CHAPTER IV

JUVENILE JUSTICE SYSTEM IN INDIA

As a State Party to the Convention on the Rights of the Child ("CRC")\(^{94}\) and various other rules and guidelines on children’s rights, the Government of India is bound to fulfill the duties set out in these instruments\(^ {95}\). International agreements on children’s rights, as they concern juveniles in conflict with law\(^ {96}\), promote a holistic approach, concerned with the development, care, and protection of children throughout their interactions with the juvenile justice system. Juvenile justice is more concerned with the rehabilitation of its charges than is adult criminal justice\(^ {97}\). When discussing juveniles in conflict with law, international agreements generally emphasize the importance of preventing juveniles from coming into conflict with the law in the first place\(^ {98}\), as well as an expectation of complete rehabilitation by the time they leave the juvenile justice system. Throughout the proceedings within the system, “States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law


\(^{96}\) “Juveniles in conflict with law” is a term used by international conventions and the Government of India alike, in an effort to reduce the stigma placed on children by the terms ‘juvenile delinquent’ or ‘juvenile offender.’ The word ‘juvenile’ has a negative connotation in society today. However, this Recent Development uses the terms “children” and “juveniles” interchangeably.


\(^{98}\) See, e.g., Riyadh Guidelines, supra note 2, arts. 1–2.
to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth.\textsuperscript{99}

India’s original Juvenile Justice Act (1986), written before many of these international instruments were promulgated, did not align with their requirements. In response to the U.N. Committee on the Rights of the Child’s recommendation that India incorporate the aims of the Convention on the Rights of the Child into domestic legislation, a new law was passed.\textsuperscript{100}

The Juvenile Justice (Care and Protection of Children) Act (2000) ("JJ Act"), amended in 2002 and 2006, covers all aspects of interaction between children and the legal system.\textsuperscript{101} From adoption to abuse and neglect to children in conflict with the law, the Act is far-reaching in its scope and intent. The provisions within the JJ Act, like its international predecessors, are intended to preserve the dignity and best interests of the child.\textsuperscript{102}

\section*{4.1 FROM IDEAL TO IMPLEMENTATION\textsuperscript{103}}

\subsection*{4.1.1 Legal Proceedings}

According to the JJ Act, the rights of juveniles conform to the general rights of the accused under Indian criminal procedure. The

\textsuperscript{99} Convention on the Rights of the Child, supra note 2, art. 40.


\textsuperscript{101} MINISTRY OF WOMEN AND CHILD DEVELOPMENT, GOVERNMENT OF INDIA, BUILDING A PROTECTIVE ENVIRONMENT FOR CHILDREN 23 (2006). See also The Juvenile Justice (Care and Protection of Children) Act, No. 56 of 2000; India Code (2000) [hereinafter JJ Act.]


\textsuperscript{103} This Recent Development draws primarily from research that the author began in June 2007 while working at Concerned for Working Children, a nonprofit organization in Bangalore, India. The article consists of observations and interviews conducted primarily within the state of Karnataka, but according to government officials within Karnataka, much of the implementation is the same throughout the nation.
international community is concerned with the standard litany of “basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority.” In addition to these basic protections, particular attention must be paid to the special needs of the juvenile. As stated by the Karnataka Rules, which implement the JJ Act, juvenile justice proceedings shall be conducted “in an informal and child friendly manner.” To address the particular needs of children, the Government of India has devised entities separate from the traditional justice system: Juvenile Justice Boards (“JJBs”). The second three-year term of Juvenile Justice Boards just began in January 2007, and the JJBs have not yet been established in all districts. Each JJB consists of a three-person panel, with one magistrate and two social workers. The goal of this composition is to have a legally recognized body that is also sensitive to the needs of children. To some degree, this has been successful, but there are also limitations; by assembling these groups of people, the government has absolved itself of much responsibility in terms of training. As a result, the magistrates have limited understanding of child welfare and child psychology, and the social workers rarely have any legal expertise. The JJB is intended to be a non-adversarial, child-friendly environment.

104 Beijing Rules, supra note 2, R. 7.1. See also Convention on the Rights of the Child, supra note 2, art. 40.
106 JJ Act, supra note 8, arts. 4–7.
107 Karnataka Rules, supra note 12, R. 13.7.
This implies that each Board acts as both prosecutor and arbiter, a difficult combination that the state attempts to justify on the basis that juvenile proceedings are not intended to be criminal proceedings, but rather records of offenses that took place. Juvenile judicial proceedings differ notably from ordinary criminal proceedings. The room is typically occupied by the following: the three JJB members hearing the case; probation officers serving as courtroom clerks; a court reporter; a guard from the Observation Home (where children are provisionally incarcerated); a police officer or two; possibly the victim and his or her family; and the child, sometimes with his or her family. Some districts have shifted proceedings from courthouse to Observation Home; rather than make the proceedings more child-friendly, however, this simply removes trained courtroom staff from the proceedings and replaces them with (usually untrained) probation officers. These alternative proceedings do not significantly diminish the sense of formality and criminal suspicion. Regardless of the location of the proceedings, the overwhelming feeling imposed on the child is that of intimidation and fear.

108 Interview with Bobby Kunhu, Consultant, HAQ: Ctr. for Child Rights, in New Delhi, India (July 26, 2007).
109 Observation Homes are the locations where juveniles in conflict with law are incarcerated pending disposition of their cases or bail release. These Homes are each connected to a Juvenile Justice Board, and hold children from up to four districts within a state. Observation Homes are designed to be less punitive or stigmatizing than a jail, and staff members are prohibited from using weapons or handcuffs on the children.
110 This is a problem in Bangalore, where the shift has already been made out of the courtroom. In Shimoga, the proceedings still take place within the courtroom. However, according to Mr. Vasudev, from the Shimoga District Department of Women and Child Welfare, court clerks and other supporting staff cost the state too much, so the state is planning to withdraw them. The Department will now have to deputize substitutes every Friday. Interview with Mr. Vasudev, Deputy Director, Department of Women and Child Welfare, Shimoga District, Shimoga, India (July 12, 2007).
111 Interviews with boys and girls, as well as the author’s first-hand observations, indicate that children are not comfortable before their respective JJBs. In Shimoga, for example, children are made to remove their shoes, and generally stand with their hands clasped before them, a gesture not exhibited by any of the adults in the room. The JJB in Bangalore was less rigid and
4.1.2 The Issue of Innocence

The JJ Act classifies all children who interact with the legal system together, which alleviates some of the stigma attached to those in conflict with law. Furthermore, although the age of criminal responsibility is approximately seven years old, because juveniles are not considered capable of the requisite mens rea according to ordinary criminal procedure, they are not considered capable of guilt. Juvenile Justice Board inquiries therefore merely endeavor to create a record of offense and offender. To that end, the records of JJB proceedings are not kept permanently, and do not follow the children into adulthood, to prevent any child from being labeled as a criminal based on offenses committed before the age of eighteen, regardless of the offense. The presumption of innocence is a crucial element of criminal judicial proceedings in India, but becomes complicated in juvenile proceedings. Per the Committee on the Rights of the Child, the presumption of innocence “means that the burden of proof of the charge(s) brought against the child is on the prosecution.” This is a conundrum for the JJB, which does not generally have a separate prosecutor. The JJB therefore acts as both arbiter and prosecutor. Moreover, the fact that guilt and retribution are not intended to be elements of the proceedings means that for any crime, all children receive the same punishment (if any). The impotence of the JJB and the insignificance of its outcomes are

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113 Interview with Bobby Kunhu, supra note 15. 22.

