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**The Right to Participation of Children in Conflict
with Law**
An Analysis of Childhood in UNCRC and Juvenile Justice in India

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Abstract

While childhood is not universally defined, but shaped by socio-cultural and legal contexts, the rights associated with it must be upheld consistently. This is especially important in the case of children in conflict with law, whose position highlights the tension within justice systems that are designed to simultaneously protect and punish them. To that end, this thesis examines how the concept of ‘childhood’ and the right to participation are constructed in the United Nations Convention on the Rights of the Child (UNCRC) and in the Indian Juvenile Justice Act, 2015. The first part of the thesis offers a doctrinal legal analysis of how the UNCRC frames childhood as both a protected and participatory condition, further analysing how such constructions of childhood relate to children in conflict with law. The second part applies this conceptual framework to the Indian context, assessing how the Juvenile Justice Act, 2015 and the treatment of children in courts reflect or diverge from the UNCRC’s vision. The analysis reveals a gap between India’s formal commitments under the UNCRC and the lived legal reality for children in conflict with law. The thesis argues for a stronger legislative alignment with the UNCRC and a conceptual shift toward recognising children as social agents with the right to participate, within the protective ambit of the rights-based framework.

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Table of Abbreviations

CCL	Child (or Children) in Conflict with Law
UNCRC	United Nations Convention on the Rights of the Child
GC	General Comment
GDRC	Geneva Declaration on the Rights of the Child
ICCPR	International Covenant on Civil and Political Rights
JJ Act	Juvenile Justice (Care and Protection of Children) Act, 2015
JJB	Juvenile Justice Board
POCSO Act	Protection of Children from Sexual Offences Act, 2012
The Committee	Committee on the Rights of the Child
UNDRC	United Nations Declaration on the Rights of the Child
UNGA	United Nations General Assembly
VCLT	Vienna Convention on the Law of Treaties

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1. Introduction

1.1 Situation of Juvenile Justice in India

In India, 78,442 children were reported to be in conflict with law in 2022¹. Of these, 88.3% were found guilty, and almost 10,000 were institutionalised, not including those already in pre-trial detention². Furthermore, a civil society report documented 9681 children illegally detained in adult prisons³, while over 800 children were found to be detained in one Delhi prison alone⁴, from 2016 to 2021.

This paints an alarming situation for juvenile justice in India, raising questions about the rights of children and due process in a system marked by high detention and conviction rates. The subject of children in conflict with law (CCL) reveals a critical tension at the heart of contemporary legal debates about childhood. This tension emerges from two contradictory assumptions – first, that children are inherently vulnerable and incapable of decision-making, and therefore must be protected and guided by adults; second, that society must be protected from harm, and that those who commit crimes must be punished. Hence, leading to the perception that children who commit crimes are simultaneously seen as incapable (by virtue of childhood), and deserving of punishment (by virtue of criminal behaviour).

Modern legal systems, particularly after the implementation of the United Nations Convention on the Rights of the Child (hereafter ‘UNCRC’ or ‘the Convention’), have embraced a rights-based framework that recognise children as active participants in decisions affecting their lives⁵. The recognition of the right to participate is precisely because denying children agency based on

¹ National Crime Records Bureau, Ministry of Home Affairs, ‘Crime in India 2022’ tbl 5A.1 <<https://www.ncrb.gov.in/crime-in-india.html>>.

² *ibid* 5A.2.

³ Gitanjali Prasad, Krishna Sharma and Yamina Rizvi, ‘Incarceration of Children in Prisons in India’ (iProBono 2024).

⁴ *Court on its Own Motion v State & Ors* [2022] DHC 12 (Crim Ref 1/2020) (Delhi HC, Mridul J & Bhambhani J, 21 January 2022)

⁵ Laura Lundy, John Tobin and Aisling Parkes, ‘The Right to Respect for the Views of the Child’ in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) <<https://doi.org/10.1093/law/9780198262657.003.0013>> accessed 3 April 2025.

presumed incapacity can hinder their development⁶. In legal settings, participatory rights include the ability to understand legal proceedings, to speak freely, to be directly addressed and heard during hearings, and to have the child's views considered central to the proceedings⁷. This necessitates child-friendly legal processes, access to legal representation, and clear explanations of decisions and their consequences⁸.

However, in India, the current Juvenile Justice (Care and Protection of Children) Act, 2015 (hereafter 'JJ Act') includes participation only as a general principle and does not clearly lay down the procedures for implementing it⁹. While provisions exist to establish child-friendly system, these often focus on building institutional structures, with the final authority to allow for child participation lying at the discretion of adult practitioners¹⁰.

This discretion, particularly within the justice system, often leads to an adult-led paternalistic or punitive approach towards children. Indian judiciary tends to treat CCL as passive subjects requiring reform, control, and 'correction', rather than recognising them as autonomous rights-holders¹¹. This is significantly seen in the 2015 provision that allows certain minors to be tried as adult¹², children remain within the child protection system where their rights are acknowledged, but they receive adult-standards of punishment. This reflects a worrying trend towards criminalisation and punitive responses to CCL, even as the UNCRC and JJ Act recognise that many such children are themselves victims in need of care and protection. These contradictions

⁶ Berit Skauge, Anita Skårstad Storhaug and Edgar Marthinsen, 'The What, Why and How of Child Participation—A Review of the Conceptualization of "Child Participation" in Child Welfare' (2021) 10 *Social Sciences* 54.

⁷ Stephanie Rap, 'A Children's Rights Perspective on the Participation of Juvenile Defendants in the Youth Court' (2016) 24 *The International Journal of Children's Rights* 93.

⁸ *ibid*; Louise Forde, 'Realising the Right of the Child to Participate in the Criminal Process' (2018) 18 *Youth Justice* 265.

⁹ Alankrita S, 'Participation of "Walled" Children Begins When Adults Listen—The Right to Participation of Children in Conflict with the Law in India' (2024) 5 *Amicus Curiae* 661.

¹⁰ *ibid*.

¹¹ Erika Rickard, 'Paying Lip Service to the Silenced: Juvenile Justice in India' (2008) 21 *Harvard Human Rights Journal* 157; Neha Mishra, 'Revisiting Juvenile Justice with Victim Lens' (2019) 2 *Journal of Victimology and Victim Justice* 164, 182; 'Justice Is Not a Privilege but Right of Every Child: Odisha HC Judge' *The New Indian Express* (6 June 2025) <<https://www.newindianexpress.com/states/odisha/2025/Jun/06/justice-is-not-a-privilege-but-right-of-every-child-odisha-hc-judge>> accessed 1 July 2025; See generally Anant Kumar Asthana, 'Juvenile Justice: Law & Practice: Compilation of JJB Orders' <<https://www.haqUNCRC.org/wp-content/uploads/2020/05/compilation-jjb-orders-by-anant-kumar-asthana.pdf>>.

¹² Juvenile Justice (Care and Protection of Children) Act 2015 s 18(3).

undermine core child rights principles, leaving little space for realising meaningful participation in justice processes.

Participation (or lack thereof) affects how justice is experienced by children¹³. Research on CCL in India shows that many children are unable to understand legal processes or meaningfully engage with proceedings that affect them¹⁴. Adult practitioners in the juvenile justice system tend to view participation not as a right, but as a duty of children to assist in the daily work of the adults themselves¹⁵. This perception aligns with sociological construction of children as *human becomings* rather than *human beings*¹⁶, and thus not yet deserving of legal voice¹⁷. Overall, the current practice in India points to an interpretation of participation that is possibly falling short of the substantive commitments articulated in Article 12 of the UNCRC.

1.2 Problem Statement and Research Questions

In India, advocacy and training initiatives have increased in recent years with the aim to improve child participation in practice¹⁸, however these efforts imply that the legal framework itself supports the right to participation. This thesis seeks to investigate this assumption. Research further suggests that failure to implement participatory rights stems not only from socio-cultural perceptions of practitioners but also from varying complex factors involved in policymaking¹⁹.

Additionally, the conceptualisation of childhood is intrinsically linked to the realisation of participatory rights for children. This is because the extent to which children are seen as capable, autonomous, or merely dependent subjects within the legal and social order affects whether they

¹³ Counsel to Secure Justice, 'Bonds of Hope: Connecting to Children in the Observation Homes of Rajasthan' (Counsel to Secure Justice; UNICEF India; Department of Child Rights, Rajasthan 2020).

¹⁴ Alankrita S (n 9); Ravi Prakash Vyas and others (eds), *Policy Research on Children Deprived of Liberty in the Administration of Justice in South Asia* (2022) ch 4. 'India'.

¹⁵ Alankrita S (n 9).

¹⁶ Chris Jenks, *Childhood*, vol 2 (Routledge 2005).

¹⁷ Ved Kumari, 'Construction of Criminality and Children' <[http:// projects.essex.ac.uk/ehrr/V7N1/Kumari.pdf](http://projects.essex.ac.uk/ehrr/V7N1/Kumari.pdf)> accessed 28 May 2025.

¹⁸ Akanksha Natesan and others, "'Not This Week, Maybe Next"—Understanding the Working of Legal Services Provided to Children in Conflict with the Law', *Human Rights and Legal Services for Children and Youth: Global Perspectives* (Springer 2023) <<https://doi.org/10.1007/978-981-99-5551-0>>.

¹⁹ Roger Hart, 'Children's Participation: From Tokenism To Citizenship' [1992] UNICEF Innocenti Essays <https://www.researchgate.net/publication/24139916_Children's_Participation_From_Tokenism_To_Citizenship> accessed 24 February 2025; Bronagh Byrne and Laura Lundy, 'Reconciling Children's Policy and Children's Rights: Barriers to Effective Government Delivery' (2015) 29 *Children & Society* 266; Natesan and others (n 18).

are afforded participatory rights in practice²⁰. If childhood is conceptualised primarily as inherently dependent and incapable, participation is more likely to be viewed as unnecessary.

All this raises a significant legal question: is the matter of weak implementation of child participation an issue in practice, or is there a misalignment between the international and domestic legal conceptualisations of childhood? If the legal framework does align with the UNCRC's interpretation of participation, then the issue lies in translating the policy into action. However, if there is a conceptual gap at the level of the law itself, then legal reform may be needed to align Indian law with its international obligations.

Overall, this thesis aims to examine how the idea of participation (within conceptualisations of childhood) is interpreted in the UNCRC, as a normative yardstick, and in the JJ Act in India; and, based on said interpretations, how can India ensure compliance with its obligations under the UNCRC regarding participation rights for children in conflict with law. Based on the problem and information above, the primary research question is: **In what ways do legal constructions of childhood in international and Indian child rights instruments shape the right to meaningful participation of children in conflict with law in the juvenile justice process in India?**

For this, the sub-questions to be addressed are:

- a. What is the concept of 'childhood' as incorporated in the United Nations Convention on the Rights of the Child? (Chapter 2)
- b. How is the child's right to meaningful participation for children in conflict with the law in the justice process interpreted in the United Nations Convention on the Rights of the Child? (Chapter 3)
- c. How are the concept of 'childhood' and the child's right to meaningful participation for children in conflict with the law incorporated in the provisions of the Juvenile Justice

²⁰ Karl Hanson, 'Children's Participation and Agency When They Don't "Do the Right Thing"' (2016) 23 *Childhood* 471; Jonathan Todres, 'Independent Children and the Legal Construction of Childhood' (2014) 23 *Southern California Interdisciplinary Law Journal* 261.

(Care and Protection of Children) Act, 2015, and to what extent does this reflect the legal provisions prescribed by the UNCRC? (Chapter 4)

- d. How do state actors within the juvenile justice system in India interpret and apply the concepts of ‘childhood’ and the child’s right to meaningful participation, especially in relation to children in conflict with the law? (Chapter 5)

1.3 Methodology

Doctrinal Legal Analysis is one of the traditional methods of legal analysis, which examines the content of a legal opinion and conducts a systematic analytical study of existing legal provisions²¹. Chapter 2 and 3 will utilise the tools for interpretation contained in articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT)²² to carry out a doctrinal legal analysis of the UNCRC. The interpretive tools are, namely, the literal (textual) approach, the systematic (contextual) approach, the historical interpretive approach and the teleological (functional) approach²³.

The literal (textual) approach simply provides for keeping the primacy of the text- words or phrases “*are to be given their normal, natural, and unstrained’ meaning*”²⁴. The articles of UNCRC will be analysed through a textual approach within the context of the treaty as a whole. The systematic (contextual) approach requires that the meaning of treaty provisions be determined with their context and in light of the object and purpose of the treaty. The context includes, the preamble, annexes, but also any agreements or instruments made in connection with the treaty’s adoption by all the parties²⁵. The general principles of the UNCRC (Articles 2, 3, 6, and 12), form a core part of the interpretative framework. These principles guide the understanding and implementation of specific rights and will be used, where relevant, to provide a broader understanding of the scope and application of the Convention’s provisions. Furthermore, supplementary documents relating to the interpretation of Articles will be employed through the contextual approach. General comments by the Committee on the Rights of the Child (hereafter “UNCRC Committee”) will be

²¹ Odile Ammann, *Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example* (Brill | Nijhoff 2020) <<https://brill.com/view/title/55800>> accessed 24 February 2025.

²² Vienna Convention on the Law of Treaties (Adopted on 23 May 1969 Entered into force on 27 January 1980) 331 UNTS 1155.

²³ Ammann (n 21).

²⁴ VCLT art 31(2)(a).

²⁵ *ibid* 31(2).

the primary supplementary document for said analysis, the use of which may be justified in accordance with the VCLT which states that “*any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation*” shall be considered, together with the context²⁶. The teleological (or functional) approach will be utilised to ensure that the interpretation is in good faith, focusing on the object and purpose of the UNCRC²⁷. The ‘principle of effectiveness’ in international human rights law holds that treaties should be interpreted so as to achieve their intended effect²⁸. Finally, the historical approach allows recourse to “*supplementary means of interpretation, including the preparatory work of the treaty...in order to confirm the meaning resulting from the application of article 31*”²⁹. This will be utilised to supplement the understanding of the Articles by providing historical context, primarily through the discussion between parties when drafting the Convention.

Comparative legal methodology will be used to interpret the Juvenile Justice Act, 2015 and its compliance with the UNCRC. The comparative methodology has been defined as “*identifying, analysing, and explaining similarities and differences in how actors in different legal systems understand, interpret, apply, and approach international law*”³⁰. While there is not much agreement on the type of method to be followed when undertaking comparative legal analysis, the macro (international) and micro (national) level of comparison can be used to analyse how various principles and norms of international law are defined and applied across various legal systems³¹. This methodology will be used here to compare the content of the UNCRC, particularly the concepts of childhood and participation for children in conflict with law, with the JJ Act, to understand the extent to which the norms and principles align with the UNCRC and make recommendations for compliance where they do not align.

²⁶ *ibid* 31(3)(b).

²⁷ *ibid* 31(1).

²⁸ Catherine Brölmann, ‘Specialized Rules of Treaty Interpretation: International Organizations’ in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2020) <<https://doi.org/10.1093/law/9780198848349.003.0023>> accessed 27 June 2025.

²⁹ VCLT art 32.

³⁰ Anthea Roberts and others (eds), ‘Conceptualizing Comparative International Law’, *Comparative International Law* (Oxford University Press 2018) <<https://doi.org/10.1093/oso/9780190697570.003.0001>> accessed 19 June 2025.

³¹ Mark Van Hoecke, ‘Methodology of Comparative Legal Research’ [2015] *LAW AND METHOD* 1.

Empirical data will be used to supplement the discussion in Chapter 5. This will be done by examining available judicial orders concerning children in conflict with the law and relevant grey literature. Grey legal literature refers to a documents produced by governments, academics, or Civil Society, that are not published commercially or indexed in standard databases³². Such sources are important to explore the broader societal debates and informal understandings of law, especially in the absence of primary data. The limitation is that there is a paucity of data in India regarding CCL since the right to privacy ensures that judicial orders are not published on any public platform, only cases that are appealed in higher courts are available. Given this limitation, relevant judgements are collected through purposive convenience sampling. This method involves deliberate selection of cases that are accessible and most relevant to the research objectives³³. In this study, judgments were identified using targeted keywords on legal research databases and two national law-based media outlets. The search was limited to the past 10 years to ensure recency and relevancy, as the JJ Act was enacted in 2015.

