

General Principles under JJ Act, 2015

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Historical Evolution of Principles: Judicial Precedents

Supreme Court

- *Bhola Bhagat v. State of Bihar*: - in enacting JJ Act 1986, the effort of legislature was “to reform the delinquent child and **reclaim him as a useful member of the society**”. [1997] 8 SCC 236.
- *Pratap Singh*: 5-judge Constitution Bench describing JJ Act, 1986 - It is settled law that the interpretation of the Statute of **beneficial legislation** must be to advance the cause of legislation to the benefit for whom it is made & not to frustrate the intendment of the legislation.
- *Salil Balil v. Uol*: The essence of JJ Act, 2000 and Rules is **restorative** and **not retributive**, providing for rehabilitation and reintegration of CICL into mainstream society. (2013) 7 SCC 705.

High Courts

- *Krishna Bhagwan v. State of Bihar*: Patna HC, referring to Bihar Children Act, 1982 and JJA, 1986 -“The basic approach seems to be **curative instead of punitive.**” AIR 1989 Pat 217.
- *Imityaz Hussain Mumtiyaz Sheikh*: Bombay HC, when dealing with JJA 2000, stated -In the statement of objects & reasons it was set out that the Act proposes amongst others to make the juvenile system meant for a juvenile/child **more appreciative of the developmental needs in comparison to criminal justice system** as applicable to adults; to **minimise stigma** and in **keeping with the developmental needs** of the juvenile/child. 2008 [116] BomLR 1645.

Also, earlier part of Model Rules, 2007; now in the parent statute itself.

JJB duty to advance the goals and objects of JJ Act, 2015

- Provisions of JJA, 2015 should be **read in a manner that enhances its goals.**
- **If two interpretations are probable, the correct interpretation is that which is in conformity with the legislation's objectives.**
- In *D. Srinivasan s/o Durai Naicker v. The Secretary Home [Prisons], Govt of TN*, the Madras HC when referring to JJA, 1986 & JJA, 2000, said, "...both the Acts **being the benevolent legislation**, they have to be interpreted in the manner as to advance the object of the Act."
- The objective of JJA, 2015 is contained in the Title, Preamble and General Principles - and should be relied upon by JJBs to buttress 'speaking orders,' while adhering to these principles.

Title of the JJ Act, 2015 – Implications for JJBs

- **‘Juvenile’** - Children alleged and found to be in Conflict with Law (CICL) are the focus.
- S.2 (35)- “juvenile” means a child below age of 18 years.
- **‘Justice’**:-
 - Black’s Law Dictionary: “Proper administration of law. In jurisprudence, the constant and perpetual disposition of legal matters or disputes to render every man his dues.”
 - Concise Dictionary of Law: “A moral ideal that the law seeks to uphold in the protection of rights and punishment of wrongs.”
- **‘Care and Protection’**: Children in need of care and protection (CNCP) and CICL are dealt with under the same legislation, so both categories require care and protection.
- In relation to CICL, the ‘Care & Protection of Children’ denotes that juvenile justice is attained through the child’s ‘care & protection.’ The relevant parties, namely, child, complainant and society receive their dues /entitlements through ‘care & protection’ of the child. Hence, under JJA, 2015, ‘care & protection’ of the child is the alternate to punishment and the same is achieved by administration of the Act, in its true spirit.
- **‘Children’**: Juvenile = Child. S. 2(12) defines “child” as ‘a person who has not completed eighteen years of age.’

Preamble, JJA 2015 – implications for JJBs: **Child Friendly**

- Definition of “**Child-friendly**”: “any behaviour, conduct, practice, process, attitude, environment or treatment that is humane, considerate **and in the best interest of the child**”. S. 2(15), JJA.
- “Child-friendly” appears in Preamble & in following provisions relevant to CICL:
 - S. 7(1): An obligation has been placed on the JJB to ensure that the **procedures are child friendly**; the **venue is not intimidating** to the child and does not resemble regular courts.
 - S. 14(5)(b): JJB should **conduct proceedings in a “simple manner** as possible and care shall be taken to ensure that the child, against whom the proceedings have been instituted, is given **child-friendly atmosphere** during the proceedings”.
 - Model Rules 10(8) & 13(7)(v): While recording the statement of a child during an inquiry under S. 14, **JJB should address a CICL “in a child-friendly manner** in order to **put the child at ease & to encourage him to state the facts & circumstances without any fear**, not only in respect of the offence which has been alleged against the child, but also in respect of the home & social surroundings, & the influence or the offences to which the child might have been subjected to.”

Pointers for JJB: Child Friendly JJB proceedings



- **Preamble – the ‘mantra’**
- **Attitudes: to Children, Adolescents, CICL;** remind yourself that person before you is a child
- **Child Rights Friendly:** Ensure that the child is not compelled to testify against himself, has legal aid, that child is oriented....
- **Atmosphere:** Relaxed atmosphere, quiet, informal, well lit, easy access to toilet and canteen facility, officials not in uniform
- **Rapport building:**
 - Exercise caution, don't assume that all children have been to school and ask questions about this, while building rapport
 - Familiarize yourself with the Social Investigation Report in order to better understand the child and his/her circumstances
 - Observe the mental state of the child, and respond by being supportive – acknowledge feelings.
- **Language:** Use of simple language, interpreter/translator (Sec 8 (3) (d)), and Principle of non-stigmatising semantics (Sec 3 (8), wherein adversarial or accusatory words are not to be used.
- **Conducting inquiry and Scheduling of cases:-** take into account child's attention span, energy levels and anxiety levels. Give the child adequate time to process the question and respond. If the child does not respond initially, the question could be posed later, again, once the child is more comfortable and responsive.

The Preamble, JJ Act, 2015 - implications for JJBs

- SC precedents:
 - *A. Thangal Kunju Musaliar v. M. Venkitachalam Potti* - “The Preamble of a statute has been said to be a good means of finding out its meaning and as it were a key for the understanding of it.” AIR 1956 SC 246.
 - *M/s. Burrakur Coal Co. Ltd. v. UoI*, -“where the object or meaning of the enactment is not clear, the preamble may be resorted to explain it.” AIR 1961 SC 1961.
 - *Arnit Das v. State of Bihar*, - “The **Preamble is a key to unlock the legislative intent**. If the words employed in an enactment may spell a doubt it would be useful to so interpret the enactment as to harmonise it with the object which the Legislature had in its view.” [2000] 5 SCC 488.
- Preamble refers to Articles 15(3), 39(e) & (f), 45 & 47 of the Constitution, and states that **such Articles impose duties “on the State to ensure that all the needs of children are met and that their basic human rights are fully protected.”**
- Claims that **UNCRC & other international instruments** were considered.

The Preamble, JJ Act, 2015 - implications for JJBs: **'Rehabilitation'**

- **'Rehabilitation'** not defined under JJA.
- Black's Law Dictionary - "Investing or clothing again with some right, authority or dignity. Restoring person or thing to a former capacity; **reinstating**; qualifying again."
- When speaking in the context of children, the appropriate words would be **'improve' / 'enhance'**, as rehabilitation helps the child surmount the situation that may have resulted in the child's offending.
- **The JJ system is designed in a manner that enables identification of the causes for a child's offending, and for efforts that help to eliminate the same.**

Preamble, JJA 2015 – Check list for JJBs

ATTITUDES	PROCEDURES
Respectful of the child irrespective of the gravity of the offence alleged -	Adherence to Best Interest Principle?
Non-judgmental?	Pursuing the rehabilitative goals of the JJA and customizing ICP for each child?
Listening attitude?	Age appropriate?
Child friendly?	Ensure child is aware of the nature and status of proceedings?
Interested in gaining a deep understanding of the circumstances of the child	Facilitate child's contact with family?
Respectful of Social Work Members and their experience and expertise	Proactively enable child to be heard?
	Short dates? Speedy disposal?
	Co-ordinate with all stakeholders to ensure all rights of all children are protected?

