

Juvenile Justice Law and Child Adoption in India: An Overview

Abstract

Child adoption is not a new phenomenon in India and tremendous change has been witnessed in the adoption process from ancient to modern times. In India there are two legislations- The Hindu Adoption and Maintenance Act, 1956 and the Juvenile Justice (Care and Protection of Children) Act, 2015 which specifically deal with child adoption. The adoption process under Hindu Adoption and Maintenance Act, 1956 is confined only to Hindus. There is Guardians and Wards Act 1890 which confers upon a child only the status of a ward. The only adoption law in India which accords an opportunity to adopt and be adopted irrespective of religion is the Juvenile Justice (Care and Protection of Children) Act, 2015. The implication of the Juvenile Justice (Care and Protection of Children) Act, 2015 on adoption of orphan, abandoned and surrendered children requires a legal discourse on its historical development and an analysis of the existing provisions of the Juvenile Justice Law in India. Hence, an attempt has been made in the present paper by the author to discuss the existing provisions relating to adoption of children under the Juvenile Justice Law in India along with an insight into the historical context.

Keywords: Juvenile Justice Law, Adoption, Children, Orphan, Surrendered, Abandoned, Child Welfare Committee.

Introduction

Adoption of children in India is not a new phenomenon. Child adoption has been in vogue since ancient times and the object behind adoption was either to continue the family lineage or to fulfil religious obligations. Pursuant to the enactment of the Hindu Adoption and Maintenance Act, 1956 secular object underlying adoption was emphasised which brought about radical change in the existing Hindu Law. However the Hindu Adoption and Maintenance Act, 1956 governs adoption only among Hindus and non-Hindus cannot adopt under this law. The Non-Hindus can become guardians of their wards under the Guardians and Wards Act, 1890.

Attempts to formulate uniform law on adoption were made but failed due to diversity in personal laws and it was only after the enactment of the Juvenile Justice (Care and Protection of Children) Act, 2000 that child adoption irrespective of the religion of the adoptee and the adopter became possible. This development in child adoption law brought about a paradigm shift by providing for adoption of orphaned, abandoned and surrendered children and delinked adoption from religion. The Juvenile Justice Law is supplemented by the Juvenile Justice Rules and the Guidelines Governing the Adoption of Children in India.

In the present paper an attempt has been made by the author to give an overview of the provisions relating to child adoption under Juvenile Justice Law in India.

An insight into the genesis of juvenile justice regime in India is necessary to understand the trend of its development before discussing the existing Juvenile Justice Law governing child adoption in India.

Sources of Data

For the purpose of the present study both primary and secondary sources of data have been utilized. The primary legal sources which have been relied upon for the present paper include The Guardians and Wards Act, 1890, The Hindu Adoption and Maintenance Act, 1956, Juvenile Justice Act, 1986, Juvenile Justice (Care and Protection of Children) Act, 2000, Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, Juvenile Justice (Care and Protection of Children) Amendment Act, 2011, Juvenile Justice (Care and Protection of Children) Act, 2015, Juvenile Justice (Care and Protection of Children) Rules, 2007, Juvenile Justice (Care and Protection of Children) Amendment Rules, 2011,

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Guidelines Governing Adoption of Children 2011 and Guidelines Governing Adoption of Children 2015. Secondary sources of data include books, journals and internet materials.

Objective of the Study

To discuss the provisions relating to adoption of children under the Juvenile Justice Law in India.

Historical Background

Law relating to adoption of children in India was confined only to Hindus under the Hindu Adoption and Maintenance Act, 1956. This Act which is still in force permits adoption of Hindu children by Hindu adoptive parents. The Guardians and Wards Act 1890 is another legislation which enables non-Hindus to be guardians of children who are regarded as wards under the Act. This statute does not confer upon the guardian the status of adoptive parent nor is the ward considered as an adopted child. In the absence of any secular law governing adoption these two legislations had deprived a large section of orphaned and abandoned children from the opportunity of being adopted and nurtured in an atmosphere of parental care. Moreover persons who were willing to be parents can be only guardians under the Guardians and Wards Act, 1890 and children brought up as wards have no inheritance rights in his/her guardian's family.

