JUVENILE JUSTICE LAW IN INDIA : A CRITICAL STUDY

Edited by
D.P. VERMA
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Foreword by
HON'BLE MR. JUSTICE MADAN B. LOKUR
Former Judge, Supreme Court of India

NATIONAL JUDICIAL ACADEMY

"Each one of the contributors are experts in the field and are those who have spent years in understanding issues concerning children and their rights. The National Judicial Academy under whose auspices they have made contributions in this volume must be congratulated not only for the systematic structure of the volume but also getting a variety of experts in different disciplines concerning children together for their benefit through those of us who have concern for children and their rights."

Excerpt from Foreword by Justice Madan B. Lokur Former Judge, Supreme Court of India

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BHOPAL

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CONTEMPORARY ISSUES AND CHALLENGES IN ADMINISTRATION OF JUVENILE JUSTICE IN INDIA: A CRITIQUE OF LAW AND IMPLEMENTATION

~ **Anant Kumar Asthana**

Abstract:

This paper is addressed to the advanced users of the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act, 2015) with an intention to familiarize about the existing shortcomings and challenges in the JJ Act, 2015 and in the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 (JJ Model Rules, 2016) to apprise about various issues which have emerged in past three years and half years of its implementation which are being debated, discussed among practitioners of juvenile justice law and some of which have come under scrutiny in judicial processes as well. Some of the issues discussed are related to legal provisions and some are related to practice and ground realities. Even though it is styled as a critique of the JJ Act, 2015 and its Model Rules yet it is written from purely implementation point of view.

1. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015

The JJ Act, 2015 provides primary legal framework for justice to children in conflict with law and children in need of care and protection. It creates several new offences against children and provides protection of identity to child victims and child witnesses also. It is applicable all

over India, except for the state of Jammu and Kashmir[1]. It came into force on 15 January 2016 and it repealed the earlier JJ Act of 2000[2].

Soon after the JJ Act, 2015 was published in the Official Gazette on 1 January 2016, four typographical errors were noticed in the text and the same were rectified by issuing a corrigenda. These errors included the following in-

1. first proviso to Section 15 (2), a word "appealable" was written, which was corrected to make it "appealable";
2. Sec. 41 (3), clause "children in need of care and protection *of* children in conflict with law" was corrected to make it "children in need of care and protection *or* children in conflict with law";
3. proviso to Sec. 41(3), word "Fulfill" was corrected to make it "Fulfil"; and
4. Sec. 110 (2) (ii), word "Clause 18" was corrected to make it "Clause 17".

Despite an earlier attempt to correct the apparent errors in the text of the JJ Act, 2015, mistakes in the text of the JJ Act continued to be noticed and resultantly this Act witnessed an amendment in the year 2017. Instead of amending the JJ Act itself, these amendments were introduced in the JJ Act, 2015 through "The Repealing and Amending (Second) Act, 2017". Through this amendment one more typographical error in the text of a provision concerning adoption in the JJ Act was rectified. In Sec. 69 (2), clause *"mentioned at (d) to (f)"* was amended to make it *"mentioned at clauses (d) to (f) of sub-section (1)"*.

All these abovementioned instances of corrections were the ones which were apparently typographical errors and thus have been corrected. However, observers of the JJ Act have highlighted[3] several other instances in the text of the Act where corrections are required in order to ensure that there is no difficulty in execution, interpretation and implementation of the JJ Act 2015. Several such instances have been discussed further.

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1 Jammu and Kashmir Juvenile Justice (Care and Protection of Children) Act 2013 is applicable in the State of Jammu and Kashmir.

2 Juvenile Justice (Care and Protection of Children) Act, 2000.

3 A Delhi Based organization HAQ: Centre for Child Rights and a Jaipur based organisation Antakshari Foundation had jointly made a representation to the Ministry of Women & Child Development in December 2017 drawing the attention of government to several such areas and had appealed to the Government that power to remove difficulty under Sec. 112 of the JJ Act be exercised to remove such difficulties. However power to remove difficulties available to the Central Government under Sec. 112 of the JJ Act 2015 lapsed on 15 January 2018 as it was a two year time-restricted power.

Sec. 53(2) of the JJ Act, 2015 makes it mandatory for all the Child Care Institutions (CCI) to have a Management Committee.[4] Structure and functioning and manner of setting up of these Management Committees is laid down in the JJ Model Rules, 2016. Several Non-Government organisations (NGOs) run CCI see this provision as an intrusion by State in their management-related affairs and had challenged this provision before the Kerala High Court[5] which has read this provision down to provide for management committees only for State run or sponsored CCI and not to the institutions registered under the Orphanages Act, which do not enjoy any sponsorship or patronage of the State. This has been appealed[6] by the Union of India before the Hon'ble Supreme Court of India.

While primary duty to make Rules under this Act rests with the State Governments but till that is done, the JJ Model Rules, 2016 framed by the Central Government shall continue to apply[7]. For approximately nine months, this Act operated without any Rules and it was on 26 September 2016 that the Central Government issued JJ Model Rules[8] for aiding to the implementation of the Act.

As on the date of writing of this paper, State of Jharkhand, Bihar, Tamilnadu, Maharashtra, West Bengal, Andaman & Nicobar, Mizoram, Nagaland, Puducherry and Odisha have framed and notified their State JJ Rules while rule making process is going on in the National Capital Territory of Delhi, Madhya Pradesh, Assam, Andhra Pradesh, Manipur, Gujarat, Kerala, Himachal Pradesh, Lakshadweep, Sikkim, Telangana, Uttarakhand and Uttar Pradesh. While some of the State Governments like Arunachal Pradesh, Chandigarh, Chhattisgarh, Daman & Diu and Tripura etc. have adopted the JJ Model Rules, 2016 and notified them separately. Haryana, Dadra and Nagar Haveli, Goa, Kerala, Karnataka, Meghalaya, Punjab and Rajasthan are States and Union Territories which have drafted their State Rules but are yet to notify them and are at different levels of administrative scrutiny and approvals. In the meanwhile, within six months of notification of the Bihar Juvenile Justice

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4 Sec. 53(2)- Every institution shall have a Management Committee, to be set up in a manner as may be prescribed, to manage the institution and monitor the progress of every child.

5 *The Secretary, Calicut Orphanage and Others vs. Union of India and Others & Connect Matters*,W.P.(C) No. 14858 of 2016.

6 *Union of India v. Emmanuel Children's Home and Others*, Petition for Special Leave to Appeal (Civil) No. 9565 of 2018.

7 *JJ Act,2015* :Sec. 110.

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

(Care and Protection of Children) Rules 2017[9], operation of its Rule 15(2)[10] has been stayed by the Hon'ble Patna High Court[11] on the ground that this rule amount to 100% reservation in appointments. Rule 15 (2) provides for reservation of the OBC, EBC, SC and ST classes in matters of appointment in Juvenile Justice Board (JJB) and Child Welfare Committees (CWC). However, the stay has been vacated now and constitutional validity of its Rule 15(2) has been upheld by the Patna High Court.

(A) Inadequacies and Inconsistencies

(i) Definition of Child in Need of Care and Protection

The JJ Act deals with two categories of children, (1) children in conflict with law and (2) children in need of care and protection. There are various categories of children who have been included within the term "Child in Need of Care and Protection" under Sec. 2 (14). A careful perusal of various sub-sections of Section 2 (14) reveals several lacunae and inconsistencies in such definitions, which are of far reaching consequences as the order of CWC by which a child is declared not to be a child in need of care and protection is a non-appealable[12] order. Given below are some of the instances in this regard.

In Sec. 2(14)(vi), there is a category of children in need of care and protection which has been defined as one "who does not have parents and no one is willing to take care of, or whose parents have abandoned or surrendered him; or". Observers have suggested that this definition presumes that all the children have parents and can only be abandoned by parents and does not include guardians and adoptive parents. This definition under Sec. 2 (14) (vi) is also inconsistent with Sec. 2 (1) and 2 (60) of the JJ Act which provides the definition of abandoned child and surrendered child and provides scope for a guardian other than a biological parent to abandon and surrender them. But Sec. 2 (14) (vi) is defining children in need of care and protection which includes only children abandoned and surrendered by their biological parent(s). Another difficulty with this definition is that word "orphan" has been

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9 Bihar Juvenile Justice (Care & Protection of Children) Rules 2017 were notified on 14.06.2017.

