



Juvenile Injustice: Nirbhaya's Continuing Tragedy

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A Critical Analysis of the Amendments to the Juvenile Justice Act, 2015

ABSTRACT

This paper critically analyses the procedural changes introduced by the amendment to the Juvenile Justice (Care & Protection of Children) Act, 2015 (hereinafter, the "Act"), effected in the aftermath of the *Nirbhaya* case. In particular, it will assess the import and scope of the amended sections 15, 18 through 21, read with other relevant provisions and rules of the Act.

There emerge inadvertent legislative omissions in the amended Act that have resulted in a fatal anomaly, whereby the Juvenile Justice Board, which is presided over by a Magistrate First Class, is presently empowered to try a juvenile offender above the age of 16 and below 18, for *heinous offences* punishable by death. Crucially, no guidelines have been defined for the conduct of a "preliminary assessment" into the mental and physical capacity of the accused juvenile to commit the alleged heinous offence, nor any minimum standards or eligibility criterion prescribed for the qualification of the psychological "experts" whom the Magistrate is empowered to consult during the said assessment. Moreover, no such guidelines particular to the Indian context exist, nor have any qualification criterion for such psychological "experts" been prescribed by the various bodies governing psychological and psychiatric care, which are conspicuously silent on this subject.

Furthermore, in cases where an offence is alleged under other special legislation such as the POCSO Act, there is a clash of jurisdiction. The exercise of power and jurisdiction u/S.15(2) of the JJ Act by a Presiding officer of the JJB necessarily results in the ouster of the jurisdiction of a designated Special Court of Session under POCSO Act, which is otherwise exclusively empowered to try POCSO offences directly impacting the quantum of sentence.

This raises serious questions about arbitrariness, fundamental rights and due process, and grave doubts about the efficacy of the amendment.

KEYWORDS: Juvenile Justice, Mental Capacity, Preliminary Assessment, Heinous Offence

1 Background: the *Nirbhaya* case, 2012

On the night of 16th December 2012, a 22 year old woman and her male friend were returning home after watching a film in a theater in New Delhi when they were accosted by six unknown males, one of whom was under the age of 18 years. While her male friend was beaten unconscious, the woman victim was brutally assaulted and gang-raped, and

subsequently died of her injuries in a hospital. Her tragic ordeal shocked the conscience of the nation and resulted in spontaneous outcry, cutting across class, caste, religious and regional divides. The identity of the deceased victim was largely concealed by the press and, instead, she came to be referred to as “Nirbhaya” or “fearless” in Hindi, in most of the reportage during the period. The case had wide ramifications on the criminal justice system and came to be known as the “Nirbhaya case”.

In the police investigation that followed, all six accused males were eventually arrested. The five adult accused were tried and four of them were convicted and sentenced to death by a fast track trial court on 13th September 2013¹, whereas one accused adult died by suicide while in judicial custody pending trial. Having exhausted all appeals, the four convicted accused were subsequently executed on 4th March 2020².

However, the one accused minor was aged 17 years at the time of the offence. Consequently, he was tried as a juvenile offender under the then extant Juvenile Justice Act, 2000 (hereinafter, “JJ Act, 2000”) and sentenced to the statutory maximum of 3 years in a reformation center, inclusive of the eight months he spent in remand pending trial³.

For the purpose of this paper, it is not necessary to reproduce the facts as recorded by the Ld. Trial Court in its judgment. Nor is it necessary to dwell upon the various appeals, reviews and mercy petitions filed by the adult accused until the day of their executions. This analysis is only concerned with the procedures and substantive laws applied to the one accused juvenile in the case. As such, only one additional fact warrants a special mention. This is the fact that on 28th January 2013, during the pre-trial inquiry the Juvenile Justice Board (JJB), which was a statutory body constituted under the JJ Act 2000, extant at the time, dismissed an application for a “bone ossification test” prayed for by the Prosecution in order to determine the age of the accused minor. Instead, the JJB relied upon the birth certificate and school record of the accused juvenile and determined that he was in fact under the age of 18 years at the time of commission of the offence⁴. The relevance of this fact will become apparent shortly, and again in greater detail in Chapter 6 of this paper.

1 Mukesh and anr. v. State (NCT of Delhi) and others, (2017) 6 SCC 1

2 DD News, *Nirbhaya convicts hanged till death*, 20th March 2020, available at: <https://ddnews.gov.in/national/nirbhaya-convicts-hanged-till-death>.

3 The Times of India, *Nirbhaya gang-rape case: Juvenile found guilty of rape and murder*, archived from the original on 31st August 2013. Retrieved 31st August 2013 available at <http://timesofindia.indiatimes.com/city/delhi/Nirbhaya-gang-rape-case-Juvenile-found-guilty-of-rape-and-murder/articleshow/22183253.cms>

4 The Times of India, *Gang-rape victim's kin appalled as 6th accused declared minor*, 28th January 2013. Archived from the original on 22 September 2013. Retrieved 29 June 2013, available at: https://web.archive.org/web/20130922230251/http://articles.timesofindia.indiatimes.com/2013-01-28/delhi/36595368_1_jjb-juvenile-board-juvenile-justice

Suffice it to say that the JJB's finding that the accused juvenile was a minor led to widespread opprobrium⁵. Suddenly, it became painfully evident to the already out-raged public that, even if he were to be convicted, the accused juvenile could only be sentenced to a maximum of three years remand in a reformation facility. This was diametrically opposed to the prevailing public sentiment at the time. There was a rising nation-wide clamour for the imposition of the death sentence upon all of the accused due to the unusual barbarity with which they had committed the crime. The possibility of one of the accused escaping with a light, three year reformatory-remand sentence merely because he was a few months shy of 18 years was totally contrary to this public sentiment.

In order to discuss this issue further, it is important to note the position of law regarding juvenile offenders, their classification, trial and sentencing as it stood in December 2012, at the time of commission of the crime.

Statutory Position in December, 2012

As on 16th December 2012, the extant law insofar as the juvenile accused in the Nirbhaya case was concerned, was the Juvenile Justice (Care and Protection of Children) Act, 2000 (Act No. 56 of 2000). It is worth reproducing certain provisions of the JJ Act 2000 in order to better illustrate the flow of a case concerning a juvenile offender.

Section 2(k) of the JJ Act 2000 defined "juvenile" or "child" as meaning a person who has not completed eighteenth year of age;

Further, Section 2(l) defined a "juvenile in conflict with law" as meaning a juvenile who is alleged to have committed an offence;

Furthermore, Section 2(p) defined an "offence" as meaning an offence punishable under any law for the time being in force;

Thus, the JJ Act 2000 covered within its ambit any person under the age of 18 years who is alleged to have committed absolutely any offence under any extant law. Crucially, no distinction was made between any class of offences. Nor was there any sub-classification between different age groups such as ages 1 to 12, 12 to 16, 16 to 18 etc.

The scheme of the JJ Act 2000 also provided for the trial and sentencing for any juvenile in

5 Hindustan Times, *Most brutal rapist declared minor, victim's kin outraged*, 28th January 2013. Archived from the original on 28 January 2013, available at https://en.wikipedia.org/wiki/2012_Delhi_gang_rape_and_murder#cite_note-96;
The Telegraph, Calcutta, *Delhi gang-rape: Board declares 6th accused a minor, does not allow bone test*, 28th January 2013. Archived from the original on 31 January 2013. Retrieved 28 January 2013, available at https://en.wikipedia.org/wiki/2012_Delhi_gang_rape_and_murder#cite_note-97

conflict with law. As such, the said Act was a complete code in and of itself. Section 15 provided for the types of orders that could be passed against a juvenile, relevant portions of which have been reproduced below:

“15. Order that may be passed regarding juvenile.- (1) Where a Board is satisfied on inquiry that a juvenile has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in force, the Board may, if it thinks so fit,-

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) Make an order directing the juvenile to be sent to a special home for a period of three years:

Provided that the Board may if it is satisfied that having regard to the nature of the offence and the circumstances of the case, it is expedient so to do, for reasons to be recorded reduce the period of stay to such period as it thinks fit.” The aforesaid amendment now makes it clear that even if a juvenile attains the age of eighteen years within a period of one year he would still have to undergo a sentence of three years, which could spill beyond the period of one year when he attained majority. [Inserted vide amendment with effect from 22.8.2006]

Section 16 of the JJ Act 2000, further clearly specified the types of orders that could *not* be passed against a juvenile, relevant portions of which have been reproduced below:

“16. Order that may not be passed against juvenile.-

(1) Notwithstanding anything to the contrary contained in any other law for the time being in force, no juvenile in conflict with law shall be sentenced to death or life imprisonment, or committed to prison in default of payment of fine or in default of furnishing security:

Provided ...”

Thus, a combined reading of Sections 15, 16, 2(k)(l)(p) yielded the inevitable conclusion that a juvenile accused of a heinous offence, such as in the Nirbhaya case, could be sentenced to a maximum of three years remand in a reformation facility. This stark realisation stirred further public outrage.

Consequently, on 23rd December 2012, in an attempt to address the prevailing public

sentiment in the immediate aftermath of the crime, the Central Government appointed a three member committee (hereinafter, the “Committee”) under the Chairmanship of Justice (Retd.) J. S. Verma to “look into possible amendments of the Criminal Law to provide for quicker trial and enhanced punishment for criminals committing sexual assault of an extreme nature against women”⁶. The Committee was tasked with submitting its recommendations within 30 days, and its ambit was specific. The report tendered by the Committee was instrumental in effecting amendments to the criminal laws concerning sex crimes in India.

However, as we shall see in the ensuing chapters, the Committee rejected the public demand for revising the age-limit of juvenile offenders for certain heinous offences. This proposition was then litigated all the way to the Supreme Court, which too rejected all attempts at invoking judicial review of the relevant statutory provisions of the JJ Act 2000. Ultimately it was the legislature which acceded to this public sentiment when Parliament passed the Juvenile Justice (Care & Protection of Children) Act, 2015, wherein a new class of juveniles was created who, in cases of “heinous offences”, could be tried and sentenced as adults.

But first we shall see how the Justice (Retd.) J. S. Verma Committee dealt with the matter.

⁶ Ministry of Home Affairs, Govt. of India Notification No. SO(300)E, 23rd December 2012

2 Justice J. S. Verma Committee Report, January 23rd, 2013

The Committee began its review of existing criminal laws pertaining to sexual assault in right earnest and completed its task on time, submitting its report on 23rd January 2013⁷, precisely thirty days after it was constituted. A rare feat in India. An indication of how the Committee view its own ambit and background is available in the very opening paragraphs of the preface to the said report, relevant portions of which are worthy of reproduction herein -

“PREFACE

1. The constitution of this Committee is in response to the country-wide peaceful public outcry of civil society, led by the youth, against the failure of governance to provide a safe and dignified environment for the women of India, who are constantly exposed to sexual violence. The immediate cause was the brutal gang rape of a young woman in the heart of the nation’s capital in a public transport vehicle in the late evening of December 16, 2012. We refrain from saying anything more about the incident, which is sub judice for the trial in a court of law for the offences committed by the rapists. It is unfortunate that such a horrific gang rape (and the subsequent death of the victim) was required to trigger the response needed for the preservation of the rule of law—the bedrock of a republic democracy. Let us hope that this tragedy would occasion better governance, with the State taking all necessary measures to ensure a safe environment for the women in the country, thus preventing the recurrence of such sexual violence.

2. The urgency of the matter impelled the Committee to undertake the performance of the assigned task within the short period of 30 days to enable the authorities, with all their resources, to take the necessary follow up action within a further 30-day period, so that the same or a substantial portion of the same may be completed before commencement of the next session of the Parliament, which, we hope, will undertake the needed legislative exercise recommended by this Committee.”

7 Justice J. S. Verma (Retd.) Committee, "Report of the Committee on Amendments to Criminal Law", 23rd January 2013

In this light, the Committee set about evaluating a wide range of laws and procedures, their social need and impact and the various judicial and legislative efforts made over the decades at achieving some measure of “safe and dignified environment for the women of India”. However, for the purpose of this analysis, we are only concerned with how the Committee dealt with the issue of treatment of “juveniles in conflict with law”. More particularly, we are concerned with how the Committee dealt with the issue of revision/reduction in the age of “juveniles” for the purpose of punishment for heinous crimes as in the Nirbhaya case.

In its report, while discussing “Sentencing and Punishment”, the Committee considered the national and political clamour for “Reduction of age in respect of juveniles” so that harsher sentences could be imposed upon juveniles above a certain age in cases of heinous offences. The Committee’s observed, inter alia, as follows:

”44. We have heard experts on the question of reduction of the age of a juvenile from 18 to 16 for the purpose of being tried for offences under various laws of the country. We must confess that the degree of maturity displayed by all the women’s organizations, the academics and a large body of thinking people have viewed this incident both in the criminological as well as societal perspective humbles us.