Principles - Introduction

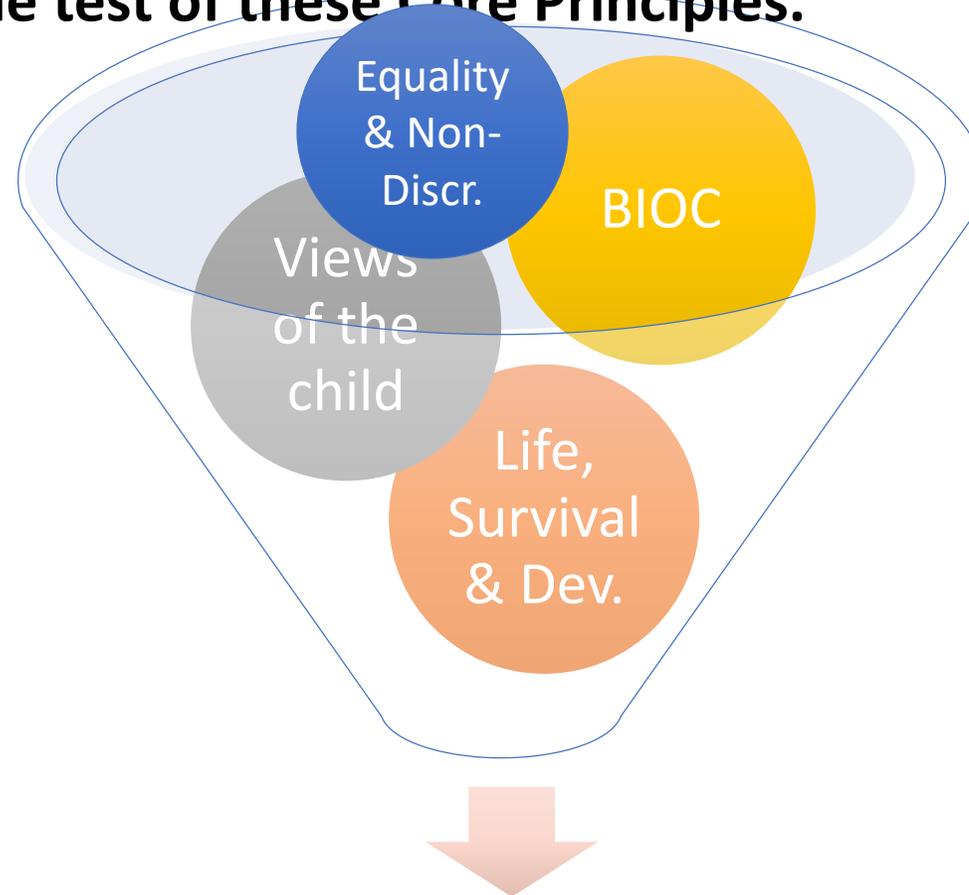
- Juvenile justice is based on principles that are
 - A: Internationally acknowledged, more particularly the minimum standard enshrined under the UNCRC, the Beijing Rules and the Havana Rules.
 - B: Some of the principles are based on Constitutional, Criminal and Administrative jurisprudence.
- JJ Model Rules, 2007 for the first time **included a chapter**, on Fundamental Principles containing 14 principles that were “fundamental to the application, interpretation & implementation of the Act and rules.”
- As these principles were in the Model Rules 2007, their inclusion in State rules depended on respective State Govts, so Legislature rightly considered the principles as pivotal for the proper & uniform administration of JJ across the country and included them as a Chapter within the parent statute – Chapter II.
- **Two additional principles** over and above those enshrined in Model Rules 2007 – Principle of Diversion and Principle of Natural Justice.
- Most of these principles are applicable to both CICL & CNCP.

Core Principles of the UNCRC: Implications for JJBs

Articles 2,3,6 and 12, UNCRC

All decisions concerning children are to be

- Screened for passing the test of these Core Principles.
- Individualized
- Contextualized



Decisions affecting children

Fundamental Principles under s.3, JJA & Core Principles of UNCRC

3(i)	Principle of presumption of innocence	3(ix)	Principle of non-waiver of rights
3(ii)	 Principle of dignity and worth	3(x)	2 Principle of equality and non-discrimination
3(iii)	12 Principle of participation	3(xi)	Principle of right to privacy and confidentiality
3(iv)	3 Principle of best interest	3(xii)	6 Principle of institutionalisation as a measure of last resort
3(v)	Principle of family responsibility	3(xiii)	Principle of repatriation and restoration
3(vi)	Principle of safety	3(xiv)	Principle of fresh start
3(vii)	6 Positive measures	3(xv)	Principle of diversion
3(viii)	Principle of non-stigmatising semantics	3(xvi)	Principles of natural justice

Principle of Innocence - “Any child shall be presumed to be an innocent of any mala fide or criminal intent up to the age of eighteen years.” S. 3(i), JJA.

- **Sacred dictum of criminal law** (inference in favour of the fact that the accused is innocent, and prosecution has burden to prove guilt beyond reasonable doubt.)
- The ‘presumption of innocence’ has **achieved human rights status**:
 - Universal Declaration of Human Rights -Art. 11(1);
 - International Covenant on Civil and Political Rights -Art. 14(2); and
 - UNCRC -“Every child alleged as/accused of having infringed penal law has at least the following guarantees: (i) To be presumed innocent until proved guilty according to law” Art. 40(1)(b)(i).
 - Beijing Rules, 1985 includes ‘presumption of innocence’ as one of the “basic procedural safeguards” along with the right to be notified of charges, to remain silent, to counsel, to the presence of a parent/guardian, to confront & cross-examine witnesses, and to appeal. - Rule 7(1).
- Apex Court: “It is now a **well settled principle** that presumption of innocence as contained in Article 14(2) of the International Covenant on Civil and Political Rights is a **human right...**” -Vinod Solanki v. UoI [2008] 16 SCC 537

Principle of Presumption of Innocence

- Regarding CICL , the presumption **extends not only to the child's innocence, but also to the fact that the child had no "mala fide" or "criminal Intent"** even if found to have committed the offence.
- The fact that a child is presumed not to have "any mala fide" or "criminal intent" **is the basis for his / her treatment under juvenile legislation:**
 - the offending is due to the circumstances of the child;
 - punishing the child is not the solution;
 - it is the situation of the child that requires to be remedied;
 - It is this absence of "mala fide" / "criminal intent" that differentiates children from adults.
 - It is presumed that a child has no 'mens rea'.

Q: Discuss the application of this principle in the context of Preliminary Assessment to be conducted by JJB under S. 15, JJA.

Principle of Dignity and Worth - “All human beings shall be treated with dignity and worth.” S. 3(ii), JJA 2015.

- **Fundamental right** guaranteed under Art. 21 of the Constitution.
- “**Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live...**” Francis Coralie Mullin vs. Administrator, UT of Delhi, (1981) 1 SCC 608.
- To abide by the constitutional standards recognised by well accepted principle, it is incumbent upon the State when assigning women and children to these establishments, euphemistically described as ‘Care Homes’, to provide at least the minimum conditions ensuring human dignity”. Vikaram Deo Singh Tomar vs. State of Bihar (1988) Supp SCC 734.
- Preamble, JJA refers to **Art. 39(f)** of Constitution, a directive principle - “That children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity...”, which emphasizes that a child’s dignity and worth should be upheld during all stages of his/her journey within the JJ system.
- **JJB duty** to ensure “at the time of initiating the inquiry, the Board shall satisfy itself that the **CICL has not been subjected to any ill-treatment** by the police or by any other person, including a lawyer or probation officer and take corrective steps in case of such ill-treatment.”

Principle of dignity and worth

UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990 (Havana Rules):

- “Juveniles deprived of their liberty have the **right to facilities and services that meet all the requirements of health and human dignity.**” Rule 31
- “In the performance of their duties, **personnel of detention facilities should respect and protect the human dignity and fundamental human rights of all juveniles.**” Rule 87
- UNCRC.
 - “Every child deprived of liberty shall be **treated with humanity and respect** for the inherent dignity of the human person and **in a manner which takes into account the needs of persons of his or her age...**” Art. 37(c).
 - “States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth”. Art. 40(1).
- UN General Comment No. 10 on rights of children in juvenile justice
 - “Treatment that is consistent with the child’s sense of dignity and worth. This principle reflects the fundamental human right enshrined in Art. 1, UDHR, which stipulates that **all human beings are born free and equal in dignity and rights.** This inherent right to dignity and worth, to which the preamble of the UNCRC makes explicit reference, **has to be respected and protected throughout the entire process of dealing with the child,** from the first contact with law enforcement agencies & all the way to the implementation of all measures for dealing with the child.”

Checklist for JJBs: Principle of Dignity and Worth



Treat child with dignity and ensure other duty bearers do too.



Identify and address cases of ill-treatment.



Ensure CCIs are maintained well.



Listen to children, ensure effective functioning of Grievance Addressal system

Principle of Participation: “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.”

- An **enabling environment** must be created to enable children to exercise their right to be heard within the JJ system.
- **Self-incriminatory information** shared by a child during inquiry/while providing information to any functionary **should not be considered by JJB**, given Art. 20 (3) of the Constitution, -a fundamental right.
- The ‘guilt’/‘innocence’ of a CICL should be determined only on basis of evidence recorded. Hence, JJB to ensure that a child **has legal representation**.

Unpacking the Right to be Heard

- Art 12, UNCRC “establishes the right of every child to **freely express her or his views, in all matters affecting her/him, and the subsequent right for those views to be given due weight, according to the child’s age & maturity.**”
- **“Freely”** -child can **express her or his views without pressure and can choose whether or not she/he wants to exercise her or his right to be heard, the child must not be manipulated or subjected to undue influence/pressure, and is intrinsically related to the child’s “own” perspective:** the child has the right to express her/his own views & not the views of others.”
- **Maturity** -ability to understand & assess implications of a particular matter, and must therefore be considered when determining the individual capacity of a child.
- Child can be **heard “either directly/through a representative/appropriate body.”**
- **Context has to be enabling & encouraging.**

Source: Committee on the Rights of the Child, General Comment No. 12 (2009) The right of the child to be heard. See para 97 118-121

Basic Requirements for Implementation of the Right to be Heard

Transparent &
Informative

Voluntary
Exercise of
Right

Respectful

Relevant

Child-Friendly

Inclusive

Supported by
training

Sensitive to
risk

Accountable

Source: Committee on the Rights of the Child, General Comment No. 12 (2009) The right of the child to be heard, para 134.

Principle of Best Interests: “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.” S. 3 (iv), JJA 2015.

