



NLUA LAW & POLICY REVIEW

Volume 1

Number II

2015

Special Issue on PROTECTION OF RIGHTS OF THE CHILDREN: ISSUES AND CHALLENGES

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- Child Trafficking: Violation of Human Dignity Debashree Debnath

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Editorial

The Special Issue of the NLUA Law & Policy Review (NLUALPR) is on “Protection of Rights of the Children: Issues and Challenges” and is divided into three parts:

- (i) Rights Based Approach to Working with Children: From ‘Charity’ to ‘Entitlements’;
- (ii) Juvenile Justice; and
- (iii) Protection of Children from Sexual Abuse.

The *first* part comprises of five articles. **Bharti Ali**, Co-Director, HAQ: Centre for Child Rights, in her article titled, “*Translating Policy Commitments into Reality: A Clarion Call for investing in Juvenile Justice policy and its Administration*” explains that amidst the rising demand for changing the juvenile justice law, one needs to know the average expenditure of the government of India on child protection. Ali also highlights that child rights have seldom been a priority for the governments and within child rights, child protection has received the least attention. **Maitryee Talukdar Ralte**, Consultant Clinical Psychologist, Ayursundra Clinic, Guwahati, in her paper titled, “*Protecting Children from Violence: A Shift from Reactive Response to Responsive Child-Centered Approach*” highlights the trauma that a child undergoes when he/she is abused. Through case study it is explained that children who are exposed to any kind of violence are prone to damaging consequences on their physical health, mental health and overall well-being. **Sapam Dilipkumar Singh**, Lecturer, LMS College, Imphal through his article “*Basic Challenges in the Protection of Child Rights in the North-East India*” describes the importance of various human rights treaties adopted by United Nations bodies, including the United Nations Convention on the Rights of the Child 1989. The article emphasises on the international obligations of the states to grant protection to children and with the example of certain legislations in North-East states of India, brings out as to how the rights of children are violated in conflict-like situations. **Mayashree Gharphalia**, Former Guest Faculty, NLU Assam, through her article, “*From Welfare to Entitlements: Legitimacy of Culture as a defence to Corporal Punishment*” describes that countries are attempting to ban all sorts of Corporal Punishment in schools. This attempt signifies that disciplining the child by physical force is inherently defective and such discipline violates the rights of the child, atleast according to legal discourse. But such ways of discipline enjoys a public legitimacy when defended on grounds of inner logic of the community. This is Cultural Relativism, a concept according to which cultural norms and values derive their meaning within a specific social context and all

cultures are worthy in their own right and are of equal value. **Chinki Agarwal and Minakshi Goswami**, LL.M. students of NLU Assam, has contributed a paper titled, *“Protection of Children in the State of Assam: A Case Study on Children involved in begging, rag picking in the city of Guwahati”* wherein the authors have undertaken case studies in the city of Guwahati by interviewing the child beggars roaming in the public places in city.

The *second* part of this Special Issue is on “Juvenile Justice” wherein there are five contributions. **Kalpna Purushothaman**, Consultant Counsellor and Researcher, Centre for Child and the Law (CCL), NLSIU Bangalore, in her article *“Counselling for children in conflict with the law: Key Challenges and Bottlenecks in Implementation”* addresses some of the key challenges in implementation of the Juvenile Justice (Care and Protection of Children) Act 2000, with specific reference to counselling for children in conflict with the law. It is argued that children in institutions in general, and juvenile justice institutions in particular are more likely to suffer from a range of mental health issues manifesting as behavioural or adjustmental problems to more serious mental illnesses. **Gitanjali Ghosh**, Assistant Professor of Law, NLU Assam, through her article *“Stock taking of the Juvenile Justice Mechanism in India: A Long Overdue Need”* attempts to conduct inquiry into the effective implementation of the JJ Act 2000. The paper presents a comprehensive picture of the JJA 2000 and its adequacy as against international standards. The main focus of the paper is on identifying the major challenges to the juvenile justice mechanism while trying to suggest remedial measures for the same. **Sukanya Baruah and Ankita Sharma**, LL.M. Students of NLU Assam, in their joint article titled, *“The Juvenile Justice (Care and Protection of Children) Act, 2000: Key Challenges and Bottlenecks in Implementation”* discusses various challenges and bottlenecks in implementation of the JJ Act which include, the location of the Juvenile Justice Board office. **Shivani Dutta and Vikram Aditya Chowdhury**, Assistant Professor, NEF Law College, Guwahati and 4th Year B.A.LL.B. (Hons.) student, NEF Law College Guwahati has contributed a joint article. The article is on *“Juvenile Justice in India: Need for Reconsideration”* critically analyses the JJ Act 2000 in the light of debates on reducing the age of juvenility in India. The similar approach is undertaken by **Saksham Dwivedi and Saptarshi Das**, 5th Year students of Chanakya National Law University, Patna and National Law University, Assam in their joint article, *“Contemporary Perspectives on Age of Juvenility: Revisiting Juvenile Justice Laws in India”*.

The *third* part of this Special Issue is on “Protection of Children from Sexual Abuse”. This part has four articles, wherein the first one

is by **Monmi Gohain and Nibedita Kalita**, Research Assistant cum Teaching Assistant, NLU Assam and LL.M. student, NLU Assam. The article "*Shared Parentage in India: A Paradigm Shift in Child Custody Laws*" narrates that there is an evolution in law relating to child custody regarding shared parental responsibility. The idea of shared parenting is new to custody jurisprudence in India. The old principle of the father as a natural guardian has been laid to rest, in its place the best interest of the child is applied to the custody disputes. **Deepa Jyoti Khakha and Kumar Bhagat, B.A.LL.B (Hons.)** students of National University of Study & Research in Law, Ranchi in their joint article titled, "*Protection of Children from Sexual Offences: A Socio-Legal Analysis*" addresses legal arena and their substantive and procedural aspects in the protection of child sexual abuse and various social approaches to prevent the children from sexual abuse. The paper focuses on laws against child sexual abuse, their loopholes and the Protection of Children from Sexual Offences Act 2012. **Rashmi Patowary, B.A.LL.B. (Hons.)** student of NLU Assam has contributed an article on "*An Appraisal of the Secularity of the JJ Act: A Review of Shabnam Hashmi Case*". The article highlights the secular feature of the JJ Act as upheld in *Shabnam Hashmi* case by the Hon'ble Supreme Court of India. **Debashree Debnath, LL.M.** student, NLU Assam, has contributed an article on the topic "*Child Trafficking: Violation of Human Dignity*". The article enumerates the obligations of States under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2000 and connects them to its relevance as dealt under the Constitution of India 1950, Indian Penal Code 1860 and Protection of Children from Sexual Offence Act 2000.

Editorial Board

PROLOGUE

Vijender Kumar*

Backdrop

Children are the foundation of a society. They are the future generations of the world, who needs to be nurtured, cared, supported and protected.¹ The protection of rights of children² becomes immensely important when one realizes that they constitute one-third of the human population in a country and guaranteeing their rights is an obligation which every country owes to its succeeding generations. Ensuring basic human rights of the vulnerable sections of society are the cardinal principles of rule of law. The most affected and vulnerable sections of the society are women and children, not to mention their plight during internal disturbances, violence and conflict-like situations. One of the challenges that the contemporary world faces today is ensuring basic human rights of children.

The National Law University, Assam (NLU Assam) is the first of its kind established in the North-Eastern region of India. State of Assam's contribution as a connecting factor between India and East Asia is very significant. On the one hand, when economic development of this region is pertinent for seven sisters plus one brother States of

* Vice-Chancellor, National Law University, Assam (NLU Assam). This paper is revised version of the Keynote Address delivered at the National Conference on "Protection of Rights of Children: Issues and Challenges" organized by National Law University, Assam and UNICEF, Office for Assam on 14 March 2015 at National Law University, Assam. The author can be contacted at vc@nluassam.ac.in.

- 1 The United Nations Convention on Rights of the Child, 1989 recognizes four categories of rights of children, right to survival, right to protection, right to development and right to participation. Further, the National Plan of Action for Children, 2005, Government of India, Ministry of Human Resource Development, Department of Women and Child Development, New Delhi, India, 2005 also brought out the guiding principles. They are:
 - (i) to regard the child as an asset and a person with human rights,
 - (ii) to address issues of discrimination based on gender, class, caste, race, religion, and legal status to ensure equality,
 - (iii) to accord utmost priority to the most disadvantaged, poorest of the poor, and least-served child in all policy and programme interventions, and
 - (iv) to recognize the diverse stages and settings of childhood and fulfill basic needs and rights.
- 2 The rights of child is exhaustive and inclusive of right to family environment in relation to adoption, right to parental care in terms of custody and guardianship, right against economic exploitation such as child labour, right to protection against sexual abuse and exploitation, juvenile justice, right to development, and right to survival in terms of health, nutrition and shelter. See ASHA BAJPAI, CHILD RIGHTS IN INDIA: LAW, POLICY AND PRACTICE, (2nd Edition, 2006); P. ISHWARA BHAT, LAW AND SOCIAL TRANSFORMATION (2009).

the North-Eastern region, on the other hand, it is equally important to ensure the protection of and guaranteeing the rights of the most vulnerable sections of the society amidst striving for development, especially the rights of the children. With this intent, NLU Assam had partnered with UNICEF, Office for Assam to organize a National Conference on the “Protection of Rights of Children: Issues and Challenges” on 14 March 2015 at NLU Assam. We proudly announce that it was a momentous day in the history of NLU Assam as the Centre for Child Rights (CCR)³ was inaugurated, which is a unique initiative of its kind which attaches great importance towards protection of children’s rights across India especially in the North-Eastern States.

Objectives of the Special Issue

An inquiry into the law relating to protection of children’s rights in India explains that it is comprehensive.⁴ However, much needs to be done, as there remains a long gap in terms of translating and implementing these laws into practice, especially in the North-Eastern States of India. The socio-economic and ethnic differences in these States make them vulnerable to various challenges, needless to mention the plight of children. The Centre for Child Rights (CCR) envisions evolving a culture of protecting the fundamental rights of children through its activities and initiatives, such as training programmes, workshops and round-table conferences for government officials, judicial officers and other stakeholders from this part of India. The CCR also looks forward to creating a pool of researchers who would

3 The purpose of establishing Centre for Child Rights (CCR) is three-fold, *First*, to create a “Knowledge Hub” which would engage in conducting doctrinal and empirical research and create database of violations of children’s rights; *Secondly*, to work from “Preaching to Praxis” - Towards ensuring guaranteed rights of the children at grass-root level; and *Thirdly*, Engaging Stakeholders through Periodic Capacity-building programmes and trainings to the stakeholders and Non-Governmental Organizations within this region.

4 Article 21-A, Article 24 read with Article 39 (e) and (f) of the Constitution of India 1950 describes the constitutional policy on right to compulsory education, protection of children from exploitation and guaranteeing his/her entitlement arising from both prohibition of child labour and right to education as State’s duty to implement the Directive Principles of State Policy (DPSP). The other national legislations that addresses and guarantees various rights of children are: Prevention of Immoral Trafficking Act 1986; certain provisions of Indian Penal Code 1860; Prevention of Children from Sexual Offences Act 2012, The Right of Children to Free and Compulsory Education Act 2009, Juvenile Justice (Care and Protection of Children) Act (Amendment 2006), Prohibition of Child Marriage Act 2006, The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act 2002, Juvenile Justice (Care and Protection of Children) Act 2000, Information Technology Act 2000, Transplantation of Human Organ Act 1994, Child Labour (Prohibition and Regulation) Act 1986, Bonded Labour System (Abolition) Act 1976, Hindu Adoption and Maintenance Act 1956, and Guardians and Wards Act 1890.

engage with each North-East States in order to work towards the 'best interests' of the child through connecting links with families, welfare boards and other government machineries. This requires both doctrinal and empirical research which in turn would contribute to creation of knowledge database on each North-Eastern States. The CCR intends to work in close cooperation with States and other similar Centres across India which would enable itself to learn through sharing information regarding effective ways of implementation of laws relating to protection of children's rights at grass-root level. For any initiative to be successful, it has to have not only top-down approach but also bottom-up approach. In this regard, NLU Assam emphasizes on sincere efforts by this Centre to address the concerns and problems faced by the children, be it sexual abuse, child labour, right to education, etc., to the concerned authorities within these North-Eastern States.

The increasing pattern of human rights abuses and exploitation of children such as child labour, drug abuse, sexual exploitation, trafficking, pornography, etc., have been worrisome. National legislations to address these issues are enacted in India. Amidst variety of legislations on protection of child rights that our country has, there is a need to deliberate upon the efficiency of existing legal system. It is also to be noted that the recent ethnic armed conflict across the globe affects the children and it has to be ensured that their rights which are guaranteed under various international legal instruments have been enforced.

Overview of the Special Issue

The Special Issue of this Journal – NLUA Law & Policy Review (NLUALPR), brings together various scholarly articles which were presented during the National Conference on "Protection of the Rights of Children: Issues and Challenges". The year 2015 witnesses the commemoration to the 25th anniversary of the entry into force of the United Nations Convention on the Rights of the Child (UNCRC) 1989,⁵ it is one of the international legal instruments which addresses the concerns and challenges faced by the international community while dealing with child rights. International human rights regime relating to children as dealt under the UNCRC is inclusive of the concerns of the international community to address the rights of child. However, there is a need to cross-check whether there is compliance to international obligations by the governments. In this regard, one of the several manifest examples in India is the eighty-sixth amendment of the Constitution which led to the insertion of Article 21-A in the

5 Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448 (1989), corrected at 29 I.L.M. 1340 (1990), See also Cynthia Price Cohen, *The United Nations Convention of the Rights of the Child: A Feminist Landmark*, 3 WILLIAM & MARY JOURNAL OF WOMEN & LAW 29 (1997).

Constitution of India 1950 guaranteeing free and compulsory education to all children in the age group of six to fourteen years as a fundamental right.⁶ The scope of international standards relating to juvenile justice, influenced by the UNCRC reflects these realities. Many of the provisions of this Convention are directly relevant to juvenile justice as well. Respect for rights such as the right to - education, health care, protection against abuse and exploitation, information, adequate standard of living and appropriate moral guidance helps to keep children away from becoming involved in crime and is essential when dealing with those who come into conflict with the law.

The gamut of basic human rights of children has been recognized in the UNCRC, and the Constitution of India 1950 that stands as the basic premise of fundamental rights of the children in India. The jurisprudence evolved through various important judgments of the Hon'ble Supreme Court of India has manifestly reiterated the rights of the children especially their rights against sexual abuse, law relating to adoption, and granting protection to children within personal laws.⁷ This Special Issue of NLUA Law & Policy Review (NLUALPR) is divided into three parts, namely:

- (i) Rights Based Approach to Working with Children: From 'Charity' to 'Entitlements';
- (ii) Juvenile Justice; and
- (iii) Protection of Children from Sexual Abuse.

On the review of the UNCRC at its completion of 25 years of entry into force, the focus is on taking a rights-based approach while working with children. These rights must not be considered as 'Charity' but as 'Entitlements'. The three protocols adopted supplement to the UNCRC is evidentiary of this fact and these protocols are:

- (i) Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict,⁸

6 See Article 21-A of the Constitution of India 1950 reads thus: "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". See also the Right of Children to Free and Compulsory Education Act 2009.

7 *Gaurav Jain v Union of India*, AIR 1997 SC 3021, *Rosy Jacob v Jacob A. Chakramakkal*, AIR 1973 SC 2090, *People's Union for Democratic Rights v Union of India* (1982) 3 SCC 235, *M.C. Mehta (Child Labour Matter) v State of Tamil Nadu*, AIR 1997 SC 699, *Rajangam v State of Tamil Nadu* (1992) 1 SCC 221, *Abdurahiman v Avoomma* AIR 1956 Mad 244, *Moulvi Mohammed v S. Mohaboob Begum* AIR 1984 Mad 7, *Lakshmi Kant Pandey v Union of India* AIR 1984 SC 469, *Jinish Lal Sah v State of Bihar* (2003) 1 SCC 605, *Unnikrishnan v State of Andhra Pradesh* AIR 1993 SC 2178, *Ashoka Kumar Thakur v Union of India* (2008) 6 SCC 1, and so on.

8 G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000), entered into force February 12, 2002.

- (ii) Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography,⁹ and
- (iii) Optional Protocol to the Convention on the Rights of the Child on a communications procedure.¹⁰

The issues pertaining to the age of juvenility has been dealt in various international instruments related to Juvenile Justice. India has enacted the national legislation namely, the Juvenile Justice (Care and Protection of Children) Act (hereinafter referred to as “JJ” Act) 2000, which addresses children in conflict with law and children in need of care and protection. The age of juvenility has been recently debated over with the report of the Parliamentary Committee on Empowerment of Women, which recommended fixing the age of male juveniles at 16 years and suggested a serious debate on measures to check the increasing trend of crimes that are being committed by juveniles and are punishable under the Indian Penal Code (IPC) 1860. The JJ Act, which was enacted in 2000 aimed to incorporate its international obligations under international law into its domestic legislations. India being a signatory of the UNCRC since 1992, the United Nations Standard Minimum Rules for Administration of Juvenile Justice 1985 (hereinafter referred to as the “Beijing Rules”) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990 will be applicable. The JJ Act is a law in compliance to its obligation to the aforesaid international treaties. The principle behind the legislation is that juveniles lack the physical and mental maturity to take responsibility for their crimes; and because their character is not fully developed, they still have the possibility of being rehabilitated. The amendment to the JJ Act 2000 brought both male and female below the age of 18 years within the ambit of the juvenile justice system, but prior to it was male below the age of 16 years and females below the age of 18 years as per JJ Act 1986. The Justice Verma Committee Report¹¹ recommended against the reduction of age of criminality under the JJ Act. It has been debated that the age of juvenility must be lowered to be at par with the juvenile justice system in the United States of America and the United Kingdom. However, in the best interest of the child, the age of juvenility must not be reduced and they must be guaranteed protection till they attain the physical and mental maturity to understand the nature and gravity of offences they have committed, which is until the age of 18 years.

9 G.A. Res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6, U.N. Doc. A/54/49, Vol. III (2000), *entered into force* January 18, 2002.

10 G.A. Res. 66/138, Annex, 66 U.N. GAOR Supp. (No. 53) at 1, U.N. Doc. A/66/138, Vol. I (2011), adopted on 19 December 2011.

11 Government of India, *Report of the Committee on the Amendments to Criminal Law* (2013).

Another pertinent problem which every society faces is towards protecting children from sexual abuses and offences. Being signatory to UNCRC, India has taken measures to address this menace through passage of the Protection of Children from Sexual Offences (POCSO) Act in 2012. This legislation is comprehensive in nature, which deals with offences like child pornography, sex tourism, child trafficking and so on. The said Act deals with protection of children from the offences of sexual assault, sexual harassment and pornography, while safeguarding the interests of the child at every stage of the judicial process by incorporating child-friendly mechanisms for reporting, recording of evidence, investigation and speedy trial of offences through designated Special Courts. Children's right to privacy and confidentiality is required to be protected and respected at every level of judicial proceedings so that the child may attain full and proper physical, emotional, intellectual and social development.

PART - I

**RIGHTS BASED APPROACH TO WORKING
WITH CHILDREN: FROM 'CHARITY'
TO 'ENTITLEMENTS'**

TRANSLATING POLICY COMMITMENTS INTO REALITY: A CLARION CALL FOR INVESTING IN JUVENILE JUSTICE POLICY AND ITS ADMINISTRATION

Bharti Ali*

Introduction

“If children are created in the image of God, then... *My God is a Juvenile Delinquent!*”¹

These lines reflect the author’s feelings arising from a journey into the lives of children in conflict with the law and their treatment under the juvenile justice system, making a loud cry for investing in children adequately. What the author experienced is certainly not what the nation had envisaged for its children.

Despite a uniform law on juvenile justice coming into force way back in 1986, not much has changed in terms of preventing juvenile crimes or treating children in conflict with law in a manner consistent with international standards and policy commitments. On the contrary, even while the child rights movement in India continues to struggle for improving the present juvenile justice law and its implementation, inability of the current juvenile justice system to deal with children committing heinous offences is being stated by the government as one of the primary reasons for changing the law and subjecting children in conflict with the law to the adult criminal justice processes and increased incarceration.

Juvenile Justice Legislation in India: Historical Background

The seeds of a distinct juvenile justice system for dealing with children in conflict with the law were sown way back in 1919-1920, when the Indian Jail Committee² clearly found prisons unsuitable for children, including adolescents under the age of 18 years, recognised their vulnerability and categorically recommended a separate justice system for young offenders so that they can be brought under ‘reforming influences’.

Over the years, the juvenile justice system in India evolved with the thinking that young people are capable of reformation and must be given that chance. Recommendations of the Jails Committee’s report led to the enactment of the Children’s Acts in several progressive provinces like Madras, West Bengal and Bombay, in 1920, 1922 and 1924 respectively.

* Co-Director, HAQ: Centre for Child Rights, New Delhi.

1 RUZBEH N. BHARUCHA, MY GOD IS A JUVENILE DELINQUENT 1 (2008).

2 East India (Jails Committee), *Report of the Indian Jails Committee, 1919-20, 193-205* (1921) <http://archive.org/stream/eastindiajailsco01indi#page/198/mode/lup> (last visited Feb. 14, 2015).

After independence, Article 15 (3) in the Constitution of India 1950, clearly gave the Indian Parliament a mandate to undertake special measures for children and other weaker sections of the society. The first Central Children's Act was thus passed by the Parliament in 1960, which was applicable to the Union Territories only, but was meant to be a model law for the states to follow. Children however continued to be treated differently under different state laws, as the definition of child who could be treated under the juvenile justice system, varied from state to state. In response to a petition filed by Sheela Barse in this regard in 1983, the Supreme Court suggested the Union of India to pass a uniform legislation for children across the territory of India and remove such inequality.³ This led to the promulgation of the first uniform law on juvenile justice called the Juvenile Justice Act 1986 ("the 1986 Act"), which provided for measures for protection, rehabilitation and reformation of juveniles, but followed differential treatment for boys and girls in as much as the age definition of a juvenile in the case of girls was 18 years, while for boys it was kept at 16 years.

The 1986 Act almost coincided with the global developments in the field of juvenile justice. Formulation of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (commonly known as the "The Beijing Rules") was the first such internationally accepted document to guide nation states on juvenile justice policy and administration. As India evolved in its understanding on human rights as well as compliance with international human rights standards, it invested in strengthening its legal framework for ensuring children their basic rights, including juvenile justice. The ratification of the United Nations Convention on the Rights of the Child by India in 1992 formed one of the bases for the enactment of the Juvenile Justice (Care and Protection of Children) Act 2000.

The United Nations (UN) Committee on the Rights of the Child in its concluding observations and recommendations for India dated 23 February 2000, required India to ensure that persons under 18 years are not tried as adults and that boys under 18 years are covered by the definition of 'juvenile', as girls already are (CRC/C/15/Add.115/ para 79, 81). Accordingly, the 1986 Act was repealed, the age of juvenility for both girls and boys was fixed at 18 years and internationally recognised principles of juvenile justice were brought into the law.

Historical wisdom put to the test of time

Even as countries have worked towards strengthening their juvenile justice legislation (hereinafter referred as JJ legislation) and

3 Ved Kumari, *Juvenile Justice: A Historical Perspective, Excerpts from "Overview Indian Juvenile Justice in Theory and Practice"*, in JUVENILE JUSTICE IN GLOBAL PERSPECTIVE (Frank Zimring ed., 2014).

administration, and towards exploring newer tools and techniques for dealing with children in conflict with the law, debates regarding principles of diversion and restoration have continued, especially in the context of the rights of the victims of juvenile offenders. The JJ legislation in most countries has been put to the test of time.

Historically, across the world, media has played an important role in questioning the juvenile justice law and building public opinion against the juvenile justice system on the basis of a couple of gruesome instances involving juveniles. The white paper of the European Council for Juvenile Justice on improving youth justice systems during a time of economic crisis⁴ (IJJO, July 2013) acknowledges that “the public and governmental fear of youth crime continues to influence policy regardless of crime levels”. It recognises that “in their reporting of crime, the media exacerbate a fear of youth crime and thus, instead of instigating innovative and positive changes in youth justice policy, governments cling to punishment over progress”. Statistics quoted by media are picked up by the policy makers to change the law, often devoid of a contextual basis in which juvenile crimes need to be understood and analysed.

For England, the trigger for introducing changes in the juvenile justice law and its administration that took away certain guarantees provided to juveniles and increased the likelihood of detention and lengthy sentences for juveniles, was the murder of two-year old James Bulger by two ten-year old boys. In India now, it has been the ‘Nirbhaya’ gang rape in Delhi in December 2012, where media is frenzy around involvement of a juvenile reported as the ‘most brutal’ has forced the government to revisit its juvenile justice law. Statistics and percentage increase in crimes by juveniles, especially those relating to women have been the bait.

The commentary to the Council of Europe recommendation concerning new ways of dealing with juvenile delinquency states:

“Public attitude surveys consistently tend to underestimate the extent to which custody is used (particularly relative to adults), overestimate the involvement of juveniles in crime and perceive youth crime as perpetually increasing, even when it is not...”⁵

Unfortunately, while the 300% increase in rapes by juveniles in the last ten years becomes the headline in a national daily and part of common man’s dinner table discussion, none talk about how

4 Marianne Moore, *Save Money, Protect Society And Realise Youth Potential, Improving Youth Justice Systems During A Time Of Economic Crisis*, INTERNATIONAL JUVENILE JUSTICE OBSERVATORY (IJJO) 22 (July 2013) http://www.oijj.org/sites/default/files/white_paper_publication.pdf (Last visited Feb.14, 2015).

5 *Id.* at 70.

much WE as a NATION have invested in juvenile justice. None write to inform public about what the governments are required to do for preventing juvenile crimes, for establishing an effective juvenile justice system and implementing the constitutional commitments and international standards in this regard. The only emotion that begins to guide law making and policy decisions at such times is the moral need to “teach a lesson” to the “most brutal young minds” portrayed as the “biggest threat to public safety”, oblivious of the fact that this young soul was never cared for in the first place by the society and the government at large.

Governance of Convenience

The proposed Juvenile Justice Bill, 2014, which allows transfer of some children in conflict with law to the adult criminal justice system as well as long periods of detention, is a violation of rights guaranteed under both the Constitution of India and the international standards. This has been repeated time and again by defenders of juvenile justice in the country and also finds resonance in various judgements of the Supreme Court of India as well as the recent Report of the Parliamentary Standing Committee on Human Resource Development that was reviewing the proposed bill.⁶

In countries where morality guides the sense of ‘right’ and ‘wrong’ and is a more cherished value than respect for the rule of law, it is the populist vote that charts the course of governance. ‘Convenience’ becomes the rule, putting constitutional guarantees and human rights commitments at stake. A selective reading of the Constitution as well as the international law has therefore been a natural corollary in framing the proposed Juvenile Justice (Care And Protection of Children) Bill, 2014. Even the fundamental right of non-discrimination and equality before law are being tweaked to convenience and the bill allows digression from the well established and internationally accepted principles of juvenile justice.

- Article 37 (c) of the UN Convention on Rights of the Child (CRC) says that: “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. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so...”
- General Comment No. 10, issued by the UN Committee on the Rights of the Child in 2007, titled ‘Children’s rights on juvenile justice’ recommends the applicability of juvenile justice system “for all children who, at the time of commission of an offence [or

⁶ Parliament of India, Rajya Sabha, *Two Hundred Sixty Fourth Report, The Juvenile Justice (Care And Protection Of Children) Bill, 2014* (February, 2015).

act punishable under the criminal law], have not yet reached the age of 18 years” (Para 36). It further recommends that those State parties which limit the applicability of their juvenile justice rules to children under the age of 16 [or lower] years, or which allow by way of exception that 16 or 17-year-old children are treated as adult criminals, change their laws with a view to achieving a non-discriminatory full application of their juvenile justice rules to all persons under the age of 18 years. The Committee notes with appreciation that some States Parties allow for the application of the rules and regulations of juvenile justice to persons aged 18 and older, usually till the age of 21, either as a general rule or by way of exception” (Para 38).

- Article 3 (1) of the CRC states that: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration**”.
- General Comment No. 14 issued by the UN Committee on the Rights of the Child on the Principle of Best Interest of the Child underlines that “protecting the child’s best interests means that the traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives, when dealing with child offenders (Para 28)”. It further states that “the child’s best interests shall be applied to all matters concerning the child or children, and taken into account to resolve any possible conflicts among the rights enshrined in the Convention or other human rights treaties. Attention must be placed on identifying possible solutions which are in the child’s best interests” (Para 33). “If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child’s interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best” (Para 39).
- Article 10 (3) of the International Covenant on Civil and Political Rights states that ‘...Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.’
- Resolution No. 4 in the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders states that pre-trial detention of juveniles must be a last resort and no minor should be detained in a facility where they are susceptible to the negative influences of adult offenders.

These standards “come from internationally respected organs and bodies of the UN and the Council of Europe, agreed on by a community of meaningful and significant state representatives and that these regulations are an expression of the behavior which the respective Member States expect from each other” [White paper of the European Council for Juvenile Justice, created by the International Juvenile Justice Observatory (IJJO) in 2009].⁷

**Concluding Observations of the CRC Committee
on India – 2000, 2004 and 2013**

Ensure that persons under 18 years are not tried as adults and that boys under 18 years are covered by the definition of juvenile, as girls already are (CRC/C/15/Add.115/para 79, 81 and CRC/C/15/Add.228/para 78, 79, 80 (g), 81).

Establish the executing state mechanisms necessary and provide adequate resources and infrastructure to implement the JJ Act (CRC/C/15/Add.115/para 79, 80 and CRC/C/15/Add.228/para 79, 80 (d)).

Take all necessary measures to address those recommendations included in the concluding observations of the second periodic report under the Convention that have not been implemented or insufficiently implemented, particularly those related to non-discrimination,... administration of juvenile justice (CRC/C/IND/CO/3-4/para 8).

Unfortunately, in framing the proposed bill, not only did the government forget the international standards set out above, but also forgot the Concluding Observations made on India, which have at different points of time made recommendations on not treating juveniles as adults and providing adequate resources and infrastructure for implementation of the juvenile justice law.

Investing in Juvenile Justice: Where India fails its children