10 The Committee shall consist of a Chairperson and four other members including atleast two women from the district concerned for which the Committee has been constituted, and out of five members including Chairperson, at least one member shall be from SC/ST and one from EBC/OBC communities.

11 *Kumari Sunita Singh & Others vs. The State of Bihar & Others*,Criminal Writ Jurisdiction Case No. 16693 of 2017.

12 *JJ Act, 2015* :Sec. 101(3)(b).

precluded in this but has been defined separately under Sec. 2 (42). It is necessary to bring word "orphan" within the purview of Sec. 2 (14) to make the provision clear and complete. To remove such inconsistencies, the definition in Sec. 2(14) (vi) should be reframed by deleting "whose parents have" and by adding word "Orphan". It has been suggested that this provision be redrafted as "who does not have parents and no one is willing to take care of, or who is an orphan or abandoned or surrendered".

Sec. 2(14)(ii) mentions another category of child in need of care and protection and defines it as one "who is found working in contravention of labour laws for the time being in force...". This definition overlooks the provisions of the JJ Act, 2015 itself. In Chapter IX of the JJ Act, 2015, an offence related to child labour has been created under Sec. 79. It is also crucial to note that child under the JJ Act, 2015 is anyone below the age of 18 years, while the Child & Adolescent Labour (Prohibition and Regulation) Act, 1986 defines a child as anyone below the age of 14 years and an adolescent as anyone who is above 14 but below 18 years of age. There may be several children in whose respect violation of Child & Adolescent Labour Act may not be sustained but they may very well be victims of offence under Sec. 79 of the JJ Act. All the children who are victims under Sec. 79 require immediate care, protection and rehabilitation support which is ultimately governed by the JJ Act. But by virtue of this definition, such children fall out of the ambit of definition of children in need of care and protection, thus denying the benefit of the JJ Act to a certain category of children. It has been suggested that it would be more appropriate to address the gap by reframing Sec. 2 (14)(ii) by defined it as "who is found working in contravention of provisions of this Act or labour laws for the time being in force..."

Under Sec. 2(14)(ix), there is yet another category of childin need of care and protection defined which reads as one "who is found vulnerable and is likely to be inducted into drug abuse or trafficking;". Such definition is narrow in the sense that it excludes children who already are inducted into trafficking or drug abuse and who were victims of trafficking and drug abuse. This obviously cannot be the objective of the JJ Act, 2015 to include only those children who are at risk. In order to include all children, whether they are at risk or have been inducted or were inducted into trafficking and drug abuse, it has been suggested that this definition be amended to make it read as one "who is found vulnerable and has been or is being or is likely to be inducted into drug abuse or trafficking."

Sec. 2(14)(xii) defines a child in need of care and protection as one "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." It seems that this provision has been drafted keeping in view only a female child but the language does not reflect this and is bound to create a difficulty when it comes to a male child because the age of marriage in the case of male child is 21 years under the Prohibition of Child Marriage Act, 2006 and anyone above the age of 18 years in not a child under the JJ Act, 2015. Therefore, in order to remove the inconsistency it would be appropriate to delete "before attaining the age of marriage" and be defined as one "who is at imminent risk of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnisation of such marriage."

(ii) Deficiency in Definition of Child Welfare Officer

There is a drafting error in Sec. 2(17) where definition of "Child Welfare Officer" has been provided. It says that Child Welfare Officer means an officer attached to a Children's Home, for carrying out the directions given by the CWC or, as the case may be, the JJB with such responsibility as may be prescribed. The error apparent is that the definition refers to the Child Welfare Officer as an officer attached to Children's Home only but subsequently it mentions that Child Welfare Officer is to carry out directions of the JJB also. A JJB will need to give directions to Child Welfare Officer of any CCI for children who are in conflict with law only. The role of Child Welfare Officer in relation to children in conflict with law is provided in various other sections of the JJ Act, 2015, i.e. in Sec. 8(3) (e), Sec. 13 (1)(ii) and Sec. 13(2). Hence, the mention of the word "Children's Home" in this definition is not appropriate, instead it should have been "Child Care Institution", so that Child Welfare Officers in all CCIs within the jurisdiction of JJBs and CWCs are covered in this definition.

(iii) Inclusion of Fit Facility in Definition of Child Care Institution

There is a great difficulty in definition of "Child Care Institutions". The definition is not consistent with other provisions in the JJ Act, 2015 and is causing tremendous difficulty at the implementation level. Under Sec. 2(21), CCI means Children Home, Open Shelter, Observation Home, Special Home, Place of Safety, Specialised Adoption Agency and a Fit Facility recognised under this Act for providing care and protection to children, who are in need of such services. This definition includes and

considers "Fit Facility" as a CCI, which defeats the very concept and purpose of Fit Facility. Due to this definition of CCI, which considers Fit Facility as another kind of CCI, not only CWCs and JJBs are finding it difficult to recognize such facilities to cater the specific needs of particular child but also institutions are hesitant of coming forward for being recognised as Fit Facility because being considered as a CCI, they will be liable to maintain staffing patterns, infrastructure and management of their institution and several other statutory compliance applicable on CCI as per the JJ Act, 2015. In the JJ Act, 2015 itself, at many places CCI and Fit facility has been treated distinctly. Inclusion of Fit Facility in the definition of CCI is not consistent with Sec. 2(27) which is definition of Fit Facility, Sec. 41(2) where law concerning registration of CCI is laid down and mention of Fit Facility is absent therein and Sec. 51 which deals with recognition of an institution as Fit Facility by JJB or CWC. The problems associated with the definition and treatment of CCI is further compounded by provisions made in the JJ Model Rules, 2016.

(iv) Confusion regarding Concept of Place of Safety

Place of Safety is prescribed as one of the most important CCI for children in conflict with law under the JJ Act, 2015. It is defined under Sec. 2(46) as, "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 law, by an order of the Board or the Children's Court, both during inquiry and on-going rehabilitation after having been found guilty for a period and purpose as specified in the order." This definition leaves the decision of admitting a child to the willingness of officer in charge. Since Place of Safety is a registered CCI under the JJ Act, 2015 and children in conflict with law are send there by an order of JJB or Children Court or other Courts in appropriate cases, there is no reasonable justification as to why the definition of the Place of Safety provides for willingness of officer-in-charge. What will happen if a child in conflict with law is placed in a Place of Safety by an order of Children Court and officer-in-charge is not willing to admit the child? It seems that present definition of Place of Safety is mixing two different notions of Place of Safety. In the old JJ Act of 2000, Place of Safety was visualised as an alternative measure for those children who for any reason could not be placed in regular institutions i.e. Observation Home or Special Home. A joint reading of Sec. 2(q), Sec. 12(3), proviso to Sec. 16(1) and Sec. 58 of the JJ Act of 2000

makes it clear that Place of Safety was perceived as a status which could be granted by competent authority i.e. the JJB to any place or institution, except jail and police lock up, for placing a child in some special circumstances and was never visualized as a separate institution to be set up under the JJ Act. It was in this context that willingness of the person in charge of the institution which is to be designated by JJB as a Place of safety for any specific child in conflict with law for receiving the child and for taking care of the said child was prescribed in the old JJ Act of 2000. But in the JJ Act, 2015, the notion of Place of Safety is completely different from what it was under the JJ Act of 2000. Now in the JJ Act, 2015, a Place of Safety is perceived as a CCI to be set up and to also be registered under the JJ Act. While notion of Place of Safety stands drastically changed under the JJ Act, 2015, the retention of "willingness of officer in charge of institution" in definition of Place of Safety is absurd and does not make any sense, rather may create difficulty.