1.4 Structure of the Thesis

The thesis will first explore the international legal context in chapter 2, looking at the conceptual foundations of ‘childhood’ and ‘participation’ incorporated in the UNCRC. Chapter 3 will focus specifically on a critical understanding of provisions for children in conflict with law. This chapter establishes the global normative framework, and the obligations placed on member states when it comes to administration of juvenile justice. Chapter 4 will then shift the focus to the national context of India, analysing how the notions of childhood and participation are constructed within the Juvenile Justice Act, 2015. This chapter explores how international standards have been domesticated into Indian law, while also identifying the sites of convergence and tension. Finally, Chapter 5 will move from legal texts to lived practice, examining through specific themes the state actors within the juvenile justice system understand and operationalise the child’s right to

³² Cleo Pappas and Irene and Williams, ‘Grey Literature: Its Emerging Importance’ (2011) 11 *Journal of Hospital Librarianship* 228; *ibid*.

³³ Lawrence A Palinkas and others, ‘Purposeful Sampling for Qualitative Data Collection and Analysis in Mixed Method Implementation Research’ (2015) 42 *Administration and Policy in Mental Health and Mental Health Services Research* 533.

participation, focusing specifically on children in conflict with the law. Drawing on empirical data, this chapter analyses how (and what) principles of participation are implemented in practice.

2. Childhood in the UNCRC

2.1 Introduction

The aim of this chapter is to answer the first research sub-question: What is the concept of ‘childhood’ as incorporated in the United Nations Convention on the Rights of the Child? The chapter proceeds in five sections. It begins with tracing the historical evolution of international child rights law closely related to the UNCRC, to show the normative shift from a charity and welfare-based to a rights-based approach. Then, it aims to unpack how the Convention constructs childhood through four broad and overlapping themes – identity & belonging, development, protection, and participation. It then analyses how childhood is framed as a period of identity formation and social belonging. The next section examines how development is legally embedded in the Convention, including how the principle of evolving capacities plays a role within these rights. Then it looks at provision related to protecting children and what that means for childhood within a rights-based framework. Finally, the chapter analyses the right to participation to understand how the UNCRC constructs childhood not only as phase for protection but also agency, legally.

2.2 Evolution of International Child Rights

The modern child rights movement traces its origins to sisters Eglantyne Jebb and Dorothy Buxton, who founded Save the Children. Alarmed that children across national lines were denied aid for political reasons, they began to lobby politicians and humanitarian actors to extend relief irrespective of nationality in the name of humanitarianism³⁴. Their work helped institutionalize the idea that the failure to protect children constituted a moral failing of societies at large. As scholars note, the condition of children in a given society can serve as a strong indicator of broader developmental outcomes.³⁵ This notion of morality constructed childhood, at least politically, as a

³⁴ Emily Baughan and Juliano Fiori, ‘Save the Children, the Humanitarian Project, and the Politics of Solidarity: Reviving Dorothy Buxton’s Vision’ (2015) 39 *Disasters* s129.

³⁵ Marshall, ‘The Construction of Children as an Object of International Relations: The Declaration of Children’s Rights and the Child Welfare Committee of League of Nations, 1900--1924’ (1999) 7 *The International Journal of Children’s Rights* 103.

proxy for societal failures, seeing the situation of children as a yardstick for morality, but not yet as rights-bearing subjects.

Following the dissolution of the League of Nations and the end of the Second World War, the United Nations took up the mandate of child protection. Conceptualised initially as simply an emergency response for post-war relief – and hence temporary – UNICEF started to expand its scope to developing and recently decolonised nations, with the aim to implement long-lasting measures to remedy child welfare³⁶. This shift begins to situate children within an international development logic where welfare was delivered to children not as a matter of entitlement, but charity and moral duty.

The first international legal articulation of children's rights came with the 1924 Geneva Declaration of the Rights of the Child (GDRC), which set out five moral principles focused primarily on protection³⁷. It portrayed the child as vulnerable, dependent, and in need of adult care. Its language framed children as passive recipients of welfare, lacking agency or autonomy³⁸. These ideas were echoed and slightly expanded in the 1959 United Nations Declaration on the Rights of the Child (UNDRC), which introduced broader protections towards development, including education, play and recreation³⁹, and recognition of emotional and psychological needs⁴⁰. However, the emphasis remained on welfare rather than enforceable rights.

By 1979, marked by the proclamation of the International Year of the Child, the international community had been increasingly moving from a welfare-based model to a rights-based approach. The adoption of international instruments such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), signalled a broader movement towards universal and legally enforceable human rights. These instruments created the normative

³⁶ UNICEF, *1946-2006: Sixty Years for Children* (UNICEF 2006) 6.

³⁷ Geneva Declaration of the Rights of the Child, League of Nations (Adopted 26 September, 1924).

³⁸ Kate Cregan and Denise Cuthbert, *Global Childhoods: Issues and Debates* (SAGE Publications, Limited 2014); Rituraj Sharma, 'Reading UNCRC and Children's Rights Sociologically: A Paradigm Shift from "Protection to Rights"' (2020) 9 *International Journal of Multidisciplinary Education and Research* 188.

³⁹ United Nations Declaration of the Rights of the Child. (Adopted 20 Nov 1959) UNGA Res A/RES/1386(XIV), art 7.

⁴⁰ *ibid* 6.

framework within which the child would later be recognised not only as a moral concern but as a legal subject.

The adoption of the Convention on the Rights of the Child (UNCRC) in 1989 marked a significant turning point. It brought together the earlier (welfare-based) declarations into a binding, legal instrument. Markedly, it includes the rights for children to *do* things in addition to having things *done to* and *for* them by adults⁴¹, recognising children as active rights-holders. The UNCRC legally codified a new image of childhood that redefined the child as a present social agent rather than a future one. This conceptualisation underpins the rest of the chapter, which explores in greater detail how childhood is framed within the UNCRC.

2.3 Childhood in the UNCRC

To understand the construction of childhood within the UNCRC, it is essential to look at the substantive articles and preamble on the Convention together, in order to understand what the Convention articulates and implies when it speaks of children and childhood. The Convention contains 54 articles in total, of which 41 are considered the substantive articles as they directly cover the rights of the child, the rest focusing on implementation guidelines. Additionally, the Committee on the Rights of the Child has identified four ‘general principles’ to be treated both as rights in themselves and as guiding norms for the implementation of all other rights within the Convention.

First conceptualised by Hammarberg in 1990, scholarship on the rights within the UNCRC tend to create a typology of three types of rights, the so-called 3Ps: provision, protection, and participation; with some variations as well⁴². State actors in India often use a similar categorisation to explain

⁴¹ Cregan and Cuthbert (n 38) 61 emphasis in original.

⁴² Thomas Hammarberg, ‘A Juvenile Justice Approach Built on Human Rights Principles’ (2008) 8 Youth Justice 193; Shannon Moore, John Davis and Luke Melchior, ‘“Me and the 5 P’s”: Negotiating Rights-Based Critical Disabilities Studies and Social Inclusion’ (2008) 16 The International Journal of Children’s Rights 249; Aline Cole-Albäck, ‘Children’s Rights in Early Childhood: An Exploration of Child Rights Pedagogy in England and Finland’ (doctoral, Birmingham City University 2020) <<https://www.open-access.bcu.ac.uk/13325/>> accessed 2 July 2025; Bronagh Byrne and Laura Lundy, ‘Children’s Rights-Based Childhood Policy: A Six-P Framework’, *Human Rights Monitoring and Implementation* (Routledge 2020); Yvonne Vissing, ‘The 3 Ps of Provision, Protection, and Participation’ in Yvonne Vissing (ed), *Children’s Human Rights in the USA: Challenges and Opportunities*

the rights in four broad categories: survival, development, protection, and participation⁴³. Based on such a classification, and through a close reading of the substantive articles and the preamble, four core themes regarding childhood have been conceptualised for this study, which will be discussed below:

1. Identity and Belonging– focusing on the idea that childhood is when identity is formed – culturally, personally, and legally- and within a familial and social context,
2. Development – looking at childhood as the time for acquiring knowledge, values, and socialisation, and also acknowledging it as a temporary, and hence, time-sensitive phase of being,
3. Protection and Care – focusing on childhood as a time of severe vulnerability requiring dependency on adults for protection, care, and support,
4. Participation – recognising children as active social agents in their life.

These categories are not definitively established within specific articles but are interwoven and conceptually overlapping throughout the Convention. This categorisation has been done for the sake of analytical clarity.

2.4 Identity and Belonging in the UNCRC

2.4.1 *What is the Identity of a Child?*

According to the textual tool of interpretation, and in line with Article 1 of the UNCRC, a child is defined as "*every human being below the age of eighteen years*"⁴⁴. Interestingly, this definition

(Springer International Publishing 2023) <https://doi.org/10.1007/978-3-031-30848-2_14> accessed 2 July 2025; Eva Jørgensen and others, 'Child Rights during the COVID-19 Pandemic: Learning from Child Health-and-Rights Professionals across the World' (2023) 10 Children 1670.

⁴³ See Dr Savita Bhakhry, 'Children in India and Their Rights' [2006] National Human Rights Commission; see Joining Forces For Children-India, 'Child Rights in India: An Unfinished Agenda' (2019) <https://childfundindia.org/wp-content/uploads/2019/07/Child%20Rights%20in%20India_An%20Unfinished%20Agenda.pdf>.

⁴⁴ United Nations Convention on the Rights of the Child 1989 ((entry into force 2 September 1990)) UNGA Res 44/25, art 1.

was absent from the original Polish draft, which instead began with what is now Article 2 on non-discrimination. However, the drafters felt a strong need to legally define the child before speaking of their rights⁴⁵. Much debate has been observed in the drafting history regarding this definition, whether childhood begins at conception or birth, but the final text leaves this open, allowing states flexibility in domestic law.

The choice to set an upper limit of childhood, by setting the age at 18, is essential to ensure universality and an enforceable threshold for implementation across socio-culturally diverse contexts. However, as Article 1 progresses, it also states the age of majority is 18 “*unless under the law applicable to the child, majority is attained earlier*”. This implies an understanding of childhood that may be universal in terms of its features and needs, but not the duration⁴⁶. This definition acknowledges the variation in developmental capacity that exists within and across age groups, cultural differences in maturity, or situations in which children may already be exercising significant autonomy below the age of eighteen. This is further reaffirmed by introducing the concept of evolving capacity, which will be discussed later in this chapter. Article 1 overall shows that being a child is, in itself an identity, legally understood by the age threshold.

In line with the contextual tool of interpretation, it is clear from other articles, especially Articles 7 and 8, that the Convention establishes the child’s right to identity. This includes the right to, firstly, *have* a name and nationality, and secondly, to *preserve* said identity, including both name, nationality as well as family relations. Article 8 was initially conceptualised as a right to “retain his true and genuine personal, legal and family identity”, on proposal by Argentina to ensure the state protects children from fraudulent means of changing the child’s identity⁴⁷. These rights position childhood as a time when one’s legal and familial identity is formed—not just administratively, but existentially—and the need to protect the same. Unlike previous iterations of

⁴⁵ See Office of the United Nations High Commissioner for Human Rights (OHCHR), ‘Legislative History of the Convention on the Rights of the Child - VOLUME I’ 301–313.

⁴⁶ Marieke Janne Hopman, ‘(Why) Should Children Have Rights? A Philosophical Perspective’ in Ton Liefwaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child* (Brill | Nijhoff 2017) <<https://brill.com/view/book/edcoll/9789004295056/B9789004295056-s016.xml>> accessed 12 February 2025.

⁴⁷ Office of the United Nations High Commissioner for Human Rights (OHCHR) (n 45) 384.

the child's right to name and nationality in the UNDRC⁴⁸ and the ICCPR⁴⁹, the UNCRC frames identity of a child as continuous, contextual, and tied to the child's broader social location.

2.4.2 What does *Belonging within a Family* mean?

An essential aspect of childhood is that the child is understood within the context of their family. A textual reading of Article 2(2) shows the idea of a special form of discrimination: that is, any form of punishment “*on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members*”. This is an additional child-specific dimension of the principle of non-discrimination in the UNCRC, in line with the relational model of childhood, where the social position of the child's caregivers is a part of the child's own identity. Punishment, in this context, is framed as one of those established social practices that disproportionately affect children⁵⁰. This further reflects a notion central to the Convention- the child's embeddedness within the family unit. This is distinct from most adult rights frameworks, which tend to emphasize individual autonomy, whereas the UNCRC recognizes dependence as fundamental to childhood.

The preamble reinforces this idea, describing the family as “*the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children,*” and calling for its protection and support⁵¹. The Convention further gives specific attention to the child's right to be cared for by their parents, “*as far as possible*”⁵², and protects against arbitrary interference in family life⁵³, along with right to their cultural identity and language^{54,55}. These provisions together frame the child as a member of multiple overlapping

⁴⁸ Principle 3 of the UNDRC simply states “The child shall be entitled from his birth to a name and a nationality”

⁴⁹ International Covenant on Civil and Political Rights (Adopted 16 December 1966, Entry into force on 23 March 1976) UNGA Res 200A (XXI), art 24(2) and (3).

⁵⁰ Samantha Besson and Eleonor Kleber, ‘Article 2 : The Right to Non-Discrimination’ in John Tobin and Philip Alston (eds), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) <<https://hal.science/hal-02516192>> accessed 21 June 2025.

⁵¹ UNCRC Preamble, para 5, 6.

⁵² *ibid* 7.

⁵³ *ibid* 16.

⁵⁴ *ibid* 29(c).

⁵⁵ *ibid* 30 specifically for indigenous groups.

communities – legally as an individual, but also in familial and cultural contexts – with these connections understood as being central to the realisation of their rights.

Critics have argued an interpretation of the UNCRC in affording individual rights to children and adding increased role of the state risks undermining the family’s authority and autonomy⁵⁶. The above discussion however affirms that the child’s rights are not in tension with family structures. Lansdown has further conceptualized the UNCRC as creating a triangular relationship between the state (as duty-holder), the parent, and the child (as the rights holder), while also ensuring the visibility of the child as subject of rights within the family, because the Convention establishes a direct relationship between the state and the child⁵⁷. Hence, this points to a conceptualisation of childhood, in the UNCRC, as a state in which children hold rights individually while also being firmly embedded in the family structures.

2.5 Development in the UNCRC

The Convention places strong emphasis on the developmental nature of childhood as a legal condition, not merely as a biological or educational process. Article 6 contains the child’s inherent right to life⁵⁸, survival, and development “*to the maximum extent possible*”⁵⁹, and is recognized as one of the Convention’s general principles. Importantly, "development" has been understood broadly to include physical, mental, spiritual, moral, and social growth⁶⁰. In essence, a multi-dimensional understanding of development is employed here to move beyond the understanding of the child as a object of protection, but rather framing childhood as a formative period that must be actively supported.

⁵⁶ Elizabeth A Faulkner and Conrad Nyamutata, ‘The Decolonisation of Children’s Rights and the Colonial Contours of the Convention on the Rights of the Child’ (2020) 28 *The International Journal of Children’s Rights* 66.

⁵⁷ Gerison Lansdown, *The Evolving Capacities of the Child* (UNICEF Innocenti Research Centre 2005).

⁵⁸ UNCRC art 6(1).

⁵⁹ *ibid* 6(2).

⁶⁰ UN Committee on the Rights of the Child, ‘General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, Para. 6)’ UN Doc UNCRC/GC/C/5 4.

2.5.1 How is Education seen as Development

Education, as elaborated in Articles 28 and 29, is framed not only as a right but as a means of development, with Article 29 setting out its aims in terms of developing personality, talents, and respect for human rights. A textual reading of Article 29(1)(c) notably points to one of the aims of education as being “*the preparation of the child for responsible life in a free society...*”, also echoed in the preamble as “*the child should be fully prepared to live an individual life in society...*”. Using the historical tool of interpretation, it is important to note the evolution of education as a right: from the GDRC’s subtle implication towards earning a livelihood, to the UNDRC ‘s notion of the utility of education for the child “*to become a useful member of the society*”, to the UNCRC where education becomes a fundamental right with specific developmental goals.

Overall, the child is positioned as a future citizen whose development is a part of social and moral development of the society as a whole. The conception of development here echoes theories within childhood studies where childhood has been framed as a phase of *becoming*⁶¹, and metaphors used in discussing children revolve around the growth, development or the tabula rasa nature of children⁶². In emphasising education as a core development means, the UNCRC makes clear demarcations for what is considered as an ideal childhood.