114 Convention on the Rights of the Child, supra note 2, art. 40.
criticized by government officials, and have also led to an indifference on the part of all actors in the system as to whether the child actually committed the offense in question. As a result, children generally cannot be found innocent of a crime. In addition, because juveniles are not punished, there is no perceived need to create a probation system or diversion opportunities. The orders that Juvenile Justice Boards may issue with respect to children include detention in a Special Home, probation, and community service, but these are rarely utilized. The vast majority of cases end with a disposition of “admonish and release.” All juveniles, regardless of guilt or innocence, undergo the same experience: waiting, either on bail or in an Observation Home, to be processed and released.

4.1.3 Delay

The CRC emphasizes the importance of conducting proceedings involving juveniles “without delay.”\textsuperscript{115} The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (“JDL Rules”) further underscore, “[w]hen preventive detention is nevertheless used, juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention.”\textsuperscript{116} To ensure speedy proceedings, the JJ Act specifies that proceedings “shall be completed within a period of four months from the date of [their] commencement,” but with exceptions if the “period is extended by the Board having regard to the circumstances of the case and in special cases after recording the reasons in writing for such extension.”\textsuperscript{117} This discretion permits cases

\textsuperscript{115} Ibid.
\textsuperscript{116} JJ Act, supra note 8, art. 14.
\textsuperscript{117} Ibid.
to languish in the system indefinitely\textsuperscript{118}. Due to a lack of reporting mechanisms, the percentage of cases that last longer than four months is unknown. However, the existence of any such case that does not have proper justification violates the JJ Act. Because the proceedings do not primarily determine guilt or innocence, children who did not commit an offense are subject to the same lengthy delays, sometimes longer, as they are often unwilling to admit to offenses. Admission enables the JJB to proceed to admonition and release\textsuperscript{119}.

\textbf{4.1.4 Bail}

Delayed proceedings raise problems for all, but particularly for those who are institutionalized without the possibility of release on bail. While JJBs release a majority of juveniles in conflict with law to their families, provided they appear every few weeks to stand before the Board, many are left in residential Observation Homes throughout the duration of the proceedings, sometimes even after their cases are closed\textsuperscript{120}. Of 33,320 juveniles arrested and brought before Juvenile Justice Boards in 2003, 12,049 cases (over a third of the total) were

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  \item This may change under the new Model Rules. According to Model Rule 7.1(a), the Board, at the summary (preliminary) inquiry, can: “Discharge the case, if the evidence of [the juvenile’s] conflict with law appears to be unfounded or where the juvenile is involved in trivial law breaking.” Model Rule 7.6 states: “Every inquiry by the Board shall be completed within a period of four months after the first summary inquiry. Only in exceptional cases involving trans-national criminality, large number of accused and inordinate delay in production of witnesses, the period of enquiry may be extended by two months on recording of reasons by the Board. In all other cases, delay beyond four to six months would lead to termination of the proceedings.” Model Rules, \textit{supra} note 20.
  \item An example of this occurred in JJB proceedings in Shimoga. A boy in his first year of college was accused of petty theft. All parties in the JJB proceeding agreed that he was innocent of the crime, but the Chief Judicial Magistrate urged the boy to admit to it anyway, in order to end proceedings that day rather than returning after the charge-sheet had been filed. The boy refused, and the JJB scheduled his next hearing in October. Observed at Juvenile Justice Bd. proceeding, in Shimoga, India (June 13, 2007).
  \item JJ Act, \textit{supra} note 8, art. 12(3) (“When such person is not released on bail under sub-section (1) by the Board it shall, instead of committing him to prison, make an order sending him to an observation home or a place of safety for such period during the pendency of the inquiry regarding him as may be specified in the order.”).
\end{itemize}
still pending disposal by the end of the year\textsuperscript{121}. The JJ Act intends for bail to be granted as frequently as possible, regardless of the nature of the offense, only allowing exceptions in those situations where the child’s release is “likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or [where] his release would defeat the ends of justice\textsuperscript{122}.” Despite this provision, magistrates are reluctant to grant bail when they do not have proof of residence, as they have no way of ensuring that the children will return to future hearings\textsuperscript{123}. Magistrates grant bail to schoolchildren and those with parents who can provide landed surety, but are less likely to grant bail to children of day laborers; children are rarely granted bail if only extended family, rather than parents, come to claim them\textsuperscript{124}. These implicit bail and surety restrictions have resulted in the institutionalization of children along socio-economic lines, in violation of international conventions expressing anti-discrimination principles\textsuperscript{125}.

4.1.5 Accountability Concerns

Children have difficulty developing their own political voice, and often adults charge themselves with acting in the best interests of children, which presumes that adults can determine what the best interests of children actually are. In the criminal justice context,

\textsuperscript{121} Enakshi G. Thukral, HAQ: Centre for Child Rights, Status of Children in India Inc. 128 (2005).
\textsuperscript{122} JJ Act, \textit{supra} note 8, art. 12. This rule is another cause for delay, as assuring that a child’s release will not lead to criminal association implicitly necessitates a Probation Officer report prior to granting bail. Juvenile Justice Boards generally do not strictly follow this regulation.
\textsuperscript{123} Interview with Aarti Mundkur, Bd. Member, Juvenile Justice Bd., in Bangalore, India (June 7, 2007).
\textsuperscript{124} \textit{Id.} According to Mundkur and corroborated by the author’s observations, bail is refused in approximately one-third of cases in Bangalore. \textit{Id.}
\textsuperscript{125} Beijing Rules, \textit{supra} note 2, R. 2.1 (“The following Standard Minimum Rules shall be applied to juvenile offenders impartially, without distinction of any kind, for example as to . . . property, birth or other status.”).
children cannot hold the system accountable because they have no voice or representation of their own. The system as devised under the JJ Act does not adequately address this issue, as few mechanisms exist to ensure accountability. One severely under-utilized mechanism of accountability is the court system itself. As India’s is a common law system, appellate courts should hear cases brought on appeal from Juvenile Justice Board proceedings. However, owing to the scarcity of resources for appeals proceedings, and the fact that few children are represented by lawyers at the initial proceedings (making the prospect of an appeal unlikely), significant case law has yet to develop.\textsuperscript{126} Under the JDL Rules as well as the United Nations Guidelines for the Prevention of Juvenile Delinquency (“The Riyadh Guidelines”)—instruments addressing the protection of persons subject to detention or imprisonment—an independent body that oversees the various institutions responsible for juveniles in conflict with law is a crucial mechanism for maintaining the best interests of children.\textsuperscript{127} The Government of India has not embraced this concept, as Observation Homes and probation officers remain vaguely subject to oversight by the Department of Women and Child Development,\textsuperscript{128} a national administrative agency that is minimally involved in observing

\textsuperscript{126} Interview with Bobby Kunhu, supra note 15.