45. Assuming that a person at the age of 16 is sent to life imprisonment, he would be released sometimes in the mid-30s. There is little assurance that the convict would emerge a reformed person, who will not commit the same crime that he was imprisoned for (or, for that matter, any other crime). The attempt made by Ms. Kiran Bedi to reform Tihar Jail inmates was, and continues to be, a successful experiment. But we are afraid that that is only a flash in the pan. Our jails do not have reformatory and rehabilitation policies. We do not engage with inmates as human beings. We do not bring about transformation. We, therefore, breed more criminals including juveniles) in our prison and reformatory system by ghettoing them in juvenile homes and protective homes where they are told that the State will protect and provide for them, but which promise is a fruitless one.

46. Children, who have been deprived of parental guidance and education, have very little chances of mainstreaming and rehabilitations, with the provisions of the Juvenile Justice Act being reduced to words on paper.

47. We are of the view that the 3 year period (for which delinquent children are kept in the custody of special home) is cause for correction with respect to the damage done to the personality of the child. We are completely dissatisfied with the operation of children’s institutions and it is only the magistrate (as presiding officer of the Juvenile Justice Board) who seems to be taking an interest in the situation. The sheer lack of counselors and

therapy has divided the younger society into 'I' and 'them'.

48. We have also taken note of the fact that considering the recidivism being 8.2% in the year 2010, as against 6.9% during 2011, we are not inclined to reduce the age of a juvenile to 16.

49. It is time that the State invested in reformation for juvenile offenders and destitute juveniles. There are numerous jurisdictions like the United Kingdom, Thailand, and South Africa where children are corrected and rehabilitated; restorative justice is done and abuse is prevented. We think this is possible in India but it requires a determination of a higher order.

50 ...

51. We have also taken certain scientific factors into account. Having regard to the development in neurosciences, we are of the view that adolescent brain development is one of the important issues in public policy. We have taken note of the reasons stated by the US Supreme Court for abolishing death penalty for juveniles in *Roper v. Simmons*¹⁶⁸ [... and] also noted the decision of the US Supreme Court in *Graham v. Florida*

54. We are of the view that the material before is sufficient for us to reach the conclusion that the age of 'juveniles' ought *not* to be reduced to 16 years".

Thus, contrary to public sentiment, the Committee did not recommend any reduction in the age of "juveniles". Nor did the committee recommend any increase in the quantum of maximum imposable sentence upon a juvenile in conflict with the law. It is noteworthy that the Committee did note, however, the need for medical examination for the accurate determination of the age of a purported minor when produced before a Magistrate / JJB. In Chapter Six of its report, while discussing "Trafficking of Women and Children", the Committee adverted to the directions of the Hon'ble Supreme Court of India in *Bachpan Bachao Andolan v. Union of India*⁸, wherein the Apex Court made the following directions:

"38. The following directions are necessary: (a) Every Magistrate before whom a child is brought must be conscious of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000;

- (b) He must find out whether the child is below the age of 18 years;
- (c) If it is so, he cannot be accused of an offence under Section 7 or 8 of ITPA;
- (d) The child will then have to be protected under Juvenile Justice Authority;

⁸ *Bachpan Bachao Andolan v. Union of India*, (2011) 5 SCC 1

(e) **The Magistrate has a responsibility to ascertain and confirm that the person produced before her or him is a child by accurate medical examination;**

(f) The definition of a child in Section 2(k) means a juvenile or a child as a person who has not completed 18 years of age;

(g) Once the age test is passed under Section 17(2) establishes that the child is a child/minor less than 18 years of age, the Magistrate/Sessions Judge while framing charges must also take into account whether any offence has been committed under Sections 342, 366, 366-A, 366-B, 367, 368, 370, 371, 372, 373, 375 and if so, he or she must also frame charges additionally;

(h) The child should be considered as a child in the protection of the Child Welfare Act;

(i) The child should be handed over to the Child Welfare Committee to take care of the child. The performance of the Child Welfare Committees must be reviewed by the High Court with a committee of not less than three Hon'ble Judges and two psychiatrists;

(j) A child must not be charged with any offence under ITPA or IPC;

(k) A minor trafficked victim must be classified as a child in need of care and protection. Further, the Magistrate must also order for intermediate custody of minor under Section 17(3) of ITPA, 1956;

(l) There should not be any joint proceedings of a juvenile and a person who is not a juvenile on account of Section 18 of the Juvenile Justice (Care and Protection of Children) Act, 2000;

(m) It is necessary that courts must be directed that the same lawyer must not represent the trafficker as well as the trafficked minor;

(n) Evidence of child should be taken in camera. Courts must protect the dignity of children. The children's best interest should be the priority." **[Emphasis Supplied]**

However, the Committee stopped short of recommending that the procedure of medical examination of purported minors or juveniles be made mandatory in all cases of "juvenile(s) in conflict with law".

Thus, it is fair to surmise that the J. S. Verma Committee rejected the public demand for stricter punishment to be meted out to the accused juvenile in the Nirbhaya case. Further, the Committee did not identify or recommend any specific medical tests for the purpose of age-determination in terms of Section 2(k) of the JJ Act 2000. It would be up to the judiciary to eventually adjudicate these issues when they came up in subsequent litigation. And like the J. S. Verma Committee, the judiciary too rebuffed public sentiment as we shall see in the subsequent chapter.

Position of Law as interpreted by the Supreme Court, until 2014

The public clamour for inflicting the harshest possible punishment on *all* of the accused in the Nirbhaya case was growing by the day. The J. S. Verma Committee had rejected this demand and refused to yield to sentiment. At this point, some members of the public decided to take matters into their own hands and sought to invoke judicial review of the JJ Act 2000 and its provisions with regard to trial and punishment.

During the proceedings before the JJB against the accused juvenile in the Nirbhaya case, former Lok Sabha M.P., Dr. Subramanian Swamy filed an application, inter alia, claiming that "on a proper interpretation of the [JJ] Act [2000], the juvenile was not entitled to the benefits under the Act but was liable to be tried under the penal law of the land in a regular criminal court alongwith the other accused"⁹. Effectively, Dr. Swamy prayed that the JJB commit the accused juvenile for trial as an adult before a Court of Sessions. One of the stated objectives of this application was to ensure that, if convicted, the accused juvenile would be sentenced under the Indian Penal Code (hereinafter, the "IPC") instead of under the JJ Act 2000. Since the accused were all charged, inter alia, u/S.302 (*murder*), 376 (2)(g)(*gang-rape*) and 120-B (*criminal conspiracy*) IPC as it stood then, the range of punishment under the IPC extended from the statutory minimum of 7 years imprisonment to even death. However, the extant JJ Act 2000, limited the maximum sentence imposable upon a juvenile in conflict with the law to 3 years in a remand/reform home¹⁰, as we have already seen in Chapter 4.

Insofar as Dr. Swamy's application was concerned, the JJB expressed its inability to decide the same and had directed the petitioners to seek an authoritative pronouncement on the said issue(s) from the High Court¹¹.

Therefore, Dr. Swamy then instituted a writ proceeding before the Hon'ble High Court of Delhi, which was registered as Writ Petition (Crl.) No. 124 of 2013, seeking the following reliefs :-

"i. Laying down an authoritative interpretation of Sections 2(I) and 2(k) of the Act that the criterion of 18 years set out therein does not comprehend cases grave offences in general and of heinous crimes against women in particular that shakes the root of humanity in general.

ii. That the definition of offences under Section 2(p) of the Act be categorized as per grievousness of the crime committed and the threat of public safety and order.

iii. That Section 28 of the Act be interpreted in terms of its definition, i.e., alter-native

9 Dr. Subramanian Swamy And Ors. vs. Raju Thr. Member Juvenile Justice, AIR 2014 (SC) 1649.

10 Juvenile Justice (Care and Protection of Children) Act, 2000 (Act No. 56 of 2000), s.15 r/w s.16

11 *Supra* note 5

punishment and serious offences having minimum punishment of seven years imprisonment and above be brought outside its purview and the same should be tried by an ordinary criminal court.

iv. Incorporating in the Act, the International concept of age of criminal responsibility and diluting the blanket immunity provided to the juvenile offender on the basis of age.

v. That the instant Act be read down in consonance with the rights of victim as protected by various fundamental rights including Article 14 and 21 of the Constitution of India.” (sic)

Vide its order dated 23.01.2013, the Hon’ble Delhi High Court dismissed the said writ petition holding that against the order of the Juvenile Justice Board the alternative remedies available under the Act should be exhausted in the first instance and in the course thereof the question of interpretation of the provisions of the Act can well be considered¹².

Aggrieved by the order of the High Court, on 19.02.2013, Dr. Swamy approached the Hon’ble Supreme Court of India vide Special Leave Petition (SLP CrI.) No.1953 of 2013 under Art.136 of the Constitution, challenging the aforesaid order of the High Court of Delhi.

While Dr. Swamy’s SLP was still pending, some of these issues were considered by the Hon’ble Supreme Court in the case of *Salil Bali vs Union Of India and Anr*¹³ wherein, inter alia, the constitutionality of Section 2(k) of the JJ Act 2000 was challenged. In the said matter, the Supreme Court clubbed seven Writ Petitions and one Transferred Case together for consideration in view of the commonality of the grounds and reliefs prayed for therein. We shall first consider the outcome of this batch of petitions before returning to Dr. Swamy’s case since it was decided subsequent to the *Salil Bali* cases.

In the *Salil Bali* cases the petitioners, inter alia, made the following notable prayers:

1. For declaration of the Juvenile Justice (Care and Protection of Children) Act, 2000, as ultra vires the Constitution¹⁴.

12 Dr. Subramanian Swamy vs. Raju Thr. Member Juvenile Justice, Writ Petition (CrI.) No. 124 of 2013, order dated 23.01.2013

13 *Salil Bali vs Union Of India and Anr*, (2013) 7 SCC 705.

14 *Saurabh Prakash Vs. Union of India*, Writ Petition (C) No. 14 of 2013; *Vinay K. Sharma Vs. Union of India*, Writ Petition (C) No. 90 of 2013.

2. To strike down the provisions of Section 2(k) and (l) of the above Act, along with a prayer¹⁵
3. To bring the said Act in conformity with the provisions of the Constitution and to direct the Respondent No. 1 to take steps¹⁶
4. To make changes in the Juvenile Justice (Care and Protection of Children) Act, 2000, to bring it in line with the United Nations Standard Minimum Rules for administration of juvenile justice In addition to the above¹⁷.
5. To appoint a panel of criminal psychologists to determine through clinical methods whether the juvenile is involved in the Delhi gang rape on 16.12.2012¹⁸.
6. To appoint a panel of criminal psychologists to determine through clinical methods whether a “juvenile” is involved in the Delhi gang rape on 16.12.2012 (Nirbhaya case)¹⁹.
7. In the Delhi gang rape (Nirbhaya) case of 16.12.2012, not to release the juvenile accused and to keep him in custody or any place of strict detention, after he was found to be a mentally abnormal psychic person and that proper and detailed investigation be conducted by the CBI to ascertain his correct age by examining his school documents and other records and to further declare that prohibition in Section 21 of the Juvenile Justice (Care and Protection of Children) Act, 2000, be declared unconstitutional²⁰.
8. All petitioners made oral prayers that in offences like rape and murder, juveniles should be tried under the normal law and not under the JJ Act 2000, and protection granted to persons up to the age of 18 years under the aforesaid Act may be removed and that the investigating agency should be permitted to keep the record of the juvenile offenders to take preventive measures to enable them to detect repeat offenders and to bring them to justice.

Of particular relevance to this analysis are the prayers contained at serial no.s 6 to 8, viz. - (a) for psychological/psychiatric analysis of the accused to determine whether he is in fact a 'juvenile' and, thereby, entitled to the benefit under the JJ Act 2000 (b) for carving out an exception to the protection under the JJ Act 2000, to try and punish juveniles accused of heinous offences as adults.

On 17th July 2013, a three judge bench of the Supreme Court comprising then CJI Altamas Kabir, S. S. Nijjar, J. Chelameswar J., pronounced its judgment in the *Salil Bali*

15 *Salil Bali Vs. Union of India*, Writ Petition (C) No. 10 of 2013; *Krishna Deo Prasad Vs. Union of India*, Writ Petition (C) No. 85 of 2013; *Kamal Kumar Pandey & Sukumar Vs. Union of India*, Writ Petition (C) No. 42 of 2013; *Hema Sahu Vs. Union of India* Writ Petition (C) No. 182 of 2013.

16 *Ibid.*

17 *Ibid.*

18 *Shilpa Arora Sharma Vs. Union of India*, Writ Petition (Crl.) No. 6 of 2013.

19 *Shilpa Arora Sharma Vs. Union of India*, Writ Petition (Crl.) No. 6 of 2013 and *Krishna Deo Prasad Vs. Union of India*, Writ Petition (C) No. 85 of 2013.