2.5.2 What is the role of Evolving Capacities?

Another key concept within this framework is the concept of evolving capacities, mentioned in Article 5 as “*States Parties shall respect the responsibilities, rights and duties of parents...to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance...*”. A textual reading of the article brings forth two important concepts: (a) evolving capacities of the child, and (b) the state’s duty to respect parents and family as a foundational unit to bring up a child.

⁶¹ GDH Cole and TH Marshall, ‘Citizenship and Social Class, and Other Essays.’ (1951) 61 *The Economic Journal* 420; Allison James and Adrian L James, *Constructing Childhood* (Macmillan Education UK 2004) <<http://link.springer.com/10.1007/978-0-230-21427-9>> accessed 6 April 2025.

⁶² Jenks (n 16).

The Committee describes evolving capacities as an enabling principle reflecting children's growing maturity, competence, and agency in exercising their rights⁶³. Varadan further argues that the Committee's interpretation extends beyond Article 5, shaping not only the framework of parental guidance but also the implementation of the Convention as a whole⁶⁴.

Critically, Article 5 bridges the gap between children who require parental support to exercise their rights and those who are capable of exercising them on their own behalf⁶⁵. The idea of family as the primary caregivers is echoed in the preamble of the Convention and previously the UNDRC⁶⁶. Interestingly, the UNDRC does not talk about the responsibilities, rights and duties of parents, rather simply the child needing to grow up in an '*environment of love and understanding*' for the '*full and harmonious development of their personality*'. However, during the drafting of the Convention, the duties of the parents were brought forth as the emphasis on evolving capacities requires for the parents to play a significant role⁶⁷. The word '*appropriate*' in the article removes the possibility that parents have carte blanche to provide, or fail to provide, whatever guidance and support they deem suitable⁶⁸. This shows a shift from an earlier paradigm of family possession and ensures that the parent's responsibility here is not because of their 'ownership of the child' but as a parental function⁶⁹.

Overall, the concept of evolving capacities in the convention provides two clear ideas about childhood – that children have the cognitive capacity to be able to, in whatever form possible, exercise their rights; however, due to the very fact that these capacities are *evolving* means that they may still remain dependent on others for their protection and development⁷⁰.

⁶³ UN Committee on the Rights of the Child, 'General Comment No. 20 on the Implementation of the Rights of the Child during Adolescence' (2016) UN Doc UNCRC/C/GC/20 para 18

<<https://documents.un.org/doc/undoc/gen/g16/404/44/pdf/g1640444.pdf>> accessed 6 June 2025.

⁶⁴ Sheila Varadan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' (2019) 27 The International Journal of Children's Rights <https://brill.com/view/journals/chil/27/2/article-p306_306.xml> accessed 14 June 2025.

⁶⁵ Ursula Kilkelly, "'Evolving Capacities" and "Parental Guidance" in The Context of Youth Justice: Testing the Application of Article 5 of the Convention on the Rights of the Child' (2020) 28 The International Journal of Children's Rights 500.

⁶⁶ UNDRC art 6.

⁶⁷ Office of the United Nations High Commissioner for Human Rights (OHCHR) (n 45) 360.

⁶⁸ Lansdown (n 57).

⁶⁹ *ibid*.

⁷⁰ John Tobin, 'Justifying Children's Rights' (2013) 21 The International Journal of Children's Rights 395.

2.5.3 What other articles relate to Development?

The UNCRC further emphasizes development through Article 24 (healthcare), Article 27 (standard of living), and Article 23 (rights of children with disabilities), all of which require states to ensure conditions conducive to a child's development. Notably, Article 27(2) highlights the primary responsibility of parents in securing the conditions necessary for the child's development. This structure reinforces the child as a legal subject situated within their social and familial context, again invoking the family-state-child relationship. The UN Human Rights Committee echoes this, stating that "*it is primarily incumbent on the family, and particularly on the parents, to create conditions to promote the harmonious development of the child's personality*"⁷¹.

Finally, Article 31(1) adds to the framework of development, adding "*...the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.*" This provision provides a broader view of development not simply limited to education or health but also including cultural and emotional growth. At the same time, this provision subtly constructs childhood as a separate domain by relegating children to spaces that are appropriate for them – the home, school, or playground⁷². These boundaries are protective but also shape childhood as being separated from adult spheres.

Overall, the Convention constructs development not only as a right but as a defining feature of childhood. It sees development as a means to adulthood while also acknowledging the child's capacity to develop as a human being intrinsic to the exercise of their rights.

2.6 Protection and Care

2.6.1 How is Protection a right?

The UNCRC places a strong emphasis on protection and care, reflecting a core assumption: children are inherently vulnerable due to their physical and cognitive immaturity and their dependence on adults. The preamble explicitly states that "*childhood is entitled to special care*

⁷¹ UN Human Rights Committee, 'CCPR General Comment No. 17: Article 24 (Rights of the Child)' (1989) para 6.

⁷² Todres (n 20).

and assistance,” echoing the language of the Universal Declaration of Human Rights⁷³. Many articles in the UNCRC reflect this as well: Article 19 specifically talks about protecting children from different types of maltreatment; Article 28, while talking about the right to education, ensures in subarticle (2) “*that school discipline is administered in a manner consistent with the child's human dignity*”; Article 17(e) calls for “*protection of the child from information and material injurious to his or her well-being*”; Article 32 mentions the need to be protected from “*economic exploitation*”; Articles 34-36 address abuse, exploitation, and neglect in various settings. Finally, Article 36 is a broad, residual clause obligating states to protect children against “*all other forms of exploitation prejudicial to any aspects of the child's welfare*”. Notably, the word ‘protect’ and its forms come up 29 times throughout the convention.

Discussions during the drafting of the UNCRC made clear that the need for a binding convention arose from persistent failures to implement the principles of the 1959 UNDRC⁷⁴. Thus, the UNCRC was rooted in the urgent need to protect real, existing children, rather than invoking “childhood” as a cultural or theoretical construct.

2.6.2 What is the Best Interests principle?

An element of protecting and caring for the child is reflected in the principle of best interests, which is also one of the guiding principles of the Convention. Reading article 3(1) textually, it is important to note the clause of the best interest being ‘a primary consideration’. The concept of best interest was introduced in the UNDRC). The Declaration mentioned the principle of best interest as ‘the paramount consideration’ in the enactment of laws for the purpose of the child’s development, which was used as is for the first Polish draft of the Convention. During the drafting of process however, after discussion, this was changed to ‘a primary consideration’ citing that “*other parties might have equal or even superior legal interests in some cases (e.g. medical emergency during childbirth)*” and that there shouldn’t be “attempts to regulate private family decisions but only official actions”⁷⁵. This lends to the Committee’s interpretation that while the

⁷³ Universal Declaration of Human Rights 1948 (Adopted 10 December 1948) UNGA Res 217/A, art 25(2).

⁷⁴ Office of the United Nations High Commissioner for Human Rights (OHCHR) (n 45) 279.

⁷⁵ *ibid* 339.

principle must be applied in all situations where child rights are concerned, it must remain flexible and adaptable for each case, keeping the focus on highlighting the situation of children since “*if the interests of children are not highlighted, they tend to be overlooked*”⁷⁶.

Regarding the right to be heard (Article 12), the Committee emphasises that best interest principle is complementary to it—Article 3 sets the objective, while Article 12 provides the means to achieve it by ensuring children are heard⁷⁷. In many cases, meaningful participation and being genuinely heard can itself serve the best interests of the child⁷⁸. Moreover, the best interest principle cannot be used by adults to trump children’s views, particularly when they demonstrate a level of maturity comparable to adults, as such children are capable of determining their own best interests⁷⁹.

In essence, the concept of best interest as a primary consideration attempts, in part, to resolve the tension between participation and protection. It retains the notion of incapacity and vulnerability in childhood but still provides for a way to ensure participation.

2.7 Participation in the UNCRC

Article 12 on the right of the child to be heard is often also commonly known as the right to meaningful participation. The UNCRC Committee has also acknowledged the same, seeing participation as an “*ongoing process which includes information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes*”⁸⁰. The article comprises of two main elements: a) that in all matters affecting the child they have a right to express their views freely, and b) that due weight must be given to those views. As will be discussed below, Article 12 contains more elements than simply the right to be heard, and hence

⁷⁶ UN Committee on the Rights of the Child, ‘General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art . 3, Para .1)’ (2013) UN Doc UNCRC/C/GC/14 6.

⁷⁷ UN Committee on the Rights of the Child, ‘General Comment No. 12: The Right of the Child to Be Heard’ (2009) UN Doc UNCRC/C/GC/12 para 74.

⁷⁸ Vyas and others (n 14) ch 4. 'India'.

⁷⁹ Lundy, Tobin and Parkes (n 5).

⁸⁰ UN Committee on the Rights of the Child, ‘General Comment 12’ (n 77) para 3.

the term ‘right to participation’ encompasses this view when considering children’s rights in conjunction with other articles of the UNCRC.

2.7.1 *What is the Right to be Heard?*

The text of Article 12(1) refers to ensuring the right of a child who is “*capable of forming his or her own views*”. This clause has been interpreted as an obligation on the state to presume that the child has capacity to form in the first place⁸¹. Moreover, the Committee has specified that it is not up to the child to prove their capacity⁸². This presumption of capacity is foundational in the way the Convention has redefined childhood – away from the earlier held notions of children being incapable. This is also important considering the distribution and dynamics of power in society often rely on adult-led judgement of children’s lives and behaviours⁸³. During drafting of this article, there were discussions to condition a child’s right to express views on reaching the “age of reason”, but this was subsequently replaced with the current form citing a difficulty to characterise or standardise an age of reason⁸⁴. Moreover, international human rights law, and indeed the Convention itself⁸⁵, does not require capacity to exercise rights as a precondition to enjoy said rights, and hence the ‘incapacity’, say for very young children or children with specific disabilities, cannot be used as a justification for not creating the mechanisms that enable children to express their views. This reinforces the UNCRC’s normative stance that the right to participation is not dependent on full autonomy but rather it is a right that exists within and supports the child’s developmental trajectory. It further affirms a vision of childhood that is fluid and consistently evolving, rather than having fixed thresholds to exercise rights.

The child’s “*right to express those views freely*” has been interpreted in many ways⁸⁶. Importantly, the term freely is connected to the child’s *own* perspective – they have the right to express their own views, not the views of others. This autonomy reinforces the UNCRC’s construction of the

⁸¹ *ibid* 20.

⁸² *ibid*

⁸³ Roger Smith, ‘Childhood, Agency and Youth Justice’ (2009) 23 *Children & Society* 252.

⁸⁴ Office of the United Nations High Commissioner for Human Rights (OHCHR) (n 45) 439.

⁸⁵ See Article 2 on ensuring rights to each child without discrimination of any kind

⁸⁶ UN Committee on the Rights of the Child, ‘General Comment 12’ (n 77) paras 22–25.

child as an individual with independent moral and cognitive capacities, even when having dependencies.

Another qualification of this right is that the child must be heard “*in all matters affecting them*”. The Committee has acknowledged this as a basic condition that must be respected and understood broadly⁸⁷, covering all issues with a real impact on children’s lives—direct, indirect, specific, or incidental⁸⁸. Moreover, adults alone cannot determine what qualifies as such matters; children must be actively involved in identifying them⁸⁹. This broad interpretive scope reflects an understanding that children are best placed to identify what affects them, and that adult assumptions are insufficient. It is essential to look at this clause considering the discussions during the drafting process. One delegate understood the phrase to mean matters "affecting the rights of the child," while another proposed "regarding the rights of the child," and another suggestion was "matters concerning his own person" accompanied by a list of specific issues. None of these more restrictive alternatives were accepted. Instead, the drafters chose the open-ended phrase “all matters affecting the child,” signalling an intent to uphold a wide scope for children's participation.

Participation, then, is not simply a consultation – it is an essential component of how childhood is both recognised and enacted, legally, under the Convention.

2.7.2 What is ‘Due Weight’?

The clause that views of the child must be “*given due weight in accordance with the age and maturity of the child*” is a central part of Article 12(1). It makes it clear that simply listening to the child is insufficient, and that the views must be considered seriously as well. This affirms the legal standing of children. This is a significant advance from the practice of decision makers to ignore and devalue children’s views⁹⁰. Importantly, this is unique to children within international human rights. While adults also enjoy the right to freedom of expression, there is no obligation on the part

⁸⁷ *ibid* 26.

⁸⁸ Lundy, Tobin and Parkes (n 5).

⁸⁹ *ibid*; Marilyn Casley and others, ‘Child Citizenship and Participation: Bottom-up Level Change from Professional Conversations with Children’ (2024) 5 *Journal of Childhood, Education & Society* 270.

⁹⁰ Lundy, Tobin and Parkes (n 5).

of the state to actively seek out or give weight to their opinions⁹¹. For children, however, the right to be heard comes paired with the duty to listen, which is a redressal of the historical power imbalances⁹².

Furthermore, by mentioning both age and maturity, it is clear that age alone cannot be allowed to determine the importance of the child's views and opinions. The UNCRC Committee has acknowledged years of research that establish that maturity is not uniformly linked to a child's biological age⁹³. This supports a more nuanced understanding of childhood as a diverse and evolving phase, shaped not only by age but also by differences across economic, gender, social, and cultural contexts.

2.8 Conclusion

With the adoption of the UNCRC, the discourse of international children's rights focuses on a legal and universal rights-based approach. Overall, the Convention sets a clear conception of childhood in our minds. It provides the child with a distinct legal identity. It situates the child within the family yet also affirms their agency by recognizing them as full rights-bearing human beings - marking a shift from earlier notions of the family's ownership over the child. At the same time, it underscores children's dependence on adults for care, support, and protection from harm, reinforcing the need for protection and care as an inherent feature of childhood. Childhood is further seen to be defined as a developmental stage through various articles on education, health, and play as being core to a child's growth. Finally, the UNCRC provides for the right to participation that reframes the child as being able to, and now having the right to, actively take part in their own lives.

The Convention reflects both the protectionist approach and normative assumptions about what childhood ought to be, and in doing so, signals the moral and developmental expectations placed on societies in their treatment of children. Critically, the rights-based framework does not erase

⁹¹ Byrne and Lundy (n 19).

⁹² Gerison Lansdown, '25 Years of UNCRC: Lessons Learned in Children's Participation' (2014) 1 *Canadian Journal of Children's Rights/Revue canadienne des droits des enfants*.

⁹³ UN Committee on the Rights of the Child, 'General Comment 12' (n 77) para 29.

assumptions regarding vulnerability and dependence of childhood, but rather builds on them, formalizing protections while introducing new normative ideas about children's agency, participation, and personhood. This nuanced understanding of childhood is the foundation for subsequent chapters that will examine how these internationally approved norms are reflected for children in conflict with law, and particularly in the Indian juvenile justice system.

3. Children in Conflict with Law in the UNCRC

3.1 Introduction

This chapter aims to answer the second subquestion: how is the child's right to meaningful participation for children in conflict with the law in the justice process interpreted in the UNCRC? To do so, this chapter builds on the conceptual framing of childhood discussed in chapter 2 and, analyses two provisions related to CCL in the UNCRC – Article 37 on deprivation of liberty and Article 40 on juvenile justice. These articles are examined using the tools of legal doctrinal analysis.

Structuring the chapter thematically, it follows two broad themes: the deprivation of liberty of CCL, and participatory right for CCL. In the first part, the concept of deprivation of liberty in the administration of juvenile justice is explored, noting specifically how Article 37 frames childhood and rights, when are children considered under criminal law, and the scope of childhood and participation when deprived of liberty. The second part looks at the rights of CCL in legal proceedings, considering the provisions in Article 40, and the scope of participation within the same.

3.2 Deprivation of Liberty in the UNCRC

3.2.1 *What is Deprivation of Liberty?*

Deprivation of liberty, for adults and children alike, is defined as the confinement of a human being to a narrowly bounded location that they cannot leave at will⁹⁴ and without free consent to such deprivation⁹⁵. In the case of children, who are ordinarily under significant and necessary protection from their parents, guardians, and other institutions during their upbringing, deprivation of liberty can be considered as a result of a decision made by a judicial or administrative

⁹⁴ Manfred Nowak, 'United Nations Global Study on Children Deprived of Liberty' (2019) <<https://omnibook.com/Global-Study-2019>>.