\textsuperscript{127} JDL Rules, supra note 2, art. 72 (“Qualified inspectors or an equivalent duly constituted authority not belonging to the administration of the facility should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative, and should enjoy full guarantees of independence in the exercise of this function. Inspectors should have unrestricted access to all persons employed by or working in any facility where juveniles are or may be deprived of their liberty, to all juveniles and to all records of such facilities.”). Id., art. 77 (“Efforts should be made to establish an independent office (ombudsman) to receive and investigate complaints made by juveniles deprived of their liberty and to assist in the achievement of equitable settlements.”). See also Riyadh Guidelines, supra note 2, art. 57 (“Consideration should be given to the establishment of an office of ombudsman or similar independent organ, which would ensure that the status, rights and interests of young persons are upheld and that proper referral to available services is made.”).

\textsuperscript{128} At the state level, it is referred to as the Department. At the national level, it is the Ministry.
probation officers or Home staff at the local level. The JJ Act also establishes home inspection committees and state-level advisory boards to oversee the administration of juvenile justice, but they have no authority or required meeting dates\textsuperscript{129}. These committees, in fact, generally do not conduct meetings or reviews of Homes\textsuperscript{130}. The police, meanwhile, are only held accountable within their own departments, and are subject to limited supervision combined with unlimited discretion as to when to get involved and what course of action to take. One of the more pernicious of the Government of India’s flaws, lack of oversight, flourishes in the juvenile justice system. Physical abuse, corruption, and abuse of power dominate the system, from police to incarceration to legal proceedings.

4.2 Police Brutality and Abuse in Observation Homes

The relationship between police and juvenile offenders is a precarious one. When the police apprehend a child for allegedly committing an offense, it is generally the first point of contact between the child and the juvenile justice system\textsuperscript{131}. The U.N. Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) advise that interactions between police and juveniles should “promote the well-being of the juvenile and avoid harm to her or him\textsuperscript{132}.” The Riyadh Guidelines go further, suggesting that police “should be trained to respond to the special needs of young persons\textsuperscript{133}.”

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  \item \textsuperscript{129} Kamataka Rules, supra note 12, R. 25 (home inspection committees), R. 43 (state advisory boards).
  \item \textsuperscript{130} Interview with Father Anthony Sebastian, Director, ECHO Center for Juvenile Justice, in Bangalore, India (Aug. 1, 2007).
  \item \textsuperscript{131} The word “apprehend” is used throughout the Indian juvenile justice system in place of “arrest,” as “offense” is used in place of “crime.” These changes in language are intended to minimize the culpability and stigmatization associated with the juvenile who is “in conflict with law.”
  \item \textsuperscript{132} Beijing Rules, supra note 2, R. 10.3.
  \item \textsuperscript{133} Riyadh Guidelines, supra note 2, art. 58.
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However, rather than avoiding harm, police interactions with juveniles tend to involve abusive interrogation techniques, sometimes bordering on torture. As the children who undergo such interrogations understand it, police want them to confess to other crimes. Police are reputed to have an arrest quota, so they pin cases on children they can torture without repercussions. These children are generally targeted based on their poverty and vulnerability. The common refrain from children is that if they “make one mistake” by committing one crime, they can expect to be brought in for questioning by police indefinitely, for any or no cause. Police discretion under the JJ Act is intended to reduce the number of children that are brought into the system, but that is not how it is being utilized. According to the Model Rules, which were established by the Government of India to direct implementation of the JJ Act at the state level, police should only apprehend children in cases of serious crimes. However, the demographics of the children in Observation Homes throughout the country clearly demonstrate that the vast majority of juveniles have been arrested for petty theft, and police arrest many of those on far less than a

\[\text{\footnotesize\textsuperscript{134}}\] In Shimoga, interrogation techniques allegedly include police rolling instruments along the thighs, then hanging the children by their wrists with their big toes tied together, forcing their bodies into one straight line. Police also allegedly place rods on children’s shoulders, and beat them on the bottoms of their feet. Children also reported having a rod placed under their legs while they are frog-tied with their hands under their legs, and being pulled up by the rod and made to sit on chairs in that position. Police also allegedly use a pulley system by which children have their hands secured behind their backs, their wrists attached to a rope, and are then slowly raised and lowered by the pulley. The officers are allegedly verbally abusive as well, calling children under interrogation names and saying bad things about their families. Children reported being beaten for approximately thirty minutes straight, until they “open[ed] up.” Interview with boys, Shimoga Observation Home, in Shimoga, India (July 12, 2007).

\[\text{\footnotesize\textsuperscript{135}}\] \textit{Id.} Girls interviewed in Bangalore were not forthcoming with information about police violence.

\[\text{\footnotesize\textsuperscript{136}}\] \textit{Id.}

\[\text{\footnotesize\textsuperscript{137}}\] Model Rules, supra note 20, R. 6.4.

\[\text{\footnotesize\textsuperscript{138}}\] Ten of the thirteen boys in the Shimoga home were accused of petty theft; more than thirty of the thirty-eight boys in Madivala had been arrested for theft. Interview with Mr. Chandrappa, Supervisor and Prob. Officer, Shimoga Observation Home for Boys, in Shimoga, India (July 11, 2007).
reasonable suspicion\textsuperscript{139}. Abuse of children occurs within the Observation Homes as well. Lack of supervision and limited staff, combined with a lack of training, strains relations between Home staff and children. Boys in an Observation Home in Shimoga report that all but one of the staff at the Home are verbally and physically abusive, and the boys and guards are mutually distrustful of one another\textsuperscript{140}. The guards fear the older boys, who are similar in size to the guards, but the younger boys receive beatings on a regular basis. Abuse in Madivala Home, Bangalore, is likewise pervasive. Human Rights Watch documented some of these abuses in a 1996 report\textsuperscript{141}. According to a source within the Indian juvenile justice system, the staff member described in the report as particularly abusive still works at the Home today\textsuperscript{142}.

4.3 Probation Officers: Incompetence and Delay

Lack of accountability and lack of training also contribute to the inefficiency of staff during legal proceedings, leading to much of the delay that occurs in JJB proceedings. Responsibilities of the Probation Officers include investigation of the juveniles’ homes, preparation of case files, and unofficial duties within the Observation Home, such as

\textsuperscript{139} Children in Shimoga and Bangalore related several tales of police arresting children for unsolved crimes. Interview with boys, Shimoga Observation Home, in Shimoga, India (July 12, 2007); Interview with boys, Bangalore Observation Home, in Bangalore, India (July 18, 2007).

\textsuperscript{140} Interview with boys, Shimoga Observation Home, in Shimoga, India (July 12, 2007).

\textsuperscript{141} HUMAN RIGHTS WATCH, POLICE ABUSE AND KILLINGS OF STREET CHILDREN IN INDIA (1996).