20 *Ibid.*

batch of matters. In so doing, the Court rejected the arguments of the Petitioners holding, inter alia, that -

“38. Having regard to the serious nature of the issues raised before us, we have given serious thought to the submissions advanced on behalf of the respective parties and also those advanced on behalf of certain Non- Government Organizations and have also considered the relevant extracts from the Report of Justice J.S. Verma Committee on “Amendments to the Criminal Law” and are convinced that the Juvenile Justice (Care and Protection of Children) Act, 2000, as amended in 2006, and the Juvenile Justice (Care and Protection of Children) Rules, 2007, are based on sound principles recognized internationally and contained in the provisions of the Indian Constitution”.

Holding that “the essence of the Juvenile Justice Act, 2000 is restorative and not retributive”, the Supreme Court negated each proposition by the petitioners to create a separate class of juveniles just under the age of majority who have allegedly committed heinous offences. Instead, the Court upheld the statutory provision treating all persons under the age of 18 years as a single monolithic block. The relevant paragraphs from the said case merit reproduction hereunder -

“48. There is yet another consideration which appears to have weighed with the worldwide community, including India, to retain eighteen as the upper limit to which persons could be treated as children. In the Bill brought in Parliament for enactment of the Juvenile Justice (Care and Protection of Children) Act of 2000, it has been indicated that the same was being introduced to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of certain matters relating to and disposition of delinquent juveniles. The essence of the Juvenile Justice (Care and Protection of Children) Act, 2000, and the Rules framed thereunder in 2007, is restorative and not retributive, providing for rehabilitation and re- integration of children in conflict with law into mainstream society. The age of eighteen has been fixed on account of the understanding of experts in child psychology and behavioural patterns that till such an age the children in conflict with law could still be redeemed and restored to mainstream society, instead of becoming hardened criminals in future. There are, of course, exceptions where a child in the age group of sixteen to eighteen may have developed criminal propensities, which would make it virtually impossible for him/her to be re-integrated into mainstream society, but such examples are not of such proportions as to warrant any change in thinking, since it is probably better to try and re-integrate children with criminal propensities into mainstream society, rather than to allow them to develop into hardened criminals, which does not augur well for the

future.

49. This being the understanding of the Government behind the enactment of the Juvenile Justice (Care and Protection of Children) Act, 2000, and the amendments effected thereto in 2006, together with the Rules framed thereunder in 2007, and the data available with regard to the commission of heinous offences by children, within the meaning of Sections 2(k) and 2(l) of the Juvenile Justice (Care and Protection of Children) Act, 2000, we do not think that any interference is necessary with the provisions of the Statute till such time as sufficient data is available to warrant any change in the provisions of the aforesaid Act and the Rules. On the other hand, the implementation of the various enactments relating to children, would possibly yield better results.

50. The Writ Petitions and the Transferred Case are, therefore, dismissed, with the aforesaid observations. There shall, however, be no order as to costs”²¹.

Thus, in the case of *Salil Bali*, the Supreme Court upheld the vires of the JJ Act 2000 and reiterated the correct position of law as it then stood. Unfortunately, this position did not satisfy the prevailing public sentiment for retribution and this would not be the final round of litigation. Shortly after the judgment in the *Salil Bali* case, Dr. Swamy’s SLP came up for final hearing also before a coordinate bench of three judges comprising then CJI P Sathasivam, Ranjan Gogoi J., and Shiva Kirti Singh J.

On 28th March, 2014, the Supreme Court delivered its judgment in the matter of Dr. Subramanian Swamy And Ors. vs. Raju Thr. Member Juvenile Justice²². The first hurdle for the Petitioner was the doctrine of “res judicata”²³ in light of the decision in the *Salil Bali* case upholding the constitutional validity of Sections 2(k) and 2(l) of the JJ Act 2000. However, in *Salil Bali*, the coordinate Bench did not consider it necessary to answer the specific issues raised before it and had based its conclusion on the principle of judicial restraint that must be exercised while examining conscious decisions that emanate from collective legislative wisdom like the age of a juvenile. Additionally, Dr. Swamy submitted that he did not seek to challenge the constitutionality of the JJ Act 2000 as a whole, but was instead merely seeking a “reading down” of certain provisions. Furthermore, the parties in *Salil Bali* were different. Therefore, the coordinate Bench in Dr. Swamy’s case adopted a more liberal approach relying upon the observations of the Constitution Bench in *Natural Resources Allocation, In Re, Special Reference No.1 of 2012*²⁴ extracted below:-

21 *Supra* note 15

22 *Supra* note 12

23 *Kesho Ram and Others Vs. Union of India and Others*, 1989 SCC (3) 151.

24 *In Re, Special Reference No.1 of 2012*, (2012) 10 SCC 1.

“48.2. The second limitation, a self-imposed rule of judicial discipline, was that overruling the opinion of the Court on a legal issue does not constitute sitting in appeal, but is done only in exceptional circumstances, such as when the earlier decision is per incuriam or is delivered in the absence of relevant or material facts or if it is manifestly wrong and capable of causing public mischief. [...]”

Thus, the Supreme Court proceeded to deal with the next issue in Dr. Swamy’s case, namely the rejection of the public demand for a reduction in the threshold for the age of a “juvenile” by the J. S. Verma Committee. The approach of the Court to the said report is best illustrated by reproducing a paragraph from the judgment as follows:

“22. The next issue that would need a resolution at the threshold is the effect of the recommendations of the Justice J.S. Verma Committee constituted by the Government of India by Notification dated 24th December, 2012 following the very same incident of 16th December 2012 so far as the age of a juvenile is concerned. The terms of reference to the Justice J.S. Verma Committee were indeed wide and it is correct that the Committee did not recommend reduction of the age of juveniles by an amendment of the provisions of the Act. However, the basis on which the Committee had come to the above conclusion is vastly different from the issues before this Court. The recommendations of the Justice J.S. Verma Committee which included the negative covenant so far as any amendment to the JJ Act is concerned was, therefore, in a different context though we must hasten to add the views expressed would undoubtedly receive our deepest consideration while dealing with the matter in hand.”

The Supreme Court then proceeded to examine the basis of the present petitions pending before itself, viz. that- (a) the JJ Act results in over-classification if all juveniles, irrespective of the level of mental maturity, are to be grouped in one class and (b) the Act replaces the criminal justice system in the country and therefore derogates a basic feature of the Constitution

Creditably, the Supreme Court compared and discussed the juvenile justice systems of eight countries including the U.K., U.S.A., Canada etc. It also analysed the various international conventions and treaty obligations by which India was bound. Particularly noteworthy is the discussion on the procedure of age-determination, arraignment, trial and punishment of juvenile accused in India, relevant portions of which are reproduced hereinafter -“JJ System: The JJ Rules provide that a juvenile in conflict with the law need not be apprehended except in serious offences entailing adult punishment of over 7 years (Rule 11(7)). As soon as a juvenile in conflict with the law is apprehended, the police must inform the designated Child/Juvenile Welfare Officer, the parents/guardian of the

juvenile, and the concerned Probation Officer (for the purpose of the social background report) (S.13 & R.11(1)). The juvenile so apprehended is placed in the charge of the Welfare Officer. It is the Welfare Officer's duty to produce the juvenile before the Board within 24 hours (S. 10 & Rule 11(2)). In no case can the police send the juvenile to lock up or jail, or delay the transfer of his charge to the Welfare Officer (proviso to S.10 & R.11(3)). [...]

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Sentencing: The Board is empowered to pass one of the seven dispositional orders u/s 15 of the JJ Act: advice/admonition, group counseling, community service, payment of fine, release on probation of good conduct and placing the juvenile under the care of parent or guardian or a suitable institution, or sent to a Special home for 3 years or less. Where a juvenile commits a serious offence, the Board must report the matter to the State Govt. who may keep the juvenile in a place of Safety for not more than 3 years. A juvenile cannot be sentenced to death or life imprisonment”.

Further, the Supreme Court also highlighted the key differences between the process of trial of an adult vis-a-vis that of a juvenile. Some of these differences are germane to the present analysis and are reproduced herein as follows -

“1. [...]

2. [...]

3. [...]

4. [...]

5. [...]

6. The JJ board conducts a child-friendly “inquiry” and not an adversarial trial. This is not to say that the nature of the inquiry is non-adversarial, since both prosecution and defence submit their cases. Instead, the nature of the proceedings acquires a child- friendly colour.

7. The emphasis of criminal trials is to record a finding on the guilt or innocence of the

accused. In case of established guilt, the prime object of sentencing is to punish a guilty offender. The emphasis of juvenile ‘inquiry’ is to find the guilt/innocence of the juvenile and to investigate the underlying social or familial causes of the alleged crime. Thus, the aim of juvenile sentencing is to reform and rehabilitate the errant juvenile.

8. [...]”

The primary proposition of law advanced by Dr. Swamy was that the relevant provisions of the JJ Act i.e. Sections 1(4), 2(k), 2(l) and 7 must be read to mean that juveniles (children below the age of 18) who are intellectually, emotionally and mentally mature enough to understand the implications of their acts and who have committed serious crimes do not come under the purview of the Act. Such juveniles are liable to be dealt with under the penal law of the country and by the regular hierarchy of courts under the criminal justice system administered in India. Thus, Dr. Swamy advocated for the “reading down” of Sections 2(k) and 2(l) of the JJ Act 2000.

In dealing with this proposition, the Supreme Court elaborated upon the fundamental principle of the “reading down” doctrine. The Court held that, “Courts must read the legislation literally in the first instance. If on such reading and understanding the vice of unconstitutionality is attracted, the courts must explore whether there has been an unintended legislative omission. If such an intendment can be reasonably implied without undertaking what, unmistakably, would be a legislative exercise, the Act may be read down to save it from unconstitutionality.”

Thus, the Supreme Court laid down a three-step test for the application of the “reading down” doctrine- Does a literal reading of the legislation reveal any unconstitutionality?

- (a) Is the unconstitutionality the result of an unintended legislative omission?
- (b) Can such the legislative omission be implied/cured without undertaking an “unmistakable legislative exercise”?

This test is crucial for the purpose of this analysis, and we shall return to it in subsequent chapters.

Having laid down this aforesaid test, the Court then proceeded to examine the impugned provisions of the JJ Act 2000 and concluded that there no case was made out for the application of the “reading down” doctrine. Relevant portions of the Supreme Court’s judgment are reproduced hereunder -

“43. In the present case there is no difficulty in understanding the clear and unambiguous meaning of the different provisions of the Act. There is no ambiguity, much less any uncertainty, in the language used to convey what the legislature had intended. All persons below the age of 18 are put in one class/group by the Act to provide a separate

scheme of investigation, trial and punishment for offences committed by them. A class of persons is sought to be created who are treated differently. This is being done to further/effectuate the views of the international community which India has shared by being a signatory to the several conventions and treaties already referred to.”

In a subtle but clear indication that they would not be publicly pressured into retrospectively reading down or striking down the provisions of the JJ Act 2000, the Supreme Court observed -

“48. Before parting, we would like to observe that elaborate statistics have been laid before us to show the extent of serious crimes committed by juveniles and the increase in the rate of such crimes, of late. We refuse to be tempted to enter into the said arena which is primarily for the legislature to consider. Courts must take care not to express opinions on the sufficiency or adequacy of such figures and should confine its scrutiny to the legality and not the necessity of the law to be made or continued. [...]”

Holding thus, the Supreme Court proceeded to dismiss yet another challenge to the vires and legality of the JJ Act 2000. Specifically, as distinguished from the Salil Bali case, the Supreme Court in Dr. Swamy’s case finally decided the two primary legal propositions that represented much of the public’s ire, namely- (a) for psychological/psychiatric analysis of the juvenile accused in the Nirbhaya case to determine whether he was in fact a ‘juvenile’ and, thereby, entitled to the benefit under the JJ Act 2000 (b) for carving out an exception to the protection under the JJ Act 2000, to try and punish juveniles accused of heinous offences as adults. Furthermore, the Supreme Court also laid down the fundamental tests for the application of the doctrine of “reading down” of statutes. It also appears that the Court adopted an unusually liberal approach in entertaining a second petition urging substantially similar grounds, perhaps in an effort to address the growing public outrage, playing the role of a much needed pressure valve in India’s complex democracy.

It would now be up to the legislature to address this growing public anger at the perceived inability of the law to adequately punish the juvenile accused in the Nirbhaya case. Passage of the Juvenile Justice (Care & Protection of Children) Act, 2015

In the aftermath of the Nirbhaya case, a clutch of petitions were disposed of by the Hon’ble Supreme Court upholding the constitutionality of the JJ Act 2000 in creating a separate classification of juvenile offenders aged under eighteen years. However, it is trite to state that the same Legislature, taking note of the alarming increase in incidents of heinous offences committed by juveniles aged between sixteen and eighteen years, amended the

said Act further and deliberately introduced a separate classification of juvenile offenders between the ages of sixteen and eighteen years with a different scheme for trial and punishment, with the explicit intention to *preferably* try such juveniles as adults in cases of heinous offences by way of the Juvenile Justice Act, 2015.