The lack of uniform and secular law on adoption of children drew attention of the legislature in India and the Adoption of Children Bill, 1972 was introduced in the Rajya Sabha on 6th January, 1972 which sought to provide a uniform law of adoption applicable to all communities including the Muslims but it lapsed owing to the strong opposition of Muslim community who claimed that it would interfere with their personal law.¹

Another attempt to enact a comprehensive adoption law was made through introduction of the Adoption of Children Bill, 1980 in the Lok Sabha on 16th December 1980. The Bill had provided that any person under 18 years of age, not already adopted or married could be adopted by any person of sound mind. The adopter had to be at least 25 years old. Adoption by single person was permitted. Married couples had to adopt jointly. The age difference between the adopter and adoptee was required to be 21 years unless otherwise provided by Court. Adoption could be legal only pursuant to an order of the District Court or City Civil Court and appeal against such order could be made to the High Court. A child could be adopted only with the consent of parents, guardians or manager of child care institution. If the child to be adopted was old enough to understand his/her interest then his/her wishes were to be given due consideration. Illegitimate children could be adopted by its parents either solely or jointly with spouse. Male persons could not adopt a female child. Court was conferred the power to intervene if child was ill-treated. Licensing authority was to be set up by law and no adoption institution could operate without licence. Child welfare was paramount consideration. The effect of adoption as per the Bill was the severance of all ties by the adopted child from his biological family and the adopted was

be conferred the status of a child born in wedlock to the adoptive parents. Muslims were excluded from the purview of the Bill. The Bill also provided for regulating inter-country adoption. The Adoption of Children Bill, 1980 had definitely proposed a more modernised adoption law. However, following strong criticism and opposition the Bill lapsed.² After the lapse of the Bill in 1980 no attempt was made to bring any other legislation on adoption of children till the year 2000.

Juvenile Justice Law and Child Adoption

In the year 2000, the Parliament in India enacted the Juvenile Justice (Care and Protection of Children) Act, 2000, which provided for a secular law on adoption of orphaned, abandoned and surrendered children. The Juvenile Justice (Care and Protection of Children) Act, 2000 repealed the Juvenile Justice Act, 1986.

The Juvenile Justice system in India is based on the principle of promoting, protecting and safeguarding the rights of children. Recognizing the vulnerability of children and the need for special and different treatment, it was in 1986 that for the first time, a uniform Juvenile Justice Act was enacted for the whole of India. This Act incorporated the United Nations Standard Minimum Rules for administration of Juvenile Justice (Beijing Rules) of 1985. Juvenile Justice Act, 1986 was enacted for the care, protection, treatment, development and rehabilitation of neglected and delinquent children.³

The basic aim of Juvenile Justice Act 1986 was to segregate the neglected juvenile from the delinquent juvenile and to provide treatment and training to the different categories of children separately, viz. in juvenile homes and special homes. The Act was not properly implemented and it did not provide for any special provision for children who were in the need of care. Moreover, rehabilitation machinery for the children was not structured in the Act. Therefore, strong urge was felt to bring about necessary changes in order to convert the Juvenile Justice Act, 1986 from welfare legislation to an instrument for the empowerment of the children for the protection of their rights. To fulfil this objective and to overcome the shortcomings of Juvenile Justice Act, 1986, the legislature enacted the Juvenile Justice (Care and Protection of Children) Act, 2000 by repealing Juvenile Justice Act, 1986.⁴