\textsuperscript{142} \textit{Id. at} 33–34 (“At the observation home, I was stripped and a guard with a crippled hand was there. He told us to call him ‘Daddy.’ He made us face a pool of water, then he told us to look at all the pictures of Gandhi, Nehru, etc. on the wall. While we were doing that, he would walk behind us and kick us into the pool of cold water to make us clean. Later he would just make us stand while he kicked us and we could not move. When ‘Daddy’ was tired of beating us he gave the younger boys to the older boys—they get the boys of their choice. The older boys are called monitors and they beat and molest the younger boys. I was in the remand home for about three months and then let go.”).
driving girls to and from JJB hearings and assisting the guards.\textsuperscript{143} Delays occur with both investigations and clerical tasks. In Bangalore, for example, there are many files—350 according to one Probation Officer\textsuperscript{144}—for which the JJB’s staff have received all documentation, including the charge-sheet, but have yet to prepare the files to bring before the JJB. During hearings, the JJB in Bangalore spends more than half of its time waiting for cases to be called, because the staff does not properly prepare files for hearings, resulting in unreadable files or failure to bring the correct files at all\textsuperscript{145}. In one instance, although approximately twenty-one of the thirty-eight boys in the home were scheduled to have hearings on July 18, 2007, the JJB heard only five cases that day, for seven boys total\textsuperscript{146}. The Probation Officers blame their delays and inefficiency on a lack of training. They have all recently transferred from various departments (since January 2007), and have no training in proper courtroom procedure. However, the Chief Municipal Magistrate of Bangalore and other JJB staff attribute Probation Officer incompetence to a lack of accountability\textsuperscript{147}. Both of these assertions are likely to be true, as staff members are working without training and without any external motivation. The JJB does not have supervisory authority over the Probation Officers, and therefore cannot compel them to work. There is currently no other form of supervision or accountability for the Probation Officers.

\textsuperscript{143} Model Rules, \textit{supra} note 20, R. 9.2 (“Before passing an order, the Board shall obtain a social investigation report prepared either by a probation officer or a recognized voluntary organisation and take the findings of the report into account.”). Note that this rule suggests that local NGOs should be involved in JJB proceedings.
\textsuperscript{144} Interview with Sheshi Kumar, Prob. Officer, Juvenile Justice Bd., in Bangalore, India (July 19, 2007).
\textsuperscript{145} Observation of Juvenile Justice Bd. hearing, in Bangalore, India (July 18, 2007).
\textsuperscript{146} \textit{Id}.
\textsuperscript{147} Interview with Chief Municipal Magistrate, in Bangalore, India (July 19, 2007).
4.4 SOLUTIONS

As of September 2007, the Government of India is drafting two bills that will hopefully offer solutions to the present problems. The Ministry of Women and Child Development is creating Model Rules as an addendum to the Juvenile Justice Act, with the intention that all states will adopt and comply with them. The Ministry is also overhauling the Department of Women and Child’s organizational structure and policy, creating an Integrated Child Protection Scheme (“ICPS”).

4.4.1 The Model Rules

The Model Rules are mildly controversial among children’s rights nongovernmental organizations (“NGOs”) in India, as the Ministry did not consult with NGOs during the drafting of the Rules. One of the primary criticisms of the Rules is that they invest too much authority in the police, something that most child-friendly legislation seeks to minimize. The Rules also limit the pool of people that will be eligible to serve on the Juvenile Justice Boards, for example by requiring that Board members be at least thirty-five years old, hold a post-graduate degree in social science, and have seven years of experience in child welfare. NGOs are concerned about excessive restrictions, as Juvenile Justice Boards already have difficulties filling positions. One oddity of the Model Rules is that they have a set of “principles,” as if the document were a Convention or Act, as opposed

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148 All states currently operate under their own Rules on juvenile justice, and it appears that the Model Rules are intended to supersede the state Rules in cases of conflict.
149 Interview with Arlene Manoharan, supra note 7. See also MINISTRY OF WOMEN AND CHILD DEVELOPMENT, GOVERNMENT OF INDIA, DRAFT INTEGRATED CHILD PROTECTION SCHEME (27th drft. 2006), available at http://wcd.nic.in/drafticps.pdf [hereinafter ICPS].
150 However, they had an opportunity in the summer of 2007 to make suggestions that may be incorporated in the Rules before they are finalized. Interview with Bobby Kunhu, supra note 15. 60. Model Rules, supra note 20, R. 3.7.
to a set of procedures or protocols. It is unclear who will enforce these principles, which is of concern because enforcement and implementation of legislation were a key problem in the first place. Despite these criticisms, the Model Rules may have a tremendous impact on ameliorating the current problems within the system. The Rules advocate for a stronger relationship between NGOs and government agencies, an acknowledgement of the positive impact NGOs can have within the Observation Homes and throughout the system. There are also two key changes that may prove important: the elimination of the charge-sheet requirement, and the clarified requirement of ending case proceedings after a maximum of six months. The elimination of the charge-sheet may lead to significant improvements in the efficiency of proceedings, although this may come at the expense of accuracy. The charge-sheet, which is submitted by the police and is currently required for the case to move forward, contains all the information relevant to the case, but can take up to three months for the JJB to receive. Moving to a general daily diary, as the Rules stipulate, may mean less information is provided to JJB members, but has the potential to significantly alleviate delays and allow children to exit the system sooner. However, it is unclear whether magistrates and police officers will follow this change in procedure, and whether it would involve a complete transition from charge-sheet to general daily diary, or whether such a determination would be on a case-by-case basis. “Openness and transparency” is a

152 Id., R. 6.8 (“In dealing with cases of juveniles in conflict with law the police shall not be required to register an FIR or filing a charge-sheet. Instead it shall record information regarding the alleged offence committed by the juvenile in the general daily diary followed by a social background report to be forwarded to the Board before the first hearing.”).

153 Id. R. 7.6

154 Interview with Mr. Chandrappa, supra note 46.
new goal emphasized by the Model Rules. As such, one form of independent oversight that will be established by the Rules that may generate change is a social audit, essentially a detailed review of the workings of individual Observation Homes, to be conducted by the government in conjunction with NGOs. In order for the social audit to work, the process will need a government official (not an independent body) to oversee it\(^\text{154}\), as well as strong initiative and significant resources contributed by those conducting the audit. The recognition of the right to legal representation for all juveniles\(^\text{155}\) may alleviate the problems of the lack of child participation and accountability of the judicial proceedings by providing juveniles with an advocate who can object to inordinate delays or inappropriate behavior on the part of the Board, as well as through the establishment of a body of case law. Children are likely to be represented by free legal aid, such as a district legal services authority, not all of which may have the time or resources to be able to appeal cases. However, an increase in attorneys required to be involved in juvenile proceedings may mean an increase in support from either the Government of India or NGOs. This may lead to more challenges and appeals, bringing the juvenile justice system increased attention from the courts.

### 4.4.2 Integrated Child Protection Scheme: ICPS

The problem with these changes is that they are still at the legislative level, and may not actually be implemented. The Integrated Child Protection Scheme will hopefully address implementation concerns, through an entirely new bureaucratic structure and increased

\(^{154}\) Model Rules, supra note 20, R. 78.

\(^{155}\) Id. R. 8.1, 8.2.
expenditures for child protection\textsuperscript{156}. Set to be completed over the course of the next Five-Year Plan (2007-2012),\textsuperscript{157} the ICPS will create new offices known as State and District Child Protection Units\textsuperscript{158}. These Units are intended to be both the supervisory bodies as well as the chief funding resource for all Observation Homes, Juvenile Justice Boards, and Special Juvenile Police Units\textsuperscript{159}. However, it is unclear whether these Units will be able to be independent, as they are still under the Ministry’s umbrella and organizational hierarchy. The Ministry has attempted to increase their independence by hiring staff for the Units on a short-term, contractual basis\textsuperscript{160}. NGOs fear this to be an ineffective solution, as it will tend to lead to political appointments of people who may not have the proper training or commitment to the position\textsuperscript{161}. This is currently the only solution the Ministry has proposed to the problem of accountability throughout the entire system\textsuperscript{162}. Both the Model Rules and the ICPS are currently in draft form, and the implementation and outcome of these changes is unclear. The Government of India is advancing these solutions in order to improve a failing system, but both require significant commitment and engagement from both state governments and civil society. In order to see real change, the Government will need feedback from the NGO community and the public at large to create the necessary external motivation that will transform these documents into reality.

