Model JJ Rules, 2007	Law as under JJ Act, 2015
The date of birth certificate from the school (other than a play school) first attended	The date of birth certificate from the school

The intention of the legislature seems to be to give absolute discretion to the JJB in this regard and that is why all the limitations and restrictions imposed under the old law have been removed. Such discretion, however, needs to be utilized judiciously and if there are age certificates from more than one school available, the JJB will have to satisfy itself as to which is most reliable and use that for age declaration.

When it is established that the child has not gone to school ever or that the school documents cannot be accessed for any reason, then reliance should be placed on the "Birth Certificate given by a corporation or a municipal authority or a panchayat".

8.3. Medical Age Determination

It is only if evidences from these two categories do not exist, that the JJB can pass an order for age determination to be carried out through the following means-

(1) an ossification test, or,

(2) any other latest medical test.

What is an Ossification Test?

An Ossification test is a test which determines age based on the degree of fusion of bone. X-rays of few bones are taken and then the opinion is given about proximate age in a range i.e., between 17 to 19 years.

What is any other latest medical test?

An Ossification test is not a very accurate means todeterminethe age of a person.A more comprehensive assessment entails the assessment by a duly constituted Medical Board, as provided for under the erstwhile JJ Model Rules, 2007, in Rule 12(3)(b), who should arrive at an opinion on age based on (1) ossification test, (2) dental examinationand (3) opinion based on examination of physical features like status of pubic hair and growth of sexual organs like breasts, chest hair, beard, etc.

It is a common practice in courts to order for an ossification test, without realizing the crucial difference between an ossification test and a duly constituted Medical Board. In *Siddu @ Siddeshwar v. State,*[Criminal Appeal No. 200465 of 2015, decision dated 23.04.2016] before the Karnataka High Court, there were two medical reports, one of an ossification test done by a radiologist and another by a duly constituted Medical Board, consisting of a physician, dentist and a radiologist. The reports gave divergent opinions on the age of the said person. The Karnataka High Court opted to go for opinion given by the duly constituted Medical Board and gave general directions to the Karnataka Government that duly constituted Medical Boards be set up in all the districts, along with a general direction prohibiting individual doctors from carrying out medical age tests. This judgment was given in the context of Model Rule 12 which required medical age examination by a duly constituted Medical Board. Similar directions were given by the Hon'ble Delhi High Court in ***Court on Its Own Motion v. Department of Women & Child Development [Writ Petition (Civil) 8889 of 2011]***:

> All the members of medical Board (Physiologist [Later on substituted with Physician] , Dental Examiner and Radiologist/ Forensic expert)shall give their individual reports based on their respective examinations and the same shall be mentioned in the report , based on which the Chairperson shall give the final opinion on the age within a margin of one year.

Lawyers should therefore argue for duly constituted medical board as it is a better means to arrive at a determination of age, as compared to an ossification test.

Is Medical opinion binding?

It is a settled position of law that medical reports on age are not binding, unless accepted by the Court or the JJB or CWC. To ascertain the acceptability of medical reports, the JJB, in this context, may permit examination and cross-examination of doctors who carried out such medical tests. In cases where advocates doubt a foul play involved in the process of medical age determination, they should ask for evidence and should insist that doctors who gave this opinion be summoned to court for evidence. Advocatescan cross-examine such doctors as to how they have carried out tests and on what basis they have given their opinion. Based on this evidence, the JJB will have to decide whether to accept the medical age report, or not, and if so, to what extent.

Jaya Mala v. Home Secretary, Government of Jammu & Kashmir and Ors. J & K [AIR 1982 SC 1297], *Ram Deo Chauhan @ Raj Nath v. State of Assam* [(2001) 5 S.C.C. 714], *Babloo Pasi v. State of Jharkhand and Anr.*[2009(1)JCR73(SC)]are some of the cases where it has been held by the Supreme Court that medical age opinion is not binding and is merely an opinion.

Medical evidence cannot be used to corroborate documentary evidence on age. The statute clearly prescribes that medical opinion can only be sought, where documentary evidence is absent. Despite this, many a time, it is seen that efforts are made by JJBs to corroborate documentary evidence by medical evidence. In *Bhoop Ram v. State of U.P.*, AIR 1989 SC 1329], it has been laid down by the Supreme Court that in case of conflict between documentary evidence and the medical report, the documentary evidence will be considered correct. Since the JJ Act, 2015 does not prescribe medical opinion to be sought in the presence of documentary evidence; the question of corroborating documentary evidence by medical opinion does not arise at all. Advocates should therefore contest this practice.

Where Two Views are Possible, benefit is to go in favor of child.

Circumstances and evidence may create a situation where two views are possible. In such a situation, it has been held in *Arnit Das v. State of Bihar,*(2000) 5 SCC 488 that -

> while dealing with the question of determination of the age of the accused for the purpose of finding out, whether he is a juvenile or not, hyper technical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he is a juvenile and if two views are possible on the same evidence, the court should lean in favour of

holding the accused to be juvenile in borderline cases.

This is based on the criminal law principle that benefit of doubt must go to an accused and this holds good in cases of age determination of accused or of children alleged to be in conflict with law.

8.4. Age Determination of Child Victims

In several cases, the question as to the age of child victims is significant and courts are required to decide the question of age of victim as well. In *Jarnail Singh v. State of Haryana,*[(2013) 7 SCC 263]**,** it was held that age determination prescribed under the JJ Act can be used for determination of age of victims as well. The JJ Model Rules, 2016, in Rule 54(18)(iv), prescribes that, "For the age determination of the victim, in relation to offences against children under the Act, the same procedures mandated for the Board and the Committee under Section 94 of the Act to be followed". This view has been reiterated by Supreme Court in few subsequent cases like *Mahadeo v. State of Maharashtra* (2013) 14 SCC 637 and*State of Madhya Pradesh v. Anoop Singh,* (2015) 7 SCC 773.

8.5. Essential Requirement of an Age Declaration order

It should be kept in mind that under the JJ Act, it is not sufficient to merely declare someone to be a child. It is also mandatory to "state the age as nearly as may be possible" after age determination is done.

Most often orders of the JJB only state that the person has been found to be below the age of 18 years, and hence declared a child. This is not a correct order. An order on age must state "the age of the child as nearly as may be". This has been provided for under Section 94(1), JJ Act, 2015. It can be argued that such a requirement is only applicable for a case, where age is decided under Section 94(1), but that may not be the correct interpretation. It has not been mentioned in Section 94(2) because there is a document available, which gives an exact date of birth. Occasion to state age as nearly as may be possible arises only in cases where exact date of birth is not known and that could be the reason that it has been specifically mentioned under Section 94(1). It would, however, apply to age determination under Section 94(2), as an appeal could lie against such an order.

8.6. Misuse of JJ Act on the point of Age and Role of Victims/Complainants

Age determination is gateway for misuse of JJ Act, 2015 by adult criminals. Similarly, many children stand deprived of JJ Act's benefits because the question of age is either not raised or not considered. Section 8(3)(m), JJ Act, 2015, requires JJBs

to regularly inspect jails to check if any child is lodged in such jails as adults and take immediate measures for transfer of such child to Observation Homes. As far as misuse of loopholes in age determination process to escape the rigours or criminal justice by adults is concerned, it can only be addressed if age determination is carried out objectively and with utmost care and caution. It is seen mostly that it is the complainant who takes interest in contesting the age and assists in bringing necessary evidence before the Board. Keeping this in view, it is important to involve complainants/ victims in the process of age determination or to at least inform them that age determination process is being undertaken. TheJJ Act, 2015, in Section 3(xvi), provides the principle of natural justice, which requires sufficient opportunity to be given to the complainants/ victims to contest the age. The Delhi High Court in *Court on Its Own Motion v.Department of Women and Child Development*, [W.P.(Civil) 8889 of 2011]in its judgment dated 11.05.2012, passed directions to this effect, which may be used for persuasion in this regard:

> JJBs shall determine the age of a person by way recording the evidence brought forth by the Juvenile and the prosecution/ complainant and the parties shall be given an opportunity to examine, cross examine or re-examine witnesses of their choice.
>
> In case of medical age examination, the parties shall be given copies of the medical age examination report immediately by the JJBs. The parties shall have the right to file objection thereto, including the right to cross-examine before final age determination is done.
>
> Before commencing the age inquiry, a notice thereof shall be served upon the complainant by the JJB or the Court Concerned, which shall also accord opportunity to the complainant of being heard on the issue including producing evidence; however the age inquiry will be concluded within the stipulated time limit of one month.

Tips for Advocates on Age Determination

S. no.	Do's	Don'ts
1.	Insist in cases where person is obviously a child, that the age be decided under Section 94(1) of JJ Act, 2015.	Do not allow all cases to be decided under Section 94(2), JJ Act, 2015 as a default measure.
2.	In cases of medical opinion, cross-examine members of the Medical Board or doctor who carried out ossification test.	Do not concede to a medical age report if it goes against your client.
3.	File written arguments on age determination.	Do not simply make oral arguments.
4.	Insist for oral arguments on age to be recorded in the order.	
5.	Register your protest whenever a court or JJB or CWC tries to pass an order of medical age determination without recording an opinion on reliability of documentary evidence.	Do not allow extraneous documents such as Aadhaar card, horoscope, etc., which are not mentioned in Section 94(2) to be relied upon.
6.	Interact well with and understand from your client about age.	Do not take age determination lightly.

9

Right to Bail

By Advocate Anant Kumar Asthana

9.1. Introduction

The notion of bail under the JJ Act, 2015, is very different from that of bail as understood in Criminal Law. Such difference is in tune with the child centric and rehabilitative approach of the JJ Act. It should be kept in mind that considerations for bail under the JJ Act, 2015, are not the same as laid down under Chapter XXXIII of Criminal Procedure Code. However, since "bail" itself is a terminology of Criminal Law, it continues to be understood and applied most often as per that framework

Section 12(1), JJ Act, 2015 states:

> **12. Bail to a person who is apparently a child alleged to be in conflict with law.(1)** When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:
>
> Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

By stating "notwithstanding anything contained in the Code of Criminal Procedure, 1973 or in any other law for the time being in force", the JJ Act, 2015 overrules the application of Cr.P.C. or any other law on bail in force, from

application of Section 12. Advocates must emphasize this aspect while arguing a bail application.

9.2. Is it mandatory for a person to be declared a child (below 18 years) before bail is granted?

Since the JJ Act, 2015 is applicable to "children", most often it is seen that the bail application is kept pending till the inquiry on determination of age is concluded. However, it is imperative to take note that Section 12, JJ Act, 2015, uses "person" and "apparently a juvenile". While use of the word "person" indicates that the benefit of Section 12 is available to a person and not necessarily to a "child", the use of the phrase "apparently a child" makes it abundantly clear that application of Section 12 does not call for a definitive finding on age to be returned before the bail application is considered. Thus, any person who is "apparently" a child, can be granted bail. It can be argued that the mere production of a person before the JJB by the police is sufficient for the JJB to form a *prima facie* view that the applicant is "apparently a child".

9.3. Can the police grant bail?

Though it is not explicitly mentioned in Section 12, JJ Act, 2015, a reading of Section 12(2) makes it clear that the Officer-in-Charge of the police station is empowered to grant bail in bailable as well as in non bailable offences. Section 12 (2) reads as below-

> When such person having been apprehended is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

9.4. Is seriousness of the offence alleged a ground for declining bail?

The nature of the offence is immaterial for consideration of bail under the JJ Act, 2015. Bail is a right and can only be denied in three exceptional circumstances mentioned in Section 12 (1) of JJ Act, which are:

1. If there appear reasonable grounds for believing that the release is likely to bring that person into association with any known criminal.
2. If there appear reasonable grounds for believing that the release is likely to expose the said person to moral, physical or psychological danger.
3. If there appear reasonable grounds for believing that the person's release would defeat the ends of justice.

Out of these three exceptional circumstances for declining bail, the most misunderstood one is -"defeat the ends of Justice". This term has been interpreted by the Hon'ble Delhi High Court in several cases and it has been held repeatedly that the facts for determining as to what amounts to defeat of the ends of justice must be construed in the context of the purpose of the Act. The phrase "would defeat the ends of justice" therefore cannot be stretched to bring into its ambit the gravity of the offence or the interest of the victim. Judgments of Hon'ble Delhi High Court in ***Master Abhishek (minor) Vs State: 2005 VI AD Delhi 18*** and subsequently reiterated in ***Dev Vrat (Minor) Vs The State (Govt of NCT of Delhi):2006[3]JCC1430*** may be referred, to further comprehend the position of law on this specific aspect. Relevant observation made by the Delhi High Court in ***Master Abhishek Case*** are reproduced below-

> Petitioner was arrested in an offence u/s 323/302/34 IPC in case FIR No. 338/04 dated 5.7.2004 PS Kalyan Puri.
>
> The Juvenile Justice Board rejected the application for bail on the observation that the juvenile was of impulsive nature. Further, it was observed that the manner in which the juvenile committed the crime shows his aggressive behavior as well as tendencies to harm others and that the fact that the person assaulted only with his fist and arms died shows his brutal mental make-up. The Juvenile Justice Board observed that in these circumstances it would not be in the interest of justice to admit the juvenile to bail.
>
> The only thing that remains to be seen is whether his release will defeat the ends of justice. Justice here should be interpreted in the context of the other provisions of the Juvenile Justice (Care and Protection of Children), Act 2000. The aim behind this act is the welfare of children. The very preamble of this act describes the purpose of enacting it…
>
> What can be said to be the factors to determine what will defeat the ends of justice have to be located in the context of the purpose of the Act. The purpose of the Act is to meet the need of care and protection of children and to cater to their development needs. This can be done by adopting a child friendly approach in the adjudication aredisposition of matters in the best interest of children and for their ultimate rehabilitation. Therefore if there is a factor which requires the Court to keep the child in custody for meeting the developmental needs of the child or for his rehabilitation, or for his care and protection then only it can be said that his release would defeat the ends of justice."

Similarly, in ***Devvrat Case***, the Delhi High Court reiterated similar views while making observations given below-

> The finding recorded in the impugned order is based on the nature of the offence as well as the release of the petitioner not being in the interest of justice. There is a difference between the expressions in the interest of justice and defeat of the ends of justice.

9.4. Exceptional Circumstances must be based on some supporting material

It is often seen that the existence of exceptional circumstances for denial of bail is presented as a matter of routine without there being any material on record to support the claim. Such claims are not tenable. In ***Girijesh v. State of U.P.,***[1] the High Court of Allahabad *vide* its judgment dated 15.04.2015 granted bail to the applicant and made the following observation:

> Even the report of the District Probation Officer, Gorakhpur is not supported by any material as to how minor will fall in company of bad elements if released on bail. The observation of the District Probation Officer in absence of any supporting material becomes bald and vague. Consequently, the same is to be ignored.

Similarly, mere risk of child getting into criminal company is not sufficient. Requirement is that there must be "known criminal" in order to invoke the exception. In ***Nand Kishore (in JC) Versus State***, (No citation available, copy available on www.indiankanoon.org) the Delhi High Court, in its judgment dated 07.07.2006 held as below-

> As regards the first exception, before it can be invoked to deny bail to a juvenile there must be a reasonable ground for believing that his release is likely to bring him into association with any known criminal. The expression known criminal is not without significance. When the liberty of a juvenile is sought to be curtailed by employing the exception, the exception must be construed strictly. Therefore, before this exception is invoked, the prosecution must identify the 'known criminal' and then the court must have reasonable grounds to believe that the juvenile, if released on bail, would associate with this known criminal. It cannot be generally observed that the release of the juvenile would bring him into association with criminals without identifying the criminals and without returning a, prima facie, finding with regard to the nexus between the juvenile and such criminal.