⁹⁵ UN Human Rights Committee, 'CCPR General Comment No. 35: Article 9 (Liberty and Security of Person)' (2014) UN Doc CCPR/C/GC/35 para 6.

authority⁹⁶. Article 37 provides that “*No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment...*”. It continues for four sub-articles by laying out guarantees against arbitrary deprivation of liberty, conditions of detention, and the right to legal and other assistance.

Deprivation of liberty represents one of the gravest forms of state intervention in a child’s life. Under Article 37(b) of the Convention, deprivation of liberty “*shall be used only as a measure of last resort and for the shortest appropriate period of time*”. This provision is rooted in the recognition that even short-term detention can have profound and irreversible consequences on a child’s development and well-being⁹⁷.

Using the contextual tool of interpretation via the General Comment no. 24 (2019), it is reinforced that “*pretrial detention should not be used except in the most serious cases, and even then only after community placement has been carefully considered*”⁹⁸. A teleological interpretation situates the provision within the broader framework of the child’s right to development, in line with Article 6, and the overall goal to protect children from harm. In essence, the harm caused by detention, especially during the critical stages of adolescence, seems incompatible with the UNCRC’s understanding that childhood must be nurtured in safe and stable environments.

Another significant aspect of deprivation of liberty is the separation of children from their familial environment, which is in contravention to the UNCRC’s broader emphases on childhood belonging within the family, in line with Articles 5, 9, 18, as discussed in Chapter 2. Furthermore, deprivation of liberty can have spillover effects on other independent rights, such as the right to education (Art. 28), health (Art. 24), rest and leisure (Art. 31), and the right to maintain contact with family members (Art. 9).

⁹⁶ Nowak (n 94).

⁹⁷ Stuart A Kinner and others, ‘The Health of Children Deprived of Liberty: A Human Rights Issue’ (2020) 4 *The Lancet Child & Adolescent Health* 6; Ton Liefwaard, ‘Deprivation of Liberty of Children’ in Ursula Kilkelly and Ton Liefwaard (eds), *International Human Rights of Children* (Springer Singapore 2018) <http://link.springer.com/10.1007/978-981-10-3182-3_15-1> accessed 2 July 2025; Nowak (n 94); Imke Steimann, Reina-Marie Loader and Manu Krishan, ‘Editorial of Special Focus: Selected Developments in the Area of Children Deprived of Liberty’ (2020) 4 *Global Campus Human Rights Journal* 281.

⁹⁸ UN Committee on the Rights of the Child, ‘General Comment No. 24 on Children’s Rights in the Child Justice System’ (2019) UN Doc UNCRC/C/GC/24 para 86.

Reading Article 37(c) textually provides the requirement to treat the children in detention “*in a manner which takes into account the needs of persons of his or her age*”. This language reinforces the evolving capacities principle (Art. 5), mandating age-appropriate treatment in line with the child’s specific situation. It also calls for an individualised approach, in line with Article 3(1) and the Havana Rules⁹⁹, that children in detention must not be considered as a homogenous group, but rather as individuals with diverse needs accommodating their age, gender, culture, health, etc¹⁰⁰. This provides for the state obligation to create separate institutions and mechanisms for children and reaffirms UNCRC’s notion of childhood as the time for identity forming, as their individual needs to be centred to the entire process.

3.2.2 When are Children considered under Criminal Law?

Minimum Age of Criminal Responsibility (MACR) is one of the first steps that determines whether a child should enter the justice system at all. Article 40(3)(a) directs to the member states to “*establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.*” This makes MACR a structural safeguard at the point of first contact to see which children should be excluded from criminal responsibility altogether. The UNCRC Committee has recommended that the MACR be no lower than 14 years, though the situation is radically different across the globe¹⁰¹. This notion aligns with a developmental understanding of childhood and protects children from early exposure to punishment. Criminalising children at too young an age contradicts UNCRC’s core principles of development (Article 6) and protection in line with evolving capacities (Article 5).

The concept of evolving capacities here is double-edged. The Committee has affirmed that as children acquire capacities, they must be provided an increasing level of responsibility and

⁹⁹ United Nations Rules for the Protection of Juveniles Deprived of their Liberty (‘Havana Rules’) 1990 (Adopted on 14 December 1990) UNGA res. 45/113, r 28 states ‘The principal criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being.’

¹⁰⁰ Liefaard (n 97).

¹⁰¹ Don Cipriani, ‘Current MACRs Worldwide and Modern Trends’, *Children’s rights and the minimum age of criminal responsibility: a global perspective* (Routledge 2016); Nowak (n 94).

participation on the matters affecting them¹⁰². This is in line with the idea of MACR, which implicitly recognises that as children develop the capacity to cause harm they must, at some point, be held accountable for their actions.

Critically, criminal responsibility is not about whether the child had the autonomy to engage in criminal behaviour, but rather if they have the necessary maturity to accept responsibility for those actions¹⁰³. Some scholars contend that recognising children as being independent also implies encouraging ownership and responsibility of their (in this case, criminal) behaviour, even if it may conflict with their protection rights¹⁰⁴. Thus, the concept of evolving capacities carries a complex implication: as children acquire capacities, they must be provided an increasing level of responsibility on the matters affecting them. This same concept, however, also supports the argument that children, whose decision-making capacities are not fully developed, should be spared the full force of criminal law¹⁰⁵.

The overall developmental lens of the Convention, reinforced by the clause in Article 40(1) to take “*into account the child's age*” in juvenile justice, supports the argument that the initial contact must be rooted in age-appropriate procedures and outcomes. Considering the widespread use of detention¹⁰⁶ even in the pre-charge and pre-trial stage, setting a low MACR risks exposing more children to harmful custodial measures. A higher MACR acts as a safeguard against the premature and unnecessary deprivation of liberty.

3.2.3 How is ‘Childhood’ seen during Deprivation of Liberty?

¹⁰² UN Committee on the Rights of the Child, ‘General Comment No. 20’ (n 63) para 18.

¹⁰³ Kilkelly (n 65).

¹⁰⁴ Maria José Bernuz Beneitez and Els Dumortier, ‘Why Children Obey the Law: *Rethinking Juvenile Justice and Children’s Rights in Europe through Procedural Justice*’ (2018) 18 *Youth Justice* 34; Smith (n 83); K Hollingsworth, ‘Responsibility and Rights: Children and Their Parents in the Youth Justice System’ (2007) 21 *International Journal of Law, Policy and the Family* 190.

¹⁰⁵ Kilkelly (n 65).

¹⁰⁶ United Nations Children’s Fund, ‘Children Deprived of Liberty in the Administration of Justice: Global and Regional Estimates and Trends’ (UNICEF 2015) <https://data.unicef.org/wp-content/uploads/2025/06/Children-Deprived-of-Liberty-in-the-Administration-of-Justice_single-pages_June-2025.pdf>.

Deprivation of liberty affects children in fundamentally different ways that it does adults, both in its impact and in its implications for the right to participation. A textual reading of Article 37(c) mandates that “*every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person...*”, which points to the application of the general principles of the UNCRC, including Article 12 on the right to be heard. Participation then, in this context, is a condition for dignity.

Children in detention face a power imbalance, separated from their families and support systems, and places in environments where adult authorities control all aspects of their daily lives. This imbalance creates a barrier to their participation unless mechanisms are put in place that are child-sensitive, confidential, accessible, and safe¹⁰⁷. In this regard, Article 37(d) of the Convention aims to support the child by including the “*right to prompt access to legal and other appropriate assistance...*”. Notably, this appropriate assistance must be provided at every and any stage of the proceedings, including during the deprivation of liberty¹⁰⁸. Fear of reprisal for speaking up is common and hence complaints procedures must be established to be safe and independent, especially when complaints are routed through the same authorities that children are complaining against¹⁰⁹. The UNCRC Committee also urges against tokenistic approaches that would allow the child to be heard but fail to give due weight to their suggestions or complaints¹¹⁰.

There is also a critical developmental dimension to consider. Because childhood is a period of rapid moral, emotional, and cognitive growth, environments that do not facilitate participation risk interrupting that trajectory. Denying children opportunities to participate meaningfully during this period would undermine both their present and future ability to engage as rights-holders. Overall, deprivation of liberty for children must be understood not only as a restriction of movement but as a potential denial of agency.

¹⁰⁷ Liefwaard (n 97).

¹⁰⁸ UN Committee on the Rights of the Child, ‘General Comment 24’ (n 98) paras 49–53.

¹⁰⁹ Nowak (n 94) s 6.2.

¹¹⁰ UN Committee on the Rights of the Child, ‘General Comment 12’ (n 77) para 132.

3.3 Right to Participation of CCL in the UNCRC

3.3.1 *What are Participatory Rights for CCL?*

The text of article 12(1) starts with “*state parties shall assure...*”. ‘Shall assure’ is considered in law as having strong legal weight, placing strict obligations on the state to implement this right¹¹¹. Further, it acknowledges it as a positive obligation, the state must not simply make mechanisms to hear the child but also ensure that said mechanisms are capable of soliciting the views of the child in a safe and child-friendly manner so that the child may express those views freely.

The clause to express views *freely* in Article 12(1), in conjunction with Article 13(1) on the right to expression and information, provides a “*co-ordinating framework in relation to the voice of the child*”¹¹². A child can only form their own views and opinions when they have been informed about the matter in question, including their options and the consequences of their decisions. The UNCRC Committee has also clarified that the child must also be informed about the conditions under which they will be asked to express their views¹¹³. Combining this with the required presumption that the child can form an opinion, it makes way for establishing more child-appropriate mechanisms, ensuring their inclusion in the decision-making process, and essentially creating a system for meaningful participation.

The Committee has also stressed that the greater the impact a decision has on a child’s life, the more seriously their views must be considered¹¹⁴. This introduces a proportionality principle into the participation framework: the more serious the consequences, the more essential the child’s involvement. This is particularly important for CCL as decisions made within penal proceedings often carry profound and lasting consequences- from institutionalisation, education to their social relationships and vocational opportunities¹¹⁵.

¹¹¹ *ibid* 19.

¹¹² James and James (n 61) 83.

¹¹³ UN Committee on the Rights of the Child, ‘General Comment 12’ (n 77) para 25.

¹¹⁴ *ibid* 30.

¹¹⁵ Nowak (n 94).

3.3.2 What rights do CCL have during Legal Proceedings?

A textual reading of Article 40 (1) points to the obligation to treat the child “*in a manner consistent with the promotion of the child’s sense of dignity and worth*”, highlighting “*the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society*”. These clauses can be considered as the core purpose of the juvenile justice system under the UNCRC – rehabilitation and social reintegration.

A key part of working with children in conflict with law is the use of non-stigmatising language, which is highlighted by the UNCRC Committee¹¹⁶. Applying the historical means of interpretation¹¹⁷, the *travaux préparatoires* of the UNCRC reveal a significant shift in how the child in conflict with the law is described. Earlier formulations included “a child who engages in asocial behaviour”, “a child accused of committing a criminal offence”, or “a child undergoing penal procedure”. After much negotiation, the final version used in Article 40—“*a child alleged as, accused of, or recognized as having infringed the penal law*”—reflects a deliberate move away from stigmatising labels. A major example of this is Venezuela’s insistence on replacing “found guilty of infringing” with “recognised as having infringed”¹¹⁸. Such terminology protects the child’s identity and dignity, and reflects a rights-based, rather than punitive approach.

The clause also requires that information be provided “*and, if appropriate, through his or her parents or legal guardians.*” The use of “and” (not “or”) presumes the requirement to include families, in line with Articles 5 and 18, which highlight the role of the family in supporting the child’s rights. Again, as with other rights, the child’s right to be informed is firmly embedded within support structures, particularly that of the family.

Article 40(2)(b)(iii) ensures the child’s right to “*have the matter determined without delay*” reflecting the time-sensitive nature of childhood. Prolonged legal proceedings can lead to significant developmental harm, as recognised by the Committee as well¹¹⁹. The Article further states that the proceedings must be held “*...in the presence of legal or other appropriate assistance*

¹¹⁶ UN Committee on the Rights of the Child, ‘General Comment 24’ (n 98) para 7.

¹¹⁷ VCLT art 32.

¹¹⁸ Office of the United Nations High Commissioner for Human Rights (OHCHR), ‘Legislative History of the Convention on the Rights of the Child - VOLUME II’ 748.

¹¹⁹ UN Committee on the Rights of the Child, ‘General Comment 24’ (n 98) para 54.

and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardian". This brings together two of the guiding principles in the context of CCL. First, the best interests of the child (Art. 3) particularly in decisions about whether the child's parent or legal guardian should be present during proceedings; and second the reference to the child's "age or situation" echoes the principle of evolving capacities (Art. 5), underscoring the need for a context-specific approach to justice for the child.

A textual reading of Article 40(3)(b) points to the use of alternative judicial proceedings, stating that "*whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings*" should be adopted. Article 40(4) further provides for a variety of dispositions including "*care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes*". These provision can be seen to reflect the core elements of childhood in the UNCRC – protection and rehabilitation, consistent with the child's dignity and worth. The UNCRC Committee has further emphasised that diversion should be considered in a majority of the cases¹²⁰. Diversion reflects an understanding of children as developing beings with high potential for rehabilitation¹²¹. This can help protect not only the child's dignity but also their right to non-discrimination as enshrined in Article 2 of the Convention. Sentencing decisions as well must prioritise non-institutional, restorative, and participatory mechanisms, guided by the principles of best interests (Article 3), development (Article 6), and notably, the child's right to be heard (Article 12).

3.3.1 What does meaningful participation during Legal Proceedings look like?

The right to participation is established in Article 12 and reinforced across Article 40. Article 40(2)(b)(ii) guarantees child's right "*to be informed promptly and directly of the charges against him or her*"¹²². This clause is related to Article 12, which guarantees that children be heard "*in all*

¹²⁰ *ibid* 16.

¹²¹ Louise Forde, 'Welfare, Justice, and Diverse Models of Youth Justice: A Children's Rights Analysis' (2021) 29 *The International Journal of Children's Rights* 920.

¹²² UNCRC art 40(2)(b)(ii).

matters affecting them". Legal proceedings tend to have strict demarcations of participation of the accused person, often limiting their role to responding to questions or receiving decisions. Within such a framework, the child's perspective can easily be sidelined or dismissed as irrelevant. This provision, however, can challenge this adult-led approach of justice and create a space for questioning power dynamics in the traditional justice system. Moreover, the word "directly" links to General Comment No. 12 (2009), which calls for communication in comprehensible, child-friendly language, adding to the state's obligation to ensure that mechanisms are in place to work with the child directly¹²³.

Article 40(2)(b)(iv)) provides for the child's right "*not to be compelled to give testimony or to confess guilt*" and to examine or call witnesses. This clause connects with the right to participate under Article 12 in an important way: the right to express views *freely* includes the right to choose not to express them, and that especially in hostile environments, the child must not be manipulated or subjected to undue influence of pressure¹²⁴.

Finally, the inclusion of the right to "*legal or other appropriate assistance*" in Article 40(2)(b)(iii) highlights the obligation to ensure that legal support is not only available, but also child-friendly, accessible, and ideally specialised in juvenile justice, as emphasised by the Committee¹²⁵. Article 12(2) provides more context for this. It provides three avenues by which a child can be heard in a judicial or administrative proceeding, namely, directly, through a representative, or an appropriate body. In many cases, including for CCL, there might be a risk of harm due to direct participation in the proceedings. It is also common that a court may order a child to be assisted by a legal representative against their will in situations where failing to appoint a representative would amount to a denial of justice. Such a conception ensures that the right to participation must be balanced with the protection of the child as well. The UNCRC Committee has affirmed that participation rights in justice or penal proceedings must not only be safeguarded but also considered with their dignity and worth¹²⁶.

¹²³ UN Committee on the Rights of the Child, 'General Comment 12' (n 77) para 82.

¹²⁴ *ibid* 22.

¹²⁵ UN Committee on the Rights of the Child, 'General Comment 24' (n 98) paras 50–53.

¹²⁶ *ibid* 3.