- Art. 3, UNCRC:
- (1) In all actions concerning children, whether undertaken by public/private social welfare institutions, courts of law, admin authorities/legislative bodies, best interests of the child shall be a **primary** consideration.
- (2) States Parties undertake to **ensure the child such protection & care as is necessary for his/her well-being, taking into account the rights and duties** of his/her parents, legal guardians, or other individuals legally responsible for him/her, & to this end, shall take all appropriate legislative & admin measures.
- (3) States Parties shall ensure that the institutions, services & facilities responsible for the care or protection of children shall **conform with the standards** established by competent authorities, particularly in areas of safety, health, number & suitability of staff, as well as **competent supervision**.
- Preamble, JJA:.. adoption of a “child-friendly approach in the adjudication and disposal of matters in the best interest of children....”
- S.2(9): “**best interest of child**” means the **basis for any decision** taken regarding the child, to **ensure fulfilment of his basic rights & needs**, identity, social well-being & physical, emotional & intellectual development.’

Principle of Best interest

UN General **Comment No.12 (2009)** emphasizes that ‘best interest’ is

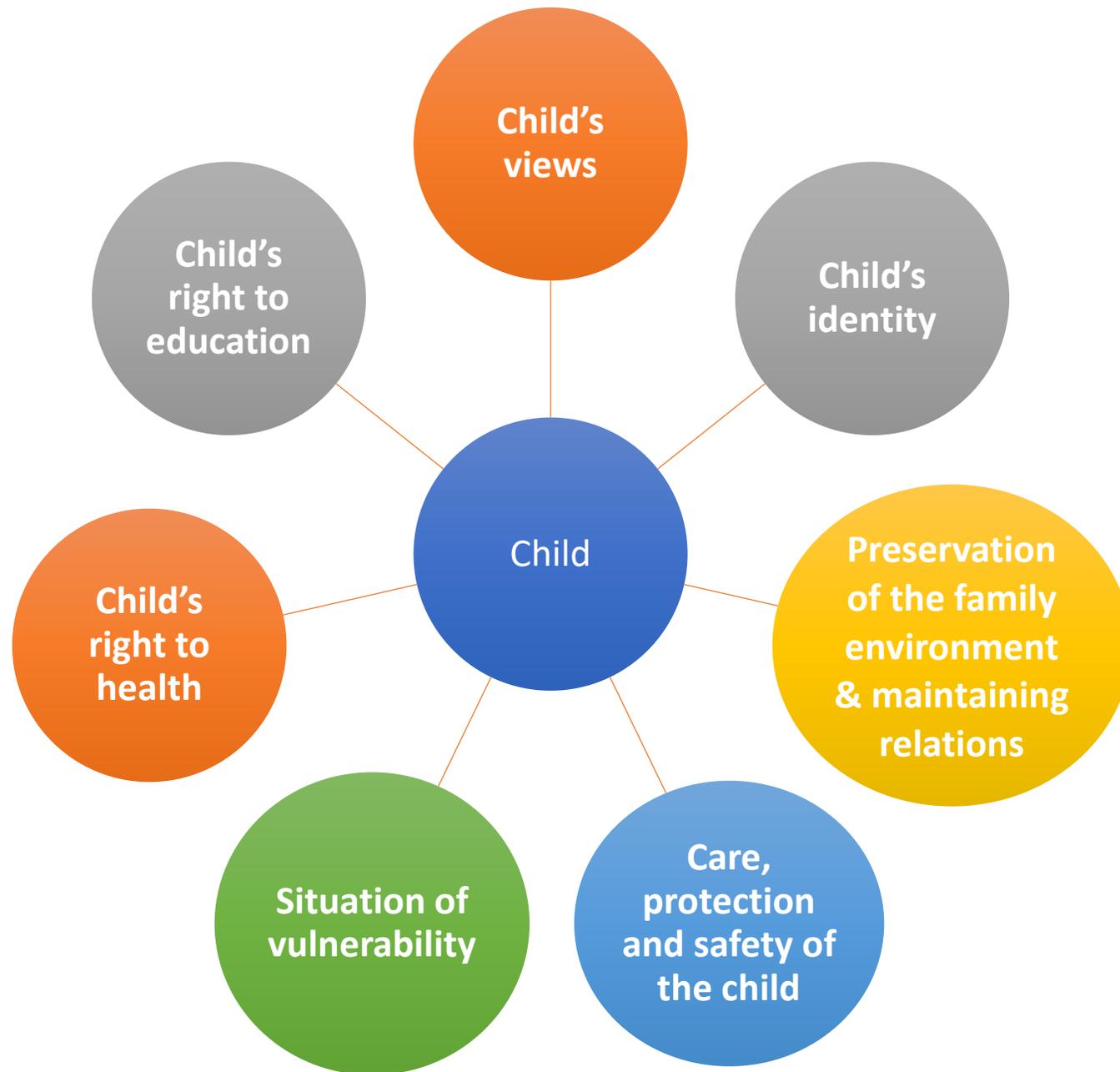
- **a substantive right;**
- **a fundamental principle to be applied while interpreting a legal provision given competing interpretations;**
- **a rule of procedure;**
- **the justification for a decision** (how, what criteria, how best interest of child was weighed against other considerations, etc.);
- **not the same for every child in a similar context;**
- **requires assessment;**
- **a child needs “appropriate legal representation when his/her best interests are to be formally assessed & determined by courts & equivalent bodies. para 96.**

Principle of Best Interest: provisions in JJA & Model Rules

- S. 3(xv) – **principle of diversion** “measures for dealing with CICL without resorting to judicial proceedings **shall be promoted unless** it is in the best interest of the child or the society as a whole.”
- S. 26(3) proviso – In **case of a child who has run away** from a Sp. Home/OH or Place of Safety, the JJB can give additional directions regarding **special steps deemed necessary for the best interest** of the child.
- S. 74(1) proviso- the JJB can **authorize disclosure of the child’s identity** if it is in the child’s best interest, after recording reasons in writing.
- S. 95(1) – After completion of inquiry, JJB can **transfer child to the place the child hails from** after due inquiry that it is in child’s best interest to do so.
- Rule 8(1) proviso: The police should exercise the **power to apprehend a CICL only with regards to heinous offences unless** it is in the best interest of the child.
- Rule 8(7): **Undertaking to be taken when a child is not apprehended** and is placed with parents/guardians/fit person, in the best interest of the child.
- Rule 11(8): While placing a child in a fit facility/ Sp. Home, JJB should consider one that is nearest to child’s parent/guardian’s place of residence, unless it is not in the best interest of the child to do so.



Elements to be considered while determining Best Interest



Source: Committee on the Rights of the Child, general Comment No. 14, (2013), on the right of the child to have his/her best interests taken as a primary consideration (art. 3, para 1)

Factors that should **not** be the sole consideration in determining the BIOC

- Socio-economic status of the birth parent or caregiver.
- Parent's disability.



Best interest: Implications for JJB

- **Proceedings to be conducted** in a manner that is conducive. JJB to demonstrate that child is not a mere 'case', and that it is concerned with his /her well-being.
- **Contact with the JJ system should have a positive impact** upon the child
- Ensure best interest of each and every CICL is the primary consideration, irrespective of gravity of offence or interests of parent/s/others.
- **Listen to views & wishes** of child; give due weightage, "in accordance with age & maturity".
- In case of **competing interests, counsel child** as to why the child's course of action is against his /her interest.
- Ensure **child friendliness**: "“Child friendly” -behaviour, conduct, practice, process, attitude, environment or treatment that is in the best interest of the child." S. 2(15), JJA.
- **Recognize its intrinsic connection with Rehabilitation** - the ultimate aim of JJ, -more likely if a child's best interest is comprehensively assessed & additional orders -S.18(2) are passed.
- **Ensure that functionaries** assess child and make recommendations for the child's ICP, based on the child's best interest.
- **Q: What can the JJB do in such situations?**

React

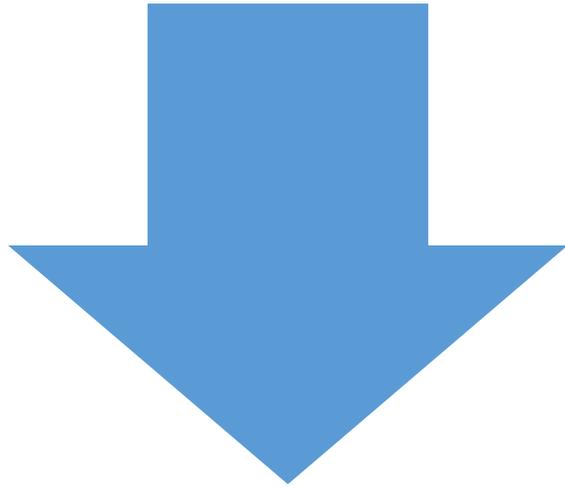
- “The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.”