The 1986 Act marked the introduction of a uniform normative

\textsuperscript{156} ICPS, \textit{supra} note 58, at 1.
\textsuperscript{157} Interview with Arlene Manoharan, \textit{supra} note 7.
\textsuperscript{158} ICPS, \textit{supra} note 58, at 29 (district level), 31 (state level).
\textsuperscript{159} Model Rules, \textit{supra} note 20, R. 65 (Units as supervisory bodies); Interview with Arlene Manoharan, \textit{supra} note 7 (Units as chief funding resource)
\textsuperscript{160} Interview with Bobby Kunhu, Consultant, HAQ: Ctr. for Child Rights, in New Delhi, India
\textsuperscript{161} Interview with Arlene Manoharan, Consultant, HAQ: Ctr. for Child Rights, in New Delhi, India
\textsuperscript{162} Interview with Bobby Kunhu, Consultant, HAQ: Ctr. for Child Rights, in New Delhi, India.
structure for implementation of juvenile justice in the whole of India, except in Jammu and Kashmir. Yet, says Ved Kumari, in practice it seemed to be a re-enactment of the Children’s Act 1960 as there was almost no difference between the two. “Apart from substituting the word juvenile with child, the JJA had made the modifications in the definition of neglected juvenile, substituted the provision relating to drugs and aftercare, and introduced five new provisions.” This law was replaced by the 2000 Act, which was again amended in 2006 and rules made.

Beyond letter and spirit
Contradictions abound

Yet, the more things changed, the more they remained the same. Several contradictions and inadequacies continue to exist in the law and its application. Says Dipa Dixit, member, NCPCR, “The JJB and its procedures are as though for an adult, and therefore harsher for a child. The system is not child-centric at all.” While the JJ Act lays down a different adjudicatory mechanism for children, particularly for those in conflict with law, the system continues to rely on the IPC defining what constitutes an offence, as it doesn’t have a separate procedural code of its own. In fact, it continues to rely on the CrPc for procedural mechanisms [section 2(y)]. Therefore, while a child may be “apprehended” instead of arrested, the police continue to use the same arrest memo. Whether or not the child will be considered a child in conflict with law will be based on the IPC or as “an offence punishable under any law for the time being in force” [section 2 (p)] depending

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164 Ibid, Page 133
upon the act committed. In the case of the CNCP, the child will continue to be part of the adult trial proceedings if the accused is an adult. This contributes to a whole lot of problems starting with the time a child is apprehended for an offence committed by him (or approaches police for justice for an offence committed against him or her) till the child is produced before the relevant authority such as the JJB (the CWC). The need for FIRs, filing of charge sheet, unnecessary procedures for age verification, conventional methods of bail, an inquiry nothing less than a trial etc – all become deriver, which only increases the trauma for the child. This also helps perpetuate the perception of these children as criminals in the mind of the police who cannot go beyond the boundary of their knowledge of these two codes. Having the CrPC does not prompt or facilitate a change in the attitude of the police and the judiciary, who keep working to the letter of the law without appreciating its very spirit. The Central Model Rules framed by the Union Government for implementation of the law emphasize the use of non-stigmatizing semantics, decisions and actions as a fundamental principle in the development of strategies, interpretation and implementation of the law.\textsuperscript{165}

The preferred words in the legislation therefore are ‘apprehension’ instead of arrest, ‘inquiry’ instead of trial, ‘children in conflict with law’ in place of juvenile delinquents, ‘special home’ instead of ‘remand home’ and so on. A simple reading of the Act and the Rules however reflect just the opposite. The lack of political will to

\textsuperscript{165} (Rule 3) Principle VIII of the JJ Rules 2007 clearly states, “The nonstigmatizing semantics of the said Act must be strictly adhered to, and the use of adversarial or accusatory words, such arrest, remand, accused, chargesheet, trial, prosecution, warrant, summons, conviction, inmate, delinquent, neglected, custody etc. is prohibited in the process pertaining to the juvenile or child under the said Act”.

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change and the restrictive attitude of the government show up in the continued use of terms such as ‘detention’ and ‘release’.

This cardinal principle of non-stigmatizing semantics and action holds no meaning as long as the procedures of the Criminal Procedure Code (CrPC) are to apply in matters of juvenile justice. If using the CrPC, use of charge sheet, trial, prosecution, warrant, summons, conviction etc. are inevitable. This inherent contradiction in our juvenile justice legislation has therefore failed to treat children separately from adults and they continue to be sent to ‘judicial custody’ by the JJB instead of being placed in safe custody as required under the law.

The fact that the JJ law allows the Criminal Procedure Code (CrPC) to be followed in dealing with matters concerning children reflects the lawmakers’—and enforcers’—reluctance to rethink and innovate for children. It also raises doubts if the law was made to suit the needs of a few law enforcement officials, especially since the CrPC itself requires reforms for violating human rights principles. In a criminal justice system that does not establish distinct and specific legal procedures for children, ensuring justice to children will not be easy. In fact, there is no purpose served by the JJ Act if it continues to rest on criminal procedures for adults. A separate set of procedures for children must be drawn up forthwith, and till that’s done, there must be a set of child-friendly procedures to settle matters where the alleged offence is not serious.

Even in the law, there are several areas lacking in both conceptual clarity and procedural transparency. For instance, the 2000 Act prescribes that children in “conflict with law” be first taken to
observation homes, where they would stay till their production before
the JJB for inquiry. Yet, children are found to be staying at least one
night, sometimes even five, in a police station. This is fraught with
risk; the children might be abused, violated, kept hungry, a statement
may be taken from them by intimidation, and so on. The law also says
that no arrest can be made after sundown but police violate that on the
pretext that the child might run away. Because the law says the
children must be produced before the JJB within the next 24 hours,
they even post-date their reports to the Board to hide the stay in the
police station. On March 2, a division bench in Delhi severely
cautions police, asking them to immediately stop taking child
offenders to stations and making them sign statements. “There will be
no signatures or thumb impressions taken from these children... Any
officer who does so will be exposed to contempt of court,” it said. But
the law is not clear on where police will keep the child if the
Observation Home authority refuses to admit the child without a paper
signed by a senior official or if such an official cannot be contacted or
on a holiday, which is a very common occurrence. Section 12 says,
“When such person having been arrested is not released on bail under
subsection:

(1) by the officer in charge of the police station, such officer
shall cause him to be kept only in an observation home in the
prescribed manner until he can be brought before a Board.” But this
“prescribed manner” does not find a mention anywhere in the Act or
the Rules. Nor is it clear if taking a written order of any Member of the
Board for placement in an observation home is a “prescribed manner”.