Non- implementation of Juvenile Justice Act, 1986 together with India's ratification of the United Nations Convention on the Rights of the Child (CRC), 1989 on 11th December, 1992, as well as changing social attitudes towards offences by children and the need for a more child-friendly juvenile justice system, were some of the factors that led to the passing of the Juvenile Justice (Care and Protection of Children) Act, 2000. Juvenile Justice (Care and Protection of Children) Act, 2000 is based on the provisions of the Constitution of India- Articles 15(3)⁵, 21⁶, 21A⁷, 23⁸, 24⁹, 39(e)¹⁰, 39(f)¹¹, 39A, 45¹², 47¹³ and 51A(k)¹⁴ which impose on the State a primary responsibility of ensuring that all the needs of children are met and that their basic rights are fully protected, and the Convention on the Rights of the Child which

emphasizes conferment of rights on children, and reintegration of juveniles and care and protection of vulnerable children, with a view to furthering their right to survival, development, protection and participation.¹⁵

The Juvenile Justice (Care and Protection of Children) Act, 2000 categorized the children coming under its purview as 'children in need of care and protection' and 'children in conflict with the law' and emphasized on providing for proper care, protection, and treatment by catering to the developmental needs of such children and adopting of child-friendly approach in the settlement and disposition of matters in the best interest of children and for their ultimate rehabilitation through various established institutions under the Act. The Juvenile Justice (Care and Protection of Children) Act, 2000 defined the term 'child in need of care and protection' to include within it, orphan, abandoned and surrendered children. It also incorporated provisions of adoption for rehabilitation of orphaned, abandoned and neglected and abused children under Section 41 as an alternative to institutional care.

The legal status of adopted child was not declared equal to that of biological legitimate child nor was the concept of adoption clearly defined in the Juvenile Justice (Care and Protection of Children) Act, 2000. This lacuna was filled up by the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006 through incorporation of the definition of "adoption" in section 2(aa) as "the process through which the adopted child is permanently separated from his biological parents and becomes the legitimate child of his adoptive parents with all rights, privileges and responsibilities that are attached to the relationship".¹⁶ Through this amendment the status of adopted child has become equal to that of a biological child. Juvenile Justice (Care and Protection of Children) Amendment Act, 2006 revised the Juvenile Justice (Care and Protection of Children) Act, 2000 with 26 amendments and came into effect from 22nd August, 2006 as the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006.¹⁷

The amendment in 2006 was brought to revise and strengthen the Act and instil a child-centric rehabilitation and family restoration focused system. It took care of every aspect of the children in need of care and protection of the State, which includes their health care, diet, education, vocational training, recreation facilities etc and also their personal requirements of clothing, shelter, sanitation etc.¹⁸

With a view to provide for better implementation and administration of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 as amended in 2006 in its true spirit and substance, Model Rules were framed by the Central Government in 2007, known as the Juvenile Justice (Care and Protection of Children) Rules, 2007. They prescribe and restate the fundamental principles involved in the administration of Juvenile Justice and the protection of Children – such as the 'presumption of innocence', 'principle of dignity and worth', deference to the 'best interests of the child', principle of 'family responsibility, principle of restoration, and

the principle of last resort among others. These principles are to be borne in mind by all the concerned stakeholders while discharging their duties under the Act towards juvenile in conflict with law and child in need of care and protection including orphaned and abandoned children. Chapter V of the Model Rules, 2007 deal with provisions relating to rehabilitation and social re-integration of children through adoption.¹⁹

Juvenile Justice (Care and Protection of Children) Act, 2000 as amended in 2006 was guided by the principle of last resort which emphasized that institutionalization of a child must be a step of the last resort after reasonable inquiry and that too for the minimum possible duration. Hence, the Juvenile Justice (Care and Protection of Children) Act, 2000 under section 40 provided that the rehabilitation and social reintegration of children should begin during their stay in children's home and carried out alternatively through the process of adoption, foster care, sponsorship and sending the child to an after-care organization.

The Juvenile Justice (Care and Protection of Children) Act, 2000 read with Juvenile Justice (Care and Protection of Children) Rules 2007 had emphasized that the primary responsibility of bringing up children, providing care, support and protection was with the biological parents. However, in exceptional situations, this responsibility may be bestowed on willing adoptive or foster parents. All decision making for the child required involvement of the family of origin unless it was not in the best interest of the child to do so. The family - biological, adoptive or foster (in that order), were to be held responsible and provide necessary care, support and protection to the child under their care and custody under the Act, unless the best interest measures dictated otherwise.