9.5. Denial of Bail is an Exception and is an Option of Last Resort

A careful perusal of Section 12(1), JJ Act, 2015 demonstrates that denial of bail under

1 Criminal Revision 1300 of 2014, Allahabad High Court.

JJ Act is an exception. While interpreting Section 12, the JJB is duty bound to be guided by the fundamental principle of "Principle of institutionalization as a measure of last resort" laid down under Section 3(xii) of the JJ Act. A child can therefore only be institutionalized as a measure of last resort and that too after making a reasonable inquiry.

In this regard it may also be noted that JJ Act has made it mandatory for JJBs to record the reasons for denying the bail and circumstances that led to such a decision under the proviso to Section 12(1).

Such emphatic prescription for granting bail is further fortified by Section 12(4), which provides that if a child in conflict with law who has been granted bail is unable to fulfil the conditions of bail within seven days of the bail order, such child should be produced before the JJB, so that the bail conditions can be suitably modified by the JJB, in order to ensure actual realization of bail. The duty to seek modification of bail condition is not on the child, but has been shifted to the JJB under the JJ Act, 2015. Section 12(4) reads as below-

> When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail.

9.6. Is there always a need to file a bail application?

Ordinarily in criminal law, an accused person should apply for bail before a criminal court. This is not the case before the JJB. Since bail is a matter of right for all children alleged to be in conflict with law, the JJB does not have to wait for the bail application to be filed. Whenever a child, who is alleged to have committed an offence, is brought before a JJB, it should consider the question of bail or release on the date of first production itself, irrespective of whether any bail application has been filed or not. Rule 10(1)(iii), JJ Model Rules, 2016, can be relied upon in this regard which lists certain orders which can be passed on the date of production itself upon review by the Board of social background report, circumstances of apprehending the child and offence alleged to have been committed by the child as provided by the officers, individuals, agencies producing the child. Rule 10(1)(iii), states as follows - 'releasing the child in the supervision or custody of fit persons or fit institutions or Probation Officers as the case may be, through an order in Form 3, with a direction to appear or present a child for an inquiry on the next date;'.

9.7. Is the offence being bailable or non-bailable of any consideration?

In the Criminal Law approach, the question of bail is dependent on whether the

offence is bailable or non-bailable. However, under the JJ Act, 2015, such consideration is immaterial as Section 12(1) does not discriminate between a bailable and a non-bailable offence. It is no argument that bail be granted because offence alleged in bailable, similarly it is also no argument that bail be denied because offence alleged in a non-bailable offence. Considerations for denial of bail are clear and specific which are mentioned in the proviso to Section 12(1).

9.8. Is bail of a child over 16 years of age and accused of having committed a heinous offence also covered under Section 12 of JJ Act?

Yes, it is covered under Section 12, JJ Act, 2015. Even though the JJB has been granted power to decide whether such a child may be transferred to be tried as adult, the provision on bail under Section 12 remains unchanged. The reason that a preliminary assessment is pending in respect of a child, is no reason for declining the bail.

9.9. Does Section 12 include Anticipatory Bail?

Yes, it does. The use of the words "…appears or brought before a Board…" in Section 12 (1) is indicative of the fact that a child may very well appear before a Board or may be brought before a Board by his parents and can seek bail. There is no need to apply for anticipatory bail under Criminal Procedure Code, because even though "anticipatory bail" is not used in JJ Act, 2015, it includes a relief which is similar to anticipatory bail. Benefit of Section 12 is available to any person, apparently a child and is alleged to have committed a bailable or non-bailable offence, and who (1) is apprehended or detained by the police or, (2) appears or brought before a Board. The latter clause would include the anticipatory nature of bail under Section 12 of the JJ Act.

9.10. Is Social Investigation Report (SIR) mandatory of grant of Bail?

Section 12 is an exhaustive provision on bail and it does not mandate the consideration of a Social Investigation Report (SIR) before bail is granted. It is true that the SIR is a good and credible document to ascertain whether exceptional circumstances for denial of bail exist or not, but it cannot be treated as mandatory. It has to be kept in mind that under Section 13(1)(ii), at the time of apprehension of child, the police is mandated to give information to the Probation officer or a Child Welfare Officer who is required to submit a SIR within two weeks and such SIR is to be used for the purpose of inquiry, not for bail. Prevalent insistence on availability of SIR is by way of tradition and not by law. Ordinarily if the SIR is available, the JJB may well use it, but its availability cannot be stretched to the extent that it becomes a pre-condition for consideration of bail.

10 Transfer of Child in Conflict with the Law from the Juvenile Justice System

By Advocate Maharukh Adenwalla

10.1. Introduction

A distinct system for children alleged or found to have committed an offence has been in existence in provinces / States since the Children Acts. For example, juvenile courts were established per the Bombay Children Act 1948[1] - "such court shall try all cases in which a child is charged with the commission of an offence".[2] Under the Children Act 1960[3], Children's Courts were set-up "for exercising the powers and discharging the duties conferred or imposed on such court in relation to delinquent children under this Act",[4] and were empowered "to deal exclusively with all proceedings under this Act relating to…delinquent children".[5]

Provisions of the Children Act, 1960 were incorporated under the JJ Act, 1986. Juvenile Courts were established "for exercising the powers and discharging the duties conferred or imposed on such court in relation to juvenile delinquents under this Act",[6] and such Juvenile Courts were given the "power to deal exclusively with all proceedings under this Act relating to…delinquent juveniles".[7] Similar powers were given to JJBs under the JJ Act 2000 - "power to deal exclusively with all proceedings under this Act relating to juvenile in conflict with law."[8] Provisions for exclusive dealing of juvenile cases by the Juvenile Justice System was strengthened with the insertion of sub-Section (4) to Section 1 of the JJ Act, 2000[9] -

1 Bombay Children Act, 1948, Section 7.
2 Bombay Children Act, 1948, Section 8(1).
3 The Children Act, 1960, extended to all Union Territories.
4 Children Act, 1960, Section 5(1).
5 Children Act, 1960, Section 7(1).
6 JJ Act, 1986,Section 5(1),
7 JJ Act, 1986, Section 7(1).
8 JJ Act, 2000, Section 6(1).
9 By The Juvenile Justice (Care and Protection of Children) Amendment Act, 2006.

"Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all cases involving detention, prosecution, penalty or sentence of imprisonment of juveniles in conflict with law under such other law."

On the international platform, the Beijing Rules and the UNCRC advocated that child offenders should be dealt differently from adults. General Comment No.10 specifically reminds State Parties of their obligations under the UNCRC:

> they have recognized the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in accordance with the provisions of article 40 of CRC. This means that every person under the age of 18 years at the time of the alleged commission of an offence must be treated in accordance with the rules of juvenile justice.[10]

This well-entrenched practice of child offenders without exception being dealt with under the Juvenile Justice System, has been overturned by the JJ Act, 2015, which allows the JJB discretion to exclude from the juvenile justice system, children above 16 years who have allegedly committed heinous offences. What is commonly referred to as *the Nirbhaya case* precipitated this drastic change in juvenile justice legislation, as one of the accused was of 17-and-a-half years. Change in juvenile justice legislation due to public outcry has been much criticized –

> It is a well-accepted principle that one bad case never makes for a good law. Ignoring the sound practice, India chose to take the most regressive step of introducing retributive approach for young children as a knee jerk reaction despite the experience of countries like United States of America and United Kingdom which have reported that children tried as adults end up committing more offences in their later life compared to children who were treated within the juvenile justice system.[11]

Such exclusion of children in conflict with the law from the ambit of juvenile justice legislation should be opposed, not only by child rights practitioners, but by all progressive forces, in different forums. But what does one do while such draconian provision remains in the statute? It is the role of the child's lawyer, as far as possible, to curtail its harm, by ensuring that a child in conflict with the law is not transferred from the juvenile justice system.

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10 Clause 37.

11 Ved Kumari, *The Juvenile Justice (Care and Protection of Children) Act 2015 - Critical Analysis* (Universal Law Publishing, 2017) p.15.

At this point, it is appropriate to mention that the Supreme Court, in *Salil Bali v. Union of India*[12] and *Dr. Subramanian Swamy v. Raju & Anr.*.[13] upheld the constitutionality of the JJ Act, 2000 (as amended in 2006), and the appropriateness of age of juvenility being fixed at 18 years. The Report of the Committee on Amendment to Criminal Law (dated 23-1-2013), commonly called *The Justice J.S. Verma Committee Report*, also recommended against reduction of age of juvenility.[14] *The 264th Report of the Parliamentary Standing Committee on Human Resources* that was constituted to examine the JJ Bill, 2015 cautioned against the transferring of children into the criminal justice system.[15]

Who may be shifted out of the juvenile justice system?

Per Section 15(1) of the JJ Act, 2015, the process for assessing whether a child in conflict with law may be denied protection of juvenile justice legislation is to be initiated only when such child is alleged to have committed a heinous offence and has completed or is above the age of sixteen years.

10.2. What is a 'heinous offence'?

10.2.1. Definitions

The JJ Act, 2015 classifies offences into three categories: (i) 'petty offences'; (ii) 'serious offences'; (iii) 'heinous offence'. Such classification has been introduced to juvenile justice legislation for the first time under the JJ Act, 2015, whereby, treatment of a child in conflict with the law depends upon the offence the child is alleged to have committed. Hence, ascertaining the category of offence is crucial, more particularly regarding 'heinous offences' as such children in conflict with the law may be tried as adults.[16]

"'Petty offences' includes the offences for which the maximum punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force is imprisonment up to three years."[17] For an offence to fall under the category of 'petty offence', the maximum period of imprisonment is three years, but no minimum period has been mentioned. It includes offences where minimum period of imprisonment is not mentioned or where a minimum period of less than three years

12 (2013) 7 SCC 705.
13 (2014) 8 SCC 390.
14 *Report of the Committee on Amendments to Criminal Law,* (2013), p.254
15 Two Hundred Sixty-Fourth Report of the Department-Related Parliamentary Standing Committee on Human Resource Development on The Juvenile Justice (Care and Protection of Children) Bill, 2014, (25 February 2015), para 3.40.
16 JJ Act, 2015, Section 18(3).
17 JJ Act, 2015, Section 2(45).

is mentioned. 'Theft' which is punishable with imprisonment "for a term which may extend to three years" falls under the category of 'petty offence' as there is no minimum period stated, and the maximum period is three years.[18] 'Voluntarily causing hurt' which is punishable with imprisonment "for a term which may extend up to one year"[19] also falls under this category, as does 'voyeurism' which is punishable with imprisonment for a term which shall not be less than one year, but which may extend to three years".[20]

"'Serious offences' includes the offences for which the punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force, is imprisonment between three to seven years."[21] For an offence to fall within the category of 'serious offence', the punishment of imprisonment should be for a minimum period of more than three years and for a maximum period of less than seven years. 'Voluntarily throwing or attempting to throw acid' will be treated as a 'serious offence' under the JJ Act, 2015 as such offence is punishable with imprisonment "for a term which shall not be less than five years but which may extend to seven years".[22] Engaging a trafficked minor for sexual exploitation is a 'serious offence' as it is punishable with imprisonment "for a term which shall not be less than five years, but which may extend to seven years".[23]

"'Heinous offences' includes the offences for which the minimum punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force is imprisonment for seven years or more".[24] For an offence to fall under the category of 'heinous offence', the minimum period of imprisonment should be seven years or more. 'Rape' which is punishable with imprisonment "for a term which shall not be less than seven years, but which may extend to imprisonment for life"[25] would be treated as 'heinous offence' due to the period of seven years imprisonment having been mentioned as the minimum punishment. 'Murder' too would fall under this category as the same is punishable "with death or imprisonment for life"[26] - the minimum period of imprisonment being 'imprisonment for life'.

The description of 'petty offences', 'serious offences' and 'heinous offences' has

18 IPC, 1860, Section 379,
19 IPC, 1860, Section 323.
20 IPC, 1860, Section 354C.
21 JJ Act, 2015, Section 2(54).
22 IPC, 1860, Section 326-B.
23 IPC, 1860, Section 370-A(1).
24 JJ Act, 2015, Section 2(33).
25 IPC, 1860, Section 376(1).
26 IPC, 1860, Section 302.

resulted in confusion as many offences do not fall within the four corners of any of these definitions. Hence, it is problematic to definitively treat the same within any of the aforementioned categories. For example, 'assault or criminal force to woman with intent to outrage her modesty' is punishable with imprisonment "for a term which shall not be less than one year but which may extend to five years"[27] - it does not fall within the category of 'serious offence' (as the minimum period of imprisonment is less than three years) nor does it fall within the category of 'petty offence' (as the maximum period of imprisonment exceeds three years). Another example, 'sexual intercourse by a person in authority' is punishable with imprisonment "for a term which shall not be less than five years, but which may extend to ten years"[28] - such offence does not fall within the ambit of 'serious offence' (as the maximum period of imprisonment is more than seven years) nor under 'heinous offence' (as the minimum punishment is less than seven years).

Under the JJ Act, 2015, there are certain adversities that a child committing a 'serious offence' undergoes as compared to a child committing a 'petty offence'. An inquiry regarding a 'petty offence' is to be conducted "through summary proceedings, as per the procedure prescribed under the Code of Criminal Procedure, 1973"[29] and the inquiry is to be completed "within a period of four months from the date of first production of the child before the Board" or within the extended period of "two more months",[30] and if not so completed, the inquiry "shall stand terminated,"[31] whereas in case of 'serious offence', the inquiry is to be conducted "by following the procedure, for trial in summons cases under the Code of Criminal Procedure, 1973,"[32] and the inquiry does not stand terminated as in the case of 'petty offence' - the Chief Judicial Magistrate / Chief Metropolitan Magistrate has the power to extend the period for completion of inquiry in case of a 'serious offence'.[33]

The adversities are graver if, due to ambiguity, a case is treated as 'heinous offence' - such child may be deprived of the protection of the juvenile justice system. There are several offences which fall within this ambiguous zone - the maximum punishment is more than seven years and no minimum punishment has been mentioned or the minimum punishment is less than seven years - such offences do not fall within the ambit of 'heinous offence' nor 'serious offence' (as the maximum period of

27 IPC, 1860, Section 354.
28 IPC, 1860, Section 376C.
29 JJ Act, 2015, Section 14(5)(d).
30 JJ Act, 2015, Section 14(2).
31 JJ Act, 2015, Section 14(4).
32 JJ Act, 2015, Section 14(5)(e).
33 JJ Act, 2015, Section 14(4), proviso.

punishment is more than seven years) nor 'petty offence' (as the maximum period of punishment is more than three years). For example, 'attempt to murder'[34] is punishable with imprisonment "for a term which may extend to ten years". As only the maximum period of imprisonment, and no minimum period is mentioned under Section 307,IPC, the offence will not fall within the category of 'heinous offence'. Another such example is the offence of 'robbery' which is punishable with "imprisonment for a term which may extend to ten years…and, if the robbery is committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years."[35] Yet another example of such offence, 'kidnapping, abducting or inducing woman to compel her marriage' - it is punishable "for a term which may extend to ten years".[36] Under Section 14(4) of the POCSO Act, 2012, which provides punishment for using a child for pornographic purposes and committing sexual assault while directly participating in the pornographic act, the minimum punishment is less than seven years (six years) and the maximum punishment is more than seven years (eight years) - should such offence be treated as 'serious offence' (as the minimum punishment is less than seven years) or should it be treated as 'heinous offence' (as the maximum punishment is more than seven years)?