Finally, during sentencing, diversion processes under Article 40(3)(b) must uphold Article 12, which guarantees the child’s right to express their views freely in all matters affecting them. Children must be able to understand the process, implications, and outcomes of diversion options. As the UNCRC Committee makes clear, participation in diversion must be “meaningful, informed, and not coerced”¹²⁷. This includes access to legal advice, family support, and clear, age-appropriate explanations. This connects directly to the principle of participation. Reintegration cannot be achieved without the active involvement of the child in shaping the process. The UNCRC Committee has emphasised that children must be consulted and heard in decisions about the nature of post-release measures, stating that in alleging a child as responsible for the offence, it implies that they are competent and able to effectively participate in the decisions regarding the most appropriate response¹²⁸.

3.4 Conclusion

The UNCRC establishes a comprehensive framework for the treatment of children in conflict with law. Article 37 emphasises deprivation of liberty as the last resort and for the shortest appropriate time, with the aim to prioritise the child’s dignity, development, and protection. Such deprivation is accompanied by procedural safeguards to take into the child’s best interest and overall development. Article 40 adds to these protections for any child in contact with the juvenile justice system. It guarantees fair treatment, legal assistance, and particularly the right to be informed and participate meaningfully. These provisions mark a clear departure from punitive framework, as much as possible, to focus on a more rehabilitative approach to juvenile justice.

The UNCRC embeds participation into every stage of the juvenile justice process through Articles 12, 37, and 40. It is constructed as continuous and multi-dimensional right that must be implemented in all stages of the child’s contact with the system. This is reflected in the conditions to enable access to information, legal support, familial support, and mechanisms that respect the

¹²⁷ *ibid* 56–59.

¹²⁸ See generally UN Committee on the Rights of the Child, ‘General Comment 24’ (n 98); UN Committee on the Rights of the Child, ‘General Comment No. 10: Children’s Rights in Juvenile Justice’ (2007) UN Doc UNCRC/C/GC/10 para 45.

child's best interest as well as evolving capacities. The Convention, therefore, makes a clear and deliberate shift toward embedding the child's voice within systems that have historically excluded it.

4. Childhood in Indian Juvenile Justice System

4.1 Introduction

This chapter addresses the third research subquestion: how are the concept of ‘childhood’ and the child’s right to meaningful participation for children in conflict with the law incorporated in the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, and to what extent does this reflect the legal provisions prescribed by the UNCRC? Building on the previous chapters, this chapter shifts the analytical focus to the domestic context of India with respect to children in conflict with law (CCL). It begins with an overview of the functioning of the juvenile justice system in India and then focuses on the relevant statutory framework. In particular, it examines how the concepts of childhood and child participation are articulated within the general principles of the JJ Act and the specific provisions concerning CCL.

At the outset, it is important to understand how legislation is conceptualised within the Indian legal landscape, as the JJ Act may not reflect a holistic or comprehensive conceptualisation of childhood as envisaged under international standards. A distinct bifurcation exists between laws framed around the provision of developmental rights and those focused on protective mechanisms. As such, the broad articulation of children’s rights in the UNCRC, have been domesticated into Indian law through separate legislative instruments¹²⁹. Nevertheless, given the focus of this thesis is on children in conflict with the law, the JJ Act remains the primary legislation under examination. While other legal instruments supplement the protection of rights, particularly in cases of systemic deprivation, it is the JJ Act that provides the legal framework for addressing violations in cases involving CCL.

4.2 Understanding the Juvenile Justice System in India

¹²⁹ For instance, the Right to Education Act, 2009, focuses comprehensively on the right to education, while the National Food Security Act, 2013, addresses malnutrition and food distribution. In contrast, legislations such as the Protection of Children from Sexual Offences (POCSO) Act, 2012, the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, and the Prohibition of Child Marriage Act, 2006 (PCMA), focus on protection of children from specific forms of harm.

India ratified the UNCRC in 1992, thereby committing to the international legal standards on child rights and juvenile justice. The JJ Act is supplemented by the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 ('JJ Model Rules'), which operationalises its provisions. While the JJ Act is applicable throughout the Union of India, the Model Rules allow for state-specific modifications. However, only a limited number of states have adopted customised rules; in most cases, the JJ Model Rules continue to be applied in their original form.

The JJ Act recognises the children and the juvenile justice system in two main categories - children in need of care and protection (CNCP)¹³⁰, and children in conflict with law (CCL)¹³¹. Accordingly, resources are divided between two quasi-judicial bodies—Child Welfare Committees (CWCs) for the former and Juvenile Justice Boards (JJBs) for the latter—each with distinct responsibilities, procedures, and personnel. This bifurcation tends to perpetuate the perception of an artificial binary between the 'victim' and the 'offender' and has been criticised for creating a 'zero-sum game' approach to child welfare¹³². Nonetheless, the JJ Act does provide mechanisms for coordination between these two bodies and recognises the frequent overlap between the two categories. In particular, it acknowledges that children in conflict with the law may simultaneously be in need of care and protection, echoing recommendations that child offenders should be treated within a broader child welfare framework¹³³.

The Juvenile Justice Boards ('JJB') comprise a judge – Principal Magistrate ('JJB Magistrate') and two other professionals called Social Worker Members ('JJB Members') and specially trained police officers, as well as designated child care institutions ('CCIs'). Three main institutions house CCL. First, during the pendency of the inquiry, the child can be sent to an Observation Home¹³⁴. Once the JJB finds the child to have been involved in the offence, they can be sent to a Special Home as part of their sentence¹³⁵. Finally, children between the ages of 16 and 18 who are accused or found guilty of a heinous offence (an offence for which the minimum punishment is seven years

¹³⁰ Children who are essentially seen as 'victims' of one of 14 categories, such as child marriage, forced labour, sexual assault, etc. JJ Act s 2(14).

¹³¹ Defined as any person below 18 years of age alleged, or having found, to have engaged in criminal behaviour ibid 2(13).

¹³² Shailesh Kumar, 'Shifting Epistemology of Juvenile Justice in India' (2019) 41 *Contexto Internacional* 113.

¹³³ Nowak (n 94).

¹³⁴ JJ Act s 2(40).

¹³⁵ ibid 2(56).

or more) or children likely to pose a threat to themselves or others while their inquiry is pending are sent to a Place of Safety¹³⁶.

Furthermore, three types of offences are recognised for CCL: ‘petty offences’ for which, under the Penal Code for adults, the maximum punishment is imprisonment up to three years¹³⁷; ‘serious offences’ for which the punishment is between three to seven years¹³⁸; and ‘heinous offences’ which, for an adult, would carry the punishment of more than seven years¹³⁹. These classifications directly influence both procedural treatment and disposition of the cases.

The preamble of the JJ Act sets the objects and purpose of the Act as consolidating legislation related to CCL and CNCP towards “*their basic needs through proper care, protection, development, treatment, social re-integration*” and highlights the adoption of “*a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation*”. In doing so, the JJ Act emphasises its aim for holistic development of vulnerable children. The philosophy of child justice jurisprudence in India is centred on restoration, rehabilitation, and reform, instead of incarceration and/or other punitive measures¹⁴⁰. This intent is further elaborated through sixteen general principles that guide the implementation of the Act¹⁴¹, many of which reflect core principles of the UNCRC, including participation, non-discrimination, and best interest.

Moreover, the preamble refers to India’s commitment to the UNCRC and other relevant international instruments such as the Beijing Rules and the Hague Convention. This reference situates the JJ Act within a broader international discourse, pointing to the fact that the development of the country’s legislation is not happening in isolation but in tandem with global norms and paints an encouraging picture for India’s international obligations towards the UNCRC specifically.

¹³⁶ *ibid* 2(46).

¹³⁷ *ibid* 2(45).

¹³⁸ *ibid* 2(54).

¹³⁹ *ibid* 2(33).

¹⁴⁰ Kumar (n 132).

¹⁴¹ JJ Act s 3.

Despite its comprehensive framework, The JJ Act has in recent years received significant criticism about specific provisions that arguably deviate from the foundational philosophy of child justice systems¹⁴². In the concluding observations to India's last Country Report to the UNCRC, the Committee noted that "*the legislation still does not cover the full scope of the Convention*"¹⁴³. Notably, this was submitted in 2014 - prior to the enactment of the 2015 version of the JJ Act. The following sections of this chapter will critically examine specific provisions of the Act in relation to the conceptualisation of childhood and the right to participation, to assess their alignment with international standards.

4.3 Identity and Belonging in the JJ Act

4.3.1 How does the JJ Act recognise Legal Personhood and Non-discrimination?

The JJ Act legally defines a child as any person who is less than eighteen years of age¹⁴⁴, in line with Article 1 of the UNCRC. However, Indian law applies this definition variably across different contexts. For example, while the JJ Act defines a child as under 18, but allows for 16 to 18-year-olds to be treated as adults in certain serious criminal cases¹⁴⁵. Education is compulsory for children aged 6 to 14¹⁴⁶, and thus child labour is prohibited while adolescent labour is permitted in non-hazardous jobs for those above 14¹⁴⁷. Furthermore, the legal marriage age is 18 for females and 21 for males¹⁴⁸, and the age of sexual consent is also set at 18¹⁴⁹. This reflects a complex legal landscape where the age and definition of a child can vary depending on the specific legal context.

¹⁴² Swagata Raha, 'Treatment of Children as Adults under India's Juvenile Justice (Care and Protection of Children) Act, 2015: A Retreat from International Human Rights Law' (2019) 27 *The International Journal of Children's Rights* 757.

¹⁴³ UN Committee on the Rights of the Child, 'Concluding Observations on the Combined Third and Fourth Periodic Reports of India' (2014) UN Doc UNCRC/C/IND/CO/3-4.

¹⁴⁴ JJ Act s 2(12).

¹⁴⁵ *ibid* 18(3).

¹⁴⁶ Right of Children to Free and Compulsory Education Act 2009.

¹⁴⁷ Child and Adolescent Labour (Prohibition and Regulation) Act 2016.

¹⁴⁸ Prohibition of Child Marriage Act 2006.

¹⁴⁹ Protection of Children from Sexual Offences (POCSO) Act 2012.

The JJ Act has principles that assure the personhood and dignity of the child. The principle of dignity and worth affirms the right to equality and dignity¹⁵⁰, Article 2 of the UNCRC and Article 15 of the Indian Constitution¹⁵¹. It states that all human beings shall be treated with equal dignity and rights, thus embedding the child’s legal personhood into the statutory framework. The principle on non-waiver of rights¹⁵² goes further by asserting that “*no waiver of any of the right of the child is permissible or valid...and any non-exercise of a fundamental right shall not amount to waiver*”. This strengthens the legal standing of the rights, “*whether sought by the child or person acting on behalf of the child*”. In this way, the JJ Act affirms the status of the child as a rights-holder, not entirely dependent on adult discretion. This reinforces the UNCRC’s construction of the child as an autonomous legal person.

The principle of equality and non-discrimination¹⁵³ mirrors Article 3 of the UNCRC and Article 15 of the Constitution, calling for equality “*of access, opportunity, and treatment to every child*”, though unlike the UNCRC, it does not explicitly include family or social status as a ground of discrimination. Non-discrimination is also reflected in the principle of non-stigmatising semantics¹⁵⁴ emphasizing that “*adversarial or accusatory words are not to be used in the processes pertaining to a child*”. The concept of non-stigmatising semantics is reflected throughout the Act: a child is not to be “arrested” but “apprehended”, they are produced before the Juvenile Justice “Board”, not “court” to hold an “inquiry”, not “investigation”. The idea is that this would promote respectful and hence rights-based discourse that avoids labelling, aligning with the child’s right to dignity. This reflects an attempt to reframe the child in the justice system as a subject deserving care and dignity, rather than stigmatisation. This aligns with the UNCRC’s vision of the childhood as developing identity, and the need to be protected.

¹⁵⁰ JJ Act s 3(ii).

¹⁵¹ Article 15 prohibits discrimination on the basis of religion, race, caste, sex, place of birth; while at the same time allowing for special provisions for women and children.

¹⁵² JJ Act s 3(ix).

¹⁵³ *ibid* 3(x).

¹⁵⁴ *ibid* 3(viii).

4.3.2 What is the Minimum Age of Criminal Responsibility (MACR) in India?

The MACR in India is significantly lower than international recommendations. Under the *Bhartiya Nyay Sanhita, 2023 (BNS)*¹⁵⁵, children below 7 years are considered *doli incapax*¹⁵⁶ (incapable of committing an offence), while children aged 7-12 years can be held responsible if proven mature enough to understand the consequences of their actions¹⁵⁷. The JJ Act adds to that, specifying that all individuals under 18 years of age at the time of committing the offence are entitled to juvenile justice protections and must be treated as children¹⁵⁸. However, a controversial exception was added in 2015 that allows children aged 16-18 years accused of ‘heinous offences’ to be tried as adults. This system of judicial waiver will be discussed in detail in section 5.3.2.

Both provisions have faced significant criticism from domestic and international actors. The UNCRRC, in its recommendations to India, advocated raising the MACR in line with global standards¹⁵⁹. Additionally, the practice of trying juveniles as adults has been widely denounced¹⁶⁰ but remains unchanged even after the 2021 amendment to the JJ Act.

Interestingly, these two provisions are the only place in the entirety of the JJ Act that we see the notion of evolving capacities. Clearly, the law is of the assumption that as children grow, they are capable of being responsible for harmful behaviour. At the same time, not recognising evolving capacities for the whole of the Act creates a dissonance in theory and even in practice. Without recognising developing capacities, the system tends to treat children in strict binaries. The presumption of *doli incapax* in law adopts the same process of constructing the concepts of ‘childhood’ and ‘crime’ as opposites – as up till a certain age children are assumed to be incapable of harbouring criminal intent; and children *above* that age, when they engage in any sort of criminal behaviour, by definition need to be categorised as either a child or a criminal¹⁶¹. The UNCRRC’s notion of evolving capacities attempts to bring these two together as has been discussed in Chapter

¹⁵⁵ The BNS is the official criminal code of India, replacing the colonial-era Indian Penal Code, 1860 that was applicable till 2023.

¹⁵⁶ *Bhartiya Nyay Sanhita 2023*, s 20.

¹⁵⁷ *ibid* 21.

¹⁵⁸ JJ Act 2015, s 2(13)

¹⁵⁹ UN Committee on the Rights of the Child, ‘Concluding Observations on the Combined Third and Fourth Periodic Reports of India’ (n 143) para 88(a).

¹⁶⁰ Raha (n 142).

¹⁶¹ Kumari (n 17).

3. However, the lack of the concept of evolving capacities in Indian law can reinforce this binary of child or criminal. This gap can undermine a dynamic understanding of childhood as a period of moral and cognitive development.

4.3.3 *How is Belonging within the Family seen in the JJ Act?*

The JJ Act strongly affirms the child's place within the family structures. This is seen first in the principle of family responsibility¹⁶² stating that “*the primary responsibility of care, nurture and protection of the child shall be that of the biological family or adoptive or foster parents, as the case may be.*”. Complementing this is the principle on repatriation and restoration¹⁶³, which states that every child has “*the right to be re-united with his family at the earliest.*” This principle reinforces the child's right to family and cultural continuity, acknowledging the importance of belonging in familiar settings. Importantly, the clause “at the earliest” is essential here, considering the time-sensitive nature of childhood. This also connects to the idea of deprivation of liberty needs to be for the shortest amount of time in line with Article 37(b) of the UNCRC. These principles resonate with the UNCRC's emphasis on family unity (Article 9) and the child's right to preserve their identity and cultural continuity (Article 8). By grounding the child's well-being within the familial unit, the JJ Act affirms a relational understanding of childhood as embedded within family and community.

4.4 Development in the JJ Act

The principle of positive measures¹⁶⁴ sets the tone for understanding the concept of development “*all resources are to be mobilised including those of family and community, for promoting the well-being, facilitating development of identity and providing an inclusive and enabling environment, to reduce vulnerabilities of children and the need for intervention under this Act.*” This can also be seen reflected in the preamble of the Act which sets development of the child as one of the core

¹⁶² JJ Act s 3(v).

¹⁶³ *ibid* 3(xiii).

¹⁶⁴ *ibid* 3(vii).

purposes. The principle of positive measures is echoed in the general principles of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'). While the Beijing Rules focus solely on children in conflict with law, the JJ Act increases the scope to all children under the Act. This framing reinforces a view of childhood as a stage requiring active nurturing and protection, aligning with the UNCRC's holistic understanding of development -physical, emotional, and social - as a foundational aspect of childhood (Art. 6).