(v) Absurdity about Termination of Members of JJBs and CWCs

Sec. 4(7) deals with termination of Social Worker Member of JJB and Sec. 27 (7) deals with termination of members of CWC. Under Sec. 4 (7)(iii) and under Sec. 27 (7) (iii), a criteria laid down for such termination reads as - "fails to attend less than three-fourths of the sittings in a year." This apparently is a glaring drafting error or lapse in proof reading of the legal text. It does not make sense. If instead of using the word "less", the word "minimum" would have been used, provision should have made sense. As of now, this provision is incapable of any construction. Another remarkable omission in Sec. 27(7) is non-mention of the word "Chairperson". Since CWC has one Chairperson and 4 Members, this provision pertaining to termination mentions only member. This has given an impression that Chairpersons of CWCs have been left out from the termination related provisions. At times it is argued that the word "Member" includes Chairperson but for the purpose of clarity and to keep the confusion away, either a definition of "Member" could have been added or word "Chairperson" could have been specifically mentioned in Sec. 27(7).

(vi) Treatment of Child in Conflict with Law as Child in Need of Care and Protection

The JJ Act 2015 has borrowed several processes, approaches and provisions from Model Juvenile Justice (Care and Protection of Children) Rules 2007 (JJ Model Rules, 2007) framed under the JJ Act, 2000 and have included them in the JJ Act, 2015 with some alternations. While

most of such instances are progressive and have been welcomed, yet some of such inclusions are perplexing and not well thought out and are causing great difficulty in implementation. Sec. 8(3)(g) of JJ Act, 2015 is a classic example of this. This provision is borrowed from Rule 13(1)(b) and Rule 11(4) of the JJ Model Rules, 2007.

Rule 13(1)(b) and 11(4) of JJ Model Rules 2007	**Sec. 8(3) (g) of JJ Act 2015**
Rule 11(4): In Such cases where apprehension apparently seems to be in the interest of the juvenile, the police or the Juvenile or the Child Welfare Officer from the nearest police station, shall rather treat the juvenile as a child in need of care and protection and produce him before the Board, clearly explaining the juvenile's need for care and protection in its report and seek appropriate order from the Board under Rule 13(1)(b) of these rules. **Rule 13(1)(b):** On production of the juvenile before the Board, the report containing social background of the juvenile and circumstances of apprehension and offence alleged to have been committed provided by the officers, individuals, agencies producing the child shall be reviewed by the Board, and the Board shall pass the following order in the first summary inquiry on the same day, namely:- (b) transfer to the Committee, matters concerning juveniles clearly stated to be in need of care and protection in the police report submitted to the Board at the time of production of the juvenile.	**Sec. 8 (3) :** The functions and responsibilities of the Board shall include'––**(g)** transferring 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 recognising 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;

A perusal of Rules above shows that law under the JJ Model Rules 2007 was that if a Police officer apprehends a child in conflict with law and at the time of production before JJB, gives a report clearly stating that the child is actually in need of care and protection, then JJB, on the very first day of production of such child, on perusal of report of police in this regard, may transfer such child to CWC. This was a well-intentioned, smooth and practical provision but when the JJ Act 2015 borrowed this in Sec. 8 (3) (g), it added the words "at any stage" and "there is a need for the Committee and the Board to be both involved".

This means that it is no more a decision of JJB to be taken on the very first day but can be taken at any stage and secondly it is not that the case will be transferred to CWC but JJB and CWC will have to remain involved. This provision has been implemented in several parts of country and experiences of Delhi have demonstrated quite a chaos and lack of clarity, prompting the Delhi High Court to intervene and to pass

corrective orders[13] to take control of situation emerging from application of this provision. A chronological description of relevant parts of orders, passed in this regard by Delhi High Court, is produced below :

> *"It is pointed out during the hearing that some JJBs have routinely referred children in conflict with law to children homes which are meant for children in need of care and protection, instead of sending them to OH/SH. These instances/relative orders of the concerned JJBs shall be placed on record before the next date of hearing."* [Order dated 16.08.2017]
>
> *"Learned counsel for the GNCTD submits that the seven inmates of the Children Home for Boys, Alipur, a child care institution [hereafter referred to as "the child care institution"] under the Juvenile Justice (Care and Protection of Children) Act, 2015, who escaped (of whom four have been recovered), were all juveniles in conflict with law but apparently housed in the child care institution due to absence of parents or guardians. Apparently, the juveniles have been granted bail but have been unable to furnish bonds or were not fortunate to have parents who could provide guarantee or security for their presence in the proceedings. In the circumstances, they appear to have been sent to the child care institution. This Court is of the opinion that the housing of such juveniles in conflict with law who are entitled to bail in the manner resorted to, is questionable. The issue is to be examined in the case of neglected children or those whose parents do not turn-up to ensure that the benefit of bail is granted to the juveniles, and an appropriate solution in that regard should be indicated by the GNCTD on the next date of hearing."*[Order dated 13.09.2017]
>
> *"Regarding housing juveniles facing inquiry for alleged offences – it was pointed out in these proceedings by the Amicus Curiae that the Juvenile Justice Boards (hereinafter referred to as the 'JJBs') have been, in the recent past, making orders directing the housing of children in conflict with law, with those facing inquiries (who are also children in need of care and protection), at CCIs. It is stated that it is an unwholesome practice because it would tend to expose other children in need of care and protection to potential bad influences. Reliance was placed upon seven orders made by the JJBs. The Amicus also relied upon the provisions of Sections 2(37), 12(3) & (4), 8(3)(g) and 37 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as 'the Act') to submit that the avenues, other than placing such children in need of care and protection, ought to be resorted to. Learned counsel for the Government of NCT suggested that one option would be to create or designate "fit" institutions under Section 2(27) read with 51 of the Act. This Court notices that the orders, which are placed on record, pertain to juveniles, who were alleged*

[13] *Court on Its Own Motion vs. Government of NCT of Delhi and Others*, Writ Petition (Civil) 5137 of 2013.

to have committed offences. The JJB in each of those cases have granted bail and have not invoked the proviso to Section 12(1) of the Act. This meant, especially, children (who concededly were otherwise in need of care and protection) were not considered to be dangerous or needing restraint. Furthermore, such children could not be handed over to their families because the parents did not report or were unable to comply with the bail conditions. In these circumstances, the Court is of the opinion that the JJB appears to have taken one of the logical options i.e. to direct the children to be sent to CCIs. During the course of hearing, it is submitted on behalf of the Government of NCT, that such children, who are facing inquiries and were granted bail, but, are unable to fulfil the conditions or whose parents did not claim them, are housed in a separate dormitory. The Court is of the opinion that the JJB appears to have adopted a reasonable procedure in the overall circumstances. At the moment the Court is unclear as to the number of such children housed in all the CCIs in Delhi. Furthermore, as to whether the child in question (who is facing an inquiry) can cause some threat or disturbance or a bad influence to other children in CCIs may have to be assisted properly by the concerned Child Welfare Committee (hereinafter referred to as 'CWC') on a case to case basis. The Court is also of the opinion that the option under Section 12 of the Act of involving the Probation Officer on a periodic basis needs to be utilised. A direction is therefore issued to the CWC, JJB and all other Authorities, to ensure that in case of such children, who face inquiry but are unable to avail of the bail orders in their favour, they should be closer to the Probation Officers, who should on weekly basis interact with the concerned children and transmit the report to the CWC. The CWC would in turn monitor the situation on a period basis, once a month."[Order Dated 18.01.2018]

"With respect to the previous order of the Court as regards the Children in Conflict with Law placed with children in need of care and protection in Child Care Institutions (CCIs), the Government of NCT of Delhi has issued an order to all concerned i.e. the Juvenile Justice Boards and the CWCs".[Order dated 20.03.2018]

Thus, it clear from above orders that JJBs declared several children in conflict with law as child in need of care and protection in the cases where either children have been unable to furnish bail bonds after being granted bail by JJBs or where no one from family of child was coming forward for bail and transferred such children in conflict with law from Observation Home to Children Homes, but retaining the inquiry of case with JJBs. CWCs are quite at loss as to what is expected to be done from their end if the case is still going on in JJB and there is no guidance either in the Act or in the Model Rules as to how JJBs and CWCs are both to be involved in the same case and what is to be done by JJB and

CWC. Children Homes where such children are transferred are also at loss as they have now to deal with producing such children before JJBs on the dated of hearing. Most of the staff of Children Homes are not acquainted with processes pertaining to JJBs, have no linkages with the system around children in conflict with law. Once "transferred", it is impractical to keep two bodies involved in the same case or same child. This has a practical difficulty. Many Children Home argue that Sec. 8(3)(g) does not require a child in conflict with law to be transferred from Observation Home to a Children Home and that merely requirement is to transfer the case to CWC, while JJBs don't seem to agree with this understanding. In nutshell, the provision under Sec. 8(3)(g) is extremely complex in actual implementation and there are difficulties inbuilt in the provision, which could have been resolved through JJ Model Rules but have not been done so. State Governments while framing their State JJ Rules can still resolve the confusion and concerns emanating from Sec. 8(3)(g).