Children alleged to have committed 'petty offences' and 'serious offences' are dealt within the juvenile justice system, -hence, the implications of ambiguity are not as severe as that of a 'heinous offence,' where a child may be waived into the criminal justice system.

10.2.2. How should any ambiguity regarding a 'heinous offence' be treated?

Ambiguities regarding 'heinous offence' require to be settled to ensure uniform interpretation and application. Ved Kumari, says,

> In order to fill the loopholes left by these definitions, it is necessary to properly determine which offences fall in which category. It is well established that harmonious interpretation is to be given in case of conflicting provisions in order to resolve the conflict. It is also well recognized that while interpreting provisions that impose criminal liability, the provisions have to be given their meaning by using strict and narrow interpretation as not to expand the liability of the accused persons.[37]

34 IPC, 1860, Section 307.
35 IPC, 1860, Section 392.
36 IPC, 1860, Section 366.
37 Ved Kumari, *The Juvenile Justice (Care and Protection of Children) Act 2015 - Critical Analysis* (Universal Law Publishing 2017) p.37.

'Doctrine of strict construction' is one of the fundamental principles of criminal jurisprudence. 'Substantive legislation'[38] should be clearly worded and strictly construed - it should unmistakably inform ordinary people what is forbidden and punishable. It is only the legislature that has the powers to construct offences with their respective punishment - such powers are not vested in the judiciary. In case of any ambiguity in wording, the same should be interpreted in favour of the accused. The rational for such treatment is that the accused / offender cannot be made to suffer due to the fault of the State - it is the responsibility of the State to be diligent when framing legislation, therefore, such defect can only be construed against the State, and not cause sufferance to the accused / offender.

It is well-settled that any ambiguity in criminal law should be interpreted in favour of the accused. In *Tolaram v. State of Bombay*,[39] the Supreme Court observed, "Statutes which impose a term of imprisonment for what is a criminal offence under the law must be strictly construed." In *M. Narayan Nambiar v. State of Kerala*,[40] the Supreme Court observed that while interpreting a penal statute, in addition to a strict interpretation, the court should also consider the objective of the statute. In *ANZ Grindlays Bank Ltd. and Ors. v. Directorate of Enforcement and Ors.*,[41] the Supreme Court stated,

> So far the principle regarding strict construction of penal statutes is concerned there can be no quarrel. However, we need not misapply the principle. This principle has developed only in the context of the provisions in statutes which lay down the elements of an offence and the persons who can be charged with it. If there is any ambiguity or doubt as to whether in a given case an offence is made out or not or about who can be an offender with respect to the given offence, the ambiguity is to be resolved in favour of the person charged.[42]

Regarding 'remedial statutes' (social welfare legislations), the Supreme Court held,

> The normal canon of interpretation is that a remedial statute receives liberal construction whereas a penal statute calls for strict construction. In the cases of remedial statutes, if there is any doubt, the same is resolved in favour of the class of persons for whose benefit the statute is enacted, but in cases of penal statutes if there is any doubt the same is normally resolved in favour of the alleged offender.[43]

38 'Substantive legislation', under criminal law, defines crimes and lays down their punishment.
39 AIR 1990 SC 1962.
40 AIR 1963 SC 1116.
41 (2004) 6 SCC 531.
42 (2004) 6 SCC 531.
43 *Regional PF Commissioner v. Hooghly Mills Co. Ltd. & Ors.*: (2012) 2 SCC 489.

The JJ Act, 2015, is a remedial law, and also falls within the purview of criminal jurisprudence in as much as it deals with the commission of crime. In view of the aforementioned judgments, when any offence alleged to have been committed by a child cannot be strictly construed within any of the categories specified under the JJ Act, 2015, the same should be treated within the ambit of a category that favours the child in conflict with the law. Further, the provisions of the JJ Act, 2015 should be guided (interpreted) per Section 3,[44] which includes the *Principle of best interest*, the *Principle of equality and non-discrimination*, the *Principle of non-waiver of rights*, the *Principle of institutionalization as a measure of last resort,* and the *Principle of fresh start*. Denying a child, the protection of the juvenile justice system, by any stretch of imagination cannot be said to be in the best interest of the child in conflict with the law.

Hence, in case of any ambiguity, the offence should not be treated as 'heinous offence', and such child should be treated within the juvenile justice system. All children in conflict with the law should be dealt under the juvenile justice system[45] - the transfer of a child into the criminal justice system is an exception and not the rule, and is at the discretion of the JJB. **Hence, in case of ambiguity, the child in conflict with the law should be treated within the rule and not the exception. In case of ambiguity, any decision against the child would amount to discriminatory and arbitrary treatment.** A child is entitled for treatment under the juvenile justice system - no waiver of a child's right is permissible - this implies that the child nor any other person / authority is entitled to waive a child's right. Shifting of a child into the criminal justice system would amount to waiver of rights, hence, in case of ambiguity the interpretation should be in favour of non-waiver. Juvenile justice legislation's aim is restoration of child to family and re-integration into society, and institutionalization is a means of disposition in extraordinary circumstances and for the minimum period. Hence, in case of ambiguity, the focus should be on rehabilitation of the child per Section 18(1) and (2) of the JJ Act, 2015 so that the child is placed in a community-setting at the earliest. For comprehensive rehabilitation, a child in conflict with the law should be assured a 'fresh start' - towards this end, Section 24 has been incorporated under of the JJ Act, 2015,[46] but the same is denied to a child who has been convicted as an adult. Hence, in case of ambiguity, a child should be dealt within the juvenile justice system to assure such child a 'fresh start'.

Moreover, the word "includes" has been used while defining 'petty offence',

44 General principles to be followed in administration of the Act.
45 JJ Act, 2015, Section 1(4)(i).
46 Removal of disqualification on the findings of an offence.

'serious offence' and 'heinous offence', which implies that offences other than those contemplated under that category may also be assimilated within that category. For example, it allows for an offence other than that which is punishable with "imprisonment between three to seven years" to be treated as a 'serious offence' - hence, an offence under Section 307, IPC may be treated as 'serious offence'. But such inclusion should be in accordance with the 'doctrine of strict construction' and the relevant fundamental principles of the JJ Act, 2015.

As offences have been categorized under the JJ Act, 2015 mainly for the purpose of ascertaining the cases of children in conflict with the law that are to be treated within the juvenile justice system, and those to be dealt with outside of the juvenile justice system, a child's lawyer's concern should relate to this differentiating aspect - it does not matter whether an offence suffering ambiguity is treated as a 'petty offence' or 'serious offence' as both such categories are dealt within the juvenile justice system, whereas, any ambiguity in respect of 'heinous offence' requires to be strongly argued for resolution in favour of the child in conflict with the law. For such purpose, the lawyer should rely upon the doctrine of strict construction to argue that any ambiguity in any penal provision should be interpreted so as to lean in favour of the accused (child in conflict with the law). Further, the relevant *fundamental principles* to be followed in administration of juvenile justice should also be relied upon so as to hold the said offence not to be a 'heinous offence' and to deal with the child under juvenile justice legislation. The lawyer should also portray before the JJB the adverse consequences of transfer upon the child, namely, punitive approach instead of rehabilitative approach, prolonged incarceration in place of safety, and the child in conflict with the law could be sent to prison.

The child's lawyer at the stage of preliminary assessment, if the facts of the case so reflect, should also argue that the offence does not fall within the scope of 'heinous offence', and the same should be treated as a 'serious offence' or 'petty offence', as the case may be. For example, if an FIR/chargesheet contains accusations relating to 'heinous offence', but the contents of the same show otherwise, the same should be brought to the notice of the JJB.

10.3. How is the age of a child in conflict with the law determined?

Whether a person should or should not be brought within the ambit of juvenile justice legislation is related to age. Several cases reached the Supreme Court on the issue of age, and several judgments have been passed in this respect, from the time the Children Acts were in force. What these judgments reflect is that children's juvenility was oft not identified and they were treated as adults thereby denying them the protection of the Children Acts or the then prevailing juvenile justice legislation. Such practice resulted in the Supreme Court observing,

> We are of the opinion that whenever a case is brought before the Magistrate and the accused appears to be aged 21 years or below, before proceeding with the trial or undertaking an inquiry, an inquiry must be made about the age of the accused on the date of the occurrence. This ought to be more so where special Acts dealing with juvenile delinquents are in force. If necessary, the Magistrate may refer the accused to the Medical Board or the Civil Surgeons, as the case may be, for obtaining creditworthy evidence about age. Thereafter, the Learned Magistrate may proceed in accordance with law. This procedure if properly followed, would avoid a journey up to the Apex Court and the return journey to the grass-root court. If necessary and found expedient, the High Court may on its administrative side issue necessary instructions to cope with the situation herein indicated.[47]

These observations were in a matter regarding the West Bengal Children Act. In a case relating to the Bihar Children Act, the Supreme Court opined,

> Before parting with this judgment we would like to re-emphasise that when a plea is raised on behalf of the accused that he was a 'child' within the meaning of the definition of the expression under the Act, it becomes obligatory for the Court, in case it entertains any doubt about the age as claimed by the accused, to hold an inquiry itself for determination of the question of age of the accused or cause an inquiry to be held and seek a report regarding the same, if necessary by asking the parties to lead evidence in that regard.[48]

Determination of age, including its procedure, has been dealt with under Section 94 of the JJ Act, 2015, and in detail under Chapter 12 on Age Determination.

With the advent of the JJ Act, 2015, the situation has been further exacerbated as now the question of age is significant at two stages: (i) application of the legislation, and (ii) waiver into the criminal justice system. For a child in conflict with the law to be shifted out of the juvenile justice system, such child should have completed or should have been above the age of sixteen years.[49] Hence, the JJB in every case of a child alleged to have committed a 'heinous offence' will have to ascertain whether such child has completed the age of sixteen years. Regarding preliminary assessment, Rule 10A (1) of the JJ Model Rules, 2016, states, "The Board shall in the first instance determine whether the child is of sixteen years of age or above". Determination of age at this stage will have to be carefully done as its implications are strict - a child could be treated as an adult in case of error.

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47 *Gopinath Ghosh vs. State of West Bengal* : 1984 Supp SCC 228.

48 *Bhola Bhagat vs State of Bihar* : (1997) 8 SCC 720.

49 JJ Act, 2015, Section 15(1).

Prior to the JJB initiating a preliminary assessment, the child's lawyer should ensure that there is a finding that such child in conflict with the law has completed sixteen years of age. All efforts should be made for the child to remain within the juvenile justice system - it is the duty of the child's lawyer to ensure that a child is not compelled to undergo preliminary assessment if not warranted under the law. Any doubt regarding age of the child should be resolved in favour of the child. In *Rajinder Chandra v. State of Chhatisgarh,*[50] the Supreme Court while referring to *Arnit Das vs. State of Bihar*[51] held that regarding age "if two views may be possible on the said evidence, the Court should lean in favour of holding the accused to be a juvenile."

10.4. Where is a child in conflict with the law kept pending preliminary assessment?

Section 12, *Bail to a person who is apparently a child alleged to be in conflict with law*, applies to **all** children in conflict with the law – there is no exception for children alleged to have committed 'heinous offences'. Hence, pending preliminary assessment, such child may be released on bail except if such release is "likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice".[52] 'Bail' has been dealt with in detail in Chapter 13, and the same shall apply in case of children alleged to have committed 'heinous offences'. There is nothing under the JJ Act, 2015 because of which a child's lawyer should desist from applying for bail pending preliminary assessment. But, at the same time, it is important to note that bail is often denied to children alleged to have committed 'heinous offences' for reasons extraneous to Section 12 of the JJ Act, 2015 (gravity of offence; tampering with evidence). Lawyers should judiciously exercise this power - experience shows that lawyers file bail applications despite repeated rejections because of which precious time is wasted in appealing the order under Section 18(3) of the JJ Act, 2015, resulting in heavy costs being imposed by the appellate court for condoning the delay.

If a child is not released on bail pending preliminary assessment, such child may be placed in an observation home or place of safety.[53] A child in conflict with the law who is above 18 years of age, or a child between the age of 16 to 18 years and accused of committing a 'heinous offence' is kept in a place of safety.[54] A separate 'place of

50 (2002) 2 SCC 287.
51 (2000) 5 SCC 488.
52 JJ Act, 2015, Section 12(1), proviso.
53 JJ Act, 2015, Section 12(3).
54 JJ Act, 2015, Section 49(1).

safety' may be established by the State Government, or 'place of safety' may be attached to an observation home, where children may be placed pending preliminary assessment.

10.5. Procedure to be followed by JJB prior to shifting a child in conflict with the law into the criminal justice system

10.5.1. Applicable Standards for Preliminary Assessment

At the outset, it is vital to mention that any law that deprives a person of personal liberty should be 'fair, just and reasonable',[55] and should be accordingly interpreted. 'Waiver' of a child in conflict with the law amounts to deprivation of personal liberty as such child is incarcerated in a 'place of safety'.

Section 15(1) of the JJ Act, 2015 lays down the procedure to be followed by the JJB once the requirements of 'heinous offence' and age, are satisfied:

> In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of sub-Section (3) of Section 18.

Transfer of a child into the criminal justice system for treatment as an adult can only be done after 'preliminary assessment' by the JJB. The word "shall" indicates that it is mandatory for the JJB to conduct 'preliminary assessment'. There are three main reasons for conducting the 'preliminary assessment' - to assess (i) the child's mental and physical capacity to commit the alleged offence; (ii) the child's ability to understand the consequences of the offence; (iii) the circumstances in which the child allegedly committed the offence. All these three factors are to be holistically considered by the JJB when deciding whether a child should be transferred from the juvenile justice system. As the JJB is not equipped to assess the child's mental capacity to commit the offence, the legislature has provided that "the Board may take the assistance of experienced psychologists or psycho-social workers or other experts."[56]

Prior to examining what is expected of the JJB when conducting a preliminary assessment, it is necessary to understand the standard to be applied for measuring

55 *Maneka Gandhi v, Union of India* : (1978) 1 SCC 248.

56 JJ Act, 2015, Section 15(1), proviso.

'the mental capacity to commit the alleged offence' and 'the child's understanding of the consequences of the offence'. Per Section 82, IPC,[57] a child under seven years of age cannot be held culpable for committing an offence. Per Section 83, IPC,[58] culpability of a child above seven years and under 12 years depends on whether that child has "attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion" – such gauging of maturity is to be done by the JJB. Reading of Section 82 and 83,IPC indicates that the Indian law assumes that all children above twelve years of age understand the nature and consequences of their conduct; therefore, under IPC a child above 16 years has the required maturity and understanding. The fact that Section 15(1) of the JJ Act, 2015 seeks such determination for a child above sixteen years inspite of Sections 82 and 83,IPC, denotes that the standard for such assessment under juvenile legislation is different from that under IPC. Other than children, Section 84, IPC,[59] exempts "a person of unsound mind" from culpability - the degree of 'unsoundness of mind' should be such that the person "is incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law." If a child in conflict with the law is of 'unsound mind', Section 84,IPC gets invoked, and such child would anyways be exempted from culpability.