On 3rd February 2013, the Central Government made its first, and direct, attempt to assuage public anger through the promulgation of the Criminal Law (Amendment) Ordinance, 2013. By way of this Ordinance, Parliament sought to amend the Indian Penal Code, the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872 to broaden the definition of “rape” and other sexual offences, and to alter the procedure of inquiry and trial and ultimately impose harsher punishments.

Then, on 2nd April 2013, after receiving Presidential assent, the said Ordinance was repealed and replaced by the passage of the Criminal Law Amendment Act, 2013. Through this act not only the IPC, Criminal Procedure Code, 1973 (Cr.P.C.), Evidence Act, 1872, were amended but also the Protection of Children from Sexual Offences Act, 2012 was amended to include more expansive definitions of “rape” and other sexual offences, as well as the stipulated procedures for inquiry, trial and sentencing. Though the impact of these amendments was wide ranging but the details are not relevant to this analysis. There is, however, one amendment that is particularly relevant to this study, which is Section 29 -

“29. For Section 42 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, “POCSO Act”), the following sections shall be substituted, namely -

42. Alternate punishment.— Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under this Act or under the Indian Penal Code as provides for punishment which is greater in degree 42A. The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force, and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.”

It is noteworthy that the amendment to the POCSO Act was not originally part of the Ordinance of 2013 but was subsequently, specifically incorporated into the Act of 2013 which super-ceded and replaced the Ordinance. At this point in time, it cannot be argued that the legislature was unaware of the fact that one of the accused in the Nirbhya case was a “juvenile”. Thus, it is fair to surmise that the protection of minors from sexual offences and the imposition of harsher sentences upon offenders was specifically intended by the legislature, *regardless of the age of the alleged offender* in view of the newly introduced

non-obstante clause now inserted at Section 42A in the POCSO Act.. This point is of special relevance to this analysis, as we shall see subsequently.

Shortly thereafter, the Central Government began preparations to amend the JJ Act 2000. On 24th July 2014, two Members of Rajya Sabha, Dr. Pradeep Kumar Balmucha and Sh. Aayanur Manjunatha addressed unstarred questions to then Minister of Women & Child Development, Mrs. Maneka Gandhi, enquiring, inter alia, “1822. [...]whether the Government is contemplating on bringing major changes to the Juvenile Justice (Care & Protection of Children) Act, 2000?”. In reply, the Minister specifically stated, “Yes, Sir. During the implementation of the Juvenile Justice (Care & Protection of Children) Act, 2000 several issues had arisen such as [...]; addressing heinous offences committed by children in the age group of 16 to 18 years; [...]”

Further, in another exchange, an MP (RS) posed a starred question enquiring under the subject line- “Amending IPC to deny protection under Juvenile Justice Act”. The following question was specifically put - “2278. DR. BHARATKUMAR RAUT: Will the Minister of HOME AFFAIRS be pleased to state:

- (a) whether Government has proposed to amend the existing law so that youngsters above the age of 16 years guilty of heinous crimes be treated at par with adult offenders;
- (b) whether Government proposes to amend the provisions of the IPC relating to adult offenders to be applicable to juveniles between 16-18 years that will deny them protection of the Juvenile Justice Act;
- (c) the details of the proposed amendments; and
- (d) whether these provisions will be regulated on the Nirbhaya gang rape accused after the amendments are passed in the Parliament?

THE MINISTER OF STATE IN THE MINISTRY OF HOME AFFAIRS (SHRI R.P.N. SINGH):

- (a) As per information provided by the Ministry of Women and Child Development, proposal for amendment of existing provisions of the Juvenile Justice Act, with focus on heinous offences committed by juveniles above age 16 years is currently under consideration by the Ministry of Women and Child Development.
- (b) to (d) The existing provisions of Indian Penal Code (IPC) cannot be amended to try juvenile offenders as Juvenile Justice Act limits the jurisdiction of IPC to adult offenders only.”

Thus, it is evident that the legislature was fully apprised of the Nirbhaya case and the issues arising in the matter of the juvenile accused in that case. Furthermore, it is also evident that the Central Government at the time intended to withdraw the benefits and

protections available to a “juvenile in conflict with law” under the JJ Act 2000, particularly for juveniles aged between 16 to 18 years accused of committing heinous offences.

On 31st July 2014, in yet another unstarred exchange in the Lok Sabha, reproduced hereinafter, the intention of the Central Government became even more evident- “Amendment in Juvenile Justice Act

2436. SHRI MANSUKH L. MANDAVIYA: Will the Minister of WOMEN AND CHILD DEVELOPMENT be pleased to state :

- (a) the action taken as on date for necessary amendment in Juvenile Justice Act to award severe punishment for teenagers who are involved in serious criminal activities, as there is sharp increase in serious crimes among teenagers due to lenient provisions in existing juvenile act;
- (b) whether Hon’ble Supreme Court has advised Government in this regard; and
- (c) if so, what further action has been taken in this regard ?

THE MINISTER OF WOMEN AND CHILD DEVELOPMENT (SHRIMATI MANEKA SANJAY GANDHI):

(a) In order to address issue of severe punishment for children above the age of 16 who have committed heinous offences, special provisions have been included in the Juvenile Justice (Care and Protection of Children) Bill, 2014.

A draft Cabinet Note for amendment of existing provisions of Juvenile Justice (Care and Protection of Children) Act, 2000 has been sent to all concerned Ministries/Departments for inter-ministerial consultations. (b) and (c) No, Madam. Do not arise.”

Then, on 12th August 2014, the Central Government introduced the Juvenile Justice (Care and Protection of Children) Bill, 2014²⁵ in the Lok Sabha. In its Statement of Objects and Reasons, it was stated, inter alia, that -

“[...]

Further, increasing cases of crimes committed by children in the age group of 16-18 years in recent years make it evident that the current provisions and system under the Juvenile Justice (Care and Protection of Children) Act, 2000, are ill equipped to tackle child offenders in this age group. The data collected by the National Crime Records Bureau establishes that crimes by children in the age group of 16-18 years have increased, especially in certain categories of heinous offences.

Numerous changes are required in the existing Juvenile Justice (Care and Protection of Children) Act, 2000 to address the above mentioned issues and therefore, it is proposed to

25 Juvenile Justice (Care and Protection of Children) Bill, Bill No. 99 of 2014, introduced in the Lok Sabha.

repeal existing Juvenile Justice (Care and Protection of Children) Act, 2000 and re- enact a comprehensive legislation.”

There were many salient features of this Bill, however only proposed amendments relevant to this analysis have been reproduced herein. Key among these amendments were the proposed Clauses 2(33), 15, 16 and 19.

15(1). Where a child alleged to be in conflict with law is produced before [Juvenile Justice] Board, the Board shall hold an inquiry in accordance with the provisions of this Act and may pass such orders in relation to such child as it deems fit under sections 18 and 19 of this Act.

(2)[..]

(3)[..]

(4)[..]

(5) The Board shall take the following steps to ensure fair and speedy inquiry, namely:—

(a)[..]

(b)[..]

(c)[..]

(d)[..]

(e)[..]

(f) inquiry of **heinous offences**,—

(i) for child below the age of sixteen years as on the date of commission of an offence shall be disposed of by the Board under clause (e);

(ii) for child above the age of sixteen years as on the date of commission of an offence shall be dealt with in the manner prescribed under section 16.

[Emphasis Supplied]

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

16(1). In case of a heinous offence committed by a child who has completed or is above the age of sixteen years, the Board shall conduct a preliminary inquiry with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he committed the offence, and may pass an order in accordance with the provisions of sub-section (3) of section 19: Provided that for such an inquiry, the Board may take the assistance of experienced

psychologists, psycho-social workers and other experts.

(2) Where the Board is satisfied on preliminary inquiry that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973:

Provided that the inquiry under this section shall be completed within the period specified in section 15.

19(1). Where a Board is satisfied on inquiry that a child irrespective of age has committed a petty offence, or a serious offence, or a child below the age of sixteen years has committed a heinous offence, then, notwithstanding anything contrary contained in any other law for the time being in force, and based on the nature of offence, specific need for supervision or intervention, circumstances as brought out in the social investigation report and past conduct of the child, the Board may, if it so thinks fit,—

(2)[...]

(3)Where the Board after preliminary inquiry under section 16 comes to the **conclusion that there is a need for further trial of the said child as an adult, then the Board may order transfer of the trial** of the case to the **Children’s Court** having jurisdiction to try such offences. **[Emphasis Supplied]**

The four clauses quoted above, when read together, are evidence of the first manifestation of the intention of the Central Government to-

(a) treat juvenile offenders aged between 16 to 18 years as a separate class,

(b) treat certain class of offences as “heinous”; and

(c) treat juvenile offenders satisfying above conditions (a) and (b) as adults for the purposes of trial and punishment.

It is critical to this analysis to note that a “Children’s Court” as contemplated in Clause 19(3) quoted above, is a Court of Sessions, as clarified in Clause 2(20), wherein it is stated that-

2(20) “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.

A “Children’s Court” under the Commissions for Protection of Child Rights Act, 2005 is also a Court of Sessions²⁶. Further, a “Special Court” under the Protection of Children

²⁶ Commissions for Protection of Child Rights Act, 2005, Section 25. Children’s Courts; *See Appendix at Sr. 1.*

from Sexual Offences Act, 2012, is also a Court of Sessions²⁷. This stands to reason as Courts under both the aforesaid statutes are empowered to try and punish for offences entailing imprisonment of seven years or more. This is also consistent with the scheme or hierarchy of Courts contained in the Cr.P.C as elaborated in Sections 28 & 29.

It is further pertinent to state that in terms of Sections 28 & 29 of the Cr.P.C. 1973, the Court of Sessions has the power to sentence a convict to any punishment including death. However, a Judicial Magistrate First Class only has the power to sentence a convict to imprisonment for a term not exceeding three years, or of fine not exceeding ten thousand rupees, or of both. This aspect is significant since the presiding officer of the JJB, both under the JJ Act 2000²⁸ as well as under the proposed Bill²⁹, was a Judicial Magistrate First Class. Thus, if the Legislature intended to enable the sentencing of 16- 18 year old juvenile offenders to imprisonment beyond 7 years, it would have to include a provision for the trial of such offenders as adults before a Court of Session. This is, in fact, exactly what was proposed in the Bill.

The introduction of this Bill caused some controversy as Members of Parliament expressed reservations with regard to some of the new provisions and amendments. Consequently, acceding to the demand of some M.P.'s, on 19th September, 2014, the Chairman, Rajya Sabha, referred the Bill to the Standing Committee for examination and report, pursuant to Rule 270 relating to the Department-related Parliamentary Standing Committees. The deliberations and proceedings of this Standing Committee are instructive in both Parliamentary intent and the nature of the minority of opposition to it. The Standing Committee laid its report before both Houses of Parliament on 25th February, 2015³⁰.

During the Standing Committee's deliberations, a wide range of socio-legal issues were discussed. However, not all of the deliberations are relevant to the present analysis. Therefore, only the portions with some bearing upon the present context have been relied upon herein.