Chapter IV of the Juvenile Justice (Care and Protection of Children) Act, 2000 dealt with the rehabilitation and social re-integration of children. The primary aim of rehabilitation and social reintegration was to help children in restoring their dignity and self-worth and mainstream them through rehabilitation within the family where possible, or otherwise, through alternative care programmes and long term institutional care was to be of last resort.²⁰ Adoption was the first alternative to institutional care for rehabilitation and social reintegration of orphan and abandoned children. Rule 33(1) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 stated that the primary aim of adoption was to provide a child who could not be cared for by his biological parents with a permanent substitute family.

The Act provided that orphan and abandoned children could be given in adoption by a court after satisfying itself regarding the investigation being done as required for giving such children in adoption in accordance with the guidelines issued by the State government or Central Adoption Resource Agency (CARA) and notified by Central Government.²¹ The Juvenile Justice (Care and Protection of Children) Act, 2000 did not lay down the procedure for adoption of orphaned, abandoned and surrendered children. The in-country and inter-country

adoption procedures were laid down by the CARA in the Guidelines Governing Adoption of Children 2011. The Guidelines Governing Adoption of Children 2011 had been replaced by the Guidelines Governing Adoption of Children 2015 which came into force on 15th August, 2015. The Central Government in view of its powers under Section 41(3) by a notification provided for regulation of adoption of orphan, abandoned or surrendered children by the Guidelines Governing Adoption of Children 2015 (Guidelines 2015) issued by the Central Adoption Resource Authority (CARA). The Guidelines 2015 drew support from the Juvenile Justice (Care and Protection of Children) Act, 2000 and the Rules. The Guidelines 2015 laid down certain more eligibility criteria for the prospective adoptive parents.

Some of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 as amended in 2006, and Model Rules 2007 were further amended by the Juvenile Justice (Care and Protection of Children) Amendment Act, 2011 and Juvenile Justice (Care and Protection of Children) Amendment Rules, 2011 respectively.

Problems relating to abuse of children in institutions, lack of adequate facilities and quality care in Children Homes, sale of children for adoption purposes, non-accountability of child care institutions, delay in adoption due to unclear procedures²² were encountered during the implementation of the Juvenile Justice (Care and Protection of Children) Act, 2000 which necessitated a complete overhaul of the law on adoption of children under the juvenile justice system in India. Responding to need for a more comprehensive legislation, the Ministry of Women and Child Development introduced the Juvenile Justice (Care and Protection of Children) Bill, 2014 in the Lok Sabha on 12th August, 2014. The Bill received the assent of the President of India on 31st December, 2015 and came into force on 1st January, 2016 as the Juvenile Justice (Care and Protection of Children) Act, 2015.²³ The Juvenile Justice (Care and Protection of Children) Act, 2015 has repealed and replaced the Juvenile Justice (Care and Protection of Children) Act, 2000.

The Juvenile Justice (Care and Protection of Children) Act, 2015 has been enacted to deal with children in conflict with law and children in need of care and protection. The Act aims at catering to the basic needs of children through proper care, protection, development and treatment. The Act under Section 2(14) identifies 'child in need of care and protection' which include large categories of vulnerable children. The children in need of care and protection include vulnerable children like street children; orphaned, abandoned, surrendered, abused and destitute children; working children; child labourers; trafficked children; mentally ill children; children affected or infected by HIV/Aids; children who are forced to beg and children who are victims of conflict and disaster situations. These children have committed no offence but they are victims of their circumstances. Among these children orphan²⁴, abandoned²⁵ and surrendered²⁶ are accorded an opportunity to socially reintegrate and rehabilitate in

the society through the non-institutional process of adoption. The Act provides for adoption to ensure right to family for the orphan, abandoned and surrendered children. The process of Adoption as per the Juvenile Justice (Care and Protection of Children) Act, 2015 results in the permanent severance of relationship by the adopted child from the biological parents. The adopted child acquires the status of a lawful child of the adoptive family with all rights and responsibilities.

Adoption of orphan, abandoned and surrendered children is possible only when they are declared to be legally free for adoption by the Child Welfare Committee (CWC) after due inquiry. One or more CWC in every district are to be constituted by the State Government and it shall consist of a Chairperson and four other members of whom one shall be a woman and another expert on child matter. They are to be appointed by the State Government. Members cannot be appointed for more than three years. The CWC is entrusted with a number of functions which includes taking cognizance of and receiving children produced before it, executing surrender deed, declaring children legally free for adoption and taking suo motu cognizance etc.

The Act has clearly mentioned the procedure for declaring a child to be legally free for adoption. When a child is produced before the CWC, an inquiry is conducted by CWC itself or on the basis of a report submitted by any person or agency recognised by State Government and order is passed by CWC to send children below six years of age who are orphaned, surrendered or appear to be abandoned to be placed in Specialised Adoption Agency and for conduct of social investigation by a social worker or Child Welfare Officer.²⁷ If CWC, after completion of inquiry, arrives at the opinion that child has no family or is in continued need of care and protection then such child is sent to Specialised Adoption Agency or Children's home until child can be provided with suitable means of rehabilitation.²⁸ CWC is required to make all efforts to trace the parents or the guardians of orphaned and abandoned child. If it is found that there is no one to take care of the orphan or child is abandoned then CWC shall make a declaration to the effect that such child is legally free for adoption. Where such children is up to two years of age such declaration is to be made within a period of two months from the date of production before it and within four months for children above two years of age.²⁹

Children who are surrendered by a parent or guardian for physical, emotional and social factors beyond their control are required to be produced before the CWC. Two months time for reconsideration of the decision must be given to parent or guardian. During the period of reconsideration after inquiry by CWC, the child shall be placed either with parents or guardian under supervision or if the child happens to be below six years of age he/she is placed in Specialised Adoption Agency and if above six years of age then in Children's home. After counselling, if CWC is satisfied, a surrender deed must be executed by parent or guardian before the CWC.³⁰ The Juvenile

Justice (Care and Protection of Children) Act, 2015 stipulates that on completion of two month reconsideration time, the institution where the surrendered child is placed must bring the case before CWC which would declare such child to be legally free for adoption.³¹ Decision to declare an orphan, abandoned or surrendered child as legally free for adoption must be done by atleast three members of the CWC.

The Juvenile Justice (Care and Protection of Children) Act, 2015 follows an inter-disciplinary approach as the functions of CWC clearly indicate that it does not work in isolation but in collaboration and partnership between all the juvenile justice functionaries and allied systems towards the achievement of a single goal -'the best interest of the child in a child-friendly environment'. This is the most critical aspect of intervention in the Juvenile Justice system for the care and protection of children including orphaned and abandoned children.

Children to be given in adoption are placed in Children's Home or the Specialised Adoption Agencies depending upon their capacity to accommodate such children. Specialised Adoption Agencies are required to cater to the health, emotional, psychological and educational needs of children, recreational activities, protection against abuse and exploitation etc. Children between the age group of six to fourteen years who are housed in child care institutions registered under the Juvenile Justice (Care and Protection of Children) Act, 2015 have the right to education under the Right of Children to free and Compulsory Education Act, 2009.

The Juvenile Justice (Care and Protection of Children) Act, 2015 has laid down the procedure relating to in-country and inter-adoption of children. Section 58 lays down the in-country adoption procedure. Guidelines Governing Adoption of Children, 2015 defines in-country adoption as adoption of a child by a citizen of India. In case of in-country adoption the Indian prospective adoptive parent must register through online application form in Child Adoption Resource Information and Guidance System (CARINGS) and submit the relevant documents. Registration would be confirmed only on receipt of completed application form with required documents and a registration number will be issued to the prospective adoptive parent so that they can keep track of their case.

The procedure relating to inter-country adoption is dealt under section 59 of the Juvenile Justice (Care and Protection of Children) Act, 2015. Section 2 (34) defines inter-country adoption as "adoption of a child from India by non-resident Indian or by a person of Indian origin or by a foreigner". Inter-country adoption of orphaned, abandoned and surrendered children can be resorted to only after the efforts for in-country adoption has failed. Non-resident Indian or overseas citizen of India or persons of Indian origin or foreigners can adopt children from India. The first three categories are given priority to that of foreigners. Such persons irrespective of religion may adopt orphan, abandoned and surrendered children by applying to an authorised foreign adoption agency

or Central authority or Government department in the habitual residence of the prospective adoptive parents which are required to prepare home study report of the prospective adoptive parents.

The Act has also provided for inter-country relative adoption under which a relative living abroad can adopt a child from his or her relative in India on the basis of adoption order by Court and issue of no objection certificate by Central Adoption Resource Authority.

After the procedure relating to in-country and inter-country adoption has been completed and an adoption order is issued by the court, the child becomes the child of the adoptive parents and the adoptive parents become the parents. The child is considered to be born in the adoptive family and from the date of effect of adoption order, the ties of the child with his or her biological family are severed. However child adopted will be entitled to property vested to him or her prior to adoption order subject to obligations attached to ownership including maintenance of relatives from biological family.³²

Conclusion

The Juvenile Justice (Care and Protection of Children) Act, 2015 is commendable for it is not only confined to adoption of children but gives due importance to the social reintegration of children who never get adopted by providing for after-care organizations for the purpose of taking care of children after they leave children's home so as to enable such children to lead an honest, industrious and useful life.

Adoption process under Juvenile Justice (Care and Protection of Children) Act, 2015 is guided by the 'best interest of the child'. Children deprived of their parental love by reason of death of the parents or unwillingness on the part of the natural guardian to take care of children or abandoned, are rehabilitated and socially reintegrated through adoption. By incorporating provisions for facilitating adoption of orphaned, abandoned or surrendered children Juvenile Justice (Care and Protection of Children) Act, 2015 has enabled such children to grow up in nurturing family environment which is vital to their all-round welfare and development. To make the Juvenile Justice law more child-friendly, responsive, effective, feasible and accessible to children, the State should encourage the active involvement, participation and collective action of stakeholders such as individuals, families, local communities, non-governmental organizations, civil society organizations, media and private sector including government in securing the rights of the children.

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5. Nothing in this article shall prevent the State from making any special provision for women and children.
6. No person shall be deprived of his life or personal liberty except according to procedure established by law.
7. The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.
8. Prohibition of traffic in human beings and forced labour - (1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.
9. Prohibition of employment of children in factories - No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.
10. The State shall, in particular, direct its policy towards securing that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.
11. The State shall, in particular, direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.
12. The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.
13. The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.
14. It shall be the duty of every citizen of India who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.
15. Supra 3, pp.32-33.
16. S N Misra, S N. *The Code of Criminal Procedure with Probations of Offenders Act & the Juvenile Justice (Care and Protection of Children) Act*. Central Law Publications Allahabad, 2007.
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21. Supra 16, p.726
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24. Juvenile Justice (Care and Protection of Children) Act 2015, Section 2(42) - "orphan means a child— (i) who is without biological or adoptive parents or legal guardian; or (ii) whose legal guardian is not willing to take, or capable of taking care of the child".
25. Juvenile Justice (Care and Protection of Children) Act 2015 Section 2(1) – "abandoned child means a child deserted by his biological or adoptive parents or guardians, who has been declared as abandoned by the Committee after due inquiry".
26. Juvenile Justice (Care and Protection of Children) Act 2015, Section 2(60)- "surrendered child means a child, who is relinquished by the parent or guardian to the Committee, on account of physical, emotional and social factors beyond their control, and declared as such by the Committee".
27. Juvenile Justice (Care and Protection of Children) Act 2015, Section 36
28. Ibid, Section 36(3).
29. Ibid, Section 38.
30. Ibid, Section 35.
31. Ibid, Section 38(2).
32. The Juvenile Justice (Care and Protection of Children) Act 2015, Section 63.