Source: Committee on the Rights of the Child, General Comment No. 10 (2007) Children’s rights in juvenile justice, para 10

Case Study No.1

17 ½ year old Vinod was apprehended for allegedly gang-raping a 27-year-old woman. The others involved were much older to him. He was produced before JJB. A strong appeal was also made to transfer him to Children's Court. On speaking to him, JJB learnt that Vinod had no family in the city & had been living alone on the streets since he was 10 years old. He had dropped out of school, & had been physically & sexually abused several times. He told JJB that he had gone to collect money owed to him by one of the adult accused & ended up accompanying them to a park where the alleged incident took place. Vinod told JJB he knew the consequences of his action. His IQ was found to be normal. Vinod was legally represented only on the date on which the JJB ordered him to be transferred to the adult court. Vinod was sent to a place of safety attached to the OH.

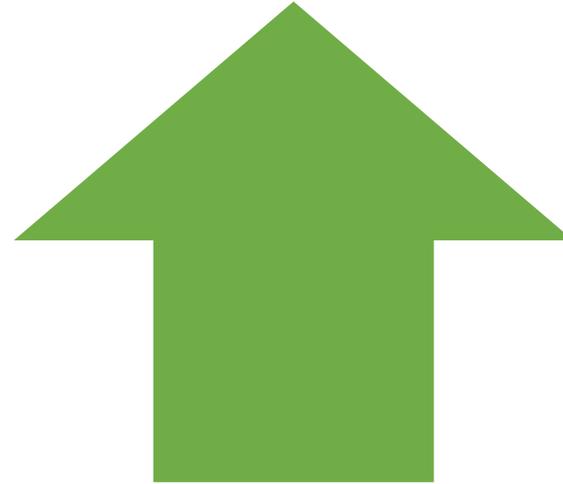
- **What factors should be highlighted in the SIR by the Probation Officer?**
- **What principles should the JJB apply while dealing with this case?**
- **What principles should the Superintendent/Case Worker/Counsellor apply while dealing with Vinod?**
- **Can the heinous nature of the offence alone be the basis for transfer?**



Child's
Wishes



Child's
interests



Implications and challenges with regard to UN Core Principles enshrined in Art. 3 & Art. 12

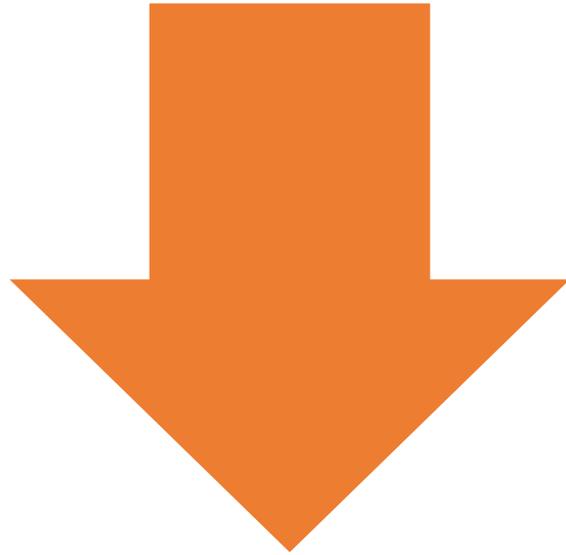
The UNCRC requires decision makers to

- To act in the child's best interests (Art 3)
- To ensure that the child's views are duly considered and given due weight, while taking into account role and responsibility of parent/s, legal guardians, and the age, maturity and evolving capacities of the juvenile. (Art 12 and 5)

These may be compatible, but could also be in conflict.

- **Q: How much weight is to be given to each right?**
- **Q: How is the best interests determined?**