Hence, it would be correct to infer that the level of 'mental capacity' and 'understanding the consequences of the alleged offence' is much lower under Section 15(1) of the JJ Act, 2015 than under the IPC. The rational for such lower level in the context of juvenile justice legislation lies in the distinction between Sections 82, 83 and 84,IPC and preliminary assessment under the JJ Act, 2015. Sections 82, 83 and 84,IPC exempts the accused from **anyliability**, whereas the purpose of preliminary assessment is not to exempt a child from responsibility, but to **gauge the system (juvenile justice system or criminal justice system) under which the child should be treated**. This understanding of the standard to be applied in judging a child's 'mental capacity' and 'understanding the consequences of the act' is crucial as often the JJB's believe that the fact that the child is above 16 of age and is of sound mind is reason enough to shift such child into the criminal justice system. The Mental Health Report is perused merely to ascertain whether the child's mental health parameters are normal, and if so, such normality is perceived as a justification to shift such child out of the juvenile justice system.

10.5.2. How does the JJB assess whether the child has the physical and mental capacity to commit the alleged offence?

57 Act of a child under seven years of age.
58 Act of a child above seven and under twelve of immature understanding.
59 Act of a person of unsound mind.

To check arbitrariness in 'waiver', legislature has given the task of assessment to the JJB, who will act cautiously and responsibly, keeping in mind the socio-legal approach and objectives of juvenile justice legislation. The JJB may send the child for mental health status examination to the psychiatry department of a public hospital and a Mental Health Report is submitted by a doctor / doctors attached to such department. It is important to note that Mental Health Reports, mostly, do not depict anything extraordinary - the report would be similar for any boy[60] of that age, irrespective of whether alleged to have committed a heinous offence or not. The doctors seek the history of the incident from the child - some children deny commission of the offence, whereas others admit to the same. Any such admission made by a child to a doctor should be treated as extraneous and should not be looked at by the JJB/Children's Court during preliminary assessment and/or during inquiry/trial or any other proceedings. Such admission is irrelevant as it is self-incriminatory.[61] Further, the child is not aware of the consequences of such admission (the child is not informed that the same will be used against the child), and is susceptible to influence (at the hands of the investigating agency/staff of Observation Home), and due to characteristics attached to age may be easily manipulated (by the investigating agency). Moreover, a doctor is "a person in authority", and any admission made to such person is hit by implications under Section 24, Indian Evidence Act, 1872.[62]

Mental Status Examination merely records certain indicators: '

> Patient is conscious, cooperative, kempt. Attention aroused and sustained, eye to eye contact initiated and maintained. Rapport is established. Speech is continuous, coherent, relevant. Insight is present and Judgments intact. Past or personal history not significant. No history of past or family psychiatric illness. Denies any substance use in the present or past."

The report also talks of sexual characteristics:

> He has early morning erection and sometimes night fall denies masturbation. He has knowledge about sexual intercourse.

The IQ level of the child is also recorded in the report. The conclusion: "No psychopathology seen. He has mental capacity to commit offence."

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60 Gender specific mention has been made as 'preliminary assessment' is mainly conducted of children in conflict with the law alleged to have committed sexual offences who are chiefly boys.

61 Violates article 20(3) of Constitution, a fundamental right : "No person accused of any offence shall be compelled to be a witness against himself."

62 Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.

These observations and findings could be that of any 17 year old. The Mental Health Report merely shows the child's mental competency. The fact that the child has no mental disorders does not mean that he has the mental capacity to commit the crime. On the contrary, the report denotes that all the child's psychological parameters are normal and the child had no risk factors. It is also important to note that mental health experts are not examining the child soon after the offence, hence, they are in no position to state what the child's state of mind was on the date and time of offence, whatever they are saying is on hindsight. A Mental Health Report can merely say that a child has no mental illness or disorder - it cannot decisively say that the child has the mental capacity to commit such offence.

It is on conversation with the child and on consideration of the Mental Health Report that the JJB comes to a conclusion that the child has the "ability to understand the consequences of the offence". Merely because a child has knowledge about sexual intercourse (gained through exposure to video clips/conversations with peers) does not mean that he understands the impact that the offence will have upon the victim or the consequences that such child in conflict with the law could face. What is being discerned by the JJB is the child's competency to stand trial (inquiry), and not his understanding of the consequences of the act alleged to have been committed.

The legislation recognizes that it is not possible for the JJB to assess whether a child in conflict with the law has the 'mental capacity to commit such offence' and the "ability to understand the consequences of the offence", hence, has "Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts."[63] Rule 10A (2) of the JJ Model Rules 2016, also reiterates the proviso, with a qualification that such professionals should "have experience of working with children in difficult circumstances." The inclusion of this qualification denotes that offending is due to the difficult circumstances of the child, and such professionals can identify the gaps in the developmental needs. As aforementioned, instead of seeking help from psychologists or psycho-social workers, the JJB prefers to send the child to the psychiatry department of a public hospital for mental health status examination. JJBs claim paucity of such psycho-social services within their respective jurisdictions, which may be the case in remote districts, but surely not in metropolitan areas, such as Bengaluru, Delhi and Mumbai. DCPUs in each district are mandated to prepare a list of such professionals and academic institutions

63 JJ Act, 2015, Section 15(1), proviso.

whose assistance the JJB can avail of.[64] A psychiatrist is unable to satisfy the requirements of Section 15(1) of the JJ Act, 2015, as they are skilled to identify mental disorders/illnesses, and not the 'mind' of the child, which even psychologists/psycho-social workers cannot do. But what an experienced psychologist/psycho-social worker can do is identify the developmental gaps in a child's life and the manner in which the same may be resolved – to satisfy the goal of 'rehabilitation'.

JJB's have been known to argue that they are not obligated to seek such assistance as the word 'may' has been deployed in the proviso. It is important to reiterate that the JJB is not skilled to delve into the subject of a child's mental capacity or understanding; hence, legislature has incorporated the proviso to Section 15(1), JJ Act, 2015. The word 'may' should be understood to mean that no such assistance is necessary if the JJB is of the opinion that the child should be retained within the juvenile justice system, but if the JJB has doubts regarding such retention, taking the assistance of "psychologists or psycho-social workers" is mandatory prior to shifting a child in conflict with the law into the criminal justice system. The ultimate aim of the juvenile justice system is 'rehabilitation', and it is only a "psychologist or psycho-social worker" who legislature believes can opine as to whether a child can or cannot be rehabilitated within the juvenile justice system.

It is noted that the prosecution does not examine the doctor/doctors that have prepared the Mental Health Report. Moreover, the JJB generally treats the report as sacred, and transfers the child on the basis of the same, without giving the child an opportunity to cross-examine the maker so as to test his/her veracity. A child's lawyer, in suitable cases, keeping in mind the interest of the child, should make an application before the JJB for the maker of the report to be summoned as 'material witness' as such evidence is "essential for the just decision of that case."[65] The JJBs have disallowed such applications by taking recourse to the Explanation to Section 15(1), JJ Act, 2015 - "preliminary assessment is not a trial". It is true that preliminary assessment does not adjudicate the 'guilt' of the child, but to ensure 'the right to a fair hearing' (*Principles of natural justice)*, a child should be given the opportunity (*Principle of participation*) to challenge the evidence adduced by the prosecution (*Principle of best interest*). In fact, the child in conflict with the law should be permitted to present evidence in their support by examining expert witnesses/witnesses to disprove the prosecution's evidence. Any report/ material that the prosecution produces in support of their claim, and that the JJB relies upon

64 JJ MR, 2016, Rule 10A(2).
65 Cr.P.C., 1973, Section 311.

when conducting the preliminary assessment, the child's lawyer should have an opportunity to test.

As mentioned in earlier chapters, under the juvenile justice system, a child in conflict with the law's treatment is commensurate not solely on the nature of the offence, but also on the circumstances of the child and the factors that may have resulted in his / her offending. Hence, the JJB is required to assess the situation of the child and "the circumstances in which he allegedly committed the offence". Such assessment may be conducted by the JJB, more particularly the social work Members, having detailed conversation with the child and obtaining a SIR from the Probation Officer. The JJB often misinterprets this aspect – instead of trying to understand the circumstances of the child in conflict with the law, and the gaps in his/her developmental needs and/or the risk factors, they read the FIR/chargesheet to scrutinize the gravity of the offence and the role played by the child. Mostly, the orders of the JJB transferring the child into the criminal justice system reproduce portions of the FIR/chargesheet. The chargesheet may be read to indicate whether the allegation is regarding a 'heinous offence', but not to ascertain 'the situation of the child' or 'the circumstances of the alleged offence'. It is important to keep in mind that at the time of preliminary assessment, undue reliance cannot be placed upon the chargesheet – this would amount to predetermining the 'guilt' of the child, and would be contrary to the tenets of criminal jurisprudence and the *Principle of presumption of innocence*.

A fundamental opposition to 'waiver' is that the facts depicted in the FIR / chargesheet are presumed to exist, and significant decisions are made on the basis of the same - lawyers know that often what is stated in the FIR/chargesheet is not proved in court by the prosecution. Such assumption causes irreparable harm to the child in conflict with the law. Therefore, the facts in the FIR/chargesheet should not be relied upon at the stage of preliminary assessment. It could also cause an anomaly – the FIR / chargesheet shows the alleged offence to be a 'heinous offence' and a child is shifted into the criminal justice system, but on completion of trial, instead of a 'heinous offence' ('penetrative sexual assault' under the POCSO Act), the commission of a 'serious offence' ('sexual assault' under the POCSO Act) or 'petty offence' ('sexual harassment' under the POCSO Act) is proved – the child was sent into the criminal justice system with all its hardships on the basis of unproven facts! Such shifting cannot be dependent on police investigation reflected in the chargesheet as this shifts the power of transfer from the JJB to the investigating agency, and could easily be misused. Children's lawyers should ensure that the JJB is guided by an SIR when assessing 'the circumstances in which the child allegedly committed the offence', and not by the FIR / chargesheet. The Model Rules 2016

does not throw much light on the manner in which the preliminary assessment is to be conducted, and the material that should be considered and weighed for such purpose.

"A preliminary assessment in case of heinous offences under Section 15 shall be disposed of by the Board within a period of three months from the date of first production of the child before the Board."[66] Generally, the JJB waits for the chargesheet to be submitted, but as mentioned earlier in this Chapter; it is not the offence, but the circumstances of the child that should be considered during preliminary assessment. For information regarding the offence, the JJB may seek from the investigating officer "the statement of witnesses recorded by him and other documents prepared during the course of investigation within a period of one month from the date of first production before the Board, a copy of which shall also be given to the child or parent or guardian of the child."[67] Furnishing of such documents may provide the JJB with requisite information, as also enable the child to refute the same. For example, the statement of a 'victim' may reflect that it is a case of romantic relationship registered at the behest of an angry parent, and the same may be further substantiated by the child's lawyer's arguments, thereby, warranting retention of the case by JJB. It is for the child's lawyer to decide in the interest of the child, whether it is better to wait for the chargesheet to be submitted or to proceed with the preliminary assessment in its absence.

10.6. Orders that a JJB may Pass on Completion of Preliminary Assessment

Order on preliminary assessment should be passed by JJB after giving equal weightage to all the aforementioned three factors, namely, the child's mental and physical capacity to commit the alleged offence; the child's ability to understand the consequences of the offence; and the circumstances in which the child allegedly committed the offence.

The fact that a preliminary assessment should be conducted by the JJB prior to 'waiver' shows that every child in conflict with the law who is above 16 years of age and is alleged to have committed a 'heinous offence' is not to be transferred into the criminal justice system – such decision is to be taken by the JJB after careful assessment. The JJB has the power to retain the child within the juvenile justice system: "Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far

66 JJ Act, 2015, Section 14(2).
67 JJ MR, 2016, Rule 10A (5).

as may be, for trial in summons case under the Code of Criminal Procedure, 1973 (2 of 1974)".[68]

A child's lawyer should be heard prior to the JJB passing an order on preliminary assessment – this is the right of a child (*Principle of participation* and *Principles of natural justice*). The lawyer should take advantage of this opportunity to assure the child protection of the juvenile justice system by challenging reports and any other material considered by the JJB during preliminary assessment; presenting oral and documentary evidence in support of retaining child within the juvenile justice system. The focus of the child's lawyer's arguments should be on reflecting that the child's rehabilitation can be assured only within the juvenile justice system, and it is in the best interest of the child (*Principle of best* interest) to so treat the child. The lawyer should network with civil society organisations/academic institutions to show that if resources are aptly deployed (*Positive* measures) there is no need to 'waive' the child into the criminal justice system. The lawyer may argue that the prosecution has not been able to rebut the *Principle of presumption of innocence* to show that the child in conflict with the law has 'mala fide' or 'criminal intent'. The child's lawyer may also argue that shifting the child into the criminal justice system violates the *Principle of equality and non-discrimination*, and that lengthy incarceration in a place of safety and separation from family is contrary to the *Principle of family responsibility*, the *Principle of repatriation and restoration*, the *Principle of institutionalisation as a measure of last resort*, the *Principle of non-waiver of rights* and the *Principle of fresh start*. For effective representation, the child's lawyer should refer to the intent of the legislature through the title, the preamble and the *General principles to be followed in administration of Act*. The lawyer must illustrate through examples how transfer is (i) against the well-settled principles of criminal law (child is presumed to be 'guilty'), (ii) against the best interest of the child (denied protection of juvenile justice system), (iii) against the philosophy of juvenile justice (children without exclusion should be treated within the juvenile justice system), (iv) most unreasonable (difficult to guess how the proceedings will unfold in future).

Under Section 18(3), JJ Act, 2015, the JJB on completion of preliminary assessment, and after giving the child a hearing, may transfer the child in conflict with the law into the criminal justice system: "Where the Board after preliminary assessment under Section 15 pass an order that there is need for trial of the said child as an adult, then the Board may order transfer of the case to the Children's Court having jurisdiction to try such offences." An order under Section 18(3) should be passed by

68 JJ Act, 2015, Section 15(2).

"atleast two members including the Principal Magistrate"[69] – this reflects that orders relating to preliminary assessment require social intervention. An order under Section 18(3) is invalid if signed only by the Principal Magistrate, and is a ground for challenge. "In the event of any difference of opinion among the members of the Board in the interim or final disposal, the opinion of the majority shall prevail, but where there is no such majority, the opinion of the Principal Magistrate shall prevail."[70] To ensure a majority-ruling, it is critical that all three members of the JJB are sitting when passing an order under Section 18(3). If the Principal Magistrate and one social work member are sitting, the social work member having a differing opinion should record his/her dissent, so that the differing views may be brought to the attention of the appellate court. An order under Section 18(3) should be a reasoned order: "Where the Board, after preliminary assessment under Section 15 of the Act passes an order that there is need for trial of the said child as an adult, shall assign reasons for the same."[71] The child's lawyer's arguments should be such that the JJB finds it very difficult to give cogent reasons for transfer. For such purpose, it is imperative that the lawyer refers to the *General principles to be followed in administration* of *Act*,as the JJB is bound to adhere to the same "while implementing the provisions of this Act".[72] Most preliminary assessment orders indicate that the JJB's reasons are in relation to nature of offence as reflected in FIR / chargehseet, and a perfunctory mention is made of the Mental Health Report. The child's lawyer should ensure that arguments made in support of retention are included in the order, and responded to by the JJB, so that the same may be relied on when the order is challenged.