166 Led by Chief Justice A P Shah
Section 8 of JJ Act says that every juvenile who is not placed under the charge of parent or guardian and is sent to an observation home, shall initially be kept in a reception unit of the observation home. The application of the law so far has been that a member of the JJB sends the child to the home and the reception unit is not prepared to receive any child till his/her first production before the JJB. It is understandable why homes do not want to take in children without a written order. For one, the law says a child can be placed with a fit person or in a fit institution and only the JJB has the power to declare the `fitness’. Secondly, since the responsibility of the child admitted falls on the home, the home may be reluctant to admit the child without an order or a valid record, especially if he or she escapes or something happens to the child before production before the JJB. The law too underscores the care and responsibility part; section 222 says “…who has escaped from a special home or an observation home or from the care of person under whom he was placed under this Act…” The law now requires only children apprehended for serious offences or those who have no parents/guardians, to be sent to an observation home immediately after apprehension. In keeping with the spirit of such provisions, the need for a written order should be done away with and instead a new set of measures can be adopted to ensure the safety of a child.

Another way out can involve the Special Juvenile Police Units (SJPUs) that are coming up in Delhi. Once the Department of Women and Child Development provides two social workers one of them a woman by law, to these units, children can remain under their supervision. The social workers can be kept on alternate duties to
ensure that at least one of them is available anytime. This is an administrative issue, require no legal change and can be followed in states too.

The CICL is innocent till proven guilty. Yet, HAQ had cases where firearms were found implanted on children by police. As per some chargesheets, the recovery was shown on a much later date from the house of the child. This is a serious issue because a child may not get enough legal assistance later to prove he was falsely indicted. Ideally, the Probation Officer should be at the station as soon as he/she receives the information about a child being apprehended. But since there are few such officers, some formal process to safeguard the interest of a child at all times, especially when he is at the police station, is urgently needed.

A similar confusion exists on the issue of whether police should call on the child at his or her home for investigation or the child and family members should be called to the police station. Again, is it necessary for child to be represented by a lawyer? If the accused and the victim are both children, should there be a public prosecutor present in the Board?167

In Delhi, on the other hand, there is a public prosecutor and children without lawyers are supposed to be represented by the legal services authority. It’s another matter that this rarely happens. Delhi is on the verge of finalising its State Rules, which makes it a good time to finalise the changes for greater clarity on many such issues. This can serve as a model for the rest of the country. Having the CrPC as the

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167 In Lucknow, for example, the State Government has said while legal aid can be provided to the CICL, no Public Prosecutor shall be provided since the JJB is meant to hold an “inquiry” and not a “trial”.

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base also works against children languishing in observation homes for months on end because of non-availability of parents. Bail is a matter of right and more so in the case of children, where the law overrides the CrPC clearly providing for bail irrespective of whether the alleged offence committed by the child is bailable or non-bailable. But bail actually has become a prerogative of a few who can afford it, who have someone to legally represent them.

The incongruity of using the CrPC is evident in another area: while the JJ Act requires the completion of inquiry in four months at the most, the charge sheet under CrPc can be filed in 90 days or more, allowing the latter to frustrate the goal of speeding up the process. Secondly, the presumption of innocence is a crucial element of criminal judicial proceedings in India, but becomes complicated in juvenile proceedings. According to the Committee on the Rights of the Child, the presumption of innocence “means that the burden of proof of the charge(s) brought against the child is on the prosecution.” This is a conundrum for the JJB, which does not have a separate prosecutor, and is expected to act as both arbiter and prosecutor. Moreover, the fact that guilt and retribution are not intended to be elements of the proceedings means that for any crime, all children receive the same punishment (if any)\textsuperscript{168}. This makes the JJB “ineffectual” in the eyes of the police and often influences the latter’s decision to anyhow send apprehended children, whom they suspect/know to be offenders, to adult prison.

Some other contradictions in the JJ Act are:

1. Though it is the law on juvenile justice, it does not clearly lay

down protocols or procedures for dealing with children who are victims of criminal acts such as rape, abduction, violence or trafficking. For instance, in the case of children who are in need of care and protection under the Act, the CWC can decide a place of safety, aid in prosecution and further the cause of rehabilitation of such children. But for child victims of crime, such procedures are not clearly laid down.

2. The JJ Act is also not clear about the procedures for regular follow-ups. There is no childcare officer or social welfare officer as in the developed countries to monitor events post-release. Thus, there is no scope for children who are unhappy with their placement/restoration to express their dissatisfaction.

3. There is a problem with age-specific interventions too. The space between seven years, the age for criminal liability in India, and 18 years, is too vast in terms of growth and maturity of children.

4. Charge sheets are delayed, beyond six months and sometimes even longer. There is no legal provision that says that cases should be closed if the charge sheet is not filed within the stipulated time.

5. Since no records are to be maintained of cases involving children in conflict with law, how do police make an entry of stolen goods found on children or recovered from them?

6. For promoting diversion, the law stops petty offences and non-serious offences committed by children from being registered in the form of an FIR. In this situation, if a person’s passport and such other important documents get stolen in robbery or theft committed by a child, how will he/she be able to make an application for issue of fresh documents without a copy of the FIR?
7. Similarly, there is a grey area in the law as to how to deal with children in conflict with law if they are intercepted at the age of say, 17 and a half years and during the course of the enquiry and/or stay in observation homes, they become adults. Magistrates and advocates have to go by precedents.

8. Segregation in terms of crimes is left to the State. Those having committed heinous crimes are placed together with those who are first time offenders or having committed petty offences. Special offences against children have been introduced in the law and the CWC and the JJB are empowered to take “cognizance”. But it is unclear what that means and where the trial will take place.

9. When families cannot be traced, the magistrates fail to use other powers under the CrPC to initiate the inquiry in the absence of parents/guardians, for instance, by appointing amicus curiae. Even the law is silent on how long the Board should wait for parents/guardians to be traced.

10. There is no universality of implementation, nor are there universal rules. For instance, in some areas, children are getting bail for an amount ranging from Rs 10,000- 50,000, while in some other areas the bail is as low as Rs 5,000 -10000.

11. The process of verification of surety is further delaying bail. Nowhere has a child been released on bail without surety although the law itself doesn’t say it’s a must.

12. There is a lack of clarity if the JJ Act overrides local laws relevant to children. For instance, Delhi has the Women’s and Children’s Institutions Licensing Act 1955 or Kerala has the Probation of Offenders Act 1958. A plethora of legislations simply worsens the
delays that are so endemic to Indian bureaucracies everywhere.

The JJ Act mandates setting up a fund by the state government, but it is not clear on what it should be used except “for the benefit of the children.” For instance, an official might decide to buy a car with the money to go around and visit homes.

4.4.3 Children’s voices in court

A singularly laudable development in the past few years has been the efforts to allow children to be heard in court. That is true for both CNCP as well as CICL. The most significant among them is the in-camera trial for sexually abused children encouraging the victim to speak freely without fear or inhibition. But the implementation of this has been more in spirit than in letter. The trial courts often do not pursue the matter as per the guidelines of the highest court, mainly because no court has the facilities. The courts still do not provide other child-friendly procedures laid down by various courts such as video conferencing, screen between the victim and the accused, translators and interpreters, and so on. The ‘in-camera’ trial is interpreted as holding the trial in a closed room where the child, judge, accused, defence lawyer, public prosecutor and the administrative staff are all present. This scarcely provides for an “in-camera” environment where the child feels secure and free.