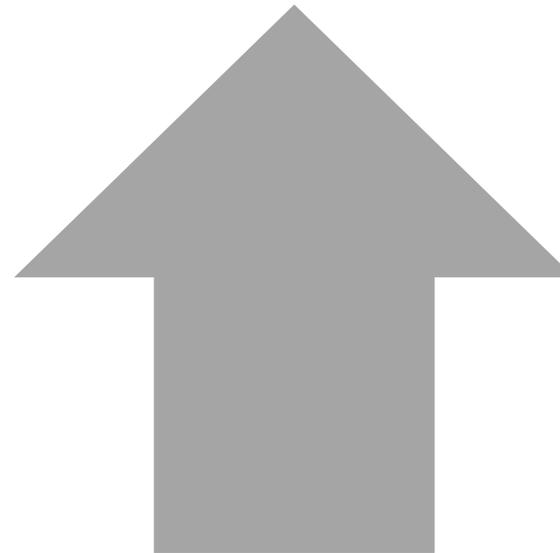


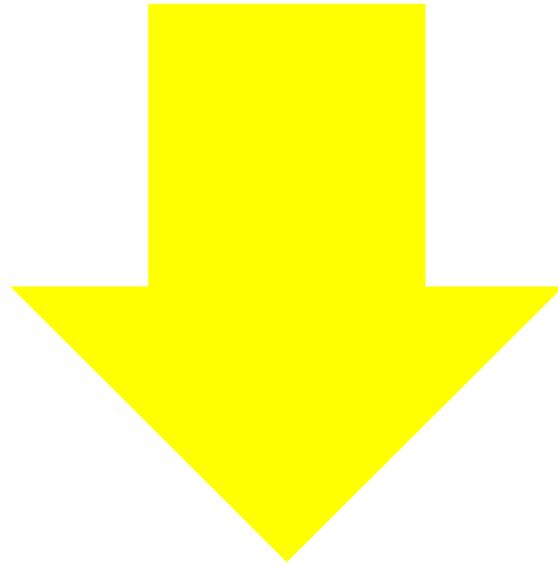
Child's
evolving
autonomy



Parental rights
and duties

Parental
autonomy





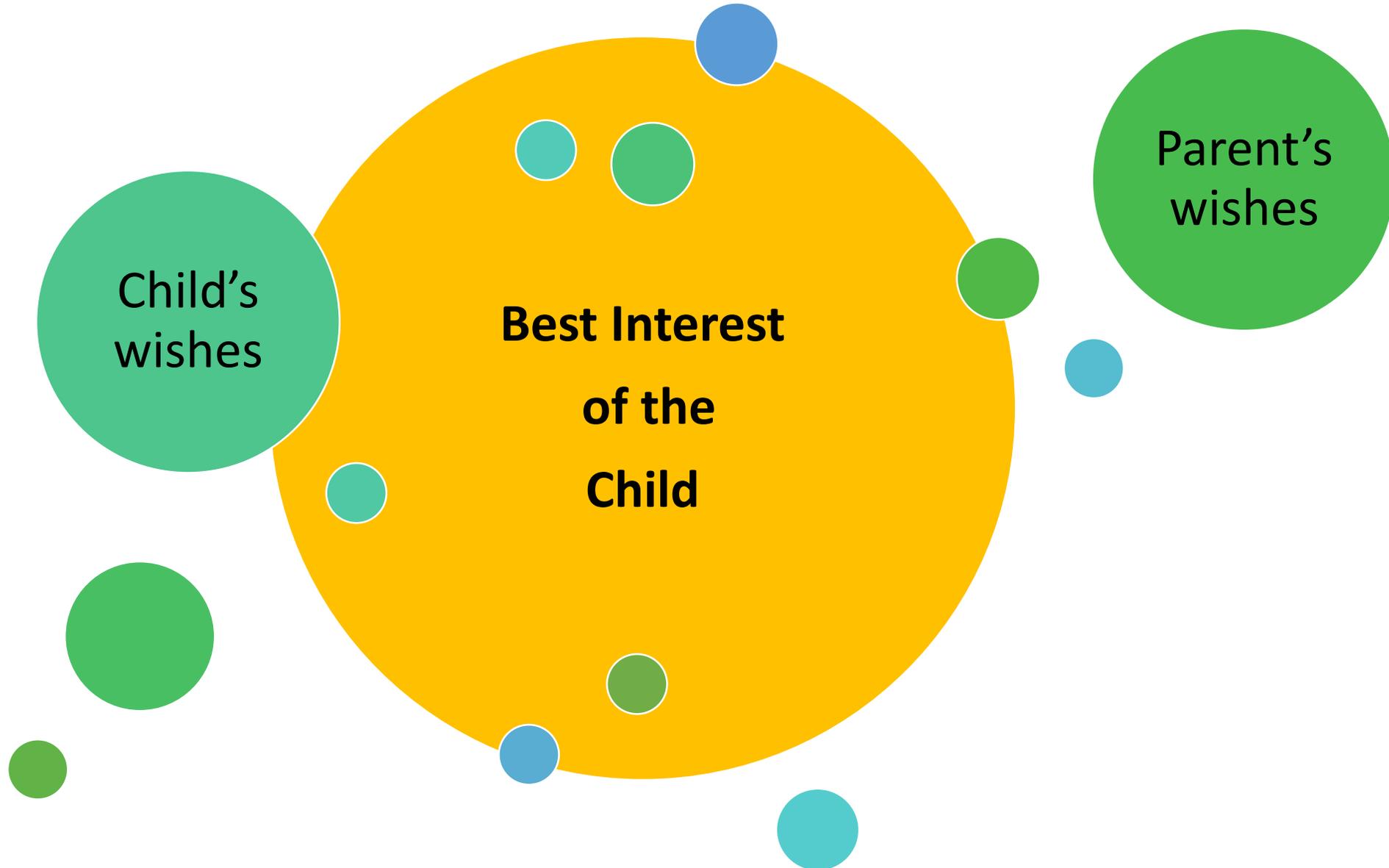
Best
interest of
the child



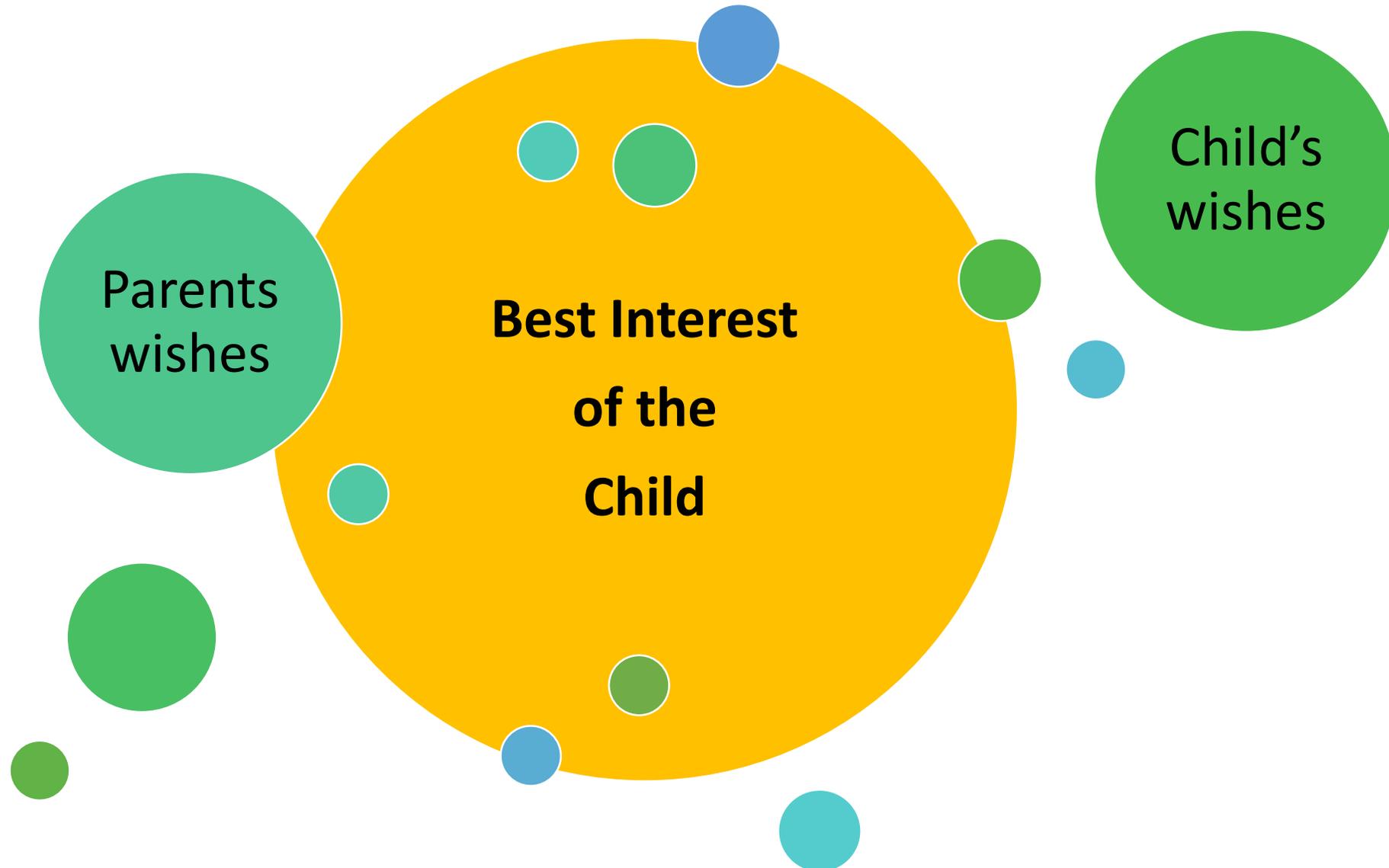
Societal
interests



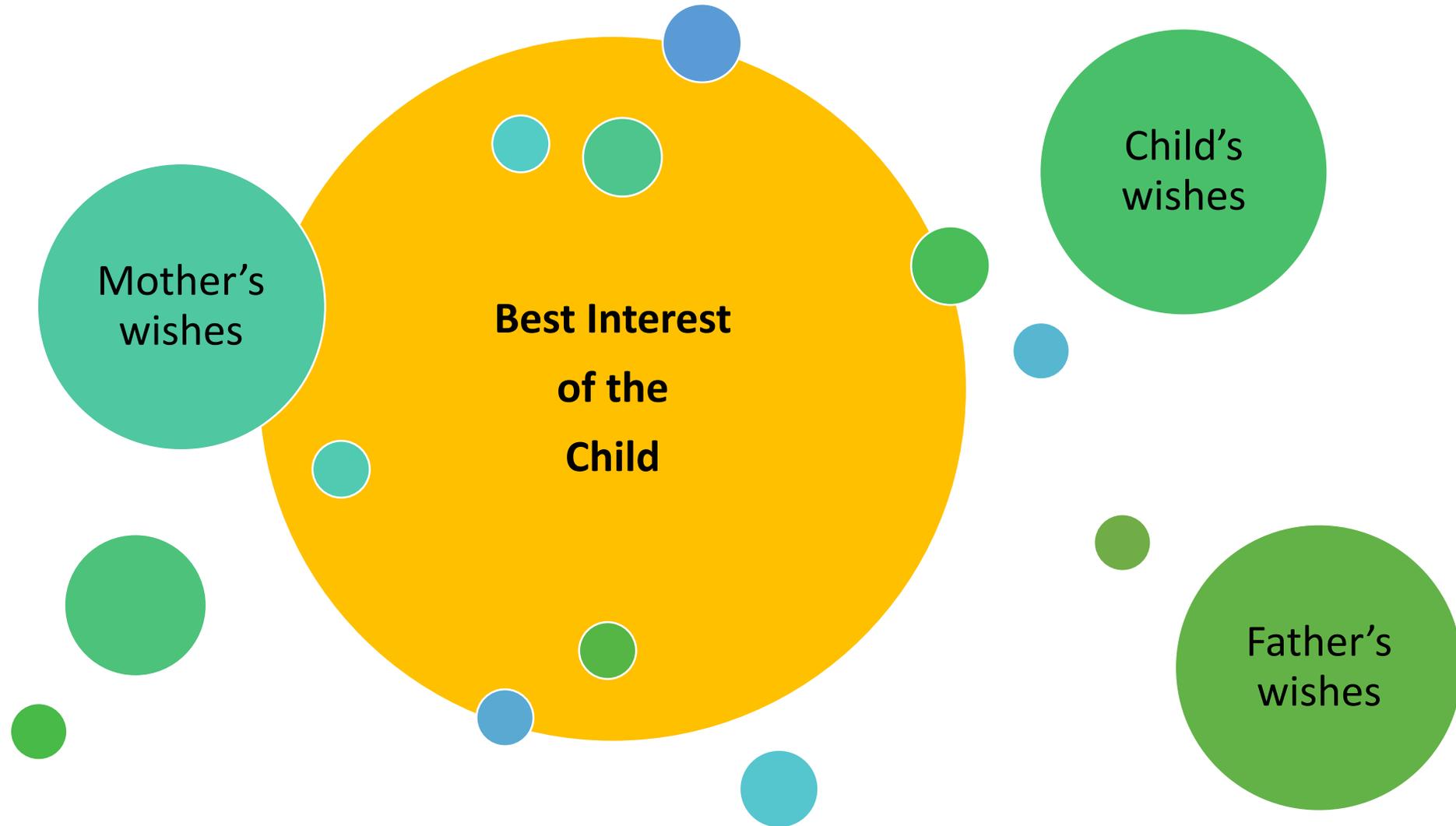
Scenario 1



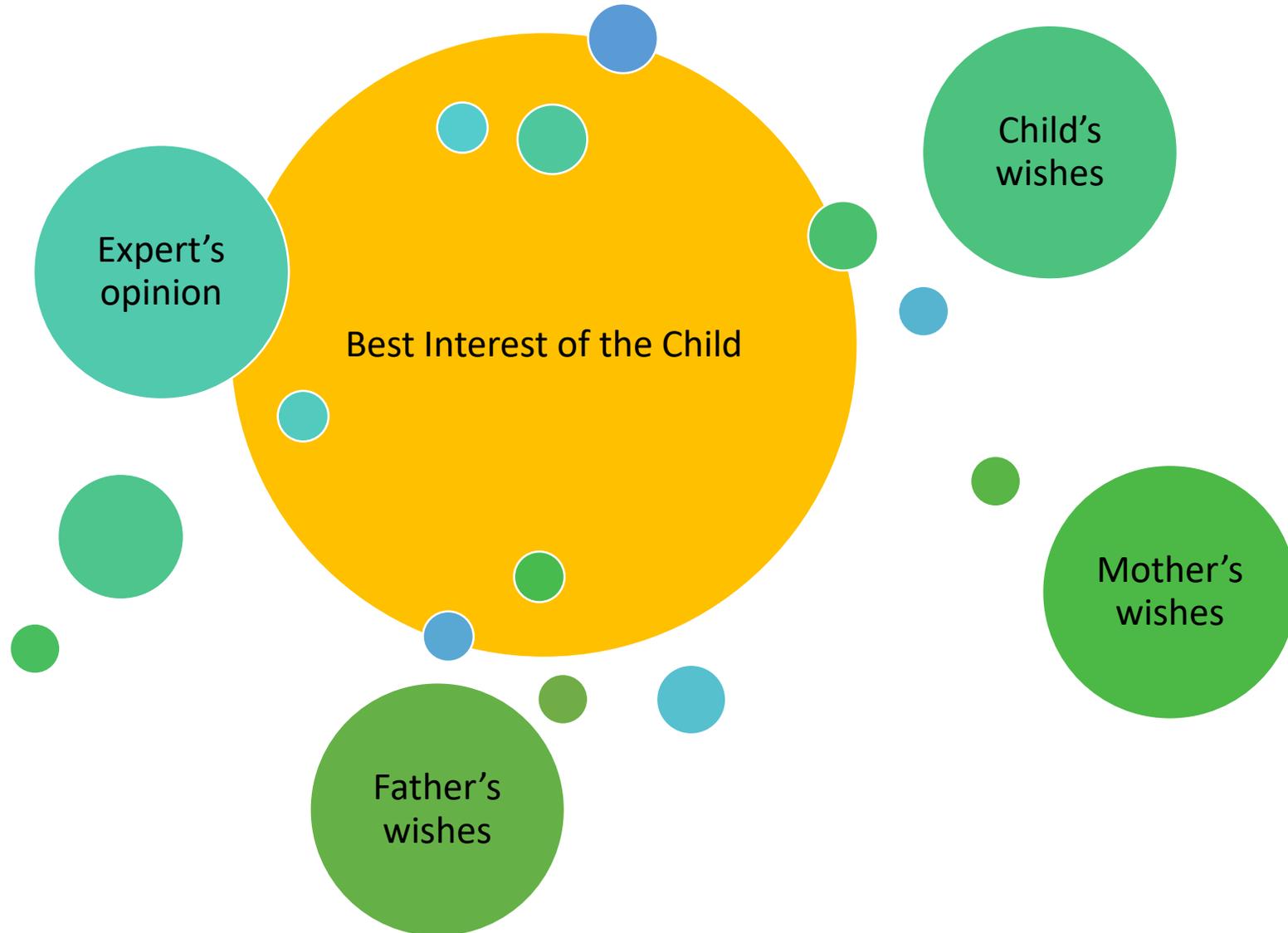
Scenario 2



Scenario 3



Scenario 4



Reality Check on application of the Best Interest Principle

- Presumption that children generally lack capacity to understand what is in their best interest.
- Presumption that parents know what is best for their child.
- Presumption that parents know ***and do*** what is best for their child.
- Decision making bodies assume they know what is best, without consulting the child, experts and significant people in the child's life.
- Decision making bodies are not even concerned with Best Interest of the child.

Principle of Family Responsibility: “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.”
S. 3(v), JJA 2015.

- Preamble, UNCRC: “**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 “that the child for the full and harmonizing development of his or her personality, **should grow up in a family environment**, in an atmosphere of happiness, love and understanding”.
- Art. 37(c), UNCRC: “**the right to maintain contact** with his or her family through correspondence and visits, **save in exceptional circumstances**”.
- Art. 1, UNCRC: “**No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence,**” hence, separation of a child from family and home should also be only in ‘exceptional circumstances’.
- S. 39(1), JJA: . **Rehabilitation & social reintegration “through family based care** such as by restoration to family or guardian”.

Principle of Family Responsibility: Implications for JJB

- The following principles are inter-related -
 - **family responsibility,**
 - **institutionalization as a measure of last resort, and**
 - **repatriation and restoration**
- They indicate that as a norm, a child's life with his/her family should not be disrupted, if avoidable, and only if separation is in the best interest of child.
- If CICL's vulnerability is exacerbated due to family's condition, and family is otherwise not abusive/neglectful/exploitative, an order for '**sponsorship**' could improve the child's situation. S. 2(58): defines "sponsorship" as provision of supplementary support, financial or otherwise, to the families to meet the medical, educational and developmental needs of the child.

Principle of Safety: “All measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse and maltreatment while in contact with the care and protection system, and thereafter.” Section 3(vi), JJA.

- Rationale for several provisions under the Act:
 - not to be kept in **police lock-ups / jails**;
 - **denial of bail** in circumstances when release may expose the child “to **moral, physical or psychological danger**”; S. 12(1), proviso.
 - arrangement of **community service** by DCPU on completion of inquiry; Rule 11(5).
 - **non-disclosure of child’s identity**; S. 74(1), and
 - arrangements of safety within CCIs. Rule 21(5)(vi).
- JJB to ensure as far as possible, that orders passed do not put the child at risk.

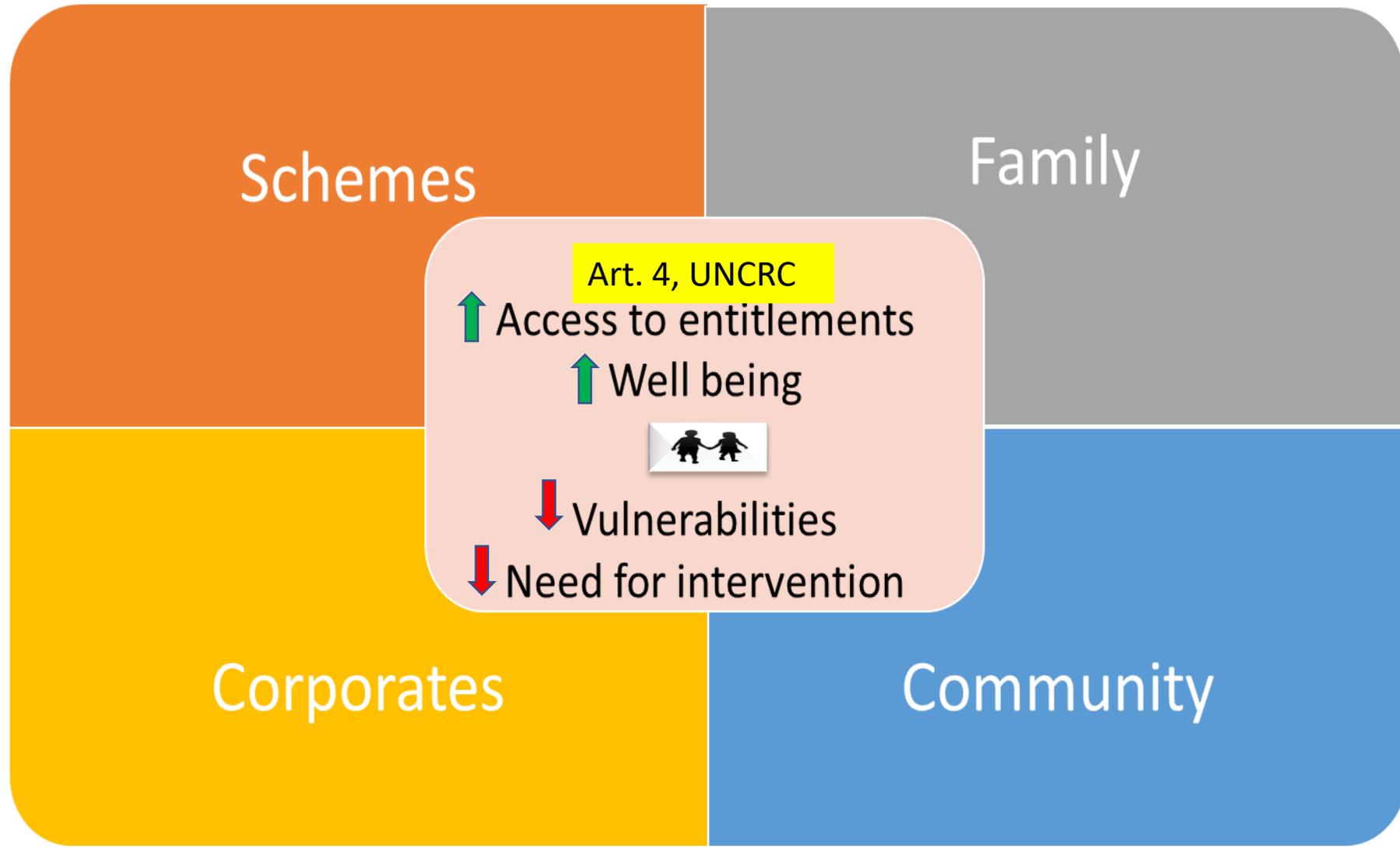
Principle of Safety: Implications for JJB

- State is the de-facto guardian of the CICL while child is in the JJ system.
- 'Abuse' & 'maltreatment' are included in the definition of 'violence', ranging from neglect to sexual abuse and torture. UN General Comment No.13, para 4.
- 'Harm' is broadly construed in the context of the JJ system, to include:
 - **emotional strain due to separation from family / familiar environment;**
 - **education disrupted due to absence from school;**
 - **ill effect on reputation due to stigma attached to juvenile delinquency, etc.**
- It is the task of the JJ system to control the effect of 'harm' so caused, by
 - assuring the child contact with family / friends -Rule 74;
 - providing educational facilities within the OH/SH/Place of Safety -Rule 36;
 - ensuring continuation of education on release- Rule 7(1)(iii)
 - ensuring non-disclosure of identity of the child – S.74,, and
 - ensuring the child does not suffer any disqualification in future – S.24, except in cases of heinous offence.