10.7. Transfer to Children's Court

Under Section 18(3), JJ Act, 2015, the "trial" of the case is transferred "to the Children's Court having jurisdiction to try such offences". Under Section 2(20), JJ Act, 2015:

> Children's Court' means a court established under the Commissions for Protection of Child Rights Act, 2005 (4 of 2006) or a Special Court under the Protection of Child Rights Act, 2012 (32 of 2012), wherever existing and where such courts have not been designated, the Court of Sessions having jurisdiction to try offences under the Act.

The preamble of the Commissions for Protection of Child Rights Act provides for

69 JJ Act, 2015, Section 7(3), proviso.
70 JJ Act, 2015, Section 7(4).
71 JJ MR, 2016, Rule 10A (4).
72 JJ Act, 2015, Section 3.

constituting of "Children's Courts for providing speedy trial of offences against children or of violation of child rights." It is paradoxical that a court that is established to entertain cases relating to offences against children is also empowered to entertain cases of children in conflict with the law. Is it that the legislature felt that the Children's Court would be best able to balance rights of child victims and child offenders? According to Section 20(2), JJ Act, 2015, the trial of a case registered under the POCSO Act will be dealt with by the Special Court constituted under that Act[73] hence the same court is empowered to conduct trials of an adult accused or a child in conflict with the law. It is apprehended that a court that conducts trials against adults and children may find it difficult to constantly swing between the punitive approach and the rehabilitative approach, thereby causing detriment to the interests of children in conflict with the law. A Sessions Court is designated as a Children's Court under the Commissions for Protection of Child Rights Act and the Special Court under the POCSO Act, such court is not enabled to provide rehabilitative services, nor social work intervention. Transfer of a child in conflict with the law into the criminal justice system denies such child the benefits of social work intervention and rehabilitative services as envisaged under juvenile justice legislation.

10.7. How should the Children's Court deal with children in conflict with the law?

At the outset, it is essential to note that *the General Principles to be followed in administration of Act*[74] are also applicable before the Children's Court. The Juvenile Justice (Care and Protection of Children) Act, 2015 also deals with proceedings before the Children's Court. Merely because a child in conflict with the law is shifted into the criminal justice system does not mean that in every aspect, such child should be treated as an adult.

Upon the child in conflict with the law's case being transferred, the Children's Court should decide as to whether "there is need for trial of the child as an adult" [75] or whether "there is no need for trial of the child as an adult and may conduct an inquiry as a Board".[76] Before the Children's Court too there is a chance for the child to be dealt with under the juvenile justice system. The child's lawyer should bring this provision to the notice of the Children's Court and argue that the order passed by the JJB is erroneous, and that the child should be treated as a 'child'. Lawyers may

73 POCSO Act, 2012, Section 28.
74 JJ Act, 2015, Section 3.
75 JJ Act, 2015, Section 19(1)(i).
76 JJ Act, 2015, Section 19(1)(ii).

also use this provision if the application for condoning delay in filing an appeal is rejected – Section 19(1) does not mention any time limit within which such decision may be made by the Children's Court.

If the Children's Court passes an order under Section 19(1)(ii), it shall conduct an inquiry as a JJB and pass appropriate orders under Section 18(1) and (2) of the JJ Act, 2015. The child's case is not remanded to the JJB for inquiry – under Section 8(2), the Children's Court can exercise the powers of the JJB "when the proceedings come before them under Section 19". It is preferable to file an appeal under Section 101(2) of the JJ Act, 2015, as under Section 19(1)(ii), it is the Children's Court who will conduct the inquiry, thereby, denying the child a socio-legal approach, whereas, if an appeal is allowed, the case will be returned to the JJB for hearing.

If the Children's Court passes an order under Section 19(1)(i) of the JJ Act, 2015, it shall conduct a trial and pass appropriate orders "considering the special needs of the child, the tenets of fair trial and maintaining a child friendly atmosphere." A child found 'guilty' by the Children's Court is to be sent to a 'place of safety'.[77] The phrase 'child friendly atmosphere' indicates that during the process before the Children's Court, the fact that the accused is a 'child' should not be forgotten. The Act does not mention the period of incarceration in a 'place of safety' – the phrase 'considering the special needs of the child' can be argued to denote that the Children's Court is not bound by the punishment laid down for that offence under the IPC or any other law for the time being in force – it is the circumstances of the child ('special needs') that will determine the period of incarceration in the 'place of safety'. Therefore, such period of incarceration may be less than the mandatory minimum period of imprisonment stipulated for such offence, but should not exceed the mandatory maximum period, as the same would put a child to greater hardship than an adult convicted for same offence.

Section 21 of the JJ Act, 2015 expresses, "No child in conflict with law shall be sentenced to death or for life imprisonment without the possibility of release" - hence, though a punishment for an offence may be 'death' (Section 302, IPC) or 'imprisonment for life, which may mean imprisonment for the remainder of that person's natural life' (Section 376-A, IPC), such sentence cannot be imposed on a child in conflict with the law..

The 'place of safety' shall provide the child with "reformative services including educational services, skill development, alternative therapy such as counselling, behaviour modification therapy, and psychiatric support".[78] Further,

77 JJ Act, 2015, Section 19(3).
78 JJ Act, 2015, Section 19(3), proviso.

> The Children's Court shall ensure that the final order, with regard to a child in conflict with law, shall include an individual care plan for the rehabilitation of child, including follow up by the probation officer or the District Child Protection Unit or a social worker.[79]

Also,

> The Children's Court shall ensure that there is a periodic follow up report every year by the probation officer or the District Child Protection Unit or a social worker, as required, to evaluate the progress of the child in the place of safety and to ensure that there is no ill-treatment to the child in any form.[80]

Such report should be "forwarded to the Children's Court for record and follow up as may be required."[81] Further, "The Children's Court may also direct the child to be produced before it periodically and at least once every three months for the purpose of assessing the progress made by the child and the facilities provided by the institution for the implementation of the individual care plan."[82] Rehabilitative services and follow up is most important because when the child in conflict with the law "attains the age of twenty-one years and is yet to complete the term of stay", the Children's Court is required "to evaluate if such child has undergone reformative changes and if the child can be a contributive member of the society"[83], and if such evaluation is positive, the Children's Court may "decide to release the child on such conditions as it deems fit which includes appointment of a monitoring authority for the remainder of the prescribed period of stay."[84]"A Probation Officer or Case Worker or Child Welfare Officer or a fit person may be appointed as a monitoring authority" by the Children's Court.[85] The DCPU is to "maintain a list of such persons who can be engaged as monitoring authorities", and share such list with the Children's Court.[86] If the evaluation is in the negative, the consequences upon the child are harsh – the Children's Court may "decide that the child shall complete the remainder of his term in jail."[87]

That a child in conflict with the law may end up in jail is most draconian. It violates the basic principle of juvenile justice, viz., that a child due to characteristics inherent

79 JJ Act, 2015, Section 19(2).
80 JJ Act, 2015, Section 19(4).
81 JJ Act, 2015, Section 19(5).
82 JJ MR, 2016, Rule 13(8)(v).
83 JJ Act, 2015, Section 20(1).
84 JJ Act, 2015, Section 20(2)(ii).
85 JJ MR, 2016, Rule 13(8)(vii)(a).
86 JJ MR, 2016, Rule 13(8)(vii)(b).
87 JJ Act, 2015, Section 20(2)(ii).

with age should be treated distinctly from an adult and that such child should not be allowed to mingle with adult offenders. To ensure that a child is not shifted to jail on attaining 21 years, legal representation should be accorded to such child at the stage when evaluation and follow up is considered by the Children's Court. Hence, the role of a child's lawyer before the Children's Court does not end at the sentencing stage – the lawyer should ensure that the child is offered rehabilitative services in the 'place of safety' and that follow up reports are properly prepared. What is the child's lawyer to do if the reports are negative? The word "may" (Section 20(2) of the JJ Act, 2015) allows the child's lawyer to argue that such child should remain in the 'place of safety' for the remainder of the term, as shifting such child to jail is not going to aid the reformative / rehabilitative process, if anything, incarceration in jail will have a damaging effect.

The child's lawyer should to the best of his / her ability resist transfer of a child in conflict with the law into the criminal justice system - this entails legal representation at different stages and levels, namely, before the JJB during preliminary assessment and challenging an order under Section 18(3) of the JJ Act, 2015 before the appellate court. Despite efforts, if a child is transferred out of the juvenile justice system, the lawyer should facilitate legal representation before the Children's Court, and ensure suitable reformative / rehabilitative services in the 'place of safety'. The object of intervention alters depending on the stage / level - before the JJB, the focus is to ensure that the child remains within the juvenile justice system; before the appellate court, the focus is on the setting aside of the order passed under Section 18(3) and returning the case to the JJB; before the Children's Court, the focus is to ensure that the case of the child is dealt with under Section 19(1)(ii) of the JJ Act, 2015; if child is found 'guilty by the Children's Court, the focus is to ensure that the stay in the 'place of safety' is for a smallest period; while child is in the 'place of safety', the focus is on implementation of the individual care plan and proper follow up; on the child attaining twenty-one years, the focus is on release of child prior to completing the term of stay upon evaluation by the Children's Court. It is not always that a single lawyer can play this all-encompassing role, but the lawyer should facilitate the same, with the help of the SLSA/DLSA, if necessary.

10.8. Appeals against the Order of Preliminary Assessment by the Child in Conflict with the Law

A child in conflict with the law may prefer an appeal from an order passed by the JJB on preliminary assessment.[88] Section 101 of the JJ Act, 2015 deals with 'Appeals'.

88 JJ Act, 2015, Section 101(2).

Section 101(1) states, "Subject to the provisions of this Act,[89] any person aggrieved by an order made by the…Board under this Act may, within thirty days from the date of such order, prefer an appeal to the Children's Court". Hence, the right of appeal is with the child in conflict with the law, the State and the victim. The court has the powers to "entertain the appeal after the expiry of the said period of thirty days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time".[90] If an appeal is preferred after expiry of the period of limitation, an application for condonation of delay will have to be filed before the appellate court. In a child's case, 'sufficient cause' would include absence of familial/other support and no proper legal advice. The Supreme Court has repeatedly held that courts should adopt a liberal approach when condoning delay - "Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated";[91] "When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preserved";[92] "when the delay is not due to want of bona fides by the petitioner and is due to the party having acted in a particular manner on the wrong advice given by his legal adviser he cannot be held guilty of negligence so as to disentitle him to plead sufficient cause".[93]

Appellate courts generally condone delay on payment of costs, which a child may not be able to deposit, hence, the lawyer should make arguments to show inability to make such payment (no family support, parent/guardian belonging to low-income group) and that such pre-condition may deprive a child the opportunity to legal justice.

Section 101(2), specifically deals with appeal "against the order of the Board passed after making the preliminary assessment into a heinous offence under Section 15 of the Act". In addition to what is contained in sub-Section (1) and its proviso, sub-Section (2) provides, "the Court, may while deciding the appeal, take the assistance of experienced psychologists and medical specialists other than those whose assistance has been obtained by the Board". Such provision enables the child's lawyer to seek a fresh mental health assessment. To promote speedy culmination, the Act states that an appeal should be disposed of within 30 days.[94]

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89 JJ Act, 2015, Section 101(3): "No appeal shall lie from, - (a) any order of acquittal made by the Board in respect of a child alleged to have committed an offence other than a heinous offence by a child who has completed or is above the age of sixteen years".

90 JJ Act, 2015, Section 101(1), proviso.

91 *Collector, Land Acquisition, Anantnag & Anr. v. Katiji & Ors.* : 1987 (2) SCC 107.

92 *Ibid.*

93 *Indian Statistical Institute v. M/s. Associated Builders &Ors.* : (1978) 1 SCC 483.

94 JJ Act, 2015, Section 101(1), proviso.

There is some confusion regarding the forum before which an appeal will lie – Section 101(1) of the JJ Act, 2015, refers to the appellate court as 'Children's Court'; the proviso to Section 101(1) refers to the appellate court as 'Court of Sessions'; Section 101(2) refers to the appellate court as 'Court of Sessions'; rule 13 of the Model Rules, 2016 refers to the appellate court under sub-Sections (1) and (2) of Section 101 as the 'Children's Court'. It appears that the provisions relating to the appellate courts have used the forums 'Children's Court' and 'Court of Session' interchangeably. Rules are subordinate legislation, thus, should be guided by the provisions of the Act, hence, one may argue that an appeal from an order under Section 18(3) of the JJ Act, 2015 will lie before the 'Court of Sessions', as the same is expressly mentioned in the Act.

Two things are important to enable a child in conflict with the law to appeal an order under Section 18(3) of the JJ Act, 2015 – (i) copy of the order; (ii) legal representation before the appellate court. Rule 10A(4) of the Model Rules 2016 states that copy of order passed under Section 18(3) should be provided to the child forthwith. Sadly, due to want of legal representation, most children are unable to challenge the order transferring them in to the criminal justice system. It is imperative that the lawyer representing the child before the JJB facilitates the filing of an appeal before the appellate court – the same lawyer may prefer the appeal or the child may be referred to a competent lawyer or the DLSA may be approached for such purpose. A system should be organised whereby every child in conflict with the law is able to avail of the right to appeal an order under Section 18(3). The JJB should refer such matters to the DLSA, DLSA should establish a panel of lawyers in the appellate court, training should be accorded to such lawyers on juvenile justice legislation.

Can a child in conflict with the law challenge an order passed by the appellate court regarding preliminary assessment?

A child in conflict with the law is barred from preferring an appeal from an order of the appellate court - "No second appeal shall lie from any order of the Court of Session, passed in appeal under this Section."[95] But such child may file a 'revision' under Section 102 of the JJ Act, 2015 before the High Court – "for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit." To operationalize 'revision', a child in conflict with the law should have opportunity to legal-aid at the High Court level. When an order on preliminary assessment by the appellate court is challenged in

95 JJ Act, 2015, Section 101(4).

revision by the State or victim, the High Court should give the child in conflict with the law "a reasonable opportunity to be heard".[96]

The court of appeal (Children's Court) and revision (High Court) have the same powers of the JJB[97] therefore they may pass appropriate orders under the JJ Act, 2015.

So that the provisions relating to 'appeal' and 'revision' do not merely remain on paper, the child's lawyer should enable the enjoyment of the same by the child in conflict with the law. Such enabling role should also be played by the SLSA / DLSA be empanelling lawyers to provide legal representation to the child at the different levels.

96 JJ Act, 2015, Section 102, proviso.
97 JJ Act, 2015, Section 18(2).

11 Orders that may be Passed by a Juvenile Justice Board

By Advocate Maharukh Adenwalla

11.1. Introduction

The process of the juvenile justice system which is geared towards rehabilitation of the child culminates with the JJB's order when the child is found to be in conflict with the law or found innocent. Hence, it is vital for the JJB to pass an order that is most suitable in view of the objectives of juvenile justice and the circumstances of the child. As mentioned in earlier chapters, the task before the JJB is to identify the developmental gaps in a child's life, which may be related to the offending, and to resolve the same with appropriate interventions or inputs. The Beijing Rules, in this respect, state that prior to passing a final order "the background and circumstances in which the juvenile is living or the conditions under which the offence has been committed shall be properly investigated so as to facilitate judicious adjudication of the case by the competent authority."[1]

Under the JJ Act, 2015, there is a range of final orders that may be passed by the JJB. The child's lawyer should ensure that discretion of the JJB is not arbitrarily applied when selecting the final order – it should be per the facts and circumstances of each case and child. The Beijing Rules stipulate the *Guiding principles in adjudication and disposition:*[2]

> (a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society; (b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum; (c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a

1 Beijing Rules, 1985, Rule 16.1.
2 Beijing Rules, 1985, Rule 17

serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response; (d) The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.[3]

Such guidelines denote that it's not gravity of the offence by itself that determines selection of the final order - the "circumstances and the needs" of the child, and the "well-being" of the child, should also be considered. Therefore, seeking and considering a Social Investigation Report is a pre-requisite to the JJB's passing its final order. Energy and attention expended in careful preparation of SIR is well worth the time spent.