As in the case of the JJB, children find the atmosphere of a family court intimidating and confusing when they are brought for an interview. There is no direct provision in the Family Courts Act for the psychological recovery and social reintegration of the child. The links with social service agencies and childcare professionals are inadequate. The workload in the family courts is so high that in many instances it
is not possible to consider the child’s special concerns and needs. Recently, Chief Justice of India K R Balakrishnan said many more such courts were needed to clear the backlog of cases.\textsuperscript{169}

4.5 MANY ALTERNATIVES: FEW WORK

4.5.1 Diverting kids from institutions

The spirit of the 1986 Act was custodial in nature and so it concentrated on rehabilitation through institutions, an idea that lost currency over the years as poor conditions at government homes made headlines frequently. Nor were governments keen to shoulder such responsibilities in the face of criticism and corruption. The new Act, it was hoped, would create fresh methods of rehabilitation, and see institutionalisation as the last option. As rehabilitation of a child in an environment conducive to its growth and development is the primary objective of the JJ Act, chapter IV has been incorporated to exclusively deal with rehabilitation and social reintegration. In that backdrop it is disheartening that the phrase “ultimate rehabilitation through various institutions” occurs in the preamble of the Act, though fortunately different options have been considered in the main text.\textsuperscript{170}

Institutionalization is still the first option depriving children of their right to liberty.

“The state government is simply not interested in diversion, restoration or innovative alternate care methods. There is just too much of a preference for status quo.”\textsuperscript{171} Some arguable points being:

1. Children’s concerns are never the primary or major concerns in any petition.

\textsuperscript{169} After the enactment of the Family Courts Act in 1985, only 138 courts were set up all over India.
\textsuperscript{170} Maharukh Adenwala: The Juvenile Justice (Care And Protection Of Children) Act 2000
\textsuperscript{171} Ratna Saxena, former Superindentent of Prayas OHB at Delhi Gate, says
2. There is no follow-up of the orders relating to children.

3. There is no set of standards/guidelines laid down to deal with children in family courts.

4. The judges, lawyers, counsellors, and other court personnel are not trained to adopt a ‘child-centred approach’.

5. The orders depend on the perception of individual judges as to what constitutes the ‘best interest of the child’. Some judges interview the child personally; others leave it to the counsellors.

Community service, state after care, adoption or foster care – whatever the manner of rehabilitation, it should ideally depend upon the facts and circumstances of each case and the best interest of the child should be of paramount importance while deciding the mode of rehabilitation. Thus, in what other ways can the child be assured of justice and restoration. The JJ Act brought in the idea of placing children in conflict with law into community service as a substitute for institutionalisation. As a concept, community service is held in much esteem but in reality, abused. The discussions among policymakers and the bureaucracy would not go beyond, for instance, getting a child to work in a hospital, not as a help to the doctor or for data entry or other office assistance, but as a floor-cleaner! In fact, in the absence of a very well thought-out programme, which ensures that the child’s dignity and self-respect is maintained and he or she is not stigmatised further, the community service clause in the law will only be seen as a punishment by both the person who gives such orders as well as by the children, who are placed in some of the most socially rejected and undignified forms of labour, making their lives a worse drudgery. One principal magistrate proudly narrated how she was using a child
offender for community service at a police station, seemingly unaware of the fact that the boy was simply running errands, in effect acting as unpaid child labour! Besides, given the attitude of the police to children in conflict with law, how far they will be assisting in the “reform” of the child remains a big question. Can this form of community service ever change the children’s lives? Although there are adequate examples of police abuse and highhandedness, there are efforts on to place a child for community service at police stations. HAQ strongly feels\textsuperscript{172} such proposals should be immediately dropped. There are also no mechanisms highlighted in the JJA for selection, monitoring and evaluation of foster care or sponsorship programmes, after care and adoption. There are very few aftercare homes in the country. Delhi has three, but children from homes run by NGOs don’t find room there. Mostly, at 18, if he doesn’t have a family, the child is let loose on the streets, with little education and few skills, to undertake life’s difficult journey helpless and on his own. In the case of children whose families are far away, the JJ system makes little effort to trace them for restoring the child.

Repatriation of children to their home states or countries, especially of those belonging to neighbouring countries like Nepal and Bangladesh – and their number is quite high – is very poor.

Adoption and foster-care is the other alternative to be considered by the CWC in appropriate cases. The CWC is to declare a child free for adoption. While the amendment to the law in 2000 gave power to the JJB to carry out investigations and give the child in adoption, this power has subsequently been taken away through the 2006 amendment.

\textsuperscript{172}HAQ (An NGO working for Juveniles In India): Report 2009
This is following the Supreme Court’s intervention on adoption matters. Only a District or High Court is now empowered to give a child in adoption.

Adoption and foster-care

Allowing adoption of all children who are in need of care and protection through the JJA Act was a revolutionary step. It opened the doors for avoiding institutionalisation even while allowing many adults to offer a new life and hope for the neglected children.

Even though foster care has been popular in the developed west, it has not been explored or adequately understood in India yet, despite inclusion in the JJA. Foster care has been prevalent in India after a fashion, where it has worked more as kinship foster care. This is when a homeless or parentless child is taken into the fold of his nearest family, such as with the aunt, uncle, sibling etc. A few states, such as Rajasthan, have been funding such care\textsuperscript{173}.

Other states however have done little in this regard. The Delhi social welfare department, for instance, is sitting on the foster care scheme, drafted after much consultation in 2003. The WCD department however claims that it allowed 24 children to be placed under foster care in 2006-07. Compared to foster care, adoption, both intra-country and inter-country, has caught on better. One unexpected impact of the new policy has been that inter-country adoptions have become a fertile ground for child trafficking. The Delhi state WCD department says it allowed 235 domestic adoptions in 2007 and 230 in 2008. Kerala, the

\textsuperscript{173} This scheme is called Palanhaar and was launched in 2004-05. Near relatives or grandparents who keep the child get a financial assistance of Rs 500 a month till age five of the child, and Rs 675 after school admission from age 6 to 15. There’s also an annual assistance of Rs 2000 for buying books, uniform etc. The state government says it spent over Rs 5 crore on the scheme in 2007-08.
best performing state in this regard, saw 300 adoptions in 2006. Still, a vast number of children in need of care and protection are waiting to be adopted. Even the list of parents who are keen to adopt them is growing longer every year. States such as Bihar are practically virgin states in terms of adoption, with few agencies registered for the purpose. The Central Adoption Resource Agency (CARA), under the Union Ministry of WCD, which has been working as a centralized coordinating agency since 2003, tells us that 3264 adoptions took place in 2007, including 770 inter-country adoptions, compared to 3831 adoptions (including 1298 inter-country ones) in 2001. Unfortunately, that’s about all the figures it has. Also, this figure doesn’t include other domestic adoptions conducted through licensed adoption agencies recognized by state governments. The main issue surrounding adoption is the role and legitimacy of the adoption agencies, most of who continue to function without licenses or registration, never bringing in the child through the JJ system. This is the biggest challenge before the JJ system today. In this connection, the recent Gillani case in Delhi holds out a lone beacon of hope for adoptable children and the use of the JJA in facilitating such adoptions. Syed Gillani and wife Pallavi’s two-year attempt to adopt a baby girl from the childcare home run by the Church of North India finally met with success when the final order clearing the adoption was passed in October 2007\textsuperscript{174}.