(vii) Confusion regarding Juvenility Claim

Even though Sec. 9 is titled as "Procedure to be followed by a Magistrate who has not been empowered under this Act" but this provision also deals with claim of juvenility before Courts. This provision is one of the most confusing provisions in the JJ Act with which Courts deal with almost on a daily basis, particularly Sec. 9(1) and Sec. 9(2). At first glance, they both seem to occupy same territory, yet procedure and decisions which follow from both these provisions are different. Sec. 9(1) uses the word "Magistrate", while Sec. 9(2) uses the word "Court". Sec. 9(1) provides for recording of opinion and forwarding the child and record of proceedings to JJB, while Sec. 9(2) provides for "making an inquiry, taking such evidence as may be necessary and recording a finding on the matter clearly stating the age of the person as nearly as may be possible". Sec. 9(1) comes into action when "A Magistrate is of the opinion", while Sec. 9(2) comes in action "if the Court itself is of the opinion" or "In case a person claims before a Court". The use of the word "Magistrate" in Sec. 9(1) often leads to interpretation that it is applicable to Magistrate Courts only, while Sec. 9(2) is for all other Courts. Ordinarily, a criminal case first goes to Magistrate and then in appropriate cases it is committed to other Courts, but in some special cases like the Protection of Children Against Sexual Offences Act, 2012 (POCSO Act) Act, all the cases are before POCSO Court from the very first day and case does not pass through a Magistrate. Obviously this cannot be the interpretation. This needs to be corrected by using uniform terminology

of "Court" in both the sections. While the correct way of interpreting Sec. 9(1) and 9(2) is that Sec. 9(1) deals with the situation where Police is not aware about the JJ Act's special procedure and produces the child before a Court which is not JJB. Here the focus is not where the accused is a child or adult. Focus is that police is dealing with a child but has produced it before a Court which is not JJB and that is why Sec. 9(1) requires such court to record such observation and simply pass an order forwarding the child and case to JJB. It is measure of course correction by Courts. On the other hand, Sec. 9(2) is a comprehensive provision for deciding whether the produced accused is a child or adult, either *suo moto* or on a claim being made and that why Sec. 9(2) prescribes for an age inquiry, evidence and return of a finding on age. The use of word "Magistrate" in Sec. 9(1) and the use of the word "Court" in Sec. 9(2) is at the root of such confusion and could have been avoided by using the word "Court" in both the provisions.

(viii) Legislative Vacuum in Categorization of Offences

The JJ Act 2015 has created a categorization of offences into (1) Petty Offences[14], (2) Serious Offences[15] and (3) Heinous Offences[16]. However, the scheme of defining these categories is such that there are some offences which do not fall into any category, i.e. Sec. 304 and 307 of the IPC. Hon'ble Patna High Court has observed in a case[17], "Hence, the category between 'serious offences' and 'heinous offences' is missing".

Such legislative vacuum is resulting into a situation where offences which do not fall in the category of heinous offences but also do not fall under the category of petty or serious offences, are being pushed into the category of heinous offences, resulting into a subversion of explicit legal provision regarding heinous offences.

This problem is further compounded by the use of the word "includes" instead of "means" in the definitions of petty, serious and heinous offences. One set of advocates argue that since definition is inclusive, offences than those which prescribe minimum 7 years or more punishments can also be included in the definition of heinous offences while other set of advocates argue that since it is a matter of criminal law, it has to be interpreted strictly and a loophole in the definition

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14 *JJ Act, 2015* : Sec. 2 (33) defines "Petty Offences".
15 *Ibid.,* Sec. 2(54) defines "serious Offences"
16 *Id.,* Sec. 2(45) defines "Henious offences"
17 *Rajiv Kumar v. The State of Bihar*, Criminal Appeal (SJ) No. 1716 of 2018.

cannot be interpreted in such a manner which amounts to re-writing the definition of heinous offences.

Judicial pronouncements arising from Punjab and Haryana High Court[18], Bombay High Court[19] Patna High Court[20] and Delhi High Court[21] have supported the interpretation that any offence which does not have minimum mandatory punishment of seven years or more cannot be considered heinous offence. Recent case law confirming this viewpoint has come from the Bombay High Court.[22]

(ix) Inconsistency with Commission for Protection of Child Rights Act

Commission for Protection of Child Rights Act, 2005 (CPCR Act) prescribes for establishment of Children Court and gives jurisdiction to try offences against children to the Children Court[23]. However, Sec. 86 of the JJ Act, 2015 prescribes a scheme of jurisdiction of courts in cases of offences against children which is not in sync with the CPCR Act, 2005 and gives jurisdiction to try some offences against children to Children Court, some offences to the Magistrate of First Class and some offences to any magistrate. Noteworthy is the fact that when the POCSO Act was enacted, it had taken care to be in harmony the with CPCR Act when it prescribed the definition of "Special Court" under Sec. 28[24] of the POCSO Act.

(x) Child Welfare Committees and Children Court outside the Fundamental Principles

Sec. 3 of the JJ Act provides 16 fundamental principles to be followed in administration of the Act. This section specifically mentions "Central Government", "State Governments", "Board" and "Other agencies as the case may be". It has been argued that absence of mention of CWC and Children Court specifically may be interpreted as deliberate exclusion, more so because JJB has been specifically mentioned.

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18 *Bijender v. State of Haryana and Another*, CRR 1615 of 2018 (O&M).

19 *Saurabh Jalinder Nangre vs. State of Maharashtra*, 2018 SCC Online Bom 6295

20 *Supra* note 17.

21 *X Minor through His Mother v. State of NCT of Delhi,* Criminal Revision No. 351 of 2019.

22 *Mumtaz Ahmad Nasir Khan v. State of Maharashtra*, Criminal Appeal No. 1153 of 2018.

23 *Commissions for Protection of Child Rights Act, 2005*: Sec. 25.

24 Proviso to Sec. 28 of the Protection of Children from Sexual Offences Act.- "provided that if a court of session is notified as a Children's Court under the Commissions for Protection of Child Rights Act, 2005 (4 of 2006) or a Special Court designated for similar purposes under any law for the time being in force, then, such court shall be deemed to be a Special Court under this section".

(xi) Anticipatory Bail to Child in Conflict with Law

If there is another issue, apart from age determination, which has attracted the attention of higher Judiciary, then it is the question of anticipatory bail to children in conflict with law. Some High Courts have taken a view that question of anticipatory bail to children does not arise at all because there is no "arrest" of children and it is merely an "apprehension" and hence question of anticipatory bail does not arise at all in context of children who are alleged to have committed offences. But some other High Courts have taken a view that a relief which is available to adults, cannot be denied to children by hiding behind a technical view on use of the words like "Arrest" and "Apprehension" and some High Courts are of the view that even though the word "Anticipatory Bail" is not used in Sec. 12 of the JJ Act, 2015, a relief which is similar to anticipatory bail is indeed possible under Sec. 12, as words used in Sec. 12, JJ Act are, "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..." (emphasis added). At present it is one of the most unsettled questions in the JJ Act, 2015 Chhattisgarh High Court, Madhya Pradesh High Court, Kerala High Court, Rajasthan High Court, Delhi High Court and Madras High Court have dealt with this issue with divergent views and decisions.