Of particular note is the intention expressed by the Ministry of Women and Child Development in introducing the Bill. The Secretary, speaking for the Ministry, expressed its intentions thus -

27 Protection of Children from Sexual Offences Act, 2012, Section 31. Application of Code of Criminal Procedure, 1973 to proceedings before a Special Court; *See Appendix at Sr. 3.*

28 Juvenile Justice Act, 2000, Section 4. Juvenile Justice Board, Sub-section (2); *See Appendix at Sr. 4.*

29 Juvenile Justice (Care and Protection of Children) Bill, Bill No. 99 of 2014, Clause 4(2); *See Appendix at Sr. 5.*

30 Department-related Parliamentary Standing Committee on Human Resource Development, *Two Hundred and Sixty Fourth Report of the Committee on the Juvenile Justice (Care and Protection of Children) Bill, 2014*, presented to Rajya Sabha (and laid before Lok Sabha) on 25th February, 2015

“1.6. Highlighting key provisions of the Bill, the Secretary, Ministry of Women and Child Development cited the chapter on the children in conflict with law which contained provisions to deal with child offenders of heinous crimes in 16-18 years of age. According to him, the current provisions and the system under the Juvenile Justice Act, 2000 were not equipped to tackle such child offenders. Therefore, special provisions were being made to address heinous offences such as rape, murder and grievous hurt by children above the age of 16 years which will act as a deterrent for child offenders committing heinous crimes. *This would address the issue of increased lawlessness in the society to some extent and will also protect the rights of victim to justice.* If the Juvenile Justice Board, after conducting a preliminary inquiry relating to the physical and mental capacity of the child, ability to understand consequences of the offence and his circumstances, comes to the conclusion that there is a need for further trial in such cases, it has been given the option to transfer the matter to the Children’s Court, which is the Session Court having jurisdiction to try heinous offences. If after trial, a child is found guilty of committing a heinous offence by the Children’s Court, then such a child is proposed to be sent to a place of safety for reformation and rehabilitation up to the age of twenty-one years. After completing the age of twenty-one years, an evaluation of the child is to be conducted by the Children’s Court after which either the child is released on probation or transferred to an adult jail for the rest of the term of imprisonment. He emphasized that the Juvenile Justice System was based on the principle of restorative justice and such children during their stay in the place of safety would be provided with many reformatory measures such as education, health, nutrition, de-addiction, treatment of disease, vocational training, skill development, life skill education and counselling. The child would be transferred to a jail after completing 21 years, only if he was incorrigible and the measures in the place of safety did not result in his becoming a contributing member of the society. The Secretary also stated that as per the UN Convention on the Rights of the Child, provisions of prohibiting death sentence and life imprisonment were being retained in the proposed legislation.” *[Emphasis Supplied]*

Thus, it is fair to surmise that, in introducing the Bill, the over-riding concerns of the Central Government were with regard to-

- (a) increased lawlessness in the society, and
- (b) protection of the rights of victims to justice

The sequitur, therefore, was that the Central Government would be called upon to justify-

- (A) whether there was sound empirical basis for the new provisions in the Bill insofar as heinous crimes committed by juveniles in the age group of 16 to 18 years;
- (B) whether the provisions in the Bill would adequately address this lawlessness in society; and

(C) whether these provisions would enhance the rights already available to victims

The Standing Committee scrutinised the above aspects very carefully. The following observations arise from a perusal of its deliberations-

(A) EMPIRICAL BASIS

Let us first examine how the Standing Committee evaluated the empirical basis for the proposed new provisions in the Bill. In Chapter III, titled “CRITICAL ISSUES NOT COVERED IN THE BILL”, the committee considered the empirical data presented by the Ministry as follows-

“3.2. The Secretary, Ministry of Women and Child Development contended before the Committee that the National Crime Records Bureau data showed that the number of children apprehended for heinous crimes, especially in the age group of 16-18 years, had gone up significantly in the recent times. From 531 murders in 2002, the figure had gone up to 1, 007 in 2013, for rape and assault with intent to outrage the modesty of women, the figures have gone up from 485 and 522 to 1, 884 and 1, 424 respectively during the same period. According to the Secretary, these were disturbing figures. The background note on the Bill submitted by the Ministry also stated that special provisions in the proposed law have been made to address heinous offences committed by children above the age of 16 years, which would act as a deterrent for child offenders committing such crimes. On a specific query regarding the number of heinous offences committed by children in the age group of 16-18 years during the last three years and the current year, the Committee was provided with the following All India figures by the Ministry:-

NCRB Data				
Years	Murder	Rape	Kidnapping & Abduc- tion	Dacoity
2010	600	651	436	105
2011	781	839	596	142
2012	861	887	704	207
2013	845	1,388	933	190
Committee’s attention was also drawn to the following data of the National Crime Records Bureau by				

many stakeholders appearing before it, which indicated the percent- age of juvenile crimes to total cognizable crimes committed in India from 2003 to up 2013:- NCRB Data			
Year	Total Cognizable Crimes	Total Juvenile Crimes	Percentage of Juvenile Crimes to Total Cognizable Crimes
2003	1716120	17819	1.7
2004	1832015	19229	1.8
2005	1822602	18939	1.7
2006	1878293	21088	1.9
2007	1989673	22865	2.0
2008	2093379	24535	2.1
2009	2121345	23926	2.0
2010	2224831	22740	1.9
2011	2325575	25125	2.1
2012	2387188	27936	2.3
2013	2647722	31725	2.6

3.10. When attention of the Ministry was drawn to the reliability of NCRB data, it was admitted that there were not many cases of children committing serious and heinous crimes. However, it was also emphasized that the data maintained by NCRB revealed that the percentage of offences committed by children in the age-group of 16- 18 years had increased to total crimes committed by children across all ages. It was also informed that a crime-wise review of offences committed by children in the age- group of 16-18 years revealed that cases of assault on women with intent to outrage their modesty had increased from 154 in 2010 to 1142 in 2013 and cases of rape by such children had increased from 651 in 2010 to 1388 in 2013.”

Thus, it is evident that the Standing Committee duly noted the concerns of the Ministry with regard to increase in sexual offences by juveniles aged 16 to 18 years against women.

However, it expressed serious reservations with regard to the actual interpretive or empirical value of the data relied upon by the Ministry. It expressed its doubts thusly-

“3.13 The Committee finds the submissions of the stakeholders very valid. The Committee takes note of the view of National Commission for Protection of Child Rights that NCRB data was based on FIRs and did not provide information on the conviction of children in the age-group of 16-18 years or otherwise. It is true that FIR/complaint was merely an information regarding occurrence of an offence. **The Committee is of the firm opinion that increased reporting of crime against children in the specific age-group should not necessarily lead to assumption of increased conviction of juvenile in the crime. The realistic figure of involvement of juvenile in heinous crime needs to be based on completion of investigation, filing of final report by the police before the court and pronouncement of judgment.**” [Emphasis Supplied]

Having disagreed with the Central Government’s empirical basis for the introduction of a new classification of juvenile offenders and offences, the Standing Committee also observed that the Ministry had failed to adequately address the various issues raised by several stakeholders during consultations. Following were the Standing Committee’s observations in that regard-

“2.10 The representative of NCPCR pointed out that there were implementation problems at district level and due to a weak monitoring mechanism the need for the present legislation arose. Terming clause 7 of the Bill a major lacuna, the representative pointed out that it was contradictory of clause 3 of the Bill which contained the principle of presumption of innocence upto the age of 18 years. Referring to clauses 15 (3), 16, 19 (3) and 20 of the Bill, the representative submitted that the issue of registration of birth and issuance of certificate by the Village Panchayats or the municipality was itself questionable and that there was need to ensure registration of every birth in the country. The representative further submitted that Juvenile Justice Boards and their members were not in a position to conduct and analyse the physical and mental capacity of the child or the circumstances which led the child to commit a heinous crime.

2.15 In brief, the Committee finds the following observations of the stakeholders which have not been addressed by the Ministry, while coming up with the proposed legislation:

- India had a long legislative history of dealing with the protection of children which is being eroded by the proposed legislation. Indian Penal Code (1860), CrPC (1898- 1973) distinguished amongst the children/adolescent in the age group of 7 to 12, 12-21, provided for exemptions and no punishments; Children’s Act (1960), provided to deal with neglected,

delinquent children, juvenile boys below 16 years and girls below 18 years, Juvenile Justice Act, (1986) replicated definition of Juvenile from the Children's Act; Juvenile Justice (Care and Protection of Children) Act, 2000 ensured India's compliance UNCRC, provided for authorities and mechanisms to deal with juveniles in conflict with law and children in need of care and protection;

- Juvenile Justice (Care and Protection of Children) Act, 2000 was a very sound, progressive piece of legislation, reformatory in nature, only needed strengthening;
- National Crime Records Bureau data should be viewed with circumspection, as it does not reflect disposal of cases;
- number of crimes committed by children between 2012-13 just 1.2 per cent of a population of 472 million children which is minuscule, a good number of offences committed by children are sexual offences which were love affairs and elopement cases
- research has shown that adolescence is a particular age where brain has not fully developed;
- children are more amenable to reforms;
- children cannot be attributed same standards of culpability as adults due to their immaturity;
- for children in conflict with law there needs to be a balance between sentencing, punishment, deterrence and rehabilitation;
- philosophy of juvenile jurisprudence centers around quality of restoration, rehabilitation and reform restorative justice approach is gaining international recognition across the world;
- some sections of the Bill violate UNCRC principles and constitutional provisions; and
(B) some sections of the Bill are regressive in nature-introduction of transfer system for children between 16-18 years alleged to have committed heinous offences to be tried and treated as an adult marks a shift from rehabilitation to retribution, introduction of heinous categories of crimes and apprehending a juvenile after completing 21 years for a heinous crime committed between 16-18 years and be tried as an adult are regressive and retributive features." Adequacy / Sufficiency of new provisions

As already noted, the Bill introduced new provisions for the inquiry, trial and punishment of juvenile offences aged 16-18 years in cases involving "heinous offences". However, in analysing the proposed procedure for inquiry into the age of a purported juvenile or "child in conflict with law", the Standing Committee made the following observations-

"10.3 The foremost flaw pointed out was that this provision [Clause 16] required JJB

to assess whether a child above sixteen years of age who has committed a heinous offence has the physical and mental capability to commit the offence, along with circumstances in which he has committed the offence. In other words, it implies an assumption that the child has already committed the alleged offence. This enquiry in an essence would be a sentencing decision that is arrived at even before the guilt is established. It was emphasized that such an action would denote complete violation of the presumption of innocence, a central tenet of the juvenile justice as well as the criminal justice system. Also, such an arbitrary and irrational procedure clearly contravenes the fundamental guarantees made under Articles 14 and 21 of the Constitution.

10.4 [...]

10.5 Another significant deficiency brought to the notice of the Committee was that the assumption that an accurate assessment of mental capacity/maturity for the purpose of transfer of the trial of the care to the Children's Court was possible when this was not true. Not only this, such an assessment would be fraught with errors and arbitrariness and would allow inherent biases to determine which child was to be transferred to an adult court. The very presumption that persons between 16 and 18 years were competent to stand trial just as adults was also not free from very genuine doubts.

10.6 The Committee also takes note of the fact that this clause binds Juvenile Justice Board (JJB) to conduct a 'preliminary enquiry within one month in respect of heinous offences committed by children above 16 years regarding their mental and physical capacity and understanding of consequences, etc. and pass orders under section 19 including, transferring the child for trial by children's court or the sessions court in the absence of children's court. The Committee would like to point out that considering the fact that large number of innocent children are being involved in crimes, which was evident from the decisions of JJBs across the country, it is impossible to conduct such a complex enquiry within a period of one month. Such a provision will amount to complete denial of fundamental rights, justice, fair and discriminate proceedings and also the negation of basic principles and provisions of Juvenile Justice (Care and Protection) Act, 2000 itself.

10.6 [sic] The Committee is of the view that all children below 18 years are amenable and should be treated in the same manner because of the fact that their involvement in offending acts was primarily due to either environmental factors or their unique developmental features such as risk taking nature, less future orientation, adventurism, etc., or both. The Committee would also like to point out that the process suggested for treating 16-18 years children involved in heinous offences, i.e preliminary inquiry by JJB

and professional team, then based on their decision to Children's Court (CC) then decision by CC regarding where to be tried, then sending the child back to JJB for trial would lead to multiple and repeated trials before different authorities that would psychologically drain him/her. The Committee, accordingly, recommends that this entire process needs a relook and review.

10.7 Lastly, the Committee also observes that the clause envisages that the Juvenile Justice Boards shall conduct a preliminary inquiry with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence, with the assistance of experienced psychologists, psycho-social workers and other experts. One can not ignore the fact that there is a severe shortage of competent psychologists, psycho-social workers and other experts and this will adversely affect the quality of inquiry and timely disposal of cases.

10.8 The Committee is in full agreement with the very comprehensive views of the stakeholders that clause 7 is discriminatory and all children below 18 years should be treated as children. The proposed legislation is meant for children alleged and found to be in conflict with law. And the definition of both the terms 'child' and 'child in conflict with law' mean a person who has not completed eighteen years of age. Accordingly, the question of envisaging a differential treatment for children above sixteen years of age should not arise. Such a move would lead to contravention of international laws and also the stated purpose of the Bill."

From the above discussion, it is evident that the Standing Committee had strong objections to the new procedure of inquiry introduced by the Bill. Its objections were based on- 1. presumption of innocence, and thereby natural justice, 2. arbitrariness in the assessment of mental capacity/maturity 3. insufficiency of trained psychological experts 4. vagueness in the procedure

Thus, not only did the Standing Committee not find the proposed provisions to be adequate or sufficient to address the "increasing lawlessness in society", but the committee also found the new procedure to be, itself, highly ambiguous and wholly inadequate.

However, one crucial aspect that was not considered by the Standing Committee was the scenario in which a Magistrate exercised his discretionary power vested in him by proposed Clause 16(2), specifically-

"16(2) Where the Board is satisfied on preliminary inquiry that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for

trial in summons case under the Code of Criminal Procedure, 1973”

Assume the case where a juvenile accused of committing a heinous offence is aged between 16-18 years. Now supposing the President of the Juvenile Justice Board, a JMFC/MM rank officer, exercised his discretion under Clause 16(2) and determined that said juvenile was **not** fit to be tried and punished as an adult. This would raise several crucial questions-

- (1) Could the JJB, presided over by a JMFC/MM, try an accused juvenile for an offence which otherwise entails imprisonment of 7 years or more?
- (2) If found guilty, could the JJB sentence such a juvenile?
- (3) If so, what would be the maximum extent of said punishment?
- (4) Would the exercise of such discretion, on the basis of a “preliminary report”, not result in a JMFC unilaterally ousting the jurisdiction of a Court of Sessions?