4.4.1 How is education for CCL viewed in the JJ Act?

Although education is not explicitly included among the general principles of the JJ Act, it appears in a few operational contexts. The Right to Education Act, 2006 provides for the right to free and compulsory education for all aged 6-14 years of age, in line with Article 21A of the Constitution of India, and Article 28 of the UNCRC. In the context of CCL within the JJ Act, however, education features only as one of the methods of dispositions of the case when, if found to have committed the offence, a child can be “*sent to a special home...for providing reformative services including education...*”¹⁶⁵. This is the only place where education is mentioned specifically for CCL. The JJ Model Rules allows the Juvenile Justice Board to pass appropriate orders for re-admission or continuation of the child in school where the child has been disallowed from continuing his education on account of the pendency of the inquiry or child having stayed in a Child Care Institution for any length of time¹⁶⁶. While the JJ Act recognises the importance of education for CCL, it clearly does so primarily in response to explicit violations rather than taking proactive steps. The Act does not, by its letter, incorporate systematic measures to ensure or promote access to education for such children¹⁶⁷. This approach to education situates it as a tool of rehabilitation rather than a developmental right intrinsic to childhood.

¹⁶⁵ *ibid* 18(1)(g).

¹⁶⁶ Juvenile Justice (Care and Protection of Children) Model Rules r 7(3).

¹⁶⁷ Asha Bajpai, 'Juvenile Justice: Administration and Implementation', *Child Rights in India: Law, Policy, and Practice* (Oxford University Press 2006)

<<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780195670820.001.0001/acprof-9780195670820>> accessed 5 April 2025.

Scholarly work in the Indian Subcontinent points to children being placed in institutional settings that can provide schooling due to lack of community-based institutions, regardless of whether institutionalisation is in their best interest overall¹⁶⁸. Such patterns suggest a model of development tied closely to control, rather than fostering childhood in an enabling environment. It is essential that the social reintegration of CCL is facilitated by enabling access to education or vocational training within the community, since education received in custodial settings is often accompanied by social stigma¹⁶⁹.

Moreover, for children who are in institutions, the absence of clear guidelines regarding the duration of stay in Observation Homes during the pendency of inquiries further complicates children's access to education, as it creates uncertainty in the children about whether they should enroll in academic/skill development activities if they are simply going to be released the next day.¹⁷⁰ This uncertainty reflects a lack of recognition of the time-sensitive nature of childhood, as education, and consequently development, are not clearly prioritised.

4.4.2 How does the JJ Act consider Evolving Capacities?

The concept of evolving capacities, an essential notion in the rights of the child enshrined in the UNCRC, is notably absent from both general principles and operative clauses in the JJ Act. The concept of age and maturity is referenced only once within the JJ Act, in the context of a child's right to participate in proceedings, which will be discussed later in Section 4.6. Beyond this limited mention, the JJ Act offers no explicit recognition of the principle of evolving capacities. The only provision that can be potentially inferred as involving evolving capacities is of preliminary assessments conducted to determine whether a child aged between sixteen and eighteen should be tried as an adult, which will be discussed later in section 5.3.2.

¹⁶⁸ Nirekha De Silva and Asitha Punchihewa, 'Push and Pull Factors of Institutionalization of Children: A Study Based in the Eastern Province of Sri Lanka' (Save the Children 2011).

¹⁶⁹ 'United Nations Rules for the Protection of Juveniles Deprived of Their Liberty ("The Havana Rules")' UNGA Resolution 45/113 paras 38–40.

¹⁷⁰ Ravi Prakash Vyas and others (eds), *Policy Research on Children Deprived of Liberty in the Administration of Justice in South Asia* (2022).

This omission points to a rigid and uniform conceptualisation of childhood within the JJ Act, where all persons under the age of 18 are treated as homogenous legal category without consideration for developmental differences. This is in stark contrast with the UNCRC’s interpretation of evolving capacity as an enabling principle and understanding children as progressively acquiring capacity and agency as they grow. This is particularly interesting in light of the differing legal age thresholds across Indian legislation as discussed in section 4.3.1. These discrepancies show an inconsistent treatment of age and capacity in Indian law.

In this context, the JJ Act’s failure to incorporate the principle of evolving capacities raises critical questions regarding its ability to support the right to meaningful participation. If the law does not acknowledge that children’s capacities develop with age and experience, it is difficult to conceptualise or operationalise participatory frameworks in the first place.

4.5 Protection and Care in JJ Act

4.5.1 How is Protection framed in the JJ Act?

The principle of Safety¹⁷¹ implements the idea of protection firmly, stating that “*all measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or maltreatment while in contact with the care and protection system, and thereafter.*” This holds two important dimensions: first, the obligation to actively prevent harm during the child’s engagement with the system; and second, the imperative to ensure that this engagement does not produce residual or long-term harm. This reflects the UNCRC’s framing of childhood as a stage requiring ongoing and responsive safeguards.

This forward-looking protection is further reflected in the principles of privacy¹⁷² and fresh start¹⁷³. Privacy is guaranteed through the stipulation that “*every child shall have a right to protection of his privacy and confidentiality, by all means and throughout the judicial process.*” Similarly, the principle of Fresh Start mandates that “*all past records of any child under the Juvenile Justice*

¹⁷¹ JJ Act s 3(vi).

¹⁷² *ibid* 3(ix).

¹⁷³ *ibid* 3(xiv).

system should be erased except in special circumstances.” Both principles work together to prevent secondary victimisation, in line with Articles 16 and 40(2)(vii) of UNCRC, which call for the protection of children’s privacy and confidentiality in both personal life and legal proceedings. The protection of privacy, in particular, is linked to the development of identity and the prevention of harmful labelling, thus upholding a view of childhood as a sensitive and formative phase that demands special legal safeguards to protect a child’s dignity.

Additionally, the JJ Act reinforces these protective guarantees through the requirement of an individual care plan for every child, regardless of whether they are placed in an institution¹⁷⁴. This plan is tailored to the specific needs of the child and is subject to periodic review, even after the disposal of the case. Such a framework, at least in design, reflects an understanding of child protection that goes beyond immediate physical safety and extends to psychological recovery, privacy, and long-term rehabilitation. The care plan is a concrete expression of the child’s evolving and individualised needs, consistent with the UNCRC’s broader vision of supporting children’s best interests, agency, and reintegration over time.

4.5.2 How does the JJ Act see Best Interest of the Child?

The principle of best interest is one that is seen in many places through the JJ Act. Section 3(iv) on the general principle specifies that *“all decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential”*. This principle mirrors Article 3 of the UNCRC but is narrower in scope. While the UNCRC mandates the best interest standard in “all actions” concerning the child, the JJ Act restricts it to “decisions.”. The UNCRC Committee has explicitly stated that the word “action” does not only include decisions, but also all acts, conduct, proposals, services, procedures and other measures¹⁷⁵. This points to a clear gap in the law. By narrowing the application of the best interest principle, the JJ Act risks treating the child as a passive recipient of decisions, rather than

¹⁷⁴ Juvenile Justice (Care and Protection of Children) Model Rules r Form 7.

¹⁷⁵ UN Committee on the Rights of the Child, ‘General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art . 3, Para .1)’ (n 76) 4.

a subject whose lived reality is shaped by a range of administrative, legal, and institutional interactions.

However, taking the principle teleologically, the principle of best interest of the juvenile or child means that the traditional objectives of criminal justice, retribution and control, must give way to rehabilitative and restorative objectives of juvenile justice¹⁷⁶. This is connected to the principle of diversion which states that “*measures for dealing with children in conflict with law without resorting to judicial proceedings shall be promoted unless it is in the best interest of the child or the society as a whole*”, in line with Article 40(3)(b) of the UNCRC. This supports the UNCRC’s broader reconceptualisation of justice for children as child-sensitive and developmentally appropriate. However, here the idea of the best interest of society is also considered, introducing an ambiguity that may be misused to justify punitive or institutional responses. This dual reference to both the child and society’s best interests reflects a tension in how childhood is framed—either as an individual status meriting protection and agency or as a potential risk to be managed. The UNCRC prioritises the child’s best interests explicitly, whereas this formulation could dilute that focus.

4.6 Participation in the JJ Act

4.6.1 What is the Right to Meaningful Participation in the JJ Act?

The principle on participation in the JJ Act is conceptually grounded in Article 12 of the UNCRC. The principle states: “*every child shall have a right to be heard and to participate in all processes and decisions affecting his interest and the child’s views shall be taken into consideration with due regard to the age and maturity of the child*”¹⁷⁷.

At first glance, this language appears consistent with Article 12. However, a closer reading reveals important distinctions. First, the JJ Act omits the UNCRC’s framing of the child’s “*capacity to form his or her own views*” as a precondition for participation. This could be interpreted positively

¹⁷⁶ Bajpai (n 167).

¹⁷⁷ JJ Act s 3(iii).

in that the right is extended to “*every child*”, without a qualifier, to encourage universality. However, as discussed in chapter 2, when interpreting Article 12, the Committee makes clear the states’ obligations to create mechanisms to evaluate the capacity of a child to form views and the means to express them. In removing this clause, the JJ Act makes the normative basis of participation less clear, particularly in the absence of mechanisms for evaluating and supporting the child’s evolving capacities. This omission results in a flattened conception of childhood that lacks the developmental nuance of the UNCRC’s notion of evolving capacity. The child is assumed to be either fully competent or not, with no legal recognition of gradual maturation.

Second, the JJ Act employs a more restrictive formulation by referring to “*all processes and decisions affecting his interest*,” as opposed to the UNCRC’s broader standard of “*all matters affecting the child*.” The phrase “affecting his interest” arguably narrows the scope of participation to cases where a subjective or institutional assessment may decide the matter is or is not significant to the child, potentially excluding matters where children’s input could be valuable but are not explicitly solicited. This reflects a more adult-centric approach, where the child’s agency is conditional rather than presumed.

Third, the omission of the word “freely” from this clause, unlike the UNCRC that specifies “*the right to express those views freely*” again restricts the formulation of participation. The Committee’s interpretation of the term provided for many obligations regarding information, consent, safe spaces, etc.¹⁷⁸ The JJ Act does not include that term, not necessarily meaning that those rights are not implemented in practice, but definitely creating a gap in the letter of the law. This gap undermines the protective element of participation, especially for vulnerable children like CCL, who require clear safeguards to ensure safe and voluntary expression of views.

Substantively, the Act makes only two references to participation in the context of children in conflict with the law (CCL). First, Section 8(3)(a) requires the JJB to ensure “*informed participation of the child and the parent or guardian in every step of the process*.” Second, Section 14(5)(c) stipulates that once a child has been found to have committed an offence, they “*shall be given the opportunity of being heard and participate in the inquiry*.” The latter instance, however,

¹⁷⁸ UN Committee on the Rights of the Child, ‘General Comment 12’ (n 77) paras 22–25.

appears more as a reiteration of the principle of natural justice applicable to all accused persons, rather than a child-specific articulation of participatory rights. Crucially, in neither provision is there any mention of the child's views being given "due weight," a core requirement of Article 12(1) of the UNCRC. The principle as well mentions it not as "*views of the child being given due weight*" but rather that their views "*shall be taken into consideration with due regard to...*". A simple difference in wording but points to the adult-child hierarchy in the conceptualisation of childhood. Rather than giving weight the views of the child, they are *taken into consideration*, pointing to the decision-making power ultimately lying with the adults themselves.

Interestingly, the JJ Model Rules incorporates the principle of participation in procedures concerning CNCP¹⁷⁹ but remain silent on its application to CCL. This asymmetry suggests an underlying perception that children in conflict with the law are less entitled to or capable of participatory engagement, in direct contradiction to the UNCRC's principle of non-discrimination in the application of rights. Such differentiation signals a tiered understanding of childhood, where the child as 'victim' is seen as more deserving of rights than the child as 'offender'.

4.6.2 How does participation relate to Criminalisation of Adolescence?

The legal age of sexual consent in India is 18, meaning the law does not recognise the consent of minors in sexual relationships. In practice, this often leads to the criminal prosecution of adolescent boys, while the girl is institutionalised as a 'victim' under child protection laws¹⁸⁰. This legal treatment of adolescent sexuality highlights a deeply protectionist construction of childhood that negates the child's agency, especially regarding their own bodies and relationships. This gendered notion of justice has been a part of India's socio-cultural and legal past.¹⁸¹ Indeed, the previous iterations of the JJ Act defined a child as up to 18 years of age for girls and 16 years of age for boys, which was later changed to bring it in line with the UNCRC. The age of consent for both

¹⁷⁹ Juvenile Justice (Care and Protection of Children) Model Rules r 19(5).

¹⁸⁰ Amita Pitre and Sunita Sheel Bandewar, 'Law Commission of India Report on the Age of Consent: Denying Justice and Autonomy to Adolescents' (2024) 9 Indian Journal of Medical Ethics 03.

¹⁸¹ See Kumar (n 132).

girls and boys used to be 16 until 2012 until the POCSO Act as well brought it up to 18.. However, the gendered notion of (mostly male) child ‘delinquents’ as unsafe continues in practice.

All sexual activity involving a minor is legally classified as rape as per the Criminal Code, irrespective of consent. Consequently, upon the registration of a complaint alleging penetrative sexual assault, the procedural mandate is for the immediate arrest of the male, often a boy himself, on the presumption of guilt. The POCSO Act places the burden of proof of innocence on the accused¹⁸², reversing the protections in the JJ Act about the presumption of innocence. When the accused is a CCL, the state, under the JJ Act, is positioned as the child’s protector and rehabilitative guardian, yet it simultaneously assumes the role of prosecutor to enforce the POCSO Act. The law thus flattens the developmental context of adolescent sexuality into a binary of perpetrator and victim, erasing the agency of both parties. It also entrenches patriarchal assumptions regarding female sexuality and male culpability¹⁸³. In doing so, the law not only fails to uphold participation rights but also contradicts the UNCRC’s emphasis on evolving capacities and voice of the child moral and social decision-making.

A study in 2020 found that the Prohibition of Child Marriage Act, 2006 “*is used twice as much against elopements or self-arranged marriages, than it is used in relation to arranged marriages*”¹⁸⁴. The situation is exacerbated by the provision of mandatory reporting¹⁸⁵ under the POCSO Act, which requires any person having the knowledge of a sexual offence being committed against a child to report, including medical professionals, with failure to do so being a punishable offense. The confluence of these legislations, though made to safeguard children, exacerbate the patriarchal norms that criminalize natural adolescent behaviour. Official crime data shows that, of the children apprehended under Special and Local Laws, about 57% of children were apprehended under the POCSO Act¹⁸⁶, though it is not possible to know how many of these were of consensual relationships. Political will also plays a significant part in promoting these issues. For instance,

¹⁸² Protection of Children from Sexual Offences (POCSO) Act s 30(2).

¹⁸³ Pitre and Bandewar (n 180).

¹⁸⁴ Partners for Law in Development (PLD India), ‘WHO USES THE LAW TO PROSECUTE CHILD MARRIAGE MOST AND WHY? Findings from Case Law Analysis (2008-2017)’ (2020) <https://doi.org/10111665/18723395/s200_pld>.

¹⁸⁵ Protection of Children from Sexual Offences (POCSO) Act s 19.

¹⁸⁶ National Crime Records Bureau, Ministry of Home Affairs (n 1).

while not related to children, the government's push to increase the age of marriage to 21 years of age has raised concerns about further criminalising adolescent consent¹⁸⁷.

This legal framework raises two major concerns. First, within a socio-legal construction of childhood that is predominantly protective, and so much so that societies impose greater restrictions on girls' autonomy, the scope for realising child rights and meaningful participation is constrained. For instance, in its General Comment No. 4 on Adolescent Health and Development, the UNCRC Committee urged States to undertake awareness and education initiatives related to sexual and reproductive health of adolescents¹⁸⁸. However, in the Indian context, where the legal age of sexual consent is uniformly set at 18, providing information on sexual health may be perceived as promoting behaviour that is, by law, criminalised. This also raises concerns regarding children's rights to access information under Articles 13 and 17 of the UNCRC, which promotes access to information vital for development and well-being.

Second, and perhaps more importantly, the strict criminalisation of adolescent sexual behaviour leads to the increased funnelling of children, particularly boys, into the juvenile justice system. This leads to a systemic overreach of the juvenile justice system and contradicts the fundamental objectives of the JJ Act and the UNCRC, which are focused on holistic development and rehabilitation of all children, regardless of gender. Together, these issues point to a legal structure that is at odds with the UNCRC's vision of childhood as a stage of development and evolving capacities.