(xii) Non-Revision of Integrated Child Protection Scheme

ICPS (Integrated Child Protection Scheme) is the financial scheme which supplies to the financial needs of State Governments for implementing the JJ Act. ICPS was rolled out in year 2009 and gradually all the State Governments signed MoUs with the Central Government on ICPS and now it is operational in all the States. But since new JJ Act, 2015 has come, it has increased the State obligation to implementation of the JJ Act and despite the fact that three years have passed since the JJ Act, 2015 came into play, ICPS still remains based on the old Act of 2000 and has yet not been revised to match the financial requirements set under the JJ Act, 2015 and under the JJ Model Rules, 2016. For instance, the new JJ Act, 2015 requires each CWC to have atleast 20 sittings in a month and remuneration for members of CWCs is set not below Rs 1500 per sitting. In several parts of the country, this 20 days minimum sittings is still not being followed. There is no financial allocation for new positions which have been created under the JJ Act and Rules, i.e. Secretary[25] of

[25] *JJ Act, 2015* :Sec. 27(3).

CWC and Rehabilitation-cum-Placement[26] officer and consequently *ad-hoc* arrangement are in operation leaving it meaningless.

(xiii) Operationalization of Place of Safety

As discussed before, Place of Safety is a crucial institution under the JJ Act, 2015. It existed under the JJ Act, 2000 in a different understanding as well but under the new JJ Act, 2015. Place of Safety is more prominent as an institution which houses children in the age group of above 16 and are alleged to have committed heinous offences and also to house those persons who are child as on the date of offence but have turned adults. In most places in India, such Place of Safety does not exist. *Ad-hoc* arrangements exists either in the form of using a part of an already existing Observation Home or Special Home as Place of Safety or using a part of district jail as Place of Safety, which is clearly impermissible[27] under the JJ Act, 2015.

(xiv) Juvenile Justice Committees and High Level Committee

Each High Court has a Juvenile Justice Committee (JJC) now, comprising of sitting Judges of High Courts who periodically monitor implementation of the JJ Act in the respective state in the manner the JJC deems fit and appropriate. The JJC is not a statutory body and is a product of resolutions passed in the Chief Justice Conferences. This institution of JJC started in year 2006 and has continued to evolve since then. Mandate of JJCs comes from resolutions passed in the Chief Justices' Conferences and also from various judgments and orders passed by the Supreme Court of India and various High Courts from time to time. One of the foremost challenges is to streamline the concept and functioning of JJCs and to make it aligned with the scheme of the JJ Act. The JJ Act, 2015 has created a new statutory body called "High Level Committee". Chairperson of this High Level Committee under Sec. 16 (2) of the JJ Act, 2015 is the High Court Judge who is chairperson of State Legal Services Authority. Most often, the Judge of High Court who is Executive Chairperson of the State Legal Services Authority is not a part of the JJC. There have been debates whether after enactment of the JJ Act, 2015 and with its Sec. 16 (2), there is any need for JJCs but at a practical level in past 3 years of implementation of JJ Act, 2015, the JJCs have become more and more active while statutory High Level Committees of Sec. 16 (2) remaining of paper or not in existence in most of the States. This is one of most critical areas where High Courts are

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[26] *Model JJ Rules, 2016* : Rule 65.
[27] *JJ Act, 2015* : Sec. 2(46) and 10(1).

required to have clarity. There are other issues also associated with JJCs. When cases on implementation of the JJ Act are filed in Courts, should judges who are members or JJCs and monitor implementation of the JJ Act on administrative side be hearing those matters on judicial side or not, has come up as an question of judicial propriety. Can JJCs pass general orders? Whether JJCs are subject to the Right to Information Act? What should be the nature of engagement of JJCs with the High Power Committee under Sec. 16(2) JJ Act? These are some of the key questions which keep coming in relation to the institution of JJC of High Courts.

(xv) Functioning of (Children's Courts)

Children's Courts are basically Session Courts which also deal with the cases of the POCSO Act[28]. The JJ Act, 2015 has accorded a key role to the Children's Courts. These Children's Courts not only hear appeals against orders of JJBs and CWCs but also deal with cases of children who are transferred by JJBs to be tried as an adult. One of the key concerns which has come up in these 3 years of implementation of the JJ Act, 2015, is that these Children's Courts are least equipped with an understanding of philosophy of the JJ Act, 2015 and in absence of which they end up treating cases of children transferred by JJBs to be tried as adult as any other regular trial of an adult accused. Since the Children's Courts are deprived of any orientation on the JJ Act and have no experience of working in a legal system which is rehabilitative and child friendly, they often fail to enforce the mandate of the JJ Act, 2015. Observers of the JJ Act, 2015 have highlighted that there is a greater need to train and sensitize the judges of Children's Courts on the JJ Act, 2015 for two reasons. *One* is that they need to adapt[29] to a completely new law which is rehabilitative, and *second* is that the law and procedure by Children's Courts is new and extremely complicated. Not only Children Courts are required to know and comprehend the new JJ Act, 2015 but also they need to build administrative channels with mainstream child protection systems like District Child Protection Units, Probation Officers, Place of Safety and officials of Department implementing the JJ

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[28] Sec. 2 (20) of the JJ Act, 2015- "Children's Court'' means 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."

[29] In *Hariram Ram v. State of Rajasthan*, Hon'ble Supreme Court observed, "The said law (JJ Act) is yet to be fully appreciated by those who have been entrusted with the responsibility of enforcing the same, possibly on account of their inability to adapt to a system without which , while having the trapping of general criminal law, is , however different therefrom".

Act, 2015 in the State. Not only knowledge but also the administrative linkages need to be brought into place for ensuring that Children's Courts are able to function as mandated under the JJ Act, 2015.

(xvi) Role of Social Worker Members of JJBs

JJBs are three member bodies, one member called "principal magistrate" is a Judicial Officer and two remaining members are social workers appointed by concerned department of State Government for a period of maximum 3 years. Decisions of JJB are to be taken by majority and where there is no such majority, view of Principal Magistrate shall prevail as final decision[30]. At times there are situations where Social Workers members have a different view than the principal magistrate but they are not able to record their view or opinion officially in the record of proceeding because case is practically in control and command of the Judicial Officer. Case file is in possession of the staff of the judicial officer and the steno of JJB types and prints orders only at the instance of Principal Magistrate. In fact, even though the JJ Act, 2015 intended to create a socio-legal nature of proceeding in JJB by adding two social worker members into the JJB, yet in practical the entire functioning of JJBs is predominantly oriented to the Judicial Officer. Despite the law, social workers members of JJBs feel handicapped and powerless in getting their views recorded in formal orders. There have also been instances where two social worker members have managed to write an order dissenting with Principal Magistrate but at the end it is only the order signed by Principal Magistrate which is enforced. This has given rise to a demand that system be evolved for ensuring that proceedings and decisions/orders of JJBs are inclusive of views of social worker members of JJBs. In some places, this concern has been attempted to be addressed through joint trainings and sensitization of Principal Magistrates and Social Worker Members of JJBs but the concern remained unaddressed by and large. In practice, the two social worker members of JJBs, to whom the JJ Act gives the power to prevail, if in unison, over Principal Magistrate's view, act as merely advisor to the principal magistrate or as "counseling providers" for children produced before JJBs and are totally dependent on well-wishes of and accommodation given by Principal Magistrate to be able to exercise their powers.

