THE JUVENILE JUSTICE ACT 2015 CRITICAL UNDERSTANDING

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Abstract

The Juvenile Justice (Care and Protection of Children) Act, 2015 has heralded a new era of juvenile justice in India by introducing the provision of transfer of 16-18 years old children alleged to have committed a heinous offence to an adult criminal court. The juvenile justice boards have been given the onerous responsibilities of determining age, determining whether the offence is heinous, conducting a preliminary assessment, and then taking the decision whether to transfer or not to transfer the child to the children s court. The children s court, then is required to reassess if the child so transferred, should be tried as a child or as an adult. The paper focuses on the difficulties presented by the language of various sections dealing with these aspects and suggests possible interpretations to secure the best interest of the child in view of various lacunae found.

I Introduction

THE JUVENILE Justice Act, 2015 (hereinafter JJA, 2015) as passed by Parliament received the assent of the President of India on December 13, 2015. It came into force on January 15, 2016 in India except the State of Jammu and Kashmir.[1] The JJA, 2015 has taken a step backward in the modern history of juvenile justice in India which began in 1850. The Apprentices Act, 1850 initiated differential treatment of children by providing for binding over of vagrant children and children committing petty offences below the age of 15 years as apprentices instead of sending them to jail. 1898 saw enactment of Reformatory Schools Act, 1897 providing for sending of children below 15 years of age to reformatory schools instead of prison if found suitable. Pursuant to the recommendations of the All India Jail Committee 1919-1920, the era of children Acts began in 1920 which extended the segregation of children accused of committing offences at the adjudication stage by establishing separate children courts. All these children Acts provided for sending the children to remand homes but permitted sending of children to jail in exceptional circumstances. Eight states enacted children Acts on similar lines but the states passing the children Act chose different cut-off age for defining child under these Acts.

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1 Gazette of India, Extraordinary, part II, s. (3) ss. (ii) on Jan.13, 2016.

Since Independence in 1947, Parliament passed the first legislation on the subject, namely, the Children Act, 1960. This was passed as a model legislation to be followed by other states. It was made applicable only to union territories as its subject matter at that point was perceived to fall within the state list of the seventh schedule of the Constitution of India. The Children Act, 1960 introduced a sex based definition of child bringing girls till the age of 18 years and boys till the age of 16 years within its protective umbrella. It also made the remarkable departure from all the earlier children Acts passed by the states by completely prohibiting use of police stations or jail under any circumstances for children covered within its purview. All children Acts passed after 1960 followed this pattern.

In 1983, Sheela Barse, a journalist filled the writ of *habeas corpus* in the Supreme Court seeking release of 1400 children lodged in various jails in India despite the prohibition against use of police station or jails under various children Acts. During the pendency of this petition, the Supreme Court recognised that differential cut-off age, defining child in different children Acts in force in different parts of India, were violating the fundamental right to equality before law and equal protection of law to all children as guaranteed by the Constitution. Hence, it pointed in one of its orders that it would be better to have a uniform legislation for the whole country. Pursuant to this direction, Parliament passed the first uniform legislation for the children applicable to the whole of India, namely, the Juvenile Justice Act, 1986 (hereinafter JJA, 1986). It substantially followed the scheme of the Children Act, 1960 but substituted the word child by juvenile perhaps influenced by the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 adopted by the General Assembly. Use of police station or jail at any stage and under any circumstances for keeping girls below the age of 18 years and boys below the age of 16 years became illegal with the enforcement of the JJA, 1986 in the whole of India except the State of Jammu and Kashmir. The JJA, 1986 was later adopted by Jammu and Kashmir also.

When India signed and ratified the United Nations Convention on the Rights of the Child in December, 1992, it was considered essential to adopt the uniform cut off age of 18 years for both girls and boys in conformity with the definition of child in the Convention on the Rights of Child,1992 (hereinafter CRC). The Juvenile Justice (Care and Protection of Children) Act, 2000 extended the ban on use of prisons or police station at any stage of proceedings and under any circumstance for children below the age of 18 years found to have committed any offence under any law in force in India.

All these enactments since 1850 were moving in one direction to bring an increasing number of children within the protective umbrella of juvenile justice. However, the gang rape of a Delhi girl, Jyoti Pande (named Nirbhaya by media) on December 16, 2012 resulted in use of social media to organise spontaneous protests against the gruesome rape. It resonated in different parts of India. Soon media coverage shifted the focus from women s safety to the involvement of a 17 year old child in this gang rape. The newspapers and multi-media screamed with flashing headlines that the child was the most brutal of all accused in this rape. The media created and promoted the frenzy around this lie.