4.7 Conclusion

While the JJ Act shows an aspirational alignment with the UNCRC, particularly in its general principles and philosophy of rehabilitation, it falls short in some key areas. The JJ Act aligns with the UNCRC in its formal definition of childhood and its articulation of dignity, non-discrimination,

¹⁸⁷ S Thanawala, 'Why Is Increasing the Minimum Marriage Age for Girls to 21 Years Being Debated?' *The Leaflet* (New Delhi, February 2023) <<https://theleaflet.in/explainer/why-is-increasing-the-minimum-marriage-age-for-girls-to-21-years-being-debated>>.

¹⁸⁸ UN Committee on the Rights of the Child, 'General Comment No. 4 Adolescent Health and Development in the Context of the Convention on the Rights of the Child' (2003) UN Doc UNCRC/GC/2003/4 para 28.

and the usage of non-stigmatising semantics. The principle of family restoration is explicitly affirmed, and development is framed as an institutional responsibility. However, the JJ Act fails to systematically reflect the evolving capacities of children, which weakens the developmental and participatory conceptualisation of childhood in the UNCRC. Protection is treated as a core right, reinforced by concrete provisions, though the principle of “best interest” is narrower in scope than the UNCRC’s formulation. In terms of participation, the JJ Act offers only minimal recognition of the right for children in conflict with the law. Participation is absent from procedural safeguards in several contexts, and its framing is more restricted than in the UNCRC.

Hence, it can be concluded that while the JJ Act formally agrees to the UNCRC, the formulation of some key principles – particularly best interests, evolving capacities, and participation is weak in scope. The protective paradigm seems to dominate over the participatory, creating a rights framework that insufficiently reflects the UNCRC’s model of children as both vulnerable and capable. A stronger and more consistent integration of UNCRC principles, particularly regarding participation and developmental autonomy, is therefore necessary to bring domestic law into closer alignment with international child rights standards.

5. Child Participation in Practice

5.1 Introduction

This chapter attempts to answer the fourth and final research sub-question: How do state actors within the juvenile justice system in India interpret and apply the concepts of ‘childhood’ and the child’s right to meaningful participation, especially in relation to children in conflict with the law? To address this question, the chapter draws from judicial orders and statutory provisions under the JJ Act as well as field reporting and media pieces. The first part of the chapter looks at the construction of childhood through three key themes- belonging, education, and evolving capacities. The second part looks at the right to meaningful participation, analysing three key aspects where this right is most visible: deprivation of liberty, the use of judicial waiver, and decision-making during disposition. Other components of the UNCRC’s vision of childhood and participation are not explored here, primarily because they are not meaningfully reflected in available judgments or reported cases.

During the collection of data, two major reasons were found leading to a lack of data – first, proceedings of the JJB and Children’s Courts, which work most closely with CCL, are not publicly available due to strict norms of maintaining privacy and confidentiality of the child. Second, the judgements that are made public are the cases that go to higher courts in the form of appeals. However, as discussed in Chapter 4, the JJ Act does not have specific legal provisions on the right to participation, limiting the scope for appealing violations to participatory rights in the first place. Also considering that a majority of the children in contact with the justice system come from resource-poor households¹⁸⁹, it is evident that only major violations will be appealed. Consequently, since higher courts rarely address participation-related claims, there is little data available for analysis.

¹⁸⁹ National Crime Records Bureau, Ministry of Home Affairs (n 1) tbl 5A.6.

5.2 Construction of Childhood of CCL in Courts

An overview of the functioning of the juvenile justice system in India has been provided in the previous chapter. However, in the context of CCL, a major point of contention must be noted. In adult criminal proceedings, the offence is formally framed as a crime against the state, reflected in case titles such as “State vs (Name of Accused)”. In contrast, the juvenile justice framework positions the state not only as the prosecuting authority but also as the guardian of the child. This dual role is rooted in the purpose of the JJ Act, which presumes that a child’s engagement in criminal conduct is due to a broader systemic failure, i.e., the state’s inability to provide a safe, nurturing, and enabling environment that could have prevented the offence. This foundational premise introduces a complex and often conflicting dynamic: the state assumes the role of protector tasked with ensuring the child’s rehabilitation and reintegration, while simultaneously acting as prosecutor and adjudicator within the same legal process. This tension is evident in the way adult practitioners in the system then work within the ambit of the Act. As noted by the Supreme Court about the JJ Act *“which was enacted to deal with offences committed by juveniles, in a manner which was meant to be different from the law applicable to adults, is yet to be fully appreciated by those who have been entrusted with the responsibility of enforcing the same, possibly on account of their inability to adapt to a system which, while having the trappings of the general criminal law, is, however, different therefrom”*¹⁹⁰.

The JJ Act, in conformity with the UNCRC¹⁹¹, affirms the presumption of innocence for all children subject to legal proceedings¹⁹². In legal terms, this presumption translates into the burden of proof resting with the prosecution. However, in practice, the JJB often functions simultaneously as judge, de facto prosecutor, and guardian. This institutional overlap compromises the structure of the proceedings, leading to a blurred or insignificant distinction between guilt and innocence¹⁹³. This can be noted in the fact that in 2021, the latest available data, 88.3% of children apprehended

¹⁹⁰ Hari Ram v State of Rajasthan (2009) 13 SCC 211 (SC)

¹⁹¹ UNCRC art 40(2)(b)(i).

¹⁹² JJ Act s 3(i).

¹⁹³ Rickard (n 11).

were eventually found guilty¹⁹⁴, suggesting either an over-apprehension of children or a procedural bias that discourages acquittal.

This inconsistency points to a fundamental challenge: while the JJ Act attempts to conceptualise childhood through a rehabilitative lens, judicial practice continues to reflect the adult criminal justice approach that may diminish the child's right to meaningful participation. It is important to note this as an underlying tension in the implementation of the Act, across the rest of the chapter.

5.2.1 How is family belonging interpreted?

The JJ Act places significant emphasis on the importance of family and community, as discussed in Section 4.3.3. However, on-ground practices often reflect a fragmented understanding of childhood as both dependent on and alienated from family structures, especially when the child is institutionalised. A stark example of this is a field account in one observation home that found that children were kept at a distance of up to ten meters from their parents during visits, greater than what is practised in most adult jails¹⁹⁵. Moreover, family visits and phone calls are only allowed once a week in all institutions according to the law¹⁹⁶. This impacts the child's right to maintain personal relations and direct contact with their families¹⁹⁷. The failure to foster familial connection reinforces a punitive model of isolation, inconsistent with the best interests of the child.

Such a violation also starts at the point of police apprehension. Despite guidelines requiring that children not be treated as adult offenders, reports reveal that minors are routinely subjected to First Information Reports (FIRs) for petty offences¹⁹⁸ and kept in police custody longer than appropriate – both in violation of the JJ Act¹⁹⁹. Courts have taken cognisance of such breaches. In 2017, the

¹⁹⁴ National Crime Records Bureau, Ministry of Home Affairs (n 1).

¹⁹⁵ Gaurav Kumar Mandal, 'Barriers Beyond Bars: The Unseen Distance in Juvenile Homes' (*JALDI: Justice, Access, and Lowering Delays in India*, 23 June 2025) <<https://jaldi-vidhilegalpolicy.in/jaldilab/notes-from-field/notes?id=225&title=Barriers-Beyond-Bars:-The-Unseen-Distance-in-Juvenile-Homes>>.

¹⁹⁶ Juvenile Justice (Care and Protection of Children) Model Rules r 74(1), 74(7).

¹⁹⁷ JJ Act s 3(xiii).

¹⁹⁸ Varsha Gowda, 'A Lifetime of Consequences for Minors in the Justice System' *Deccan Herald* (Bengaluru, 5 May 2024) <<https://www.deccanherald.com/india/karnataka/bengaluru/a-lifetime-of-consequences-for-minors-in-the-justice-system-3008893>>.

¹⁹⁹ Juvenile Justice (Care and Protection of Children) Model Rules r 8(1), 8(3).

Gujarat High Court criticised the police for continuing to detain a juvenile even after he had explicitly claimed his minor status²⁰⁰. In 2020, when a child died by suicide while in police custody of more than six hours, the Calcutta High Court condemned the situation stating, “*The custodial death is one of the worst crime in a civilized society governed by the rule of law.... more particularly the irresponsible behaviour and lack of sensitivity of the police officers who have the solemn responsibility to protect the rights of a citizen more particularly the right recognized and guaranteed for the minors in conflict with law.*” These cases underscore the systemic failure to engage the family or community during initial contact, despite there being clear guidelines²⁰¹. The culture of criminalisation is contradictory to the rehabilitative spirit of the Act. More importantly, when children have to go through complex legal proceedings without adequate familial support or sensitivity, their identity as children, particularly grounded in familial support and dependency, is further marginalised. Instead, the children are treated as autonomous actors who must be separated from their familial context, contrary to both the UNCRC and the JJ Act’s core principles.

5.2.2 How is education seen in practice?

Education, as discussed in Chapter 2, is a central component of development within childhood under the UNCRC. In the context of CCL, education is a critical rehabilitative tool, as understood by the JJ Act (discussed in section 4.4.1). However, judicial practice in India reveals a troubling gap between this normative understanding and its actual implementation.

Take this case recounted by one of India’s foremost child rights lawyers- “*a 14-year-old, picked up by police when he was 13, asked to speak up before a Juvenile Justice Board recently. The boy, residing at an observation home, was asked if his schooling was ongoing. He said no. The JJB directed the observation home to enrol him under the National Institute of Open Schooling (NIOS) to continue his education.*”²⁰². This raises questions as to why the child, who had the right to

²⁰⁰ *Rahul Kumar @ Pappu Kamleshbhai Panchal v State of Gujarat* [2017] Cr Misc App No 22077 of 2017 (Gujarat HC)

²⁰¹ Juvenile Justice (Care and Protection of Children) Model Rules r 8(2)(i).

²⁰² Varsha Gowda (n 198).

education²⁰³, did not have such an access in a government-run home to begin with. This reflects a passive interpretation of the right to education, where the burden of access is placed on the child rather than the state.

Moreover, the nature and quality of educational and vocational programmes offered in institutions are often mismatched with the developmental needs and interests of children. In many cases, these programmes are limited to short-term, low-skill courses such as mobile repair or hairstyling²⁰⁴. One field account documents the case of Dabbu (pseudonym), a child who had come into contact with the Juvenile Justice System for the second time and had been found to be using substances. The Juvenile Justice Board ordered that he “*be kept at the Observation Home until the completion of a Mehndi course that he has started.*”²⁰⁵ This raises questions regarding whether a Mehndi²⁰⁶ course would provide meaningful employment for the child, and whether the completion of a course is justification enough to keep a child institutionalised.

While the UNCRC both envision education as central to the child’s growth and identity, such cases show that education is often treated as a checkbox requirement rather than as an enabling right that promotes the full development of the child. It also demonstrates a failure to conceptualise childhood as a period requiring support towards the capabilities of the individual child.

5.2.3 How are Evolving Capacities applied?

The principle of evolving capacities is limited in the JJ Act as discussed in section 4.4.2. However, Indian courts have at times acknowledged the fluid and developmental nature of childhood, especially in the context of age determination and the treatment of older adolescents.

²⁰³ Right of Children to Free and Compulsory Education Act s 3(1) provides every child, from age 6 to 14, the right to free and compulsory elementary education.

²⁰⁴ Varsha Gowda (n 198).

²⁰⁵ Anant Kumar Asthana, ‘Through the Revolving Door of the Juvenile Justice System: Disposal vs. Rehabilitation’ (*JALDI: Justice, Access, and Lowering Delays in India*, 5 July 2024) <<https://jaldi-vidhilegalpolicy.in/jaldilab/notes-from-field/notes?id=204&title=Through-the-revolving-door-of-the-Juvenile-Justice-System%3A-Disposal-vs.-Rehabilitation->>>.

²⁰⁶ Mehndi is the practice of making designs on someone's hands with henna, traditionally done by women in the Indian subcontinents on the occasion of weddings or religious events

For instance, in one case an adult, the Delhi High Court observed²⁰⁷: “*The applicant, 19 years in age, is not quite a child in the eye of the law but is yet only a neo adult. This court would propose that if a child (between the age 16 to 18 years) can be treated as an adult for the purpose of trial in heinous offences, a child who has just about crossed the legislated age of adulthood i.e. 18 years and remains a young adult (19-20 years) can certainly be afforded the protection of his liberty akin to a child in conflict with law.*”

This observation suggests a recognition that the transition from childhood to adulthood is not absolute or immediate, and that a residual understanding of childhood requiring care and protection can continue beyond the age of 18. It is an implicit acknowledgment of the evolving capacities of young persons and the need for a legal response that reflects developmental realities rather than rigid age thresholds.

In another significant ruling, the Supreme Court²⁰⁸ cautioned that placing juveniles in adult prisons constitutes a grave deprivation of personal liberty and emphasised that “*...in deciding whether an accused is juvenile or not, a hyper technical approach should not be adopted.*” Such remarks align with the UNCRC’s emphasis on the best interests of the child and the necessity to apply child-sensitive procedures throughout the justice process.

However, despite legislative requirements under the JJ Act, delays in age verification or errors in documentation frequently result in children being held in adult facilities. In response to this systemic issue, the Delhi High Court in 2020²⁰⁹ directed that “*...all cases alleging petty offences against children or juveniles in conflict with law, where the inquiry has been pending and remains inconclusive for a period longer than one year... shall stand terminated with immediate effect.*”

At the conceptual level, such rulings demonstrate an awareness, although inconsistent, of childhood as a dynamic period with evolving capacities as conceptualised in the UNCRC. However, the JJ Act’s lack of a comprehensive framework regarding the same leaves its implementation on specific judicial interventions, rather than a systemic recognition. This gap

²⁰⁷ State v Nikhil Kumar @ Chohi Bail Matters No. 2220/2021, Delhi High Court

²⁰⁸ Vinod Katara v State of Uttar Pradesh [2022] WP (CrI) 121/2022 (SC, 12 September 2022) (Dinesh Maheshwari and JB Pardiwala JJ)

²⁰⁹ Court on its Own Motion [2020] CRL REF 1/2020 (Del HC)

weakens the alignment between Indian law and the UNCRC, as the principle of evolving capacities is an enabling right guiding the realisation of all other rights of the child.

5.3 Meaningful Participation for CCL in Courts

The JJ Act integrates the right to participation mostly in principle, the implementation remains limited in practice. The following sections discuss the spaces that have a larger scope, and restriction, of meaningful participation - during deprivation of liberty, the judicial waiver mechanism, and decision-making during dispositions.

5.3.1 What impacts Deprivation of Liberty in practice?

India's reliance on institutionalization persists due to a lack of robust non-custodial alternatives. While the JJ Act provides six non-institutional measures for rehabilitation, their implementation is minimal²¹⁰. Diversion programs, foster care, and community-based rehabilitation initiatives are either underfunded or underdeveloped. Consequently, institutionalization is often perceived as a punitive “jail sentence” that will “shock” children into reformation²¹¹.

Granting bail is a critical measure in reducing the detention of children. In India, offenses for adults are categorised as either ‘bailable’ or ‘non-bailable’, but for children, bail is considered mandatory no matter the nature of the offence²¹². Bail can be denied in situations where the child themselves might be in danger. In practice, however, bail decisions often reflect class, caste, and gender biases. Children without fixed residences, those in the care of extended families, or from socio-economically marginalised communities are more likely to be denied bail, as courts demand landed

²¹⁰ Official data does not track cases disposed through community service or counselling. NCRB data only notes convictions, fines, or institutionalization, without detailing the stage of the trial at which these outcomes occurred.

²¹¹ HAQ Centre for Child Rights. (2021). Children Deprived of Liberty: What does it mean in the Indian context (p. 33). <https://www.haqUNCRC.org/wp-content/uploads/2021/10/children-deprived-of-liberty-what-does-it-mean-in-indian-context.pdf>

²¹² JJ Act s 12(1).

sureties or school enrolment as proxies for stability²¹³. This practice disproportionately impacts marginalized children and violates principles of equality and non-discrimination principles.