(xvii)Incarceration of Child in Jails and Remedial Measures

Sec. 8 of the JJ Act, 2015 has added a new function for JJBs for the first time which is to inspect jails to find out if any child is lodged in

[30] *JJ Act, 2015* : Sec. 7(4).

such jails and to take immediate measures for transfer of such children to Observation Home[31]. Though a much desired and well -intentioned provision, it is a simplistic provision and is profound in its inadequacy as it reflects no understanding of circumstances in which a child lands up in jail, dynamics of judicial proceedings and of hierarchy of criminal courts. Even if a child is found by JJB to be lodged in any jail, there must be a judicial order of some court placing such child in the jail. A JJB, on its own, cannot, without taking the risk of interfering with the judicial orders of some other court, remove such child from the jail and transfer him or her to Observation Home. This lacuna in this provision could have been addressed by laying down a well thought out, mechanism or procedure for operationalization of this function of JJB in the JJ Model Rules, 2016 by making use of the clauses "without prejudice to the generality of the foregoing powers" in Sec. 110(2) of the JJ Act, 2015 and "any other matter which is required to be" under Sec. 110 (2) (lviii) but the JJ Model Rules, 2016 are silent on this and provide no mechanism or procedure for discharge of this function. It is noteworthy that guidance for a suitable procedure in this regard was available in judicial pronouncements which have not been taken note of either at the time of drafting of the JJ Act, 2015 nor at the time of drafting of the JJ Model Rules, 2016. Prior to the enactment of the JJ Act, 2015, issue of incarceration of children in jails was taken up *suo moto* by Hon'ble Delhi High Court and extremely detailed procedural directions were issued for various authorities for elimination of incarceration of children in adult jails[32]. In absence of required procedure, implementation of Sec. 8(3)(m) is bound to be difficult, if not impossible, lax and inadequate. There is another glaring omission in the language of Sec. 8(3)(m). It only mentions "Observation Home", ignoring the fact that many persons, who will be eventually identified as children on the date of commission of offence, might have turned adult (above 18 years of age) and can only be kept in "Place of Safety". Hence the language of Sec. 8(3) (m) could have been "Observation Home or Place of Safety, as the case may be."

(xviii) Ambiguity regarding JJB's Power of Dispositional Order

Sec. 18 (1) of the JJ Act, 2015 has a very serious flaw. It gives power to JJB to pass dispositional Order (which is an order equivalent to the

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[31] Sec. 8. *Powers, functions and responsibilities of the Board.* (3) "The functions and responsibilities of the Board shall include- (m) 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".

[32] *Court on Its Own Motion v. Department of Women & Child Development and Others*, II (2013) DLT (CRL.) 262 (DB).

order on sentence in criminal courts) for three categories of children, (1) Child of any age who has committed a petty offence, (2) Child of any age who has committed a serious offence and (3) A child below the age of 16 years who has committed a heinous offence. One category has been left out here which is (4). A child of 16 years or above age who has committed a heinous offence. Though Sec. 15 (2) lays down the procedure to be followed by JJB in the case of a child of 16 years or above age who has committed a heinous offence in whose respect preliminary assessment has been carried out by JJB and JJB has decided not to transfer the case to Children Court for trial as an adult instead dispose it off itself, yet omission to mention this category under Sec. 18(1) is deeply troublesome and it might confuse JJBs that they don't not have power to pass dispositional order in respect of such category of children. Fortunately this lacunae has been filled in by the JJ Model Rules 2016, under Rule 11(1).

(xix) Revision under JJ Act, 2015

Sec. 102 of the JJ Act, 2015 provides for revision to lie before High Court from an order made by JJB or CWC, which are vested with powers of Judicial Magistrate of First Class or Metropolitan Magistrate or from orders of Children Court (which is a Court of Session) or Court. Since awareness about such special provisions of the JJ Act, 2015 among criminal lawyers is minimal, many of them tend to avail remedies available under the Cr.P.C. There are several instances where revisions against orders of JJB are filed before Court of Session under Sec. 397 of the Cr.P.C. The Delhi High Court in *A.M. v. State and Others*[33] has pronounced an authoritative judgment on this aspect on 12 December 2018. Hon'ble Delhi High Court raised a legal issue, "...whether the court of sessions could have exercised the revisional jurisdiction qua an order of this nature under the law governing juvenile justice" and held that

> *"Both in Section 53 of the erstwhile law and section 102 of the law now in force, reference to revisional power vesting in the court of sessions is conspicuously omitted. To put it simply, and straight, the special law on juvenile justice conceives of revisional scrutiny only by the "High Court" and no other forum. From the above, this court concludes, that in cases involving juveniles in conflict with law, the orders passed by the competent authorities under the special legislation are subject to revisional scrutiny only by the High Court and not by the Court of Sessions. To put it slightly differently, by implication, the power of revision in terms of Section 397 read with Section 399 Cr.P.C. cannot be exercised by the court of Sessions in cases arising out of the Juvenile Justice Act, both of 2000 and 2015."*

[33] Criminal MC No. 3855 of 2016.

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

(i) State Governments compulsion in conformity with Model JJ Rules 2016

Pursuant to the enforcement of the JJ Act, 2015 on 15 January 2016, the Central Government notified the JJ Model Rules, 2016 in September 2016. These Model Rules will be applicable to all the States till their own State JJ Rules are framed. Since the JJ Act, 2015 in Sec. 110(1) stipulates that State Governments while making their own Rules shall conform to the Model Rules, it has given rise to a controversy on power of State Governments to make their own rules without being compelled to conform to the Model Rules. Provision in the JJ Act, 2015 reads as, "they shall apply to the State *mutatis mutandis* until the rules in respect of that matter are made by the State Government and while making any such rules, they conform to such model rules." A petition[34] challenging the constitutional validity of this absolute conformity clause of Sec. 110(1) of the JJ Act, 2015, filed by the author of this article, is pending adjudication before the Delhi High Court. It is pertinent to note that the earlier JJ Act, 2000 did not have this absolute conformity clause, rather it had used a rather accommodative language which read as, "...they shall apply to the State until the rules in respect of that matter are made by the State Government and while making any such rules, *so far as is practicable*, they conform to such model rules" (emphasis added). Also it is pertinent to take note that several provisions of the JJ Model Rules are not only contrary to the JJ Act, 2015 but also to the Criminal Procedure Code (Cr.P.C.) and State Governments cannot be compelled to follow such provisions which are perverse.

(ii) Certain Rules Contrary to Scheme of Appeal

There are several instances where it has been observed that the JJ Model Rules, 2016 are contradictory to the JJ Act, 2015. One of most prominent violation is in Rule 13, where procedure in relation to Children Court has been delineated, particularly in 13(3) and Rule 13 (5). In order to fully appreciate the lacunae in Rule 13, we will need to first have a look at Sec. 101 of the JJ Act, 2015 where provisions related to appeal have been prescribed. Sec. 101 (1) prescribes that any one aggrieved with an order of JJB may file an appeal to the Children's Court but when it comes to filing an appeal against an order made by JJB under Sec. 15 of the Act, Sec. 101 (2) prescribes that appeal shall lie before Court of

[34] *Anant Kumar Asthana v. Union of India and Another*, Writ Petition (Civil) No. 8348 of 2017.

Sessions. The use of word "Children's Court" in Sec. 101 (1) and "Court of Sessions" in Sec. 101 (2) is a conscious and careful choice and not merely a typographical error, as framers of the Model JJ Rules seem to have misunderstood.

While all other orders of JJB, i.e. age declaration, denial of bail etc. may be appealed under Sec. 101 (1) before Children's Court but an order of JJB made under Sec. 15 cannot be appealed before Children's Court because the effect of order under Sec. 15 is that case gets transferred to Children's Court and it becomes the trial court. Hence Legislature cautiously chose "Court of Sessions" for an appeal under Sec. 101(2).

Such legislative scheme of Sec. 101 is not understood and appreciated in Rule 13 of the JJ Model Rules, 2016 and has probably been perceived as a drafting error and has attempted to provide a solution via Rule 13, causing this conflict with the scheme of the JJ Act, 2015 itself.