With the passing of the Criminal Law Amendment Act, 2013, all women were presumed to have become safe except from juveniles who were continuing to pose the biggest threat to safety of women in India. Newspapers and multi-media flashed more lies of 50% increase in juvenile crime, 60% increase in sexual offences by children and so on even though the National Crimes Records Bureau (NCRB) data continued to show that there was no substantive change in either the rate of crime or share of juvenile delinquency to total crime.

Petitions were filed in the Supreme Court challenging the constitutionality of definition of child [2] and for lowering of cut-off age for defining child [3] but were dismissed by the Supreme Court with cogent reasoning. The Juvenile Justice Bill, 2014 as introduced in Lok Sabha was examined by the Department-Related Parliamentary Standing Committee on Human Development Resources consisting of 11 members of Parliament from Rajya Sabha and 32 members of Parliament (MPs)from Lok Sabha belonging to different parties and headed by Satyanarayan Jatia, a BJP leader. In its 264th report on Juvenile Justice (Care and Protection of Children) Bill 2014, the Parliamentary Standing Committee rejected the bill being unconstitutional and unwarranted in the following words: [4]

> [T]he existing juvenile system is not only reformative and rehabilitative in nature but also recognises the fact that 16-18 years is an extremely sensitive and critical age requiring greater

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2 *Salil Bali* v. *Union of India* (2013) 7 SCC 705.

3 *Subramanian Swami* v. *Raju through the Juvenile Justice Board* (2013)10 SCC 465

4 Para 32 of the 264 Report on the Juvenile Justice (Care and Protection of Children) Bill 2014 of the Department-Related Parliamentary Standing Committee on Human Resource Development presented to Rajya Sabha on Feb. 25, 2015 and laid on the table in Lok Sabha on Feb. 25, 2015.

protection. Hence, there is no need to subject them to different or adult judicial system as it will go against Articles 14 and 15(3) of the Constitution.

However, the JJ Bill, 2014 was passed in Lok Sabha despite very cogent arguments presented by the MPs who were in the miniscule minority there. In Rajya Sabha, the JJ Bill, 2014 had reached that point where various political parties had given notice to the chairman for sending it for further examination to the select committee.[5] However, the concerted efforts by the media savvy experts playing on the emotions of the bereaved family of Jyoti Pande, succeeded in the withdrawal of this notice at the last minute and passing of the JJ Bill, 2014 in the Rajya Sabha in the emotionally charged atmosphere created by the presence of Jyoti Pande s parents in the gallery, without any debate on the provisions of the bill or the objections to the bill raised by the Parliamentary Standing Committee.

However, now that the JJA, 2015 has been enforced, it is essential to clearly understand the scheme of the new Act and the challenges presented by its various provisions in its implementation.

II Broad scheme of the JJA, 2015

The preamble of the JJA, 2015 containing the objects of the Act shows that it has made no departure from the protective approach of juvenile justice towards children in conflict with law as well as children in need of care and protection. The preamble states that the Act is aimed at 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 .

As a positive change the JJA, 2015 has dropped the usage of the term juvenile and retained it only in the title. Section 1(4) now gives overriding effect to provisions of this Act in case of conflict with any other law not only in relation to children in conflict with law but also in case of all matters relating to children in need of care and protection.[6]

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5 Moushumi Das Gupta, Bill on juvenile age is set for further delay *Hindustan Times*, New Delhi, Dec. 19, 2015, *available at*: http://m.hindustantimes.com/delhi/bill-on-juvenile-age-is-set-for-further-delay/story-uXtjWeVm6MXz86jtkHUNWJ.html(last visited on Dec.19,2015).

6 The Juvenile Justice (Care and Protection of Children) Act 2015, s.1(4) reads: Notwithstanding anything contained in any other law for the time being in force,

There is also no change in the definition of child which means a person who has not completed the age of 18 years.[7] For purposes of clarifications it must be noted that the JJA, 2015 has not reduced the age of defining a child to 16 years but children between the age of 16-18 years alleged to have committed a heinous offence may be transferred to an adult criminal court, known as the children s court[8] to be tried as adults in certain circumstances. This is the most crucial change brought about by the JJA, 2015 and is examined in detail in the next part of this paper.

The JJA, 2015 continues to apply to two categories of children, namely, children in conflict with law and children in need of care and protection. While the term children in conflict with law (CCL) continues to refer to children alleged or found to have committed any offence, some changes have been made in the definition of children in need of care and protection (CNCP). The most important inclusion among CNCP is that of child labour in this definition.

The juvenile justice board (JJB) continues to have the responsibility of adjudicating matters relating to CCL and the child welfare committee, the responsibility to decide matters connected with CNCP. While the JJB continues to be constituted by one judicial magistrate and two social workers, it is no more required that the magistrate must have special knowledge of child psychology and child welfare. A practicing professional with a degree in child psychology, psychiatry, sociology or law are among the categories of persons who may be appointed as members of the JJB[9] and the child welfare committee (CWC).[10]

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the provisions of this Act shall apply to all matters concerning children in need of care and protection and children in conflict withlaw, including

(i) apprehension,detention,prosecution,penaltyorimprisonment,rehabilitation and social re-integration of children in conflict with law;

(ii) procedures and decisions or orders relating to rehabilitation, adoption, re-integration and restoration of children in need of care and protection.

7 *Id.*, s. 2(12).

8 *Id.*, s. 2 (20) reads: 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.

9 *Id.*, s. 4(3).

10 *Id.*, s. 27(4).

Section 6 clearly laid down that if a person who has crossed the age of 18 years is apprehended for an offence committed prior to the age of 18 years, is to be treated as a child and their cases are to be disposed under the provisions of this Act.

When a CCL is produced before the JJB, if it is obvious from the appearance of the child that it is so, it may note the age and proceed with inquiry.[11] In other cases, the age is to be determined by adducing evidence. In order of preference, age is to be determined by reference to: [12]

(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.

For the purposes of disposal of cases of CCL, the JJA, 2015 has categorised the offences in three categories, namely, petty offences, serious offences, and heinous offences. The JJB has to dispose of all cases of children below the age of 16 years committing any offence, and cases of children between the ages of 16-18 years if they have committed a petty or serious offence. In these instances the JJB is free to choose any of the following orders for any offence on the basis of the social investigation report and suitability of the order in the best interest of the child[13]

(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 guardian;

(b) direct the child to participate in group counseling and similar activities;

(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;

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11 *Id.*, s. 94(1).

12 *Id.*, s. 94(2).

13 *Id.*, s.18 (1).

(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 assured that the provisions of any labour law for the time being in force are not violated;

(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 behaviour and child s well-being for any period not exceeding three years;

(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;

(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, behaviour modification therapy, and psychiatric support during the period of stay in the special home:

Provided that if the conduct and behaviour of the child has been such that, it 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.

In addition to the above orders the JJB may also direct the child to: [14]

(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.

In case of a 16-18 year old child alleged to have committed a heinous offence, the JJB has to conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand

14 *Id.*, s.18 (2).

the consequences of the offence and the circumstances in which he allegedly committed the offence [15] taking the help of experienced psychologists or psycho-social workers or other experts. After this assessment, the JJB may choose to dispose of the case itself or may decide to transfer the case to the children s court.[16]

On receipt of preliminary assessment from the JJB, the children s court has the discretion to decide whether to try the child as an adult or to deal with her/him as child and pass appropriate orders accordingly. Progress of children sent for stay for terms beyond the age of 21 years need to be reviewed annually. On their attaining the age of 21 years, another assessment is to be done to see if the child has reformed and is ready to be released in society, the children s court may direct their release under the supervision of the monitoring committee for the remainder of the period of stay initially ordered.

Any aggrieved person may file an appeal against any orders by the JJB or the children s court.[17]

In relation to the CNCP, the CWC may direct the child to be restored to the parents, or direct the child to be kept in a children home. It may also place the child in the care of a fit person, fit facility, or in foster care. Adoption has been included as an important means for the permanent rehabilitation and reintegration of children in the JJA 2015 though it has its share of controversial provisions. Orphan and abandoned children declared fit for adoption may be given for adoption to Indians, as well as foreigners. Problematically, a child, whose legal guardian is not willing to take, or capable of taking care of the child , is also included within the definition of an orphan. Abandonment of children is no more an offence and children so abandoned may be declared fit for adoption by the CNCP if it fails to persuade the parents to look after their children.

III Lacunae in the JJA, 2015

Constitutional challenges

The JJ Bill, 2014 as introduced in the Lok Sabha contained clause 7 which was unconstitutional on the face of it as it prescribed that persons arrested

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15 *Id.*, s.15(1).

16 *Supra* note 8

17 *Supra* note 6, ss. 15(2) proviso and 101.

after attaining the age of 18 years for an offence committed by them before completing the age of 18 years shall be tried as adults. This provision was in direct conflict with article 20 of the Constitution which in most clear terms provides that no person can 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 . Thankfully this clause was dropped by the ministry before it was passed by the Lok Sabha. However, it still contains provisions which are in contravention to the right of equality guaranteed by the Constitution.

Article 15 (3) of the Constitution of India permits special legislation for children but it does not provide any definition of who is a child. Article 24 prohibiting employment of children in factory, mine or other hazardous work is applicable to children below the age of 14 years. Article 21A securing the fundamental right to compulsory and free elementary education is limited to children between the age of 6-14 years. Articles 39(e) and (f) aimed at ensuring that children of tender age are not abused and they are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity, do not specify any specific age group. Article 45 imposes responsibility to provide early childhood care for children below the age of six years. India signed CRC in December 1992, and obligated itself to bring the definition of child for all purposes in accordance with its provisions. Article 1 of the CRC defines child as any person below the age of 18 years unless majority is attained at an earlier age in that country. The JJA, 2000 was brought into force specifically to fulfill this obligation of India by raising the age of juvenility in case of boys from 16 years to 18 years as girls till the completion of 18 years were already within the purview of the earlier legislation, namely, the JJA, 1986. Even so, there is no doubt that India did still retain its sovereign power to choose any cut off age for defining child even in contravention of the CRC obligation and it could have chosen the age of 16 years or lower if it thought it necessary to do so. However, the JJA, 2015 chose the path of choosing the cut off age of 18 years for defining children but providing for selective transfer of children above the age of 16 years but below 18 years of age, alleged to have committed a heinous offence to the adult criminal court to be tried as adults. This provision is in direct contravention of the general comment 10 of the UN CRC Committee which specifically prohibits children below the age of 18 years to be tried as adults and exhorts the countries that have been doing so to abolish such provisions.

India is perhaps the first country which did not provide for any exclusion in the first place but chose to do so 15 years after its compliance with article 1 of the CRC. While there is no doubt that the general comments are not binding on India as a state party to the CRC, there is also no doubt that the India is certainly bound by its own Constitution.

Article 14 of the Constitution guarantees equality before the law or the equal protection of the laws within the territory of India to all persons including children. It has been well established that this provision did not permit class legislation but it did permit reasonable classification applying the nexus test. Any classification is reasonable if the criterion for classification has a nexus with the object of the Act. In order to pass this test, we need to establish that the criteria for providing for differential treatment of children by reference to their age and the nature of offence have a direct nexus with the objects of the JJA, 2015. The first para of the preamble to the JJA, 2015 laying down the aims of the Act reads as follows:

> 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.

It is apparent that the object of the Act is not to subject children to any punishment but only to provide for their care, protection, development, treatment and social re-integration. The provision for transfer of some children by reference to their age, offence, and circumstances of its commission and their state of mind is not geared toward achieving these objectives but to punish them by providing long term incarceration, which will lead them to spending time in prisons too. These children are also subjected to life-long disqualifications attached to conviction for an offence even if they are reformed and released from the place of safety on attaining the age of 21 years.[18]

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18 *Supra* note 6, proviso to s.21.

In *Subramanian Swami* v. *Union of India*,[19] it was argued before the Supreme Court that clubbing of all children till the age of 18 years irrespective of their mental capacities and nature of offence committed by them was an over-classification and was not permissible under the Constitution. Rejecting the plea of reading down the provision of the JJA, 2000, the Supreme Court in view of no ambiguity in the provision of the Act, reiterated the well-established principle that:

> Classification or categorization need not be the outcome of mathematical or arithmetical precision in the similarities of the persons included in a class and there may be differences amongst the members included within a particular class. So long as the broad features of the categorization are identifiable and distinguishable and the categorization is reasonably connected with the object targets, Article 14 will not forbid such a course of action.

By defining child as a person below the age of 18 years, the state has accepted that broad features of children till that age of 18 years are identifiable and distinguishable and object of this classification is to provide for their care and protection, *etc.*, as mentioned above. Hence, any further sub-classification must be reasonably connected with the same objects for it. As the object of this sub-classification is not at all connected with the objects of the JJA, 2015, provisions relating to transfer of 16-18 year old children alleged to have committed a heinous offence to an adult court fail the test of reasonable classification inherent in article 14 of the Constitution. The arbitrariness that will result in actual cases of transfer of children is something that we will be witnessing in the times to come in the absence of any scientific knowledge for determining whether the offence was committed with a child-like or adult-like mind.

It is further submitted that after defining children as those who have not completed the age of 18 years, exclusion of 16-18 years old to be tried as adults is also against article 15(3) which permits special legislations only for children and not against them.

Classification of offences

The JJA, 2015 has introduced legislative classification of offences into three categories, namely, petty, serious and heinous. Such classification has

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19 Criminal Appeal no.695 of 2014, *available at*: http://judis.nic.in/supremecourt/imgs1.aspx?filename=41356 (last visited on Apr. 6, 2014).

hitherto been unknown to not only juvenile justice but also in criminal justice. So far, offences had been classified as bailable / non-bailable, compoundable/ now-compoundable, warrant and summons cases, cognizable/non-cognizable cases by the Code of Criminal Procedure, 1973(Cr PC) . In addition, section 27 of the Cr PC makes a distinction between offences punishable with death penalty and life imprisonment and others and provided that if a child below the age of 16 years has committed offences not punishable with death penalty or life imprisonment may be tried to the children s court. However, the limitation of offences were overruled by the judgements of the Supreme Court as long back as 1979 in *Rohtas* v. *State of Haryana* [20] and again in *Raghbir* v. *State of Haryana* [21] in 1981. The question of applicability of the children Act to a child above the age of 16 years also was decided in favour of children by the Bombay High Court in *Sangeeta Jain*.[22]

For the first time a distinction was made between offences punishable with seven years or more in case of children by the order of the Supreme Court in *Sheela Barse* v. *Union of India*.[23] By this order the Supreme Court directed that all inquiries in offences punishable with less than seven years of imprisonment must be completed within three months of filing of the complaint, failing which the case must be treated as closed.

It is the first time in the history of juvenile justice in the country that a distinction has been made on the basis of punishment prescribed for the offence for trying children as adults.

Be that as it may, the sections defining petty, serious and heinous offences pose serious difficulty of interpretation and implementation. Section 2 of the JJA, 2015 contains the definitions of petty, serious, and heinous offences:

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 upto three years.[24]

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20 AIR 1979 SC 1839.
21 1981 Cri 1497 (SC).
22 1996 Cri LJ 24 (Bom).
23 AIR 1986 SC 1773.
24 *Supra* note 6, s.2(45).

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.[25]

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.[26]

It is noteworthy that all the three definitions use the word includes and not means while defining these categories leaving the question alive as to what else is included in these definitions beyond what has been specifically mentioned in these definitions. In criminal law, the accepted principle of interpretation is the strict and narrow interpretation as not to extend the criminal liability of the accused. Hence, no offence that provides for a greater criminal liability than provided in it may be included within these categories.

The definition of petty offences is quite clear as it includes only those offences that are punishable with maximum imprisonment of three years. However, confusion is created by the definition of serious offences which includes offences punishable with three years of imprisonment also instead of limiting this category to offences punishable with more than three years . However, applying the principles of harmonious interpretation and imposition of lower criminal liability, and use of the word maximum in the definition of petty offence, it would be prudent to exclude offences punishable with maximum of three years of imprisonment as petty offences.

The definition of serious offences further poses problems by limiting the period of imprisonment to seven years for classification of offences as serious. All offences that are punishable with more than seven years of imprisonment are apparently covered neither in the definition of serious offences nor in the definition of heinous offences which applies only to those offences that are punishable with minimum imprisonment of seven years or more. Offences like attempt to murder and many others under the Indian Penal Code (IPC) and other laws in force that are punishable with imprisonment for more than seven years but do not provide the minimum punishment of seven years cannot be classified as heinous offence.

It was mentioned during the debate in Parliament that classification of heinous offences in the bill was not clear. The Minister for Women and Child

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25 *Id.*, s.2(54).

26 *Id.*, s.2(33).

Development, Maneka Gandhi in her reply to the discussion in Rajya Sabha on December 22, 2015, stated that heinous offence have been spelt out in the bill as follows:[27]

> It is every crime that is listed by the IPC as seven years or more . I just want to tell you what it is . I will explain to you what they are. They are murder, rape, acid attack, kidnapping for ransom, Dacoity with Murder. That s it.

Apparently, this explanation is not in accordance with the words contained in the definition of heinous offences. Offences included within the heinous offences category are not limited to offences only under the IPC but include offences under any other law for the time being in force also. In her statement she furthered ignored use of the crucial word minimum imprisonment of seven years. Thankfully though, all the offences of the IPC mentioned by her are only those that are punishable with minimum imprisonment of seven years or more .

As offences punishable with imprisonment of more than seven years which are not punishable with mandatory minimum imprisonment of seven years are outside the purview of the definition of heinous offenses and also are not included within the ambit of serious offences either, it leaves a major lacuna that will need to be filled by judicial interpretation. It is the author s submission that such offences need to be classified as serious offences. Apparently, offences punishable with more than seven years of imprisonment cannot be included within the definitions of petty and heinous offences as both categories use a definitive words maximum and minimum to set the limit of what cannot be included within those categories. No such definite word setting the boundaries has been used in the definition of serious offences and expanding the boundary of that definition is permissible applying the principles of harmonious and narrow interpretation for imposing criminal liability. As a child committing a serious offence irrespective of age is to be dealt with by the JJB and only protective orders under section 18 may be passed in relation to them, it will not be against the interest of children to classify offences punishable with imprisonment of more than seven years as serious offences for the purposes of the JJA, 2015 and thereby filling this

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27 Reply of Minister of Women and Child Development , Maneka Sanjay Gandhi on the discussion on the Juvenile Justice (Care and Protection of Children) Bill, 2015, Dec. 22, 2015. *Available at*: https://www.youtube.com/watch?v=bdlQ-Q8YhcI (last visited on Mar. 16, 2016).

major lacuna in the Act classifying offences. As of now, the Centre for Child and Law of National Law School of India University has prepared a list of heinous offences,[28] it will be advisable for the JJB to take the following simple steps while determining if an offence is to be classified as a heinous offence:

Firstly, examine if the section provides for imposition of a minimum sentence?

Secondly, if the answer to the first question is yes, then examine if the minimum sentence prescribed for the offence is seven years or more than seven years?

Thirdly, if the answer to the second question is yes, the offence is included within the definition of heinous offence but if the answer is in the negative, it is not included within the definition of heinous offence.

This interpretation, however, still leaves the problem of classification of offences punishable with mandatory minimum sentence of less than seven years. An offence punishable with minimum punishment of three years touches on the boundary of petty offences but need to be classified as serious offence as the maximum punishment provided for such offences is more than three years.[29] Other offences punishable with minimum imprisonment of less than three years but punishable with maximum of three years need to be classified as petty offences.[30]

Sentencing by the children s court

If the childrens court decides to try the child as an adult, then it is required to pass appropriate orders after trial subject to the provisions of this section and section 21, considering the special needs of the child, the tenets of fair trial and maintaining a child friendly atmosphere. While this section specifically

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28 See ss. 121, 195, 195A, 302, 304B, 311, 326A, S.364A , 370(2), 370(3), 370(4), 370(5), 370(6), 370(7), 376(1), 376(2), 376A, 376D, 392 r/w 397, 394 r/w 397, 396 r/w s. 397, s. 393 r/w s. 398, 395 r/w s. 398 of the IPC; ss. 4(1) and (2) of the Commission of Sati (Prevention) Act, 1987; ss. 15(c), 17(c), 18(b), 19, 20(c), 21(c), 22(c), 23(c), 24, 25, 27A, 29, 31A of the NDPS Act,1985; ss.27(2) and (3) of the Arms Act; ss.10(b)(i), 16(1)(a) of the Unlawful Activities (Prevention) Act 1967; s.59(iv) of the Food Safety and Standards Act, 2006; ss.3(2)(i)(iv)(v) of the Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act 1989, S.3(1)(i) of the Maharashtra Control of Organized Crime Act, 1999; ss.4 and 6 of the Protection of Children from Sexual Offences Act, 2000.

29 See, for example, the offence of assault or use of criminal force to women with intent to disrobe punishable under s. 354B of the IPC.

30 For example, the offence of voyeurism punishable under s.354C of the IPC.

excludes imposition of the punishments of death and life imprisonment without the possibility of release as provided by section 21, it does not direct that the children s court should pass the minimum period of imprisonment prescribed for the offence when committed by adults. Section 19 read with section 20 clearly means that the children s court has to compulsorily pass an order of institutionalisation of the child but it is nowhere stated that the duration of this stay has to be the minimum period of imprisonment prescribed for the offence. On the other hand, this order of institutionalisation has to be determined by reference to the special needs of the child and the final order passed by the children s court must include an individual care plan. The progress of the child must be monitored by the children s court on a periodical basis. If the period of stay as ordered by the children s court is not over by the time the child attains the age of 21 years, a fresh assessment needs to be done to find if the child has reformed and is fit to be released in the society. On receipt of a favourable report, the children s court may order their release under the supervision of the monitoring committee for the remainder of the stay as originally ordered. Only if the report is in the negative that such a child is to be sent to a jail to complete the remaining duration of his stay as ordered by the children s court.[31]

If the children s court decides to deal with the transferred child as a child, it is required to pass orders in terms of section18.[32] It is noteworthy that section 18 does not specify what orders the JJB may pass in case it decides not to transfer a 16-18 year old child alleged to have committed a heinous offence to the children s court. Taking a cue from section 19, it is submitted that the JJB too has to pass the orders mentioned in section 18 for such children.

Appeal

The provisions of an appeal against any order under section 101 JJA, 2015[33] of the JJB or CWC may be made within three days but the court of sessions or the district magistrate may allow such appeals beyond the limit of 30 days in if there was sufficient cause due to which the aggrieved person could not file the appeal within the specified time. It is also clear that appeals from the CWC on matters related to foster care, sponsorship, and after-care will lie before the district magistrate.

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31 *Supra* note 6, s. 20.

32 *Id.*, s. 19(1).

33 *Id.*, s. 101

While this provision permits an aggrieved person to file an appeal against any order of the JJB or CWC, the JJA, 2015 does not contain a definition of aggrieved person. For example, in case of complaint of rape by a father of a 17 year old girl who had voluntary sex with her boyfriend, does the father falls within the definition of aggrieved person if the JJB was to decide against the transfer of such boy to the childrens court? The high courts are expected to be called upon the locus of the person filing an appeal if they are secondary victims of an offence.

Another aspect that is confusing in this provision is the reference to childrens court in sub-section (1). In the scheme of the Act, the childrens court though a court of session, in fact is the first court of trial for 16-18 year old children transferred to it to be tried as adults for having allegedly committed a heinous offence. Hence, no appeal should lie to it from any order of the JJB or the CWC. All appeals against the order of the JJB or CWC except those mentioned in sub-sections (1) above should lie only to the court of session and reference to childrens court needs to be read as technical drafting error and be substituted by reference to a court of sessions. It is only by doing that the scheme of appeals will become clear.

An aggrieved person may file only one appeal against the order of the JJB but it does not prohibit cross appeal from the same order by the child as well as the victim. For example, a JJB may determine the age of the child to be 17 years but may decide not to transfer the child to the childrens court even though alleged to have committed a heinous offence. In this case the child may challenge the age determination claiming to be less than 16 years of age and the victim may file an appeal against the non-transfer of the child to the childrens court. However, once such cross-appeals are decided by the court of session, no further appeal is permissible.

Once the child has been transferred to the childrens court to be tried as an adult, appeals may again be made by the aggrieved party to the high court against the order of trying the child as a child or an adult. Later, another appeal may be made by either party aggrieved challenging the appropriateness of the final order passed by the childrens court.

IV Other problems under the scheme of the JJA, 2015

Internal contradictions

The provisions for transfer of 16-18 years old children are in apparent conflict with many of the fundamental principles contained in section 3 of

the JJA, 2015. For example, the JJA, 2015 provides that [a]ny child shall be presumed to be an innocent of any mala fide or criminal intent up to the age of eighteen years. [34] This principle is couched in the manner of irrebuttable presumption contained in the Evidence Act, containing the words shall presume. If the JJB is required to presume that every child till the age of 18 years is innocent of any *mala fide* or criminal intent, it cannot hold that certain children fell outside this category and should be transferred to the children s court to be tried as adults.

Similarly, provisions permitting transfer of children to the children s court and their trial as adults is against the principle of best interest which required 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 .[35]

The proviso to section 18(1) (g) is in clear violation of the principle of safety asking for all measures for ensuring safety of the child so that he is not subjected to any harm, abuse or maltreatment while in contact with the care and protection system and thereafter.[36] The above proviso permits sending of any child irrespective of their age or offence to a place of safety which is meant primarily to keep children from the age of 16 years having committed a heinous offence till the age of 21 years.

The principle to provide equality of access, opportunity and treatment to every child[37] is violated by the provision for trial of children as adults as such trial takes away opportunity for a better life and treatment from them.

Time lines

Provision of time frame can be seen as an effort at ensuring speedy disposal of cases. However, if the time lines are unreasonably short, they lead to making the mockery of law or violation of rights of people affected by the time lines. The JJA 2015 obligates that the initial assessment to determine suitability of transfer of the 16-18 year old child should be completed within three months by the JJBs. This time line poses serious questions about not only legality of the procedure but also practicality of the time frame. This time frame does not require that the assessment should be done after the police files its final report in the case confirming that *prima facie* a case of heinous

34 *Id.*, s.3(1).
35 *Id.*, s.3(iv).
36 *Id.*, s.3(vi).
37 *Id.*, s.3(x).

offence has been made against the child. In the absence of final report, any assessment on the ability of the child to have committed the offence with a childlike mind or not proceeds on the assumption of that the child indeed had committed the offence only on the basis of complaint received. This assessment also presumes that the JJB has also determined that the child is between the age of 16-18 years. Age determination of a child on the basis of a school certificate or the birth certificate from another state takes long time in procuration and certification of those documents and it may not be possible to do both age determination and initial assessment within the time frame provided.

Age determination

Determination of age by medical examination poses even more difficult problem in case of 16-18 year old children. Earlier legislation provided for determination of age by examination by a medical board conducting bone ossification test, dental and physical examination of the child. Combined finding of the doctors constituting the medical board reduced the margin of error from two years on either side to six months on either side. However, the JJA, 2015 provides primarily to bone ossification test for determining the age which may give margin of error up to two years. In order to transfer a child to the adult system, the JJB needs to give a clear finding that the child was above the age of 16 years but below the age of 18 years on the date of commission of offence. In the absence of documentary evidence, it is not going to be possible to determine the age range by reference to the medical tests. This Act also does not include the provision as was contained in the JJA, 2000 that gave benefit of doubt up to one year on the lower side in favour of the child. In the absence of such provision, the ruling of the Supreme Court in *Rajinder Chandra*[38] providing for benefit of doubt to be given to the child will still bind the JJB while determining the age. Hence, if the medical report determines the age of the child to be around 17 years of age, the margin of error being two years, his age need to be determined as 15 years on the lower side. The same approach needs to be adopted for determining the upper age limit.

Delays

The scheme of appeals included in the JJA, 2015 will result in long delays in the final disposal of cases of 16-18 years old children alleged to have committed a heinous offence. The JJA, 2000 permitted no appeal against the finding of the

38 *Rajinder Chandra* v. *State of Chhattisgarh* (2002) 2 SCC 287.

JJB that the child has not committed an offence. Any person aggrieved by such order of the JJB could approach the higher courts only through revision or writ petitions. In all such cases the high court or the Supreme Court had the option of refusing admission at the initial stage itself without assigning reasons in writing. A right of appeal to aggrieved person, however, stands on a different footing and the appellate court is duty bound to hear the appeal on merits following the principles of fair trial and disposing the matter by giving reasons in writing.

The JJA, 2015 first permits one appeal by an aggrieved party against any order of JJB in case of 16-18 years old children alleged to have committed a heinous offence. Secondly, it permits appeal by any aggrieved person against an order of the children s courts. In addition, the appellate remedies of revision and writ petitions may also be resorted to by an aggrieved person. The appellate remedies are not limited to only the final order of the JJB or the children s court but include many interim orders also. For example, in case of a 16-18 years old child alleged to have committed a heinous offence, the JJB is required to determine the question of bail to the child, whether the child was above the age of 16 years but below the age of 18 years on the date of alleged commission of offence, whether the offence in question is a heinous offence, whether there is a *prima facie* case made out against the child, procure an assessment report from experts, determine whether the child should be transferred to the children s court to be tried as an adult? Each one of these orders is open for appeal by the aggrieved person. It is not clear if an aggrieved person may file one appeal on each one of these orders to the session court? If so, it will be years before the children s court is ceased of the order.

Once the children s court is ceased of the matter, it has to first reassess whether the child should be tried as an adult or a child, conduct the inquiry or trial as the case may be, determine if the child had committed the offence or not, and then to pass the final order. Each one of them may give rise to an appeal by the aggrieved person. With these range of appeals, revision and the constitutional remedies of special leave petition, it will not be surprising if we see the first case of 16-18 years old child alleged to have committed an offence taking decades before it is finally decided.

V Conclusion

The JJA, 2015 is a major step backward in the progressive and forward looking philosophy of juvenile justice initiated with the enactment of the Apprentices Act, 1850. By providing for use of prisons in certain circumstances, it has taken India back to 1920 when the initial children Acts provided for exceptional use of prisons for keeping children. In 1920, that was a progressive step as it reversed the policy of exceptional use of reformatories and borstal

to exceptional use of prisons. By going back to the position of law in 1920, the JJA, 2015 has ignored the new knowledges generated since then in disciplines like criminology, penology, victimology, psychology, psychiatry, neuro science, rehabilitation, restorative justice which have equipped us better to deal with persons committing offences. Restorative justice is being successfully practiced in many countries even for such serious offences like murder and rape by adults, leading to decrease in repeat offending by them, Indian Parliament buckled under the political and emotional pressure created by one bad case of barbaric gang rape in which one of the accused happened to be a child on the verge of attaining majority. It is a well-accepted principle that one bad case never makes for a good law. Ignoring that sound experience, 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 the USA and UK which have been practicing exclusion of children much younger than 16 years sending them to long term imprisonments for the last 25 years. They have all reported failure of such approach based on research findings that children tried as adults ended up committing more offences in their later life compared to children who were treated within the juvenile justice system.[39]

This paper has presented only the most glaring lacunae and problems presented by the JJA 2015 in the very drafting and its scheme. It is not aimed at pointing out all the problems and challenges posed by it. The first writ petition filed in public interest by Tehseen Poonawalla challenging the constitutionality of the JJA was dismissed by the Supreme Court on February 26, 2016[40] saying it cannot be a subject matter of public interest litigation and can only be admitted if an aggrieved comes before the court. Apparently, some children will have to suffer before deeper insights are generated from the experience on the ground in implementation of this legislation with passage of time. It is for sure that this legislation signifies win of emotions over reason and rule of law.

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39 See *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: Report on Recommendations of the Task Force on Community Preventive Services, Centers for Disease Control and Prevention,* Nov. 30, 2007, *available at*: http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm (last visited on Mar. 10, 2015).

40 *Available at*: http://www.livelaw.in/sc-refuses-to-entertain-plea-against-new-juvenile-justice-act-2/#(last visited on Mar. 10, 2015).