Recent jurisprudence acknowledges the statutory presumption in favour of bail. In 2025, the Kerala High Court²¹⁴ held that seriousness of the offence and the manner of its commission are not relevant considerations for bail under the JJ Act²¹⁵. The judgment clarified that any deviation from this presumption must be narrowly construed, reaffirming the Act's rehabilitative purpose. Moreover, even in cases where a child is transferred to be tried as an adult, the presumption of bail under Section 12 remains applicable. This was reinforced by the Punjab and Haryana High Court in a 2025 decision²¹⁶, emphasising that age and status as a child continue to warrant protection regardless of procedural posture.

Yet, the formal guarantee of bail does not automatically translate to a meaningful participation. Section 8(3)(a) of the JJ Act charges the JJB with ensuring the "informed participation of the child and the parent or guardian in every step of the process." Yet, in practical terms, there is a stark distinction between "being informed" and "being heard". The former can reduce children's involvement to passive receipt of information, contradicting the spirit of active engagement and meaningful participation encouraged by Article 12 of the UNCRC. Moreover, though the JJ Act mandates that JJB members must interact directly with children and conduct inquiries in a 'child-friendly manner' the legislation lacks clarity on how to implement it to empower the child's right to participation.

Regarding the right to be informed, Article 39A of the Indian Constitution and the Legal Services Authorities Act, 1987 guarantee free legal aid to ensure equal access to justice. The JJ Act similarly provides for legal aid, and the Supreme Court in 2011²¹⁷ also directed the establishment of dedicated Legal Aid Centres attached to JJBs. In policy terms, this should ensure that every child has access to legal assistance at every stage. Nevertheless, the reality on the ground is concerning - data shows limited awareness among children and their guardians about their entitlement to legal

²¹³ Rickard (n 11).

²¹⁴ *XXXX v. State of Kerala*, Bail Appl No 6291 of 2025 (Ker HC, 11 June 2025) (Bechu Kurian Thomas J)

²¹⁵ JJ Act s 12(1).

²¹⁶ *Bholu v Central Bureau of Investigation*, CrI Rev No 2366 of 2018 (P&H HC, 11 October 2018)

²¹⁷ *Sampurna Behura v Union of India and Others* WP (C) No 473 of 2005 (SC)

representations²¹⁸. A recent case in Delhi prompted a judicial inquiry into the effectiveness of legal aid offered to children²¹⁹. These reports suggest that the guarantee of participation in hearings is hollow without proper legal representation which is not available due to on-ground realities.

The continued reliance on institutionalisation, the inconsistent application of bail provisions, and the systemic failure to ensure effective legal representation all diminish the possibility of meaningful participation, where the child is rendered passive in the system that claims to rehabilitate them.

5.3.2 How does the Judicial Waiver mechanism impact participation?

Section 15 of the JJ Act introduces the mechanism of judicial waiver in cases involving heinous offences allegedly committed by children above the age of sixteen. The concept of judicial waiver has long-term consequences for the child. As observed by the Supreme Court²²⁰ if tried as an adult, the child faces the possibility of lifetime imprisonment, loss of protection from disqualification under the JJ Act²²¹, and the loss of the right to expungement of records – all rights otherwise guaranteed to CCLs under the Act.

The provision requires the JJB to evaluate three criteria²²²: a) the mental and physical capacity of the child to commit the offence, b) the ability to understand the consequences of the offence, and c) the circumstances of its commission; all to be done with the help of an expert in child psychology. If the Board concludes from this assessment that the child can be tried as an adult, it may transfer the case to the Children’s Court.²²³

Although this provision appears to be structured, it has both substantive and procedural inconsistencies. Firstly, the notion of judicial waiver itself points to age-based discrimination, in violation of the principle of equality and non-discrimination. Second, the practice of preliminary

²¹⁸ Vyas and others (n 14).

²¹⁹ Natesan and others (n 18).

²²⁰ *Barun Chandra Thakur v Master Bholu and Anr* (2022) LiveLaw (SC) 593, Criminal Appeal No. 950 of 2022 (SC)

²²¹ JJ Act s 24(1).

²²² *ibid* 15.

²²³ JJ Act, s 18(3)

assessment raises serious concerns regarding the presumption of innocence which is a guaranteed in the JJ Act, the Constitution, and the UNCRC²²⁴. At no point during this process is there a provision to give the child an opportunity to meaningfully participate or be supported in expressing their views with the assistance of psychologists beyond the assessment. The absence of procedural safeguards comprises the child's participatory rights.

The preliminary assessment can be done at any point of the legal process, including before the completion of inquiry or even before filing the charges. In *Bholu v. Central Bureau of Investigation*²²⁵ the court noted that transfers often occur even before completion of police investigations, and so, without understanding the circumstances regarding the commission of the offence. Furthermore, subjecting children to such assessments at an early stage often results in them inadvertently acknowledging culpability, amounting to self-incrimination.²²⁶ The UNCRC Committee explicitly warns against compelling children into self-incrimination, further suggesting that the risk of false confession is increased by the child's age and development, lack of understanding, and fear of unknown consequences²²⁷. This also creates a clear violation of the rights under the UNCRC as the right to fair trial and due process can often be violated under the guise of 'being heard'²²⁸.

The provision states that the JJB 'may' transfer the case to the Children's Court, however, there is a growing tendency among JJBs to rely solely on these assessments to justify transferring cases, often to reduce their own caseload²²⁹. There are many judicial precedents that highlight this tension. In one case, the Supreme Court²³⁰ invalidated an entire trial process on grounds that the assessment and subsequent transfer to adult court were due to an inadequate assessment. Similarly, in 2025, the Madhya Pradesh Court quashed the transfer order²³¹ made on the grounds by the JJB

²²⁴ UNCRC, Article 40(2)(b)(ii)

²²⁵ *Bholu v Central Bureau of Investigation* [2018] Punjab and Haryana High Court 2366.

²²⁶ Bharti Ali and Enakshi Ganguly, "Defeating the Ends of Juvenile Justice?" in Nessa Lynch, Yannick Van Den Brink and Louise Forde, *Responses to Serious Offending by Children* (1st edn, Routledge 2022) <<https://www.taylorfrancis.com/books/9781032107707/chapters/10.4324/9781032107707-15>> accessed 13 February 2025.

²²⁷ UN Committee on the Rights of the Child, 'General Comment 24' (n 98) para 59.

²²⁸ Raha (n 142).

²²⁹ Ali and Ganguly (n 226).

²³⁰ *Thirumoorthy v State Represented by the Inspector of Police* (2024) LiveLaw (SC) 262

²³¹ *Child under Conflict with Law v State of Madhya Pradesh* CRR No 1064 of 2025, 2025:MPHC-JBP:25193 (MP HC, 26 May 2025) (Vishal Mishra J)

that the child was “not interested in studying”, despite the preliminary assessment pointing to the child was feeling remorse and had a supportive familial environment. The court held that the socio-economic background of the child was not conducive to education, and that the purpose of the JJ Act is “*to protect such children and give them a chance to reform themselves.*” This brings an interesting notion, that not being interested in studying – which is considered key aspect of childhood – can be a reason to treat the child as an adult. These cases also highlight the failure to create an enabling environment where children can express themselves freely, and the failure to give due weight to their views.

In another case in 2022²³², the JJB’s report mentioned that the CCL in question had told two different narratives of the event during the first production and then another version during the preliminary assessment. The JJB concluded that the child “*knows to cook up a story in order to save himself which in turn goes to show that he has adequate mental capacity*”. Such language shows the stigmatising attitudes embedded in the system, undermining the principle of best interest of the child.

Such observations reveal a troubling pattern – once the JJB orders a transfer, even if subsequent courts quash the order, the case will return to the same JJB that held the stigma and prejudice that the child already faced. Scholarly work such as Kareem L. Jordan’s analysis of judicial waivers in the US, lends to this assumption, observing that “the mere successful transfer immediately condemns the juvenile as being perceived as more dangerous and incorrigible than their juvenile counterparts; a characterisation likely to impede upon their trial in the adult court and result in prejudicial outcomes”.²³³

The Bombay High Court in 2018, went further in analysing the tension: “*Merely on the premise that the offence is heinous and that it lends to the societal volatility of indignation, we are bracing for juvenile recidivism. Retributive approach vis-à-vis juveniles needs to be shunned unless there are exceptional circumstances, involving gross moral turpitude and irredeemable proclivity for the crime...Let no child be condemned unless his fate is foreordained by his own destructive conduct.*

²³² *Barun Chandra Thakur v Master Bholu and Anr* (2022) LiveLaw (SC) 593, Criminal Appeal No. 950 of 2022 (SC)

²³³ Jordan, 2021 in Ali and Ganguly (n 226).

*For this, a single incident not revealing wickedness, human depravity, mental perversity, or moral degeneration may not be enough. Just desserts are more than mere retribution...*²³⁴

Finally, after the trial of a CCL in the Children's Court, detention is the only sentencing option under the JJ Act. If Children's Court that finds the child guilty post-trial, the child is ordered to be in a place of safety till the age of 21 years after which the child could be transferred to an adult prison upon failing a reformation assessment. This deviates from Article 37(b) of the UNCRC that states that deprivation of liberty must be the last resort.

Ultimately, the judicial waiver mechanism illustrates a legal framework where the conceptualisation of childhood returns to the strict binaries of child or criminal. Importantly, this practice stands in sharp contrast to the UNCRC's evolving capacity principle and erodes meaningful participation by exposing children to processes they neither fully understand nor consent to.

5.3.3 How are CCL cases disposed of?

Section 18 of the Act provides for a variety of options available to the JJB for disposing a case. For children who are found to have engaged in the offence, there are eight options including release after admonition, group counselling, community service, payment of fine or compensation, probation under supervision, or placement in a Special Home for up to three years, depending on the nature and gravity of the offence. Custodial sentences, such as placement in Special Homes (up to three years) or Places of Safety (for heinous offences and 16–18-year-olds), are expressly intended as measures of last resort.

This framework aligns closely with UNCRC Article 37(b), which stipulates that deprivation of liberty must be "*used only as a measure of last resort and for the shortest appropriate period,*" as well as recommendations by the UNCRC Committee, which advocates for alternative measures to

²³⁴ *Mumtaz Ahmed Nasir Khan v State of Maharashtra and Another* Cr App No 1153 of 2018, with Cr WP No 1346 of 2018 and Cr App No 262 of 2018 (Bom HC)

detention including diversion, probation, community programmes, and restorative justice whenever possible²³⁵.

Article 12 of which requires children to be heard in all matters affecting them and for their opinions to be given "due weight" in accordance with their maturity. However, Section 18 of the JJ Act which focuses on disposition options, does not have any language to consider the views of the child. Only a broad responsibility of the Board is articulated in Section 8 regarding ensuring "informed participation of the child...in every step of the process." This raises questions regarding whether dispositions such as community service or counselling genuinely reflect children's interest, or whether they are made primarily to meet administrative convenience or expectations.

There is growing evidence showing community service orders, for example, are being applied. In two recent cases involving children accused under the POCSO Act, JJBs in Telangana and Andhra Pradesh ordered community service at public institutions, including government hospitals²³⁶. These represent positive examples of non-custodial alternatives being used in appropriate contexts. Yet, the limitations of the system are apparent. In a case in 2019 that reached before the Supreme Court, the CCL's, now adult, case was set aside by ordering community service²³⁷. This raises a critical question: why must cases seeking basic rehabilitative measures reach the apex court before such relief is granted?

Due to the lack of legal advocacy at this critical juncture, children cannot effectively participate, or challenge unfit sentences, or advocate for alternatives aligned with their best interests. Furthermore, the absence of clear emphasis on participation in the law can often lead to participation being deemed insignificant or irrelevant unless decided by the adult practitioner.

²³⁵ UN Committee on the Rights of the Child, 'General Comment 24' (n 98); Nowak (n 94).

²³⁶ Juvenile POCSO offenders sentenced to community service in Telangana' (MSN News, 2023) <https://www.msn.com/en-in/news/India/juvenile-pocso-offenders-sentenced-to-community-service-in-telangana/ar-AA1HrvyA> accessed 8 July 2025; 'Juvenile offender sentenced to community service in Prakasam POCSO case' (Deccan Chronicle, 14 October 2023) <https://www.deccanchronicle.com/nation/crime/141023/juvenile-offender-sentenced-to-community-service-in-prakasam-pocso-cas.html> accessed 8 July 2025

²³⁷ Miscellaneous Application No. 381 of 2019 in Special Leave Petition (Crl.) No. 709 of 2019 (Supreme Court of India).

5.4 Conclusion

The construction of childhood in Indian courts continues to reflect a binary understanding: the child is either viewed as an innocent in need of protection or as a deviant deserving of punishment. This binary undermines the UNCRC's conceptualisation of childhood as a dynamic and evolving phase. One of the most fundamental tensions lies in the dual role of the state, which acts simultaneously as protector and prosecutor. Furthermore, the mechanism of judicial waiver, the omission of evolving capacities, and the emphasis on institutionalisation, all highlight a troubling trend towards the increasing criminalisation of childhood.

Regarding participation, although the Act contains general provisions calling for "informed participation," it does not create clear mechanisms in implementation. Legal aid remains inaccessible or ineffective in many contexts, and children's voices are often marginalised during proceedings, especially in disposition hearings. The judicial waiver system further exemplifies this disconnect, where children's rights to be heard are at risk for undermining due process and the presumption of innocence. The lack of clarity in implementing participatory rights further undermines the legitimacy of the juvenile justice process, leaving participation as tokenistic at best.

In conclusion, it is evident that while the JJ Act adopts a rhetoric of child rights, the practices of state actors, including JJBs and courts, reflect a limited and often inconsistent engagement with these principles. Participation is often limited or substituted with adults' perceptions of the child's best interests. Without a conceptual shift in the judicial and administrative culture, children in conflict with the law remain at risk of being denied the very rights the JJ Act and the UNCRC seek to protect.

6. Conclusion

Legal constructions of childhood are foundational to whether and how participation is understood, implemented, and respected in juvenile justice systems. This thesis aimed to understand how such constructions – in the UNCRC as a normative yardstick on children’s rights globally, and in Indian law through the Juvenile Justice Act – shape the realisation of participatory rights of children in conflict with law in India.

The UNCRC mandates that participation be enabled regardless of the child’s behaviour or age, based solely on their legal identity as a child and their right to express views in matters affecting them. The UNCRC’s vision demands that mechanisms be in place to inform, consult, and support children in all stages of justice proceedings. While it contains many provisions related to protection and development of the child – provisions that may be seen in practice as restricting the participation of a child – the principles of evolving capacities and best interests, along with participation, aim to resolve this tension.

The JJ Act, despite referencing participation as a general principle, lacks the procedural specificity to make this right actionable. In analysing the right to participation in the two instruments, it was evident that the JJ Act allowed a very narrow scope of participation in the letter of the law. One of the key findings of this thesis was the selective and instrumental use of the concept of evolving capacities in Indian law. Evolving capacities are acknowledged primarily to increase accountability, not autonomy. Consequently, the right to participation is shaped by a legal framework that does not fully recognise the child as a competent rights-bearer. In reducing the scope of the principle of best interest and participation, and not having clear scope of evolving capacities at all, the weight of the Act bends towards a protectionist approach without the other principles to balance them, as in the UNCRC

The judiciary plays a critical role in either reinforcing or challenging legal constructions of childhood. This thesis shows that Indian courts have not consistently interpreted the JJ Act in a manner that empowers the child’s voice. This inconsistency points to an underlying ambivalence in judicial attitudes towards child participation, rooted in cultural perceptions of childhood as a state of incompleteness and incapacity.

Hence, realising the right to participation for CCL in India requires more than institutional reform—it requires a conceptual shift in how childhood is legally and culturally understood. It is recommended that alongside increased capacity-building efforts, there is a need for a legal reform to align the JJ Act with the CRC. This can be done by:

- a) limiting the judicial waiver mechanism,
- b) revision of policies to reduce the criminalisation of adolescents
- c) integrating the concept of evolving capacities across all stages while a child is in contact with the justice system,
- d) codifying participation into concrete procedures to ensure that children are informed, heard, and empowered at every stage,
- e) ensuring that participation includes not simply the right to be heard but the notion of ‘due weight’ as well.

In conclusion, the right to participation provides an opportunity in the realisation of many other rights for children. A perspective shift is needed to recognise children in conflict with law as people first, with voice and agency, to help build a more inclusive and democratic justice process.

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