There have been several instances where appeals against order of JJB under Sec. 15 have been filed before Children's Court and in turn Children's Courts have refused to hear the appeal and have transferred them to be listed before a Court of Session. In one such case, the concerned Children Court in Delhi, before which an appeal under Sec. 101(2) JJ Act, 2015 had been filed, has recorded in the order[35]:

> *"Pursuant to the order dated 04.06.2016 of JJB, trial of the present Appellant in the said case is also pending before me and the present appeal against the order passed under Section 15 of Juvenile Justice Care and Protection Act, 2015 is also pending before the undersigned. Although Section 101(1) of Juvenile Justice (Care and Protection of Children) Act 2015 provides that any person may challenge the order passed by JJB by way of appeal to the Children Court. However, the provision for challenging the order passed under Section 15 JJ Act is provided in Section 101(2) JJ Act, 2015. As per (2) of Section 101 JJ Act, an appeal shall lie against the order of the Court passed under Section 15 of the Act before Court of Sessions. Thus, the bare perusal of Section 101(1) and Section 101(2) of JJ Act shows that there is distinction made in the Courts to whom appeal shall lie against the order under Section 15 of JJ Act. As per section 101(2) of the Act, such appeal may be filed before the Sessions Court as opposed to the use of word "Children Court", as mentioned in Section 101 (1) of the Juvenile Justice (Care and Protection of Children) Act, 2015. Since the word 'Children Court' is conspicuously missing in Section 101(2)*

[35] Order Dated 31 May 2018 in Criminal Appeal No. 04/2016 passed by ASJ-5 (Central), Tis Hazari Courts, Delhi.

> *of the Juvenile Justice (Care and Protection of Children) Act, 2015, it is apparent that it was the Legislative intent that appeal under Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2015 should be heard by some other court of Sessions and not the same court before whom the trial of such child in conflict with law, who has been directed to be tried as an adult under Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2015 is pending. Even otherwise, judicial proprietary demands that this court being the trial court for trying case of the Appellant as an adult offender pursuant to order of JJB passed under Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2015 should not hear the appeal against the said order. In view of the aforesaid, the present appeal is directed to be placed before Ld. Session Judge (HQ)/THC, Delhi for appropriate directions and with request to assign the present appeal to some other court."*

Under Sec. 101(1), appeals from the order of the CWC or the JJB are to be preferred to the Children's Court[36], which court is a Court of Sessions [see Sec. 2(20)]. But under Sec. 101(2), an appeal against a JJB's order on the preliminary assessment into an heinous offence under Sec. 15 has to be preferred to a Court of Sessions, which has not been designated as a Children's Court.

The reason for this distinction in Sec. 101(1) and Sec. 101(2) is because under Sec. 18(3), if the JJB concludes after its preliminary assessment into an heinous offence under Sec. 15, that the child needs to be tried as an adult, then the JJB, under Sec. 18(3), is required to transfer the trial to the Children's Court having jurisdiction to try such offences.

On such transfer of the trial from the JJB under Sec. 18(3), the Children's Court then becomes the court of original jurisdiction and the court of first instance. Since the Children's Court (which is a Sessions Court) becomes the court of first instance, such Children's Court cannot concurrently exercise appellate jurisdiction over the same trial and over the order of the JJB's preliminary assessment into an heinous offence undertaken by the JJB under Sec. 15. For this significant reason, Sec. 101(2) requires the appeal to be preferred to a Court of Sessions, which means that such a court should not be designated as a Children's Court.

This appellate hierarchy scheme and the importance of the distinction between appeals to a Children's Court under Sec. 101(1) and an appeal to a Court of Session under Sec. 101(2) is fortified by the fact that under Sec. 101(4), no second appeal lies from an order of a Court of

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[36] *JJ Act, 2015* : Sec. 2(20).

Sessions when passed under Sec. 101(2) whereas under Sec. 101(5), a further appeal lies to the High Court against a Children's Court's order, which order is passed under Sec. 101(1).

This makes it clear that there is an important reason why the Act specifically uses the phrase "Children's Court" in Sec. 101(1) and the phrase "Court of Sessions" in Sec. 101(2).

This legislative scheme delineating the appellate hierarchy in respect of orders passed by the JJB generally, and when passed specifically under Sec. 15 is nullified by Rules 13 (3) to 13(5).

Rule 13(3) by providing that the appeal under Sec. 101(2) is to be preferred to a Children's Court and Rule 13(4) and 13(5) providing the procedure to be so followed, are contrary to the parent Act and Sec. 101 which provides a completely separate appellate procedure and a distinction in forums when appeals are preferred under Sec. 101(1), and when appeals are preferred under Sec. 101(2).

Rule 13(3) is contrary to the important distinction which Sec. 101 draws, which is that when the JJB makes its preliminary assessment under Sec. 15 and decides to transfer the trial, under Sec. 18(3), to the Children's Court so that the child is tried as an adult, the Children's Court cannot at the same time sit in appeal over the JJB's order since it will become the court of first instance on such transfer of the trial being made.

But under Rule 13(3) the Children's Court is designated as the appellate court for the purpose of Sec. 101(2) which is contrary to the plain language of Sec. 101(1) and Sec. 101(2) read with Sec. 101(4) and Sec. 101(5). Thus Rule 13(3) to 13(5) are *ultra vires* Sec. 101.

Such scheme of legislation under Sec. 101 of the JJ Act 2015 becomes further clear when Sec. 101(4) and 101(5) are taken into consideration. A joint reading of these two provisions further marks the distinction between "Children's Court" and "Court of Sessions". There is no second appeal against an order of the Court of Sessions, while there is provision of appeal before High Court against an order of Children's Court.

The scheme provided under Rule 13(3) and 13(5) are also prejudicial to the child in conflict with law as it merges decision in appeal with a decision under Sec. 19(1). If the scheme of Rule 13(3) and 13(5) are enforced then one level of right available to a child under Sec. 19(1) stands denied.

It has been noticed in several cases in various parts of country that Children Courts, after receiving the case on transfer from JJB, automatically proceed with the case considering child as an adult and do not make compliance of Sec. 19(1). This issue was highlighted before the Delhi High Court in a case[37] filed on behalf of a child in conflict with law and it held that Children's Court must pass an order under Sec. 19(1) and the fact that the Children's Court had proceeded and framed the charges, would not come in the way.

(iii) Dilution of Section 41 (1) of JJ Act

Another important instance where the JJ Model Rules, 2016 are in violation to the JJ Act, 2015 is issue of registration of CCI, which has been dealt under Sec. 41 of the JJ Act, 2015 and under Rule 21 of the JJ Model Rules, 2016. While under Sec. 41 (1) of the JJ Act, 2015 the language used in the Act is, "Notwithstanding anything contained in any other law for the time being inforce, all institutions, whether run by a State Government or by voluntary or non-governmental organisations, which are meant, either wholly or partially, *for housing children in need of care and protection or children in conflict with law*, shall, be registered under this Act..." (emphasis added), when it comes to the corresponding provision in the JJ Model Rules, 2016, the language used in Rule 21 (1) is, "All institutions *running institutional care services for children in need of care and protection or children in conflict with law*, whether run by the government or voluntary organisation, shall be registered under sub-section (1) of section 41 of the Act, irrespective of being registered or licensed under any other Act for the time being in force." (emphasis added)

Sec. 41 pertains to 'Registration of child care institutions'.Sec. 41(1) provides that any institution which is run by the State Government, or a voluntary organization or NGOs which either wholly or partly are housing children in need of care and protection or children in conflict with law, needs to be registered under the Act. Sec. 110(2) (xxiii) provides that rules are to be made for the manner in which all institutions under the Act are to be registered under Sec. 41(1).

Rule 21(1) which relates to 'Manner of Registration of Child Care Institutions', however, alters the language and import of Sec. 41(1). *Firstly*, it requires registration of institutions which are "running institutional care services" for a child in need of care and protection or a child in

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[37] *CCL LK @ LKP v. State,* Criminal Revision Petition No. 985 of 2018. Judgment delivered on 19 July 2019.

conflict with law, whereas Sec. 41(1) provides that institutions which are wholly or partly housing children in need of care and protection or children in conflict with law need to seek registration under the Act. *Secondly*, Rule 21(1) provides that only institutions which are run by the government or by voluntary organizations need to seek registration under Sec. 41(1).Rule 21(1) omits to mention institutions which are run by NGOs also need to seek registration. Sec. 41(1) clearly stipulates that institutions being run by NGOs also fall in the category of institutions which need to seek registration under Sec. 41 of the Act, apart from institutions being run by the State Government and institutions being run by voluntary organizations.

Rule 21(1) by omitting to mention that registration has to be sought by NGOs which run institutions which house children alters the language of the substantive provision, namely Sec. 41(1). This seemingly innocuous omission would have far reaching repercussions on the future of children in such institutions.