Principle of Safety: Implications for JJB -CCIs

- “Every institution shall evolve a system of ensuring that there is no abuse, neglect and maltreatment”
- Any case of alleged abuse/neglect/exploitation of child in a CCI to be reported to the person-in-charge of the institution and JJB. Rule 76
- Functions of JJB:
 - Pass directions to register an FIR;
 - Pass directions for disciplinary action against the perpetrator; and/or
 - Pass directions for transfer of the perpetrator’s
 - Pass directions to transfer the child’s from the CCI.

Principle of Positive Measures: “All measures are to be mobilized 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.” S. 3(vii), JJA.



Principle of Positive Measures: Implications for JJB

- JJB:
 - Recognize that the establishment of a robust community preventive programme by the State could have protected the child from crime.
 - The purpose of the JJ system is to instill a positive influence on the child through appropriate interventions.
 - Impart constructive inputs to equip a child to cope with life in OH/SH/Place of Safety
 - Seek to ensure that the State appoints qualified, trained and experienced human resources to deal with children. Rule 89.
 - Ensure linkages with the functionaries of the CCIs, so as to ensure provision of suitable services and access to opportunities/entitlements under other laws and schemes.

Principle of Non-stigmatizing Semantics: “Adversarial or accusatory words are not to be used in the process pertaining to a child.” S. 3(viii), JJ Act, 2015.

- ‘Mental violence’ includes ‘verbal abuse’. UN General Comment No.13, para 21.
- Criminal justice parlance is
 - derogatory, accusatory, pejorative, and is not suitable for a child.
 - violates the Principle of Dignity and Worth
 - violates the Principle of Safety.
- Child Friendly semantics aids in rapport building
- While communicating with the child, JJB shall use child friendly techniques through its conduct & shall adopt a child friendly attitude with regard to body language, facial expression, eye contact, intonation & volume of voice while addressing the child”- Rule 6(5);
- No staff of CCIS shall use abusive or vulgar language - Rule 66(6);

Suggested Child Friendly Semantics

	Juvenile in Conflict with Law, Accused, Undertrial	Child alleged to be in Conflict with Law
	Arrest	Apprehend
	Trial	Inquiry
	Convict	Child Found to be in Conflict with Law

Principle of Non-waiver of Rights: “No waiver of any of the right of the child is permissible or valid, whether sought by the child or person acting on behalf of the child, or a Board or a Committee and any non-exercise of a fundamental right shall not amount to waiver.” S. 3(ix), JJ Act, 2015.

- This principle guarantees all Constitutional rights & those enshrined in various laws, without exception.
- A child is dependent on State Government to create opportunities & facilities to enable him/her to avail his/her rights within the JJ system.
- If a child is not provided an opportunity to enjoy his/her rights, or is unable to do so, it cannot be deemed that he/she has waived them - such child is not estopped from thereafter claiming his/her rights.
- JJB has duty to ensure protection of all rights.
- As a child’s rights are integral to his/her well-being, neither the child or any other person/authority can waive the same on the child’s behalf.

- Children in OH are entitled to free and compulsory education up to the elementary level under RTE Act, 2009.
- In the case of sexual assault on a child by management / staff of Sp. Home, a child is entitled to action under POCSO Act, 2012.
- An admission by the child before the police that he /she has committed the offence, cannot be credited by the JJB, as it would amount to waiver of the right against self-incrimination guaranteed under Art. 20(3) of the Constitution.
- A child's parent declining to engage or accept the services of a lawyer cannot be accepted by the JJB, as it would amount to waiver of the child's right to a fair inquiry (trial), guaranteed under Art. 21 of the Constitution.

Principle of Equality and Non-discrimination: “There shall be no discrimination against a child on any grounds including sex, caste, ethnicity, place of birth, disability and equality of access, opportunity and treatment shall be provided to every child” – S. 3(x), JJA.

- Equality & non-discrimination are fundamental rights under Constitution –Art. 14, 15(1)&(3).
- Included under all international human rights treaties, and in most clauses of UN GC 10.
- UDHR:
 - Art. 1 -“All human beings are born free and equal in dignity and rights.”
 - Art. 7 -“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”
 - Art. 2 -gives examples of grounds on the basis of which distinction should not take place - “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth **or other status.**”
- UNCRC: -children should be treated “without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth **or other status.**”
- The principle implies that JJ legislation should be applied equally to all children within the JJ system; no child should be denied protection; and all children should be treated in a manner that is in their ‘best interest’.

- Special measures taken for the benefit of a child requiring special assistance does not amount to discrimination - “disabled friendly toilets” in CCIs.
- Measures should also be taken to prevent bias and societal discrimination against children /adults who have passed through the JJ system.
- A CICL may face discrimination due to the nature of the offence

DYNAMICS OF EQUALITY

FORMAL EQUALITY



SUBSTANTIVE EQUALITY



REMOVAL OF BARRIERS ADDRESSING THE CAUSE OF INEQUALITY



Exercise: Determine if the following violate the Principle of Equality

- Children who allegedly commit offences are dealt within the JJ system and not the adult criminal justice system.
- A child living in the OH is given additional nutritional supplements because of anemia.
- Girls alleged and found to be in Conflict with Law are placed in State Homes for Women instead of in Observation Homes for Girls/Special Homes for Girls.
- Children alleged to have committed heinous offences are kept separately from those who are alleged to have committed petty and serious offences in the Observation Home.

Privacy and Confidentiality: “Every child shall have the right to protection of his privacy and confidentiality, by all means and throughout the judicial process.” – S. 3(xi), JJA.

- The ‘right to privacy’ is the ‘right to be left alone’ - declared a fundamental right by Supreme Court. Justice K.S. Puttaswamy (Retd.) v. UoI, (2017) 10 SCC 1.
- ‘Confidential’ is different from ‘privacy’. It means “Intrusted with the confidence of another or with his secret affairs or purposes; intended to be held in confidence or kept secret; done in confidence.”
- Though the ‘right to be left alone’ of a CICL may be forfeited to some extent, this principle ensures a child protection from publicity, especially that which reveals his/her identity, and from undue interference during stay in OH/SH/Place of Safety.
- S. 74, JJ Act 2015 protects a child against disclosure of his/her identity, - it is an offence to publish a report in any medium regarding any inquiry or investigation or judicial procedure which discloses “the name, address or school or any other particular, which may lead to the identification” of a CICL.

How can the JJB apply the Principle of Privacy & Confidentiality?

- Information obtained regarding a child during the JJ process should not be shared, and should be used only in the interest of the child, for eg.,
 - Report on Preliminary Assessment -S. 15(1), JJ Act.
 - Social Investigation Report– S. 8(3)(e), JJA.
- Infrastructure- design of sanitation facilities.
- Visits from family.
- JJB “may, if it so thinks fit, communicate the substance thereof...to the child or to the child’s parent or guardian, and may give...the child/parent/guardian, an opportunity of producing evidence as may be relevant to the matter stated in the report” – S. 99(1), JJA.

How can the JJB apply the Principle of Privacy & Confidentiality?

- Q: Should a victim be given access to reports filed before JJB in respect of a CICL?
- A “victim shall not be denied access to their case record, orders & relevant papers.” S. 99(2), JJA.
 - Recent amendments to CrPC has broadened role of victim in criminal proceedings - right “to engage an advocate of his choice to assist the prosecution” - S. 24(9), proviso, CrPC.
 - “right to prefer an appeal” - S. 372, proviso, CrPC.
- It is not known who is meant by ‘victim’ under S. 99(2), JJA, but CrPC defines ‘victim’ - “a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression ‘victim’ includes his or her guardian or legal heir” – S. 2(wa), CrPC.

How can the JJB apply the Principle of Privacy & Confidentiality?

- Q: Should JJB allow the CICL and his/her lawyer access to documents filed before the JJB?
- Any communication made by a CICL to his / her lawyer is 'privileged communication,' protected from disclosure under S. 126, Indian Evidence Act.
- JJB to ensure that CICL is allowed to meet with his / her lawyer in privacy in the OH/SH/Place of Safety, out of hearing of management / staff of such institution.

Principle of Institutionalization as Measure of Last Resort: “A child shall be placed in institutional care as a step of last resort after making a reasonable inquiry.”

- Keeping a CICL in a jail and /or police lockup is prohibited under the JJA.
- “Arrest, detention or imprisonment of a child shall be **in conformity with law** and shall be used only as a measure of **last resort** and for the **shortest appropriate period of time**” –Art, 37(b), UNCRC.
- “Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time” Rule 13.1, Beijing Rules.
- “**Whenever possible, detention pending trial shall be replaced by alternative measures**, such as close supervision, intensive care or placement with a family or in an educational setting or home” -Rule 13.2 Beijing Rules.
- “Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be **limited to exceptional cases.**” Rule 2. Havana Rules.