It is noticed that though JJBs are most cautious when conducting the inquiry, often transgressing the stipulated period, scant time is spent when selecting the final order. The child's lawyer should make arguments regarding the final order to be passed, and the JJB should be steered into holding an informed and extensive discussion in this respect. Passing of final orders should not be mechanically done - the situation of the child should be minutely examined, and a suitable order selected to meet the needs of that particular child. Selection of an order does not have to be done in a single sitting - the case may be adjourned so that appropriate inputs may be sought. It is also noticed that the final order is selected chiefly on the basis of the gravity of the offence, and the circumstances of the child are cursorily looked at so as to portray that the spirit of the legislation has been adhered to. A child's lawyer should constantly revert the JJB to the circumstances of the child, and away from the type of offence committed. It is important to acknowledge that a child who has committed a 'petty offence' may require greater intervention than a child who has committed a 'serious offence' or 'heinous offence' - the focus should be on the needs of that child, irrespective of the offence committed. A child is tagged as a 'habitual offender' when he/she re-enters the juvenile justice system - such re-entry is due to the system not having correctly identified such child's circumstances and needs.

Another aspect noted is that the JJBs oscillate between the extremities - "allow the child to go home after advice or admonition"[4] or "direct the child to be sent to a special home"[5] - dispositional measures between these two extremities are rarely applied. JJB should be persuaded into adopting innovative ways to apply other dispositional measures in the child's interest.

3 Beijing Rules, 1985, Rule 17.1.
4 JJ Act, 2015, Section 18(1)(a).
5 JJ Act, 2015, Section 18(1)(g).

Objectives of juvenile justice legislation and the *General principles to be followed in administration of Act* should be kept in mind by the JJB when selecting a dispositional measure.

11.2. What orders is the JJB empowered to pass on completion of inquiry?

On completion of inquiry the JJB may decide that the child has not committed any offence or that a child has committed an offence.*Orders regarding a child not found to be in conflict with law* and *Orders regarding child found to be in conflict with law* are dealt with under Section 17 and Section 18 of the JJ Act, 2015, respectively.

"Where a Board is satisfied on inquiry that the child brought before it has not committed any offence, then notwithstanding anything contrary contained in any other law for the time being in force, the Board shall pass order to that effect."[6] If such child is in the Observation Home and has not been granted bail, the child should be forthwith released on passing of such order.

Sub-Section (2) of Section 17, permits the JJB to refer the case of a child in conflict with the law to the CWC - "In case it appears to the Board that the child referred to in sub-Section (1) is in need of care and protection, it may refer the child to the Committee with appropriate directions." It is not that the case of every child who has no family support should be referred to CWC - for purpose of such referral, the child should be a 'child in need of care and protection' under Section 2(14) of the JJ Act, 2015. If a child is able to care for himself / herself, such referral should be opposed, as it may result in such child's liberty being further restricted. JJBs have the powers under Section 8(3)(g) of the JJ Act, 2015 to transfer

> to the Committee, matters concerning the child alleged to be in conflict with law, stated to be in need of care and protection at any stage, thereby recognizing that a child in conflict with law can also be a child in need of care simultaneously and there is a need for the Committee and the Board to be both involved.

Competent authorities under the JJ Act, 2015 (JJB and CWC) have distinct jurisdictions, and overlapping of the same could result in a chaotic situation - it is only in exceptional circumstances that both these competent authorities may simultaneously get involved in a single case.

11.2.1. Can the JJB close inquiry of a child in conflict with the law?

6 JJ Act, 2015, Section 17(1).

Expeditious completion of an inquiry is the essence of juvenile justice legislation - delay unnecessarily disrupts the life of a child in conflict with the law. Therefore, the JJ Act, 2015 contains provisions for quick disposal. "If an inquiry by the Board under sub-Section (2) for petty offences remains inconclusive even after the extended period, the proceedings shall stand terminated".[7] Sub-Section (2) of Section 14 states,

> The inquiry under this Section shall be completed within a period of four months from the date of first production of the child before the Board, unless the period is extended, for a maximum period of two more months by the Board, having regard to the circumstances of the case and after recording the reasons in writing for such extension.

A child's lawyer should diligently seek termination (closure) of an inquiry regarding 'petty offence' on expiry of the extended period, and the JJB is obligated to terminate (close) the proceedings as is evidenced by the word "shall". Termination (closure) of proceedings is not an option for 'serious offences' or 'heinous offences' - in such cases, further extension is granted for conclusion of inquiry by Chief Judicial Magistrates (CJMs) / Chief Metropolitan Magistrates (CMMs) "for reasons to be recorded in writing."[8] Mostly, no such further extension is sought by JJBs from CJMs / CMMs. Children's lawyers in the absence of such further extension having been granted should seek termination (closure) of the inquiry as such continuance is ultra vires the law - such application for termination (closure) should be made before the JJB, and in case of rejection or post-facto grant of extension, the same should be challenged before the High Court. Instead of applying before the JJB, the child's lawyer may facilitate the filing of a writ petition before the High Court for violation of the procedure established under the law (juvenile justice legislation).

Moreover, the JJ Act, 2015 provides that except when "otherwise expressly provided by this Act,…a Board while holding any inquiry under any of the provisions of this Act, shall follow, as far as may be, such procedure laid down in the Code of Criminal Procedure, 1973 (2 of 1974) for trial of summons cases."[9] Hence, Section 258 of Cr.P.C is applicable to juvenile cases - the JJB may after recording reasons for doing so "stop the proceedings at any stage without pronouncing any judgment" and release (discharge) the child in conflict with the law. A child's lawyer may invoke Section 258 of CrPC and seek closure of inquiry if continuance of

7 JJ Act, 2015, Section 14(4).
8 JJ Act, 2015, Section 14(4), proviso.
9 JJ Act, 2015, Section 103(1).

the inquiry is likely to serve no purpose. Section 258 of CrPC also permits the JJB to stop proceedings and pronounce a judgment of acquittal "after the evidence of principal witnesses has been recorded". Hence, if the evidence of a material witness denotes that no offence has been committed, the child's lawyer may seek closure of the case so as to avoid unnecessary disturbance to the child.

11.2.3. What role does the victim play at the stage of passing of final orders?

A victim who has suffered damage or injury due to commission of a crime is a prosecution witness during inquiry, and may play an extended role before the JJB, through a 'watching advocate' (lawyer instructed by victim).[10] The victim's role before the JJB ends after the JJB arrives at a finding that the child in conflict with the law has committed the offence - justice is done to the victim on such finding of the JJB. Selection of an order that satisfies the facts of the case, and the circumstances and needs of the child in conflict with the law is a matter between such child and the JJB. An appropriate order is that which conforms to the objective of juvenile justice legislation. During arguments, the child's lawyer should stress that the sole criteria for deciding the order should be that which is most suitable for rehabilitation of the child, and the same should not be overpowered by any other concern.

11.3. What orders is the JJB empowered to pass regarding child found to be in conflict with the law?

Section 18(1) of the JJ Act, 2015 lists the different dispositional orders that the JJB may pass on completion of inquiry. In addition to such orders, the JJB may also pass orders under Section 18(2) of the JJ Act, 2015 depending on the circumstances and needs of individual children. Section 18(1) is similar to Section 15(1) of the JJ Act 2000, but Section 18(2) has been freshly inserted in the 2015 Act.

11.3.1. Regarding which children in conflict with the law can the JJB pass orders per Section 18(1) of the JJ Act, 2015?

Firstly, the inquiry should have been completed, and the JJB should have been satisfied that the child in conflict with the law has committed an offence. Such orders may be passed regarding a child who :

- "irrespective of age has committed a petty offence, or a serious offence";[11]

10 Cr.P.C, 1973, Section 301(2).
11 JJ Act, 2015, Section 18(1).

- "below the age of sixteen years has committed a heinous offence";[12]
- Is above sixteen years, and after preliminary assessment, the Board decides to dispose of the matter";[13] or
- Is above sixteen years, and after receipt of preliminary assessment, the Children's Court decides that "there is no need for trial of the child as an adult".[14]

In all the aforementioned cases, the JJB and the Children's Court may pass orders under Section 18(1) and 18(2) of the JJ Act, 2015. It is only in cases where the Children's Court decides that "there is need for trial of the said child as an adult"[15] that orders are passed outside of Section 18(1) and 18(2).

11.3.2. What should the JJB and the Children's Court consider when selecting the mode of disposition under Section 18(1) of the JJ Act, 2015?

The disposition order is "based on the nature of offence, specific need for supervision or intervention, circumstances as brought out in the social investigation report and past conduct of the child".[16] All these aspects together should be examined when selecting the mode of disposition.

Differential treatment of a child on the basis of "nature of offence" has for the first time been included in the JJ Act, 2015. "Nature of offence" has also been included to gauge the selection of the disposition measure. It is apprehended that the "nature of offence" will be the standard utilized by JJBs, more particularly the Principal Magistrate, when selecting the mode of disposition, and the circumstances of the child may take a backseat, thereby, denying the child the much needed developmental inputs. It is the child's lawyer's representation that should convince the JJB that it should adopt a socio-legal approach throughout the process, including when passing final orders, and not to give disproportionate attention to the "nature of offence".

On completion of inquiry, the JJB may think that a particular child has a "specific need for supervision", and should provide for the same through its order. Under the JJ Act, 2015, the JJB may release a child "on probation of good conduct and placed

12 *Ibid.*
13 JJ MR, 2016, Rule 11(1).
14 JJ Act, 2015, Section 19(1)(ii).
15 JJ Act, 2015, Section 19(1)(i).
16 JJ Act, 2015, Section 18(1).

under the care of any parent, guardian or fit person"[17] or "on probation of good conduct and placed under the care and supervision of any fit facility".[18] Release of a child under care and supervision should be deployed as an alternative to institutionalization, and should be welcomed as a measure to restore a child to a family-setting or community-setting (*Principle of repatriation and restoration* and *Principle of institutionalization as a measure of last resort*). 'Supervision orders' are a disposition measure under the Beijing Rules.[19]The Beijing Rules state that a child should not be removed from "parental supervision", unless necessary.[20]

Under the JJ Act, 1986[21] and the JJ Act, 2000[22], there were specific provisions where the Juvenile Court or JJB, respectively, to complement certain orders passed under Section 21(1) and Section 15(1), respectively, were empowered to place such children under the supervision of probation officer for a period not exceeding three years. 'Supervision' was defined under the JJ Act 1986:

> 'Supervision', in relation to a juvenile placed under the care of any parent, guardian or other fit person or fit institution under this Act, means the supervision of that juvenile by a probation officer for the purpose of ensuring that the juvenile is properly looked after and that the conditions imposed by the competent authority are complied with.[23]

Supervision' ensures that the progress of the child is monitored, including adherence to the Individual Care Plan - lapses, if any, are brought to the notice of the JJB, and corrective action is taken in the best interest of the child.

The JJ Model Rules, 2016, on *Completion of Inquiry*, allows for the JJB to place a child under supervision of probation officer when passing certain disposition orders under Section 18(3) of the JJ Act, 2015 –

> The Board, where it releases a child on probation and places him under the care of parent or guardian or fit person or where the child is released on probation and placed under the care of fit facility, it may also order that the child be placed under the supervision of a Probation Officer who shall submit periodic reports in Form 10 and the period of such supervision shall be maximum of three years.[24]

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19 Beijing Rules, 1985, Rule 18.1 (a).
20 Beijing Rules, 1985, Rule 18.2.
21 JJ Act, 1986, Section 21(2).
22 JJ Act, 2000, Section 15(3).
23 JJ Act, 1986, Section 2(s).
24 JJ MR, 2016, Rule 11(9).

Further, "Where it appears to the Board that the child has not complied with the probation conditions, it may order the child to be produced before it and may send the child to a special home or place of safety for the remaining period of supervision."[25] The *Duties of a Probation Officer* also reflects such 'supervisory' functions: "To make regular visits to the residence of the child under his supervision and places of employment or school attended by such child and submit periodic reports as per Form 10".[26] Form 10, *Periodic Report by Probation Officer when child is released on probation*, is a format of the progress report, and indicates the information to be gathered during follow up. Supervision may be necessary in certain cases to ensure rehabilitation of the child - a child's lawyer should not shy away from supervisory orders. Supervision results in monitoring the child's progress, as also positive alterations to the child's Individual Care Plan, if it is noticed by the probation officer that the same is not having the desired effect. Formation of a healthy relationship between the child and the Probation Officer may be the outcome, which would provide guidance to the child during difficulties. Such supervision should not be excessive and overbearing, so as to defeat its healthy effect.

"Specific need for intervention" is another factor that the JJB should consider when passing a final order. The inquiry process may reveal developmental gaps in a child's life requiring intervention - the order should resolve these needs so that the child's situation is improved. Intervention may be of different kinds depending on the child's needs - some of these are listed under Section 18(2) of the JJ Act, 2015. The principle of *Positive measures* assures the child suitable intervention by mobilizing resources "to reduce the vulnerabilities of children". An Individual Care Plan records the necessary intervention, and the manner of its execution:

> All dispositional orders passed by the Board shall necessarily include an individual care plan in Form 7 for the child in conflict with law concerned, prepared by a Probation Officer or Child Welfare Officer or a recognised voluntary organisation on the basis of interaction with the child and his family, where possible.[27]

For comprehensive rehabilitation, it is essential that the child's lawyer facilitates the identification of developmental gaps, and ensures that an Individual Care Plan is prepared, so that appropriate intervention measures are mentioned in the final order.