4.5.2 JJ system in other countries

The CRC has set the standard where childhood is defined as below the age of 18 years, but countries are allowed reservations against commitments. In the US, which has signed but not ratify the

\textsuperscript{174} www.unicef.org/pon97/p56a.htm - 13k
CRC, the age of criminal responsibility is set by state law and only 13 states have set the minimum age ranging from 6 years to 12 years. The rest rely on common law, which holds that children of 6-14 years bear no criminal responsibility\textsuperscript{175}.

In Japan offenders below the age of 20 are tried in a family court, rather than a criminal court system\textsuperscript{176}. In all Scandinavian countries the age of criminal responsibility is 15 and adolescents below the age 18 are geared towards a system, which is social service oriented and incarceration is usually the last resort\textsuperscript{177}.

In China, children of 14-18 years are dealt with by the juvenile justice system compared to 7-18 years in India. But unlike India, China allows life imprisonment for particularly serious crimes. In most countries of Latin America, the reform of juvenile justice legislation is under way. The age of adult criminal responsibility has been raised to 18 in Brazil, Colombia and Peru and children of 12-18 years are sent before the juvenile justice system. There are currently 14 countries known to permit the sentencing of juveniles for life without a possibility of release: Antigua and Barbuda, Australia, Brunei, Burkina Faso, Cuba, Dominica, Israel, Kenya, Saint Vincent and the Grenadines, the Solomon Islands, South Africa, Sri Lanka, Tanzania and the United States. Outside of the US, there are believed to be no more than 12 child offenders serving life sentence. In Iran and Saudi Arabia child offenders may be sentenced to death\textsuperscript{178}.

The United States of America celebrated the centenary of the JJ

\textsuperscript{175} Ibid.
\textsuperscript{176} Ibid.
\textsuperscript{178} Ibid.
system ten years ago—the first juvenile court was established in Illinois in 1899—but towards the end of the last century, it started moving towards adult-oriented criminal law jurisprudence. Separate courts for children have existed there for over a hundred years, with a focus on rehabilitation—as opposed to punishment—through liberal sentencing and options for release and probation. This system, however, came under increasing threat in the nineties with the rise in juvenile crime and many privileges have since been taken away. The USA also disproportionately sentences child offenders to life without parole. With an estimated 2,225 child offenders serving the sentence, and 42 of the 50 states plus the federal government permitting the sentence, the US is home to over 99 per cent of youth serving the sentence in the world.124

In most countries of the world, the juvenile justice system deals only with children in conflict with law, while other social and state-specific laws are used for children in need of care and protection. In both cases however, individual care plans are developed for children. Each child has a social worker attached to her/him, unlike in India where such a system is beyond imagination. The task in India may be huge, thanks to the sheer numbers of children involved and hence daunting. Yet were we to have such a system, we would not find enough social workers for the job. It seems either our institutions have stopped producing social workers willing to be with children or the government has ceased to appoint them. Few students opt for working in the field of social welfare in India, though they wouldn’t mind taking up such offers from the UN or the private corporate sector and MNCs. Even psychosocial care or counselling services are highly
inadequate. Unless these children are counselled through their journey into the JJ system and out of it, in order that their self-esteem and confidence remains intact, their future remains bleak.

Even in terms of law change, we seemed to have proceeded in a bureaucratic manner, so much so that even 17 years after signing the CRC, we are still grappling with non-fulfilment of concepts such as diversion, restorative justice and best interests. In India, there was no systematic collection of data, evaluation of comparative experiences or experiential learning. Research efforts were scant and the Ministry of Social Justice and Empowerment, in a hurry to produce a new law, seems to have neglected the reform of process.

For further change in the JJ Act, lawmakers can take a leaf out of the books of some countries where the JJ system and laws are functioning well and in keeping with international standards. Of late, the JJ systems in countries such as South Africa, Scotland and the Netherlands have come across as shining examples, replacing countries such as the US, which were earlier the model.

For India, a better role model to follow would be some of the developing countries. The case of Uganda, which enacted its legislation on the care of children in 1995, reflects how a developing country with limited resources has successfully moved towards matching international principles with binding local law179. For instance, paying great attention to the principle of diversion at the point of first contact, police in Uganda have been empowered to deliver a caution at the point of arrest and let the child go on a personal bond by guardian or parent. The police may also dispose of the case

179 The following discussion draws on Arvind Nairn: Juvenile Justice, A Critique, 2004
themselves without recourse to formal proceedings. If the first tier of diversion does not work then the child goes through an innovative, non-criminal adjudicatory process, for instance, before the Village Resistance Committee Court that is empowered, regardless of criminal law, to enable reconciliation, compensation, restitution, apology or caution. Except for offences punishable by death and those committed jointly by adults and children that go before the magistrate, all other cases go to the Family and Children’s Court. The maximum penalties here are detention for six and three months. Clearly, while Uganda has taken seriously the three cornerstones of human rights framework, diversion and deprivation of liberty, India has ignored them.

South Africa too ratified the CRC in 1995. Its legislation on juvenile justice and child protection, the Child Justice Act promulgated in May, 2009 is an attempt to learn from the best experiences around the world and apply it to the local context and provides a good example for India. The South African Law Commission’s Issue Paper on Juvenile Justice closely studied the experiences of three countries, New Zealand, Uganda and Scotland before coming up with its own proposals. To begin with, the process of law reform in South Africa has been rich, extremely consultative, rich and democratic, ensuring fundamental clarity on conceptual issues like minimal age of criminal responsibility, expunging records, etc. The entire process, beginning with circulation of the Issue Paper to the submission of the policy to the ministry of justice, took three years. Here too, much emphasis is placed on preliminary inquiry, which aims to ensure that the case of each child is carefully considered and given maximum opportunity to be diverted out of the system, before proceeding to trial so that there is
no pre-trial detention. However, for juveniles who commit serious
offences, however, imprisonment is a sentencing option and they are
also not eligible to have their criminal record expunged, similar to the
system prevailing in the US, thus losing the chance to humanize them.

4.5.3 An Act of Compassion

By international standards the (South African) Act is both
sophisticated and radical, raising the age of criminal capacity (the age
children are presumed to know the law), diverting arrested youngsters
away from courts and prison to community-based structures and
forcing wrongdoers to face their victims and to make reparations.

If South Africa’s existing legal framework can be said to be
punitive, the new legislation is restorative, favouring negotiation over
punishment, reparations over imprisonment and community healing
over social abandonment. It should have been passed years ago, but
official nervousness about its implications - and a country baying for
the incarceration of criminals - saw it continually rewritten and
sidelined in the parliamentary mill. It may hold the record in South
Africa for spending the longest time between its inception and
becoming law.

There can be no keener revelation of a society’s soul than the
way in which it treats its children. Nelson Mandela, Former President
of South Africa Some of the developed countries, especially
Scandinavian countries, also stand out. The experience of Scotland, in
particular, bears mention. The progressive Scottish system evolved
independently of the CRC from a report, by Lord Kilbrandon in 1964,
which recommended for the first time that the JJ system should
“clearly separate two important functions: the establishment of guilt or
innocence on one hand, and the decision on what measures would help each individual child on the other.” This means after the Sheriff determined the veracity of the charge, a citizens’ body would determine the treatment for the offender. This report also decided to treat all children as children in need of care and protection. The Scottish system also gives precedence to diversion. Not only has police the power to release the child with caution but before the child goes for the hearing, the Reporter must also be satisfied that there are sufficient grounds for it and if not, has the power to release the child. It is also the most radical system, going beyond the crime committed into the reasons behind it.