Principle of Detention as Measure of Last Resort

- Basis for S. 12, JJA -Bail to a person who is apparently a CACL - ensuring that children are released on bail at the earliest, irrespective of the nature of offence; in appropriate cases the child may be released without surety or “under the supervision of a PO or under the care of any fit person.”
- Grant of bail is the rule, and rejection an exception, i.e. circumstances where release on bail would not be in interest of the child – S. 12.(1), JJA, proviso.
- This Principle is also closely related to Principle of Best Interest and Principle of Family Responsibility.
- On grant of bail with surety, if a child is unable to procure surety, the JJB should consider “modification of the conditions of bail,”- S. 12(4), JJA.
- Though the “minimum necessary period of time” is not expressed in the principle, the sentiment is reflected in S. 18(1), JJA and re-iterated in Rule 11(11).
- S. 18(1)(f) does not amount to institutionalization: child is “placed under the care and supervision of any fit facility for ensuring the good behavior and child’s well-being..” -a supervisory order, not a detention order.

Impact of Institutionalization on Children

- Education
- Privacy
- Leisure, play and recreation
- Access to mass media and information
- Access to healthcare
- Access to family & friends
- Vulnerability to violence
- Impact on mental health
- Independent living skills

Art. 37(b), UNCRC: No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

S. 3(xii), JJA - Principle of institutionalisation as a measure of last resort: A child shall be placed in institutional care as a step of last resort after making a reasonable inquiry.

How can the JJB apply the Principle of Institutionalization as a Measure of Last Resort?

- Ensure speaking orders with reasons as to why detention in a Special Home is in the Best Interest of the child found to be in conflict with law, and why other dispositional orders are not suitable.
- Also, ensure that detention is for the minimum necessary period.
- Principle of Repatriation and Restoration may also be referred to.
- Proactively explore early release of a child placed in a SH/Place of Safety under S. 97, JJA and Rule 82, either absolutely or on such conditions as it may think fit to impose.

Principle of Repatriation and Restoration: “Every child in the juvenile justice system shall have the right to be re-united with his family at the earliest and to be restored to the same socio-economic and cultural status that he was in, before coming under the purview of the Act, unless such 127restoration and repatriation is not in his best interest.”

- A CICL should as soon as possible be sent to the village, city or country where his/her family resides.
- “Restoration to family or guardian” is the preferred process of rehabilitation and social reintegration - S. 39(1), JJA.
- ‘Repatriation’ -sending someone back to their own country.
- ‘Restoration’ -returning a child to a family-setting.
- Though, the term ‘restoration’ has been chiefly used in relation to CNCP, the same may be aptly applied to CICL, more particularly given the principle of institutionalisation as a measure of last resort.

Principle of Restoration and Repatriation

- As separation from family is only in exceptional circumstances, most dispositional measures encourage child's reuniting with family, with or without supervision.
- If JJB selects placement of a child in SH, such child should be kept in a SH "located nearest to the place of residence of the child's parent or guardian" - Rule 11(8).
- However, reunification with family may not always be in the best interest of the child.
- If the JJB finds the child not to have committed any offence, it can
 - "pass order to that effect," – S. 17(1), JJA, or
 - "refer the child to the Committee with appropriate directions."
- The concern of the JJ system is not mere adjudication - irrespective of the final decision, the process is equipped to connect the child with supportive services within the JJ system and/or the community.

Principle of Fresh Start: “All past records of any child under the Juvenile Justice system should be erased except in special circumstances” - S. 3(xiv), JJA.

- **Aim of JJ** -to ensure rehabilitation and social re-integration, - impart positive inputs to enable child to lead an enriched life, -not hamper child’s future.
- JJA provides for CICLs to be given a ‘fresh start,’ with **no baggage**.
 - **Destroying records** of conviction after a prescribed period, -Rule 14.
 - **Removal of disqualification** attached to the conviction- S. 24(1), JJA.
- Beijing Rules -“**Records of juvenile offenders shall not be used in adult proceedings** in subsequent cases involving the same offender” -Rule 21.2
- This clause should not be restricted in deployment only to adult offenders - such records should **also not be used in subsequent juvenile proceedings**.

Principle of Fresh Start

- It is unacceptable for a child who has been apprehended for a second or third time for separate offences, to be labeled a 'habitual offender'.
- When a child re-enters the JJ system, one should accept that the needs of the child were not previously correctly assessed, or, that the response was inappropriate and greater effort and energy should be expended on such case.
- The proviso to S. 24(2), JJA, however allows retention of records of conviction in respect of a child whose matter has been dealt with as an adult by the Children's Court.
- Such child also suffers disqualification on conviction, thereby denying him / her protection under the principle of fresh start.
- Such disqualification also does not conform with the object of juvenile justice legislation.
- A child without exclusion requires to be protected from any adverse effect due to his / her time within the JJ system. The phrase "except in certain circumstances" contained in the present principle, allows the JJB to retain records of a CICL only in situations where the same is in the interest of the child.

Principle of Diversion: “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.”

- JJ system is a ‘diversion’ from criminal justice system, -philosophy is restorative and rehabilitative rather than punitive and retributive.
- Since, enactment of Children Acts, India had adopted a distinct system for CIL.
- Beijing Rules: “Efforts shall be made to establish, in each national jurisdiction, a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice” – Rule 2.3.
- UNCRC:
 - - “the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law” – Art. 40(3).
 - “Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.” – Art. 40(3)(b).
 - -states that ‘arrest’ of a child “should be used only as a measure of last resort”. Art. 37(b).
- UN General Comment No. 10:
 - “Given the fact that the majority of child offenders commit only minor offences, a range of measures involving removal from criminal / JJ processing and referral to alternative (social) services (i.e. diversion) should be a well-established practice that can and should be used in most cases.” – para 24.
 - ‘Diversion’ is “not limited to children who commit minor offences”. And that, “In addition to avoiding stigmatization, this approach has good results for children and is in the interests of public safety, and has proven to be more cost-effective.” - para 25.

Principle of Diversion: Points to Ponder

Diversion (i.e. measures for dealing with children, alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings) **should be used only when there is compelling evidence that**

- A) the child committed the alleged offence,
 - B) that he/she **freely** and **voluntarily admits** responsibility -no intimidation/ pressure; and,
 - C) the **admission will not be used against him /her in any subsequent legal proceeding**". (UN GC 10, para 27.
- The word 'diversion' is not included in JJA, 2015, or in JJ Model Rules, 2016, though shades of 'diversion' are contained in the said Model Rules:
 - - "No First Information Report shall be registered except where a heinous offence is alleged to have been committed by the child, or when such offence is alleged to have been committed jointly with adults" – Rule 8.1.
 - - "the power to apprehend shall only be exercised with regard to heinous offence, unless it is in the best interest of the child" –Rule 8.1, proviso.

Principle of Diversion

- Diversion at different stages of the process.
- The concern of JJ system is not the offence alone, but also the offender - what is 'it' that resulted in a child offending, and what should be done to address the 'cause' of such offending.
- The JJ system prevailing in India, therefore, adopts a multi-disciplinary approach as is evident from the diverse composition of JJB. Positive inputs and influences through intervention drawn from expertise informed from a range of disciplines, specific to the needs of a particular child, is the focus. Denying any child protection of JJ system is contrary to the principle of diversion.
- 'Diversion' from CCIs into family-setting / community-setting, is also reflected in the provisions of law relating to bail and final orders, and is also emphasized with insertion of the Chapter on Rehabilitation & Social Reintegration, in JJ Act, 2000 and 2015.
- Absolute 'diversion' from JJ system is not the prerogative of police - it is for JJB to ascertain after hearing the relevant parties, the extent of intervention depending on the needs / interest of the child and the nuances of a particular case.
- The 'circumstances of the child' that should ascertain the extent of intervention. Unfortunately, in practice, it is the 'nature of the offence' that alone determines the same.

Principle of Natural Justice: “Basic procedural standards of fairness shall be adhered to, including the right to a fair hearing, rule against bias and the right to review, by all persons or bodies, acting in a judicial capacity under this Act.”

- In *Canara Bank v. Debasis Das*, the SC described the concept of ‘natural justice’.
 - “Rules of natural justice are not codified canons. But they are principles engrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values...Natural justice are those rules that have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial or administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.”
 - ...“Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law.”
 -“may be implied from the nature of the duty to be performed under a statute.”
 - “What particular rule of natural justice should be implied and what its context should be in a given case must depend on a great extent to the facts and circumstances of that case, the framework of the statute under which the enquiry is held.”

PRINCIPLES – INITIAL CHECKLIST FOR JJBS

- Ensure **every provision of the Act and Rules are interpreted in accordance with Principles**
- **Ensure all stakeholders and duty bearers working with CICs also adhere** to these Principles
- Examine each of these principles, their links with the Constitution and other legislations / practices, as also international instruments, and how they may be effectively used to **bolster reasoning while passing and writing speaking orders** in the interest of the child.
- **Engage rigourously with the balancing act** that comes with trying to identify which Principle will take precedence over others.
- **Proactive application of Principle of positive measures** – linkages and co-ordination, ensure all rights are protected
- Read UN General Comments of the UN Committee on the Rights of the Child for guidance on juvenile justice and how to apply the principles. See:
https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11

References

- *Maharukh Adenwalla, Handbooks for Advocates working with CICLs, Centre for Child and the Law, National Law School of India University, 2018*
- *Frequently Asked Questions on the Juvenile Justice (Care and Protection of Children) Act, 2015, Centre for Child and the Law, National Law School of India University, 2018.*