Vitaly, these questions were neither deliberated upon nor considered by the Standing Committee, nor in Parliament at any stage. As such, this is a startling defect in the Bill that went unnoticed, and remains unnoticed in the subsequently passed Act to this day. It is this aspect that will be critically analysed in the next chapter.

(C) Enhancement of victim’s rights

Since the Standing Committee concluded that the proposed provisions were both empirically unjustified and procedurally inadequate, indeed arbitrary, it did not extensively probe the issue of enhancement of victim’s rights. Instead, it determined the proposed provisions to be inconsistent with Indian jurisprudence and international obligations.

Having extensively deliberated upon these, and other, issues, the Standing Committee found the new classification of juvenile offenders was required to be reviewed. It concluded thus-

“11.6 The Committee also recommends that all relevant clauses (clauses 6, 7, 16, 19, 20) dealing with Children’s Courts and differential treatment of children between 16-18 years of age need to be reviewed in that light of its observations and recommendations.”

Shortly thereafter, notwithstanding the objections / reservations expressed by the Standing Committee, Parliament nevertheless enacted the Juvenile Justice (Care and Protection of Children) Act, 2015 repealing the Juvenile Justice (Care and Protection of Children) Act, 2000 to overcome the problems that were faced in the implementation of the JJ Act, 2000. The JJ Act, 2015 received the assent of the President on the 31st December, 2015 and came into effect from 1st January, 2016, when it was notified in the Official Gazette. In so doing, the proposed provisions quoted above were incorporated

in the new Act verbatim.

The clear intention of the legislature to treat juvenile offenders aged between 16 to 18 years as a separate class became all the more apparent when, after the enactment of the JJ Act 2015, the following exchange occurred on 5th May 2016 in the Rajya Sabha-

“Amending the Juvenile Justice (Care and Protection of Children) Act, 2000

1439. SHRIMATI RENUKA CHOWDHURY: Will the Minister of WOMEN AND CHILD DEVELOPMENT be pleased to state:

(a) whether there is no provision in Juvenile Justice (Care and Protection of Children) Act, 2000 about vicious, unregenerate and convicted juvenile, who despite having undergone the reformation process for maximum penalty continue to be a menace to society, if so, the details thereof; and

(b) the steps taken by Government to plug the loopholes in the Act?

THE MINISTER OF WOMEN AND CHILD DEVELOPMENT (SHRIMATI MANEKA SANJAY GANDHI):

(a) and (b) The Government has recently enacted the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act, 2015) repealing the Juvenile Justice (Care and Protection of Children) Act, 2000 to overcome the problems that were faced in the implementation of the JJ Act, 2000. The JJ Act, 2015 has come [sic.] into effect from 15th January, 2016. Amongst the various provisions of the JJ Act, 2015 there are special provisions to deal with children in the age group of 16-18 years who commit heinous offences which will act as deterrent, for such children.”

From the above discussion, three aspects of the legislative intent behind the JJ Act 2015 become immediately apparent, viz. the intention to-

(a) treat juvenile offenders aged between 16 to 18 years as a separate class,

(b) treat certain class of offences as “heinous”; and

(c) treat juvenile offenders satisfying above conditions (a) and (b) as adults for the purposes of trial and punishment.

In enacting the JJ Act 2015, Parliament overruled the reservations / objections expressed by the Supreme Court in *Salil Bali* and *Dr. Subramaniam Swamy*, the Parliamentary Standing Committee in its cited report and the J. S. Verma Committee report. Thus, it is fair to surmise that the legislative intent behind the Act is unambiguous and transparent, though not free from defect in its expression.

The next chapter will detail how the intention of the legislature manifested in the JJ

Act 2015, and offer a sincere critique. Critical Analysis of the amended procedure under the Juvenile Justice (Care and Protection of Children) Act, 2015

While analysing the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015³¹, it is important to take note of which relevant provisions of the Bill made it into the final Act. Significantly, Clause 16 was wholly incorporated from the original Bill into the ultimate Act as Section 15, with a few noteworthy additions. This section created a new procedure and, by implication, substantive law for a new class of juveniles aged between 16 & 18 years. Section 15 is reproduced herein below-

“15. (1) In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of sub-section (3) of section 18:

Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts. Explanation.—For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence.

(2) Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973:

Provided that the order of the Board to dispose of the matter shall be appealable under sub-section (2) of section 101:

Provided further that the assessment under this section shall be completed within the period specified in section 14.”

Note: For clarity, it is important to state that Clause 2(33) of the Bill, which introduced a new classification of “heinous offences”, was also retained verbatim in the final Act as Section 2(33).

The following amendments were made in Clause 16 of the Bill before final assent and incorporation as Section 15 of the Act-

1. Whereas Clause 16(1) of the Bill originally proposed the words “[...] the Board shall conduct a preliminary **inquiry** with regard to his mental and physical capacity to commit such offence [...]”, the word “inquiry” was substituted by the word “assessment” in the final text of Section 15(1) of the Act.

³¹ Juvenile Justice (Care and Protection of Children) Act, 2015, Act 2 of 2015, notified 1st January, 2016.

2. A new “Explanation” was inserted at the bottom of Section 15(1), which clarified the deliberate intention of Parliament to remove any legal / juridical connotations that may be associated with the use of the word “inquiry”, substituting it with “assessment” instead.
3. A proviso was inserted to Clause 16(2) to explicitly make the “preliminary assessment” of the Board “appealable”.

The following sections will analyze the purport and impact of the new insertions in Section 15 in greater detail.

(A) The new default statutory position in law-

The above amendments that became part of the final Act make it abundantly clear that the Legislature intended to confer upon the Magistrate presiding over the Board a very limited and explicitly appealable power of conducting merely a “preliminary” psychological evaluation only for the implicit purpose of determining whether an accused juvenile is of a mental stature that would disqualify him from being tried and punished as an adult. However, the default position of law, since the passing of the new 2015 Act, would now be to treat juveniles above 16 years of age as adults in all cases of heinous offences, unless the preliminary assessment found the accused to be of such mental or physical capacity as would tend to render any criminal trial as an adult moot. Stated differently, the accused juvenile would have to be assessed as being of “diminished” mental or physical capacity. This observation i.e. the **new default statutory position in law**, is a vital component of the hypothesis.

(B) Analysis of sub-section (1) of Section 15 of the JJ Act 2015- Unimplementable, Arbitrary, Dangerous

There is a grave lacuna in the above cited Section 15(1) of the Act. There exist no guidelines to make the determination of “mental and physical capacity” of an accused, aged between 16 to 18 years, to commit a “heinous offence”, as required under Section 15(1) read with Rule 10-A of the Juvenile Justice (Care & Protection of Children) Model Rules, 2016. Furthermore, the cited provisions do not lay down any mandatory minimum eligibility / qualification criterion for the “experienced psychologists or psycho-social workers or other experts” whose assistance may be sought by the JJB during the preliminary assessment. Nor has any such criterion been laid down under Section 19 or 101, which empower a Children’s (Sessions) Court to conduct the very same assessment. The said provisions do not prescribe the number and/or gender of the assessor, nor do they lay down any specific tests to be performed nor any checklist nor other intelligible criteria to be evaluated by the assessor(s) at the time of conducting the preliminary assessment.

As such, the said provisions are vague, wide-ranging and utterly arbitrary in their present form, as presciently pointed out by the Parliamentary Standing Committee in para 10.5 fully reproduced in the previous chapter. This issue was repeatedly highlighted and flagged by the Parliamentary Standing Committee during the detailed deliberations with stakeholders as well. The Standing Committee had warned that “the assumption that an accurate assessment of mental capacity/maturity for the purpose of transfer of the trial [...] to the Children’s Court was possible when this was not true. Not only this, such an assessment would be fraught with errors and arbitrariness and would allow inherent biases to determine which child was to be transferred to an adult court.”

This manifest arbitrariness in the exercise of “preliminary assessment” affects the rights of both accused as well as victim, in that an accused juvenile of diminished mental capacity may end up being tried, convicted and sentenced as an adult due to the lack of any established or pre-determined psychological testing criteria, while on the other side an accused juvenile who is competent to so be tried and sentenced may escape punishment due to a faulty or inadequate or inaccurate preliminary assessment.

Crucially, the Central Government missed another opportunity to clarify or specify these criterion when it notified the Justice (Care & Protection of Children) Model Rules on 31st September, 2016 vide the Official Gazette. Rule 10-A was inserted ostensibly in order to provide for rules to govern the exercise of “preliminary assessment”. Therefore, Rule 10-A merits reproduction in full as follows-

“10 A. Preliminary assessment into heinous offences by Board.-

(1) The Board shall in the first instance determine whether the child is of sixteen years of age or above; if not, it shall proceed as per provisions of section 14 of the Act.

(2) For the purpose of conducting a preliminary assessment in case of heinous offences, the Board may take the assistance of psychologists or psycho-social workers or other experts who have experience of working with children in difficult circumstances. A panel of such experts may be made available by the District Child Protection Unit, whose assistance can be taken by the Board or could be accessed independently.

(3) While making the preliminary assessment, the child shall be presumed to be innocent unless proved otherwise.

(4) Where the Board, after preliminary assessment under section 15 of the Act, passes an order that there is a need for trial of the said child as an adult, it shall assign reasons for the same and the copy of the order shall be provided to the child forthwith.”

As is immediately evident upon a bare perusal, no specific tests or criterion were specified for the conduct of the preliminary assessment. Apart from a perfunctory in-

clusion of a presumption of innocence clause in sub-rule (3), Rule 10-A did not make the task of preliminary assessment any clearer for a Magistrate presiding over a JJB.

The District Child Protection Unit, which is the primary authority to avail of “experts” referred to in Rule 10-A(2) of the Juvenile Justice Model Rules 2016, has been misidentified and misunderstood to be an apt arrangement to deal with aspects of psychological testing in matters of heinous crimes with stress on such experts “who have the experience of working with children in difficult circumstances”. The said Unit comes under the larger umbrella of the Central Adoption Resource Authority (CARA) which came into being under the aegis of Ministry of Women and Child Development around 2006. The Unit has been structured on the lines of the Hague Convention Of Inter-Country Adoption 1993 and is a special authority for adoption related matters. However, this Unit under CARA and cannot be resorted to for the purposes of “forensic psychological” testing, as would be required to assess the capacity of any individual to “commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence” as is mandated under Section 15(1) of the JJ Act 2015.

The branch of “Forensic Psychology”³² as per American Psychological association, is the application of clinical specialties to the legal arena. This definition emphasizes the application of clinical psychology to the forensic, legal setting. Christopher Cronin, who has written a well-known textbook on forensic psychology³³, defines it as “The application of clinical specialties to legal institutions and people who come into contact with the law”, again emphasizing the application of clinical skills such as assessment, treatment, evaluation to forensic settings. The scope of forensic psychology in international jurisdictions like the United Kingdom, United States and Australia has been not only well stated but is also in active dialogue with criminal procedural systems for a long period, thereby improving the quality of forensic psychological testing. However, this vital domain of psychology is largely under-utilised in Indian criminal jurisprudence, much less so in matters concerning juveniles. This makes it impossible for any Magistrate presiding over the JJB to conduct any objective assessment of such mental capacity.

This begs the question- what ought to be considered objective criterion for the purpose of assessing a juveniles mental capacity?

This is where the crucial new default position of law, as discussed the previous

32 American Academy of Forensic Psychology, *What is Forensic Psychology?* available at: <https://aafpforensic.org/>

33 Christopher Cronin, *Forensic Psychology: An Applied Approach*, Kendall Hunt Publishing; 3rd edition, February 27th, 2019.

section, becomes all the more relevant. If this new default position is to treat juveniles above 16 years of age as adults in all cases of heinous offences, then the assessment criterion ought to be exclusionary in nature. That is, the assessment must evaluate whether the accused juvenile is “incompetent” to stand trial as an adult, rather than the converse. This stands to reason since applying the converse would be even more arbitrary. The converse, i.e. to test all 16-18 year old accused juveniles to determine whether they are “competent” to stand trial as adults would be to impose a heavy cost on the maturity of an individual. Bearing in mind that an accused, at the stage of preliminary assessment, is merely an accused and not a convict, it would be illogical to suggest that merely because an accused juvenile exhibits traits of maturity therefore he ought to be tried as an adult. Whereas, if the accused juvenile exhibited traits of immaturity or other traits consistent with “incompetence” or “diminished capacity”, such juveniles could safely be excluded from the provisions to try them as adults.

A scheme that prefers exclusion for diminished capacity is not only fair, it is also consistent with the Indian Penal Code within the meaning of the defence available to an accused u/S.84³⁴ IPC for “unsoundness” of mind. Or where it can be demonstrably shown that the accused juvenile offender suffers from some “mental illness” within the meaning of Section 2(s)³⁵ of the Mental Healthcare Act, 2017 that “impairs judgement” or leads to some form of diminished capacity.