25 JJ MR, 2016, Rule 11(10).
26 JJ MR, 2016, Rule 64(3)(xiii).
27 JJ MR, 2016, Rule 11(3).

"Circumstances" of a child are reflected in the SIR, hence, it is imperative that the JJB obtains an SIR prior to passing the final order - "Before passing an order, the Board shall obtain a social investigation report in Form 6 prepared by the Probation Officer or Child Welfare Officer or social worker as ordered, and take the findings of the report into account."[28]

SIR is defined under the JJ Model Rules, 2016:

> "social investigation report" means the report of a child containing detailed information pertaining to the circumstances of the child, the situation of the child on economic, social, psycho-social and other relevant factors, and the recommendation thereon.[29]

An SIR may be prepared by the probation officer[30] or child welfare officer[31] or social worker[32]. Significance of an SIR is reflected by the fact that the police after apprehending a child should "as soon as possible" inform

> the probation officer, or if no probation officer is available, a Child Welfare Officer, for preparation and submission within two weeks to the Board, a social investigation report containing information regarding the antecedents and family background of the child and other material circumstances likely to be of assistance to the Board for making the inquiry.[33]

"To conduct social investigation of the child" is one of the duties of a probation officer[34] and

> The social investigation report should provide for risk assessment, including aggravating and mitigating factors highlighting the circumstances which induced vulnerability such as traffickers or abusers being in the neighbourhood, adult gangs, drug users, accessibility to weapons and drugs, exposure to age inappropriate behaviours, information and material.[35]

The importance of an SIR at the time of dispositional orders was also reflected under the JJ Act, 2000: "The Board shall obtain the social investigation report on juvenile either through a probation officer or a recognized voluntary organisation or

28 JJ MR, 2016, Rule 11(2).
29 JJ MR, 2016, Rule 2(1)(xvii).
30 JJ Act, 2015, Section 2(48).
31 JJ Act, 2015, Section 2(17).
32 JJ MR, 2016, Rule 2(1)(xviii).
33 JJ Act, 2015, Section 13(1)(ii).
34 JJ MR, 2016, Rule 64(3)(i).
35 JJ MR, 2016, Rule 64(2).

otherwise, and shall take into consideration the findings of such report before passing an order."[36]

The Beijing Rules state that reaction to juvenile offenders should be considerate to the circumstances of the juvenile offender.[37] It further states that a Social Inquiry Report should be sought by the adjudicating authority at the pre-sentencing stage to indicate the background and circumstances of the child.[38] An SIR plays a significant role in portraying before the JJB the circumstances of a child in conflict with the law. An SIR should be referred to by the JJB when passing final orders. An SIR denotes the psycho-social situation of the child, and makes recommendations regarding the child's rehabilitation. To serve its envisaged purpose, an SIR should be prepared over a period of time through sittings with the child, parent/guardian, siblings, friends, teachers, neighbours, etc., so that a correct portrayal of the circumstances is possible. The child's lawyer should facilitate such correct portrayal by the Probation Officer as the same is the backbone of rehabilitation.

"Past conduct of the child" may be considered by the JJB to explore appropriate disposition orders, but not as justification for imposing orders harsher than the merits of the case require. A child re-entering the juvenile justice system should not be branded as 'habitual offender' (*Principle of fresh start*) - such case should be treated as a failure of the juvenile justice system in rehabilitating him / her - the concentration should be on what went wrong on the last occasion, and keeping that in view, an alternative disposition measure should be sought. No bias should accrue upon a child due to 'past conduct' - the juvenile justice system cannot 'give-up' on any child in conflict with the law. Efforts should continuously be made to rehabilitate the child in a community-setting. Institutionalisation should not necessarily be resorted to in all such cases as it would be punitive to do so. 'Past conduct' should influence the intensity and extent of inputs/ intervention - not the severity of action.

11.4. What are the different disposition orders under sub-Section (1) of Section 18 of the JJ Act, 2015?

It is important that disposition measures under Section 18(1) are not perceived by stakeholders as punishment. If so perceived, selection of the final order will be

based on 'just deserts' (nature of offence) instead of 'rehabilitation' (circumstances / needs of the child). It is the circumstances and needs of the child that should govern the child's lawyer's recommendations regarding final order - arguments should be on suitability of the order to achieve the goal of 'rehabilitation', and not on 'leniency' or 'severity' of such order. Every disposition order stipulated under the Act is linked to 'rehabilitation'. The child's lawyer plays an important role to ensure that the most appropriate disposition measure is selected to assure a child's rehabilitation. Commentary to Rule 15 of the Beijing Rules states, "The competent authority's search for an adequate disposition of the case may profit, in particular, from the co-operation of the legal representatives of the juvenile". For positive impact of a disposition order, the child's lawyer should explain to the child and parent / guardian as to why a particular disposition measure has been selected.

It is crucial to understand the import and consequence of each clause under sub-Section (1) of Section 18 of the JJ Act 2015.

> ***(a) allow the child to go home after advice or admonition by following appropriate inquiry and counseling to such child and to his parents or the guardians***

Similar mode of disposition was also included in the JJ Act, 1986 ("Allow the juvenile to go home after advice or admonition")[39] and the JJ Act, 2000 ("allow the juvenile to go home after advice or admonition following appropriate inquiry against and counseling to the parent or the guardian and the juvenile").[40]

Under this mode of disposition the child is reprimanded and warned not to re-offend. Such child is also counseled regarding future behavior. As the child is the family's responsibility (*Principle of family responsibility*), the JJB also advises the child's family / guardian, especially regarding importance of adhering to the Individual Care Plan for child's comprehensive rehabilitation. It is the duty of the JJB to ensure the informed "participation of the child and the parent or guardian, in every step of the process",[41] which would include the stage of final orders. If a child has no parent / guardian, such child may be released "on execution of a personal bond without surety".[42]

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36 JJ Act, 2000, Section 15(2).
37 Beijing Rules, 1985, Rule 5.1.
38 Beijing Rules, 1985, Rule 16.
39 JJ Act, 1986, Section 21(1)(a).
40 JJ Act, 2000, Section 15(1)(a).
41 JJ Act, 2015, Section 8(3)(a).
42 JJ MR, 2016, Rule 11(7).

A final order under Section 18(1)(a) is the one that most children's lawyer's hope to obtain from the JJB - lawyer's think that such order is the 'most lenient' of all disposition measures listed. It is important to recognize, that such order may not be suitable for all children - it is the circumstances and needs of the child that should be given prime weightage.

(b) direct the child to participate in group counseling and similar activities

It is the Beijing Rules that has inspired this mode of disposition (Various disposition measures)[43] - "orders to participate in group counseling and similar activities".[44] The same mode of disposition was included under the JJ Act, 2000.[45] Despite inclusion of such disposition measure since the JJ Act, 2000, it was rarely used, largely because the JJB was unable to operationalize the same. The JJ Model Rules, 2016 has placed the task of arranging for such group counseling upon the DCPU[46] - in case of an order being passed under Section 18(1)(b), "necessary direction may also be issued by the Board to the District Child Protection Unit for arranging such counseling".[47] Group counseling guarantees a child advice from an independent responsible adult, whenever felt necessary, and the building of a healthy relationship with the counselor and/or peers, for future sustenance. A child's lawyer should welcome such order, and should facilitate the arranging of group counseling with the DCPU. Such counseling will stand in good stead for the child in the future.

(c) order the child to perform community service under the supervision of an organisation or institution, or a specified person, persons or group of persons identified by the Board

Rule 18(1)(c) of the Beijing Rules provides for "Community service orders", as did the JJ Act, 2000.[48] Concerns were raised regarding 'community service orders' in relation to the safety and dignity of the child. Attempts have been made by legislature to resolve these concerns. Under the JJ Act, 2015, community service should be under supervision of an entity or person(s) "identified by the Board" (*Principle of safety*). Further, a community service order may be passed only for a child in conflict with the law who is above the age of 14 years[49] - such prescription of age is in keeping with the Child and Adolescent Labour (Prohibition and Regulation) Act 1986. 'Community service' is defined under the Model Rules 2016:

43 Beijing Rules, 1985, Rule 18.
44 Beijing Rules, 1985, Rule 18(1)(f).
45 JJ Act, 2000, Section 15(1)(b).
46 JJ MR, 2016, Rule 85(1)(ii).
47 JJ MR, 2016, Rule 11(5).
48 JJ Act, 2000, Section 15(1)(c).
49 JJ MR, 2016, Rule 2(vi).

'community service' means service rendered by children in conflict with law who are above the age of fourteen years and includes activities like maintaining a park, serving the elderly, helping at a local hospital or nursing home, serving disabled children, serving as traffic volunteers etc.[50]

The illustrations of 'community service' under this definition are not exhaustive. As in 'group counseling', arrangements for 'community service' are to be made by the DCPU. 'Community service orders' are 'restorative justice orders' - 'community service' is a way by which the child in conflict with the law compensates society for the injury caused. A child should be informed by the JJB and / or the child's lawyer about the rational for passing a community service order in the child's case - it is only then that such child will understand the import of such order. Rights of children should be safeguarded during 'community service' - towards this end, the child's lawyer should verify the status of the supervisory body / person (s).

(d) order the child or parents or the guardian of the child to pay fine:

Provided that, in case the child is working, it may be ensured that the provisions of any labour law for the time being in force are not violated

Payment of fine has been a disposition measure since the JJ Act, 1986, and has gradually evolved to its present position. Under the JJ Act, 1986, the fine was to be paid only by the juvenile (not by parents/guardian) who is "over fourteen years of age and earns money."[51] Under the JJ Act, 2000, payment of fine was by "the parent of the juvenile or the juvenile himself" if he is over fourteen years of age and earns money.[52] The Beijing Rules provides for "Financial penalties" as a disposition order, but does not mention as to who should be ordered to make such payment.

If the disposition order directs the child to pay a fine, the implication is that such child should be working. An additional caveat being that such child should not be working in contravention of the Child and Adolescent Labour (Prohibition and Regulation) Act 1986 (CALPR Act). Under the CALPR Act, no child (a person who has not completed fourteenth year of age)[53] shall work in any occupation or process[54] and no adolescent (a person who has completed fourteenth year of age but has not completed eighteenth year)[55] shall be employed or permitted to work in any hazardous occupations or processes included in the Schedule.[56]

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50 *Ibid.*
51 JJ Act, 1986, Section 21(1)(e).
52 JJ Act, 2000, Section 15(1)(d).
53 CALPR Act, 1986, Section 2(ii).
54 CALPR Act, 1986, Section 3.
55 CALPR Act, 1986, Section 2(I).
56 CALPR Act, 1986, Section 3A.

Is payment of 'fine' an appropriate disposition order for a child in conflict with the law? Does payment of 'fine' by parent / guardian serve any purpose in the scheme of juvenile justice? 'Fine' may also be looked upon as a 'restorative justice order', like 'community service' - where the child in conflict with the law compensates for the harm caused. The JJB has been conferred by the Cr.P.C, the powers of a Metropolitan Magistrate / Judicial Magistrate of the First Class.[57] Hence, the Board may "order the whole or any part of the fine recovered to be applied…in the payment to any person of compensation for loss or injury caused by the offence".[58] It is for the child's lawyer to explain to the child the purpose underlying such order. Such order should not be understood as merely a convenient mode of release.

> ***(e) direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or fit person, on such parent, guardian or fit person executing a bond, with or without surety, as the Board may require, for the good behavior and child's well-being for any period not exceeding three years***

Same disposition order was contained under the JJ Act, 1986[59] and the JJ Act, 2000.[60] Restoring a child to a family-setting is the object of juvenile justice legislation (*Principle of repatriation and* restoration). Family is "the natural and fundamental group unit of society",[61] therefore, "separation of children from their parents is a measure of last resort. It may be resorted to only when the facts of the case clearly warrant this grave step (for example child abuse)."[62] Preamble to the UNCRC recognizes "that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding". Hence, the JJB should lean in favour of releasing the child under the care of parent (s), except if it is not in the interest of the child to be so released. In the absence of parent (s), the child may be so released under the care of a guardian, and in such case, the JJB should apply the same test as that for parent (s). "'Guardian' in relation to a child, means his natural guardian or any other person having in the opinion of … the Board, the actual charge of the child, and recognized … by the Board as a guardian in the course of proceedings".[63] Except in extraordinary circumstances, a child should be restored with parent (s),

57 JJ Act, 2015, Section 4(2).
58 Cr.P.C, 1973, Section 357(1)(b).
59 JJ Act, 1986, Section 21(1)(b).
60 JJ Act, 2000, Section 15(1)(e).
61 International Covenant on Economic, Social and Cultural Rights, 1966, Article 10(1).
62 Commentary to Rule 18 of the Beijing Rules, 1985.
63 JJ Act, 2015, Section 2(31).

and in their absence, with the guardian. If the child's lawyer has information that such restoration would be against the interest of the child, such information should be shared with the JJB, and supplementary orders may be explored such as an additional direction for such child's supervision by probation officer[64] in keeping with the *Principle of safety*.

A child may also be so released under the care of a 'fit person'. Who is a 'fit person'?

> 'Fit person' means any person, prepared to own the responsibility of a child, for a specific purpose, and such person is identified after inquiry made in this behalf and recognised as fit for the said purpose, by the Committee or, as the case may be, the Board, to receive and take care of the child.[65]

A relative of the child or any other person who is found suitable by the JJB "to receive and take care of the child" may be appointed as 'fit person'. The JJB is required to verify credentials and recognize such person to "receive a child for care, protection and treatment" for a specified period.[66] Such 'fit person' may be required to furnish a written undertaking for "good behavior and well-being of the child for a maximum period of three years"[67] and / or the JJB may "order that the child be placed under the supervision of a Probation Officer" for like period.[68] JJB may withdraw the recognition so granted by recording reasons in writing,[69] and in such case, such child may be placed with another 'fit person' or 'fit facility' or child care institution.[70] Under the JJ Act, 2015, the Board has the powers to amend any order passed regarding institution or person under whose care or supervision a child is placed."[71] The child's lawyer should facilitate the identification of 'fit person' and co-operate during inquiry regarding 'fit person'. Child's preference should also be brought to the notice of the Board for its consideration in keeping with the *Principle of participation*. If possible, the child's lawyer should continue to maintain contact with the child even after disposition, so that any neglect on part of the 'fit person' is brought to the notice of the JJB.

> ***(f) direct the child to be released on probation of good conduct and placed under the care and supervision of any fit facility for ensuring the good behavior and child's well-being for any period not exceeding three years***

64 JJ Act, 2015, Section 11(9).
65 JJ Act, 2015, Section 2(28).
66 JJ Act, 2015, Section 52(1).
67 JJ Act, 2015, Section 11(6).
68 JJ Act, 2015, Section 11(9).
69 JJ Act, 2015, Section 52.
70 JJ MR, 2016, Rule 28(5).
71 JJ Act, 2015, Section 104(1).

The JJ Act, 1986[72] and the JJ Act, 2000[73] had similar provisions regarding place of child under the care of 'any fit institution'. The JJ Act, 2015 has substituted the term 'fit institution' with 'fit facility'. What is a 'fit facility'?

> 'Fit facility' means a facility being run by a governmental organisation or a registered voluntary or non-governmental organisation, prepared to temporarily own the responsibility of a particular child for a specific purpose, and such facility is recognised as fit for the said purpose, by the Committee, as the case may be, or the Board, under sub-Section (1) of Section 51.[74]

Is the 'fit facility' a residential institution? A 'fit facility' may or may not be a residential institution - it could be any 'service' which in the opinion of the JJB is suitable for rehabilitation of the child, and the organisation (governmental or non-governmental) managing such service is willing to take responsibility of such child.[75] Intent of the legislature is reflected by substitution of the word 'fit institution' with 'fit facility' and the use of word "supervision" which denotes non-residential care. A 'fit facility' is recognized for a particular child in conflict with the law, keeping in mind such child's specific needs, which may be residential or otherwise. Upon assessing the rehabilitative needs of a particular child in conflict with the law, the JJB identifies specific interventions - towards this end, the JJB provides that child access to such inputs through a 'fit facility'. The JJB may for any reason recorded in writing, withdraw the recognition granted to a 'fit facility',[76] and transfer a child placed therein to another 'fit facility' or child care institution.[77] A 'fit facility' is chosen because the programme offered (residential or non-residential) 'fits' the specific needs of a child - if the programme fails to satisfy the needs of the child, the child may be shifted to another 'fit facility'. Hence, the child's lawyer should monitor the efficacy of the programme, and if the same is unable to meet the needs of that child, should request transfer to another 'fit facility'.

> ***(g) direct the child to be sent to a special home, for such period, not exceeding three years, as it thinks fit, for providing reformative services including education, skill development, counseling, behavior modification therapy, and psychiatric support during the period of stay in the special home:***
>
> ***Provided that if the conduct and behavior of the child has been such that, it***

72 JJ Act, 1986, Section 21(1)(c).
73 JJ Act, 2000, Section 15(1)(e).
74 JJ Act, 2015, Section 2(27).
75 JJ Act, 2015, Section 51(1).
76 JJ Act, 2015, Section 51(2).
77 JJ MR, 2016, Rule 27(8).

would not be in the child's interest, or in the interest of other children housed in a special home, the Board may send such child to the place of safety

The JJ Act, 1986[78] and the JJ Act, 2000[79] also included sending the child to a Special Home as a disposition order. Though personal liberty is denied in a Special Home, the purpose of passing such order is not punitive, but reformative and rehabilitative, as reflected by the wordings of Section 18(1)(g) of the JJ Act, 2015. Clause (g) illustrates the rehabilitative services that should be offered within a Special Home – the word "including" denotes that the said illustrations are not exhaustive – the Special Home should have a basket of rehabilitative services to satisfy the needs of children housed therein. The rehabilitative character of a Special Home is also indicated by the maximum period of stay, i.e., three years.

A child on crossing 18 years will continue in the Special Home if the child has not completed the term so ordered by the JJB.

A child should be placed in a Special Home "located nearest to the place of residence of the child's parent or guardian, except where it is not in the best interest of the child to do so"[80] - this ensures the maintaining of regular contact between a child and family. Least possible use of institutionalization is advocated by the Beijing Rules[81] - "The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period." This sentiment is reflected in the JJ Act, 2015 (*Principle of institutionalization as a measure of last resort*). Hence, when passing an order under clause (g), the JJB should give reasons as to why none of the other disposition measures are suitable. The child's lawyer should argue that any other disposition order under Section 18(1) would sufficiently meet the objective of juvenile justice legislation (rehabilitation). If placement in a Special Home is ordered, the lawyer should attempt to reduce the stay to a minimum period.

Crime in India 2016[82], TABLE 5A.5, shows that cases of 34775 children in conflict with the law were disposed in 2016, out of which 10019 (29%) were sent home after advice or admonition; 9932 (28%) were released on probation and placed under care of parents / guardian; 2025 (6%) were released on probation and placed under care of child care institutions; 10247 (30%) were sent to special homes; 2552 (7%) were directed to pay fine. These all-India figures show that the number of children sent to

78 JJ Act, 1986, Section 21(1)(d).
79 JJ Act, 2010, Section 15(1)(g).
80 JJ MR, 2016, Rule 11(8).
81 Beijing Rules, 1985, Rule 19.
82 Published by National Crime Records Bureau, Ministry of Home Affairs, Government of India.

the Special Home was the largest, closely followed by children sent home on advice or admonition and those placed under care of parents / guardian. The figures relating to Karnataka for 2016 are as follows: cases of 652 children in conflict with the law were disposed, out of which 143 (22%) were sent home after advice or admonition; 262 (40%) were released on probation and placed under care of parents / guardian; 20 (3%) were released on probation and placed under care of child care institutions; 209 (32%) were sent to special homes; 18 (3%) were directed to pay fine. It is important to note that at the all-India level, disposition orders under certain clauses of Section 18(1) have either not been passed or were negligible and therefore not separately recorded. Children's lawyers should persuade the Board to pass group counselling and community service orders in appropriate cases – it does not matter that such services are not available – when copies of such orders are sent to the DCPU, arrangements will require to be so made, and the juvenile justice system will get operationalized. Same is the situation regarding orders for placing children under the care and supervision of fit facility. At the time of passing final orders, the emphasis is on selecting an order that is most suitable for rehabilitation of a child – this cannot be compromised merely because the system is unprepared – it is imperative that such arrangements be made.

When may the JJB pass orders under the proviso under clause (g)?

It is after the JJB has decided that a child found to be in conflict with the law requires institutionalization in a Special Home that the proviso to sub-Section (1) to Section 18 of the JJ Act, 2015 comes into play. Such child may be sent to a 'place of safety' instead of a Special Home if the JJB is of the opinion that (a) "the behaviour of the child has been such that it would not be in the child's interest" to be sent to a Special Home, or (b) "in the interest of children housed in a special home". The proviso is generally deployed by the JJB as a punitive measure, when the nature of the offence is grave. Putting a child in a 'place of safety' sends a message that such child's stay in a Special Home may 'spoil' the other children and that such child is incorrigible. A child's lawyer should argue that no child is beyond redemption, and that the rehabilitative services in the Special Home are adequate to deal with every child's developmental needs (or should be, and the child should not be made to suffer for

its absence). It should also be shown to the JJB that the child's behaviour in the Observation Home was not disruptive and had no negative effect on other children housed therein – report of the Superintendent of Observation Home and/or Probation Officer should be sought specifically on this aspect. Further, children's behaviour is amenable to change if brought under constructive influence. A certain child may require greater intervention or inputs, but the same is not dependent on the nature of the offence, and should be made available within the Special Home.

A child's stay in 'place of safety' cannot exceed three years - "In no case, the period of stay in the special home or the place of safety shall exceed the maximum period provided in clause (g) of sub-Section (1) of Section 18 of the Act."[83]

Incarceration of children in an institution in lieu of a special home was also included under the JJ Act, 1986[84] and the JJ Act, 2000[85], but under both these juvenile justice legislations, a child should have been above a stipulated age to be so placed – under the JJ Act 1986, the age was 14 years[86] and under the JJ Act 2000, it was 16 years. Under the JJ Act, 2015, any child in conflict with the law, irrespective of age, may be sent to 'place of safety'. 'Place of safety' is defined under the JJ Act, 2015 to mean:

> any place or institution, not being a police lockup or jail, established separately or attached to an observation home or a special home, as the case may be, the person in-charge of which is willing to receive and take care of the children alleged or found to be in conflict with the law, by an order of the Board or the Children's Court, both during inquiry and ongoing rehabilitation after having been found guilty for a period and purpose as specified in the order.[87]

Sending a child to a 'place of safety' is also contained in other provisions of the JJ Act, 2015 – placement of children in conflict with the law who have crossed the age of 18 years;[88] the Children's Court on finding a child 'guilty', sends such child to 'place of safety'.[89] The JJ Act, 2015 provides for a separate 'place of safety' for children "during process of inquiry" and "convicted of committing an offence."[90]

Creation of a separate institution – 'place of safety' – for children who otherwise

83 JJ MR, 2016, Rule 11(11).
84 JJ Act, 1986, Section 22(1), proviso.
85 JJ Act, 2000, Section 16(1), proviso.
86 The age of juvenility for a boy was sixteen years.
87 JJ Act, 2015, Section 2(46).
88 JJ Act, 2015, Section 49(1).
89 JJ Act, 2015, Section 19(3).
90 JJ Act, 2015, Section 49(2).

would have been sent to a Special Home is because of an assumption that such children may, if allowed to mingle, 'contaminate' other children, and such children are more 'difficult' to rehabilitate. If none of the other disposition orders are found adequate after due deliberation, a child may be placed in a Special Home, but there is no need to send such child to a 'place of safety' – diverse rehabilitative measures should be available in Special Homes so that every child is able to benefit from the same.

11.5. What orders may the JJB pass under sub-Section (2) of Section 18 of the JJ Act, 2015?

Sub-Section (2) has for the first time been introduced under the JJ Act, 2015. Sub-Section (2) lists orders that may be passed by the JJB in **addition** to the orders passed under sub-Section (1): "If an order is passed under clauses (a) to (g) of sub-Section (1), the Board may, in addition pass orders".

These additional orders are necessary to facilitate the satisfaction of the needs of the child and/or to protect the child from future risk-situations, thereby enhancing such child's chances for rehabilitation. Keeping in view the development gaps and needs of a particular child, an apt order under sub-Section (2) may also be sought. Inclusion of an additional order under Section (2) entails that there is fulfillment of the development needs of the child by person or facility or institution under whose care and/or supervision the child is given or sent. An undertaking executed by parent, guardian or 'fit person' or personal bond executed by child should include compliance with such additional order under sub-Section (2).

The additional orders under sub-Section that the JJB may pass are as under:

(i) attend school; or

(ii) attend a vocational training centre; or

(iii) attend a therapeutic centre; or

(iv) prohibit the child from visiting, frequenting or appearing at a specified place; or

(v) undergo a de-addiction programme.

The aforementioned additional orders are passed when through the process of inquiry, the JJB has identified the development gaps and needs in a child's life. Such additional orders will enable a child's comprehensive rehabilitation. An additional order under item (iv) should also be interpreted within the space of 'rehabilitation' – if during inquiry, it was noticed that the child offended due to influence of others, efforts should be made to keep the child away from such influences – such order is to

protect the child from unhealthy influences and subsequent re-offending. Such additional orders are supplementary to the orders passed under sub-Section (1), as also complement the circumstances and needs of the child.

11.6. How should the JJB deal with a child in conflict with the law alleged or found to have committed an offence under the Protection of Children from Sexual Offences Act 2012?

Section 34(1) of the POCSO Act states, "Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act 2000 (56 of 2000)." Hence, any such child in conflict with the law should be dealt with under juvenile justice legislation.

It is important to note that the POCSO Act was enacted prior to the JJ Act, 2015, but there was no suggestion then to treat children alleged to have committed sexual offences differently from other children – the JJ Act, 2000 was found adequate to deal with of such children.

An accusation upon a child of above sixteen years of having committed a 'heinous offence' under the POCSO Act is no reason to send such a child into the criminal justice system - such child can be dealt by the juvenile justice system. Moreover, the JJB is enabled to protect the child victim's rights, while keeping the child in conflict with the law within the juvenile justice system. To protect the child victim's rights, the JJB may apply the procedure under Section 33 of the POCSO Act (*Procedures and powers of Special Court*); Section 36 of the POCSO Act (*Child not to see accused at time of testifying*), Section 37 of the POCSO Act (*Trials to be conducted in camera*) and Section 38 of the POCSO Act (*Assistance of an interpreter or expert while recording evidence of child*).

The rehabilitative needs of the child victim can also be satisfied by the JJB passing orders for *Compensation* under Section 33(8) of the POCSO Act and rule 7 of the Protection of Children from Sexual Offences Rules 2012. Such compensation is payable by the State Government. The JJB also has the option of referring the child victim for compensation under the *State Victim Compensation Scheme*.

11.7. What orders is the JJB not permitted to pass?

As aforementioned, if a child in conflict with the law is on conclusion of inquiry found to have committed an offence, the JJB is empowered to pass orders under Section 18(1) and (2) of the JJ Act, 2015 – the JJB cannot pass any other orders.

That a child cannot be detained with adult offenders is the foundation of the

juvenile justice system. Moreover, the purpose of detention emphasized under the criminal justice system (retribution, deterrence and rehabilitation) is very different from that of the juvenile justice system (rehabilitation and re-integration). Under the heading *Detention pending trial*, the Beijing Rules state, "Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults."[91] It further states, "Juveniles in institutions shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults."[92] The *Statement of Objects and Reasons* of the JJ Act 1986, inter alia, states, "To lay down a uniform frame work for juvenile justice in the country so as to ensure that no child under any circumstances is lodged in jail or police lock-up." The same dictum continues under portions of the JJ Act, 2015. Proviso to Section 10(1) states: "Provided that in no case, a child alleged to be in conflict with law shall be placed in a police lockup or jail." Further, one of the functions and responsibilities of the JJB is "conducting regular inspection of jails meant for adults to check if any child is lodged in such jails and take immediate measures for transfer of such a child to the observation home".[93]

Regarding children in jail, the Supreme Court observed,

> If a child is a national asset, it is the duty of the State to look after the child with a view to ensuring full development of its personality. That is why all the statutes dealing with children provide that a child shall not be kept in jail. Even apart from this statutory prescription, it is elementary that a jail is hardly a place where a child should be kept. There can be no doubt that incarceration in jail would have the effect of dwarfing the development of the child, exposing him to baneful influences, coarsening his conscience and alienating him from society.[94]

Hence, the provision allowing the Children's Court to send a child in conflict with the law to jail under Section 20(2)(ii) is in absolute contravention of juvenile justice.

No disposition order under sub-Section (1) and (2) of Section 18 of the JJ Act, 2015 allows for imprisonment of a child found to have committed on offence. The JJ Act, 2015, prohibits the keeping of a child in jail at any stage of the proceeding. Keeping a child in conflict with the law in police lockup or jail is contrary to Article 21 of the Constitution as it is contrary to the procedure laid down under juvenile justice

91 Beijing Rules, 1985, Rule 13.4.
92 Beijing Rules, 1985, Rule 26.3 – *Objectives of institutional treatment*..
93 JJ Act, 2015, Section 8(3)(m).
94 *Sheela Barse v. Union of India,* (1986) 3 SCC 632.

legislation and amounts to illegal detention. The Supreme Court has directed payment of compensation by State agency for illegal detention.[95]

Section 21 of the JJ Act, 2015, stipulates *Order that may not be passed against a child in conflict with the* law : "No child in conflict with law shall be sentenced to death or for life imprisonment without the possibility of release, for any such offence, either under the provisions of this Act or under the provisions of the Indian Penal Code or any other law for the time being in force."

Section 18(1) and (2) of the JJ Act, 2015 is all-conclusive regarding orders that may be passed by the JJB regarding a child found to have committed an offence, therefore, Section 21 relates to orders that may be passed against a child in conflict with the law by the Children's Court. Section 21 does not allow the Children's Court to sentence a juvenile to death or for imprisonment for the remainder of the child's natural life – orders that a Children's Court may pass under Section 19(1)(i) of the JJ Act, 2015 is dealt with earlier under this chapter.

Prohibition on imprisonment or capital punishment was also included under previous juvenile justice legislation: Section 22 of the JJ Act, 1986 (*Orders that may not be passed against delinquent juveniles*) and Section 16 of the JJ Act, 2000 (*Order that may not be passed against juvenile*).

Conclusion

A disposition order should not be based on the nature of offence, but on the rehabilitative needs of the child

95 *T.C. Pathak v. State of U.P.*, (1995) 6 SCC 357.

The Centre for Child and the Law (CCL) is a specialized research centre of the National Law School of India University (NLSIU), and was established in 1996. CCL-NLSIU adopts a multi-disciplinary integrated praxis based child rights approach while working on issues concerning children and the law. The main thrust of the work is on Juvenile Justice and Child Protection, Universalisation of Quality Equitable School Education, Child Labour, Protection of Children from Sexual Offences, Justice to Children through Independent Human Rights Institutions, Right to Food, and Child Marriage. The mission of CCL-NLSIU is to institutionalize a culture of respect for child rights in India.

The Juvenile Justice team at CCL-NLSIU provides multi-disciplinary, psycho-socio and legal services to a limited number of children and families journeying through the juvenile justice system, while alsoengaging in research, teaching, and training. The program aims to enable children to claim their rights, to positively inform policy, law and practice on issues concerning children, and to trigger transformative processes aimed at reforming the juvenile justice system.

This Handbook for Advocates provides information about children in conflict with law, juvenile justice law in India, as well as international law and guidelines that should inform litigation practice with this unique client group.

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