A reading of Sec. 110(2)(xxiii) also makes it clear that power of making rules is confined only to the procedure of registering CCI and does not empower the Central Government to alter provisions of the Act through the medium of rules.

(iv) Tampering with After Care

Yet another instance where the JJ Model Rules, 2016 have tampered with the mandate of the JJ Act, 2015 is Rule 25 (6) which relates to 'After care of children leaving child care institutions' and is dealt by Sec. 46 of the JJ Act, 2015 which provides that "Any child leaving a child care institution on completion of eighteen years of age may be 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 use of the phrase 'financial support' in Sec. 46 of the Act for the important purpose of ensuring the re-integration of the child into society would mean financial support for the child to pursue means of equipping themselves with necessary skills in order to lead a wholesome life and become gainful citizens, but Rule 25(6) reduces the scope of Sec. 46 since it provides that the State Government needs to only provide children placed in the after care programme with "essential expenses". Rule 25(6) reduces the burden of the State Government since essential expenses would relate to expenses for food, clothing, and housing and not financial support in the broader sense as mandated by Sec. 46. Rule 25(6) which is also relatable to Sec. 110(2)(xxxiii) read with Sec. 46 speaks

of the need of making rules for "...one time financial support". Thus Rule 25(6), by departing from the clear language of the Act which stipulates for provision of financial support, and not for essential expenses only, reduces the scope and dilutes the ambit of Sec. 46 in the parent Act, which is impermissible.

(v) No FIR in Petty and Serious Offences to Exceed JJ Act

Another instance of the JJ Model Rules, 2016 over reaching the JJ Act, 2015 is its Rule 8(1) which stipulates that a First Information Report is only to be registered when the offence allegedly committed is an 'heinous offence' or when any offence, be it petty or serious or heinous, has been committed by the child jointly with adults. Such prescription of Rule 8(1) is *ultra vires* the proviso to Sec. 110 (1) and 110(2) of the JJ Act, 2015, since there is no substantive provision in the JJ Act, 2015 which prohibits registration of a F.I.R. for offences allegedly committed by a child which are not heinous offences. In absence of any provision in the JJ Act, 2015 its Rules are not competent for such adventure. Subordinate legislation like the JJ Model Rules, 2016 are enacted in aid of the parent legislation and for carrying out the purposes of Act. No substantive provision in the Act prohibits registration of an F.I.R. in offences which are not heinous offences i.e. offences which have a punishment of less than 7 years and thus Rule 8(1) is neither in aid of, nor in furtherance of, any substantive provision in the Act.

(vi) Non-Registration of FIR contrary to Cr.P.C.

While it is true that the JJ Act, 2015 prevails over Cr.P.C. in several fundamental areas like bail[38], joint trial[39], preventive detention[40] and procedure of inquiry[41] etc., but there is no dispute on the understanding that the areas on which the JJ Act, 2015 is silent are to be covered by the Cr.P.C. Registration of F.I.R. is one such area where the JJ Act, 2015 has not made any provision overriding Cr.P.C. Despite this, the JJ Model Rules, 2016 in Rule 8 (1) have taken an extra walk and have gone on to prescribe that no F.I.R. will be registered in cases of petty and serious offences. This is clearly impermissible. Rules are not competent to create a provision overriding legislation like the Cr.P.C. If at all this was needed, the appropriate forum was the JJ Act, 2015 itself. It has been a debatable issue anyway whether registration of F.I.R. is a measure against

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38 *Ibid.*,Sec. 12.
39 *Id.*, Sec. 23.
40 *Id.*, Sec. 22.
41 *Id.*, Sec. 103.

protection of children or it is an enabling tool to ensure that police owns up to all the cases of crimes by children, be they petty or serious or heinous. The embargo of registration of F.I.R. created by Rule 8(1) is also contrary to Sec. 154 of the Cr.P.C., 1973 which requires registration of an FIR in cases where the police officer receives information regarding commission of a cognizable offence. Rule 8(1) is also contrary to a Constitution Bench judgment of the Hon'ble Supreme Court of India in *Lalita Kumari v. Government of Uttar Pradesh*[42]**.** In this case, Hon'ble Supreme Court of India sought to answer the following question:

> *"The important issue which arises for consideration in the referred matter is whether "a police officer is bound to register a first information report (FIR) upon receiving any information relating to commission of a cognizable offence under Section 154 of the Code of Criminal Procedure, 1973 (in short 'the Code') or the police officer has the power to conduct a 'preliminary inquiry' in order to test the veracity of such information before registering the same?"*

After exhaustively analyzing the law on Sec. 154, 155, and 156 of the Cr.P.C. and also the various judicial pronouncements, the Hon'ble Constitution Bench laid down the following directions:

> ***"Conclusions/Directions***
>
> ***120.*** *In view of the aforesaid discussion, we hold:*
>
> ***120.1.*** *The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.*
>
> ***120.2.*** *If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.*
>
> ***120.3.*** *If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.*
>
> ***120.4.*** *The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.*
>
> ***120.5.*** *The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.*

[42] 2014 (2) SCC 1.

> ***120.6.*** *As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:*
>
> *(a) Matrimonial disputes/family disputes*
>
> *(b) Commercial offences*
>
> *(c) Medical negligence cases*
>
> *(d) Corruption cases*
>
> *(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.*
>
> *The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.*
>
> ***120.7.*** *While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.*
>
> ***120.8.*** *Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above."*

Thus, it can be seen that Rule 8(1) prohibits registration of a FIR for offences which are cognizable but not an 'heinous offence'. For example, an offence under Sec. 379 of the IPC is a cognizable offence under the Cr.P.C. but not a 'heinous offence' since the term of imprisonment is 3 years. Rule 8(1) is clearly without force of law.

(vii) Betrayal to Legislative Scheme of JJ Act

Process of Preliminary assessment under Sec. 15 of the JJ Act, 2015 is vague and extremely confusing. In desperation to address this, the JJ Model Rules, 2016 has made various provisions to fill in the gaps left out by the Act. Overzealously done, some of these gap-filling measures are turning out to be impractical and at time creating tremendous difficulties at various levels. Rule 10(5) is a good example of this. It provides that, "In cases of heinous offences alleged to have been committed by a child, who has completed the age of sixteen years, the Child Welfare Police Officer shall produce 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 of the child before the Board, a copy of which shall also be given to the child or parent or

guardian of the child." By making this provision, Rule drafters have tried to supply ammunition for forming an opinion on "Circumstances in which he allegedly committed the offence", which is one of indicators for decision under Sec. 15. Rule 10(5) overlooks the Sec. 8(3) (e) which already provided the basis for forming such opinion. It prescribes that one of the functions of JJB is to, "(*e*) directing the Probation Officer, or in case a Probation Officer is not available to the Child Welfare Officer or a social worker, to undertake a social investigation into the case and submit a social investigation report within a period of fifteen days from the date of first production before the Board to ascertain the circumstances in which the alleged offence was committed;" Preliminary Assessment is not a trial and also at the time of process of preliminary assessment child is protected by the principle of presumption of innocence. By way of this Rule 10(5), the JJ Model Rules, 2016 is enabling JJB to consider investigation related documents. There is no need for doing this as Sec. 8(3)(e) already empowers JJB to call for a Social Investigation Report to ascertain the circumstances in which the alleged offence was committed. Similarity in the language of Sec. 15 and in Sec. 8(3)(e) is astounding and indicates that both are complementing each other. Compelling police to submit investigation related documents and statements of witnesses to JJB even before completion of investigation by Police and also making it mandatory to supply these documents to child in conflict with law is a clear interference with the investigation. A Sessions Court while hearing an appeal against Section 15 order from JJB has recorded this difficulty in its order, "compelling investigating agency to place on record the statements of its witnesses and documents running collected during the course of investigation prior to filing of the final report by the investigating agency amounts to intruding in the sphere of investigation which may hamper a fair and impartial investigation."[43]

[43] Quoted by the Punjab and Haryana High Court in its judgment of 11 October 2018 in*Bholuv. Central Bureau of Investigation*.Criminal Revision No. 2366 of 2018.