It would, therefore, be of considerable value for the legislature to consider harmonising the laws governing “unsoundness” of mind, competence to stand trial and mental health, after consulting stakeholders and psychological experts.

Thus, the complete absence of a scientific approach for the determination of competence of a juvenile to stand trial as an adult is both arbitrary and dangerous. Furthermore, the lack of any established or pre-determined psychological testing criteria has been noticed by various High Courts that have subsequently attempted to introduce or substitute their own judgment in such situations, further compounding the inherent arbitrariness in the provision, as discussed in the next chapter.

(B) Analysis of sub-section (2) of Section 15 of the JJ Act 2015- Unintended legislative omission, redundant at best, dead letter at worst

34 Indian Penal Code, 1860, Section 84. Act of a person of unsound mind; *See Appendix at Sr. 6.*

35 Mental Healthcare Act, 2017, 2(s) “mental illness”; *See Appendix at Sr. 7.*

As if to further clarify the “preliminary” nature of the power of “preliminary assessment” conferred upon the Magistrate presiding over the JJB, Section 19(1) of the Act begins with the words “After the receipt of preliminary assessment from the Board under section 15, the Children’s Court may decide that [...]”. The said Section 19(1) bears reproduction as follows-

“**19.(1)** After the receipt of preliminary assessment from the Board under section 15, the Children’s Court may decide that-

- (i) there is a need for trial of the child as an adult as per the provisions of the Code of Criminal Procedure, 1973 and 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;
- (ii) there is no need for trial of the child as an adult and may conduct an inquiry as a Board and pass appropriate orders in accordance with the provisions of section 18

(2)[...]

(3)[...]

(4)[...]

(5)[...]”

However, an anomaly arises when the above section 19(1) is read with Section 15(2). Section 19(1) confers powers upon a Children’s Court (which is a Court of Sessions³⁶) to make a final determination about the “need for trial of the child as an adult”. However, Section 15(2) empowers the Magistrate presiding over the JJB with the very same power, that too purely on the basis of a mere “preliminary assessment”. Under Section 15(2), if the Magistrate “is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973”. Exercising this power leads to the following consequences-

1. It unilaterally excludes the jurisdiction of the Children’s Court, which is a Court of Sessions, and
2. It renders the powers vested in a Sessions Court by virtue of Section 19(1)(i) redundant at the very least, and a dead letter at worst.
3. Contradicts the very meaning of the word “preliminary” since it operates as a de facto final determination as far as trial and punishment are concerned, unless overturned in appeal under Section 101(2).

³⁶ *Supra*; See notes 26 & 27 on Pg.31.

The above assertions are further borne out when one considers the nature of powers granted to the Children's Court in such an appeal u/S.101(2). For that purpose, Section 101(2) is reproduced hereunder-

“**101(2)**. An appeal shall lie against an order of the Board passed after making the preliminary assessment into a heinous offence under section 15 of the Act, before the Court of Sessions and the Court may, while deciding the appeal, take the assistance of experienced psychologists and medical specialists other than those whose assistance has been obtained by the Board in passing the order under the said section.”

Thus, the Children's Court, which is a Court of Sessions, possesses the very same powers of determination of age of a juvenile as the Magistrate presiding over the JJB. However, the Magistrate presiding over the JJB can preclude the exercise of these powers by excluding the Children's (Sessions) Court's jurisdiction altogether by exercising his powers under Section 15(2) of the Act. This exercise of power under Section 15(2) of the Act results in a situation that is wholly contrary to the scheme of the Cr.P.C., 1973.

Section 209³⁷ of the Cr.P.C. 1973 mandates that when “it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he **shall** commit” the case to a Court of Session for trial. A bare perusal of Schedule I of the Cr.P.C. reveals that most offences punishable by imprisonment of 7 year or greater are triable exclusively by Courts of Sessions. Pertinently, offences alleged in the Nirbhaya crime, with which the accused juvenile was charged, were also exclusively triable by Sessions Courts. One of the purposes for this committal procedure is to ensure consistency with the power of punishment i.e. to ensure that the Court which tries an accused for any offence also has the power to punish for the offence. The Magistrate's power of punishment is derived from Section 29³⁸ of the Cr.P.C., which empowers him to “pass a sentence of imprisonment for a term not exceeding three years”.

The only other provision in the Cr.P.C. which contemplates a situation in which a “Magistrate cannot pass sentence sufficiently severe” is contained in Section 325³⁹ of the Cr.P.C. However, this provision does not contemplate a situation in which a Magistrate may transfer a case that has been tried before himself to a Court of Sessions for sentencing. Such a situation would be antithetical to settled jurisprudence and beyond the pale of the Cr.P.C.

37 Code of Criminal Procedure, 1973, Section 209. Commitment of case to Court of Session when offence is triable exclusively by it; *See Appendix at Sr. 9.*

38 Code of Criminal Procedure, 1973, Section 29. Sentences which Magistrates may pass; *See Appendix at Sr.8.*

39 Code of Criminal Procedure, 1973, Section 325. Procedure when Magistrate cannot pass sentence sufficiently severe; *See Appendix at Sr. 10.*

Thus, it is clear that a Magistrate cannot impose any punishment beyond imprisonment for 3 years. Be that as it may, this circumscription of Magisterial power would directly interfere with any Legislative intention to try and punish a juvenile as an adult. This begs the question-

If a Magistrate presiding over the JJB exercised his power u/S.15(2) of the JJ Act 2015 to try an accused juvenile before himself under the procedure of a summons case, what sentence can he then impose?

Before answering this question, it is trite to state that no Court can impose any sentence which it is not explicitly empowered to impose. Viewed in this light, it is therefore distressing to note that the JJ Act 2015 does not explicitly empower the Magistrate presiding over the JJB to impose any punishment upon a juvenile aged 16 to 18 years convicted for committing a heinous offence. On the contrary, there is only one provision in the Act which empowers the Magistrate to try and punish accused juveniles. That provision is Section 18, which paradoxically and explicitly excludes the Magistrate's jurisdiction in all cases of juveniles aged 16 to 18 years convicted for committing a heinous offence. The words of the said provision that confer jurisdiction of upon the Magistrate bear repetition-

“18. (1) Where a Board is satisfied on inquiry that a child irrespective of age has committed a petty offence, or a serious offence, or a child below the age of sixteen years has committed a heinous offence,[...]”

Thus, all cases of juveniles aged 16 to 18 years pertaining to heinous offences are explicitly excluded. This results in three peculiar anomalies if a Magistrate presiding over the JJB exercises his power u/S.15(2) of the JJ Act 2015:

- 1. A mere “preliminary assessment” by a Magistrate, in the absence of an appeal, results in a final determination of the maximum quantum of punishment that can be imposed upon a juvenile accused, which cannot exceed 3 years simple imprisonment as provided for in Section 29 Cr.P.C, 1973; and**
- 2. The Magistrate then proceeds to try a juvenile accused for offences which are exclusively triable by a Court of Sessions under Chapter XX (Trial of Summons Cases by Magistrates)**
- 3. The Magistrate, post conviction, is not explicitly empowered to impose any punishment upon the accused juvenile.**

Such a situation would defeat the intention of the legislature in enacting the new provisions, as already seen. To put it another way, consider the Nirbhaya case as an illustration. If the Magistrate presiding over the JJB that inquired into, tried and convicted the accused juvenile in the matter had exercised his discretion available under the

new Section 15(2) of the JJ Act 2015, not only would there be no increase in the quantum of maximum sentence imposed upon the said juvenile (he was sentenced to 3 years at a reformation facility), but also the Magistrate would have suddenly discovered that he does not have any power to impose the sentence. The above anomalies arising from Section 15(2) have gone entirely unnoticed by the Standing Committee as well as by Parliament. Much emphasis was laid on Section 15(1) by the Standing Committee, with good reason as already explained. However the issues arising from the rather poorly drafted Section 15(2) appear to have been inadvertently overlooked. As such, Section 15(2) in its present form, militates against the explicit and repeatedly stated intention of Parliament. Furthermore, the exercise of the discretion vested in it by the presiding Magistrate raises both procedural and substantive issues of law. The conclusion, therefore, is inescapable. Section 15(2) of the JJ Act 2015 is the result of an unintended legislative omission, which makes it redundant at the very least, and a dead letter at worst.

In part recognition of this unintended legislative omission, Parliament once again amended the JJ Act 2015 by way of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2021⁴⁰. The said amendment was notified in the official gazette on 7th August, 2021. By way of this amendment, an important clause was inserted to Section 18, thusly-

“In section 18 of the principal Act, in sub-section (1), after the words “heinous offence,” the words and figures “or a child **above the age of sixteen years** has committed a heinous offence and the Board has, after preliminary assessment under section 15, disposed of the matter” shall be inserted.” [**Emphasis supplied**]

Thus, Parliament now empowered the Magistrate to pass sentence against a 16- 18 year old juvenile accused of committing a heinous offence. However, this minor correction still does not bring the JJ Act 2015 within the scheme of the Cr.P.C., and the words of Section 15 continue to seriously deviate from the original legislative intent, as has been argued herein before. Furthermore, the amendment does not alleviate the issues arising from conflicts with other special legislation as we shall see in the next section.

(C) Conflict with other special legislation-

By way of illustration, consider a case in which an accused juvenile, aged between 16 or 18 years, commits a “heinous offence” of a sexual nature against another person aged below 18 years. This scenario begs the question, which law will govern the inquiry, trial and sentencing in such a case viz. the JJ Act 2015 or the POCSO Act 2012?

40 Juvenile Justice (Care and Protection of Children) Amendment Act, 2021, Act 23 of 2021.

The answer is not at all straightforward as the result is an insolvable clash of interests.

i. Clash of jurisdictions-

A conflict occurs at the very outset, with a clash of jurisdictions.

The POCSO Act, 2012, provides for the creation of “Special Courts” to exclusively try offences under the said Act. Notably, a Special Court as defined in the POCSO act is a Court of Sessions. Section 28 of the POCSO Act 2012, merits reproduction-

“28. Designation of Special Courts-

(1) For the purposes of providing a speedy trial, the State Government shall in consultation with the Chief Justice of the High Court, by notification in the Official Gazette, designate for each district, a Court of Session to be a Special Court to try the offences under the 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 other law for the time being in force, then, such court shall be deemed to be a Special Court under this section.

(2) While trying an offence under this Act, a Special Court shall also try an offence [other than the offence referred to in subsection (1)], with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974) be charged at the same trial.

(3) The Special Court constituted under this Act, notwithstanding anything in the Information Technology Act, 2000 (21 of 2000) shall have jurisdiction to try offences under section 67B of that Act in so far as it relates to publication or transmission of sexually explicit material depicting children in any act, or conduct or manner or facilitates abuse of children online.

Furthermore, Section 34 of the POCSO Act specifically empowers the Special Court so established, which is a Court of Sessions, to determine the age of an accused juvenile offender and further provides that where any offence under the POCSO Act is committed by a juvenile, such juvenile shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000. This provision, too, merits reproduction-

“34. Procedure in case of commission of offence by child and determination of age by Special Court.

(1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016).

(2) If any question arises in any proceeding before the Special Court whether a person is

a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.

(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person.”

Notably, on 16th August 2019, sub-section (1) was amended and the words “Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016)” were substituted in place of the words “Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000)” by Act 25 of 2019, section 9. Thus, as late as August 2019, Parliament intended to vest *exclusively* in the Special Court (as opposed to the Juvenile Justice Board) the power to make a determination as to whether an accused juvenile would be tried as an adult, in all cases where offences defined under the POCSO Act are concerned. This is further made clear by the use of the mandatory “shall” in sub-section (2). This scheme is natural for two reasons:

1. since it would be antithetical to argue that a Special Court under the POCSO Act would remand a case to a Magistrate presiding over a JJB to first conduct a preliminary assessment to determine whether the Special Court ought to try the accused juvenile or the JJB ought to dispose of the matter by itself under Section 15(2). This is akin to a Court of Sessions remanding a matter to a Magistrate to first determine whether the Sessions Court ought to enjoy jurisdiction or not; and
2. the Special Court, being a Court of Sessions, is conferred with the power of imposing sentences including life terms and death in terms of Section 28 of the Cr.P.C., 1973. This, as already observed in the preceding chapter, is entirely consistent with the intention of the legislature in creating a separate class of “heinous offences” and of offenders aged between 16 to 18 years.

However, as already demonstrated, Section 15(2) of the JJ Act 2015 empowers the Juvenile Justice Board, presided over by a MM or JMFC, to unilaterally oust the jurisdiction of every other Court where it is satisfied on “preliminary assessment” that the matter should be disposed of by the Board and proceed by itself. This begs the question, in the given scenario, how are the provisions of the POCSO Act to be given effect?

To finely illustrate the anomaly, consider the following step-by-step appraisal of the provision of POCSO Act and JJ Act 2015, read as harmoniously as possible-

1. A juvenile aged between 16-18 years is accused of committing an offence punishable u/S.6 of the POCSO Act. (Mandatory minimum sentence of rigorous imprisonment for 20

years, may extend to the remainder of natural life, or even death)

2. The said accused is produced, in the first instance, before a Special Court designated under the POCSO Act.

3. The Special Court, being specifically empowered under Section 34(2) of the POCSO Act to determine the age of the accused juvenile, must now determine whether he is indeed aged between 16 to 18 years. Further, Section 34(1) specifically mandates that the Special Court shall invoke the provisions of the JJ Act 2015 in this process.

Therefore, under which provisions can the Special Court now proceed?

As already elaborated, the Special Court, being a Court of Sessions, is also a “Children’s Court” as specifically provided for in Section 2(20) of the JJ Act. Thus, the POCSO Special Court, also being a Children’s Court of competent jurisdiction under the JJ Act 2015, can only proceed under the provisions relevant to the powers of a Children’s Court in the JJ Act 2015. Distressingly, however, the only enabling provision in the JJ Act 2015 that empowers a POCSO designated Special Court / Children’s Court to try the accused juvenile is Section 19, which begins with the words-

“19. *After the receipt of preliminary assessment from the Board* under section 15, the Children’s Court [...]”

This conflicts with S.34(2) of the POCSO Act which mandates that “whether a person is a child⁴¹ or not, such question shall be determined by the Special Court”. If Section 19(1) of the JJ Act were to be literally construed, it would mean that *before* a POCSO Special Court can come to a determination on “whether a person is a child or not”, it must first remand the matter for a “preliminary assessment” u/S.15(1) of the JJ Act, since a “heinous offence” u/S.6 POCSO Act has been alleged. But if the Special Court is mandated to adjudicate this question, then what is the value of the preliminary assessment conducted by the Magistrate? And what if he finds that the accused juvenile is not fit for trial as an adult?

It is trite to state that criminal statutes are to be interpreted literally, and powers cannot be inferred or implied, particularly where the words of the statute are clear. Additionally, Special Courts, Courts of Session and Magistracy are creatures of statutes themselves. They are, thus, bound to strictly construe the provisions of both the POCSO as well as JJ Acts. How then is this conflict to be resolved?

From this premise, the only construction of the words “*after* the receipt of prelimi-

41 Protection of Children from Sexual Offences Act, 2012, S.2(1)(d) “child” means any person below the age of eighteen years; *See Appendix at Sr. 2.*

nary assessment from the Board” that is available to a designated POCSO Special Court (Sessions) is to first remand the matter to the Magistrate presiding over the JJB for a determination u/S.15(1). The Magistrate then conducts a “preliminary assessment” of the accused juvenile to determine his mental and physical capacity to commit the offence and contemplate its consequences. If the Magistrate, assisted by other members of the Board, assesses that the accused juvenile does possess these capacities, he then proceeds to “transfer the trial of the case to the Children’s Court having jurisdiction to try such offences” in terms of the provisions of Section 18(3)⁴² of the JJ Act 2015. That is, in this scenario, the JJB transfers the matter back to the POCSO Special Court for trial. Several questions arise herefrom-

1. Is the Special Court now bound to also additionally conduct its own inquiry to determine the age of the accused juvenile in terms of the mandate in Section 34(2), or can it simply rely on the JJB’s preliminary assessment? 2. What if the JJB exercised its own powers u/S.15(2) of the JJ Act 2015, assessing the accused juvenile to be of such mental and/or physical capacity as to render him unfit to stand trial as an adult? 3. Can the JJB simply proceed to try the accused juvenile even for POCSO offences, entailing potential death penalty sentences?

Thus, the POCSO Act vests the power of determination of age of an accused juvenile offender with a Special Court of Sessions, whereas the JJ Act provides that the JJB presided over by a Magistrate may exclude the jurisdiction of the Special Court based solely on the “preliminary assessment” report of the accused juvenile.

The present scenario is an illustration of this clash of jurisdictions and perversion of legislative intent due to lack of concise wording of the statute.

ii. Clash of presumptions-

As already seen a presumption of innocence clause was inserted into the Model Rule 2016 in sub-rule (3) of Rule 10-A. However, Sections 29 & 30 of the POCSO Act provides for a presumption of culpable mental state on the part of any accused. These provisions merit a reproduction-

“29. Presumption as to certain offences.

Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case

42 Juvenile Justice (Care and Protection of Children) Act, 2015, Act 2 of 2015, Section 18 Sub-section (3) Orders regarding child found to be in conflict with law; See Appendix at Sr. 11.

may be unless the contrary is proved.”

“30. Presumption of culpable mental state.

(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.—In this section, “culpable mental state” includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.”

This presumption is particularly troubling since it is precisely the mental state of the accused juvenile that the Magistrate presiding over the JJB is required to assess in his “preliminary assessment” u/S.15(1) of the JJ Act. This begs the question, did the legislature intend to apply the presumption of a culpable mental state even unto accused juveniles aged between 16-18 years? Can the JJB simply rely on this presumption in preparing its preliminary assessment?

To summarise-

The wording of Section 15 of the Juvenile Justice (Care & Protection of Children) Act, 2015 and Rule 10-A of the Juvenile Justice (Care & Protection of Children) Model Rules, 2016, clash directly with the provisions of Sections 29 and 30 of the Protection of Children from Sexual Offences Act, 2012. Furthermore, the wording of Section 15(2) of the Juvenile Justice (Care & Protection of Children) Act, 2015 leaves open the possibility of a Magistrate exercising his own discretion to exclude the jurisdiction of a Sessions Court to exclusively try scheduled / specified offences, such as in the case where the JJB may now try a POCSO case, which it is not sufficiently empowered to do. The JJB is also not competent to resolve the conflicting provisions of the law, for instance where in Section 3(i) of the Juvenile Justice (Care & Protection of Children) Act, 2015, the accused is presumed innocent of any mala fide criminal intention whereas under Section 30 of the POCSO Act there is a presumption of culpable mental state.

3 CONCLUSION

The amended Juvenile Justice (Care and Protection of Children) Act, 2015, created a new

classification of juvenile offenders with the specific intention to try and punish, as adults, such juveniles aged between sixteen and eighteen years accused of the commission of “heinous offences”. The default position of law, since the passing of the new 2015 Act, would now be to treat juveniles above 16 years of age as adults in all cases of heinous offences, unless the preliminary assessment found the accused to be of such mental or physical capacity as would tend to render any criminal trial as an adult moot.

However, by way of a legislative lapse, the Juvenile Justice Board (hereinafter, “JJB”), which is presided over by a Magistrate First Class, is empowered virtually to finally determine whether such an accused juvenile offender is to stand trial as an adult based on a mere “preliminary assessment”. If the new default position is to treat juveniles above 16 years of age as adults in all cases of heinous offences, then the assessment criterion ought to be exclusionary in nature. That is, the assessment must evaluate whether the accused juvenile is “incompetent” to stand trial as an adult, rather than the converse. Stated differently, the accused juvenile would have to be assessed as being of “diminished” mental or physical capacity.

Vitaly, no guidelines have been defined for the conduct of a “preliminary assessment” into the mental and physical capacity of the accused juvenile to commit the alleged heinous offence, nor any minimum standards or eligibility criterion prescribed for the qualification of the psychological “experts” whom the Magistrate is empowered to consult during the said assessment. Moreover, no such guidelines particular to the Indian context exist, nor have any qualification criterion for such psychological “experts” been prescribed by the various bodies governing psychological and psychiatric care, which are conspicuously silent on this subject.

Furthermore, in cases where an offence is alleged under other special legislation such as the POCSO Act, there is a clash of jurisdictions, presumptions and procedures. The exercise of discretion vested in a Magistrate/Presiding officer of the JJB necessarily results in the ouster of the jurisdiction of a designated Special Court of Session under the POCSO Act, which is otherwise specifically empowered to exclusively try POCSO offences. The direct result thereof is that a 16 to 18 year old Juvenile accused of heinous offences almost always escapes the punishment of the law as no punishment greater than three years detention can be imposed upon him by the JJB, whereas the minimum mandatory sentence under the POCSO Act for the alleged offence is ten years rigorous imprisonment, thereby utterly defeating the intention of the legislature.

The JJ Act 2015 was passed hurriedly, without consulting all stakeholders or fully addressing their views and objections. Whats more, in its haste, the legislature appears to

have succumbed to the outcry that the Nirbhaya case naturally generated country- wide. In so doing, it has created a vague scheme that conflicts with other legislation, its own national and international obligations, and is inherently arbitrary and manifestly dangerous. The Juvenile Justice (Care and Protection of Children) Act, 2015, is in dire need of a scientific review, lest we learn nothing from the enduring tragedy of Nirbhaya.

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36. Supra; See notes 26 & 27
37. Code of Criminal Procedure, 1973, Section 209. Commitment of case to Court of Session when offence is triable exclusively by it; See Appendix at Sr. 9
38. Code of Criminal Procedure, 1973, Section 29. Sentences which Magistrates may pass; See Appendix at Sr. 8
39. Code of Criminal Procedure, 1973, Section 325. Procedure when Magistrate cannot pass sentence sufficiently severe; See Appendix at Sr. 10
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41. Protection of Children from Sexual Offences Act, 2012, S.2(1)(d) "child" means any person below the age of eighteen years; See Appendix at Sr. 2
42. Juvenile Justice (Care and Protection of Children) Act, 2015, Act 2 of 2015, Section 18 Sub-section (3) Orders regarding child found to be in conflict with law; See Appendix at Sr. 11

ABBREVIATIONS

1. **JJ Act 2015** - Juvenile Justice (Care and Protection of Children) Act, 2015, Act 2 of 2015
2. **JJ Act 2000** - Juvenile Justice (Care and Protection of Children) Act, 2000
3. **I.P.C.** - Indian Penal Code, 1860
4. **Cr.P.C.** - Code of Criminal Procedure, 1973
5. **POCSO Act 2012**- Protection of Children from Sexual Offences Act, 2012

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APPENDIX

Commissions for Protection of Child Rights Act, 2005-

1. Section 25. Children’s Courts.—For the purpose of providing speedy trial of offences against children or of violation of child rights, the State Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify at least a court in the State or specify, for each district, a Court of Session to be a Children’s Court to try the said offences [...]

Protection of Children from Sexual Offences Act, 2012-

2. Section 2(1)(d) “child” means any person below the age of eighteen years

3. Section 31. Application of Code of Criminal Procedure, 1973 to proceedings before a Special Court-

Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be **deemed to be a court of Sessions** and the person conducting a prosecution before a Special Court, shall be

deemed to be a Public Prosecutor

Juvenile Justice Act, 2000-

4. Section 4. Juvenile Justice Board, Sub-section (2)-

A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of the first class, as the case may be, and two social workers of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974), on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of the first class and the Magistrate on the Board shall be designated as the principal Magistrate.

Juvenile Justice (Care and Protection of Children) Bill, Bill No. 99 of 2014-

5. Clause 4(2)- A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of the First Class not being Chief Metropolitan Magistrate or Chief Judicial Magistrate (hereinafter referred to as Principal Magistrate) with at least three years of experience and two social workers from two different reputed non-governmental organisations selected in such manner as may be prescribed, of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973 on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of the First Class.

Indian Penal Code, 1860-

6. Section 84. Act of a person of unsound mind—

Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

Mental Healthcare Act, 2017-

7. 2(s) “mental illness-”

Means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by sub normality of intelligence.

Code of Criminal Procedure, 1973-

8. Section 29. Sentences which Magistrates may pass

- (1) The Court of a Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years.
- (2) The Court of a Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding five thousand rupees, or of both.
- (3) The Court of a Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year, or of fine not exceeding one thousand rupees, or of both.
- (4) The Court of a Chief Metropolitan Magistrate shall have the powers of the Court of a Chief Judicial Magistrate and that of a Metropolitan Magistrate, the powers of the Court of a Magistrate of the first class.

9. Section 209. Commitment of case to Court of Session when offence is triable exclusively by it

When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall-

- (a) commit, after complying with the provisions of section 207 or section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;
- (b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

- (c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;
- (d) notify the Public Prosecutor of the commitment of the case to the Court of Session.

10. Section 325. Procedure when Magistrate cannot pass sentence sufficiently severe-

(1) Whenever a Magistrate is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or, being a Magistrate of the second class, is of opinion that the accused ought to be required to execute a bond under section 106, he may record the opinion and submit his proceedings, and forward the accused, to the Chief Judicial Magistrate to whom he is subordinate.

(2) When more accused than one are being tried together, and the Magistrate considers it necessary to proceed under sub- section (1), in regard to any of such accused, he shall forward all the accused, who are in his opinion guilty, to the Chief Judicial Magistrate.

(3) The Chief Judicial Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case and may call for and take any further evidence and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law.

Juvenile Justice (Care and Protection of Children) Act, 2015, Act 2 of 2015-

11. Section 18(3) Orders regarding child found to be in conflict with law-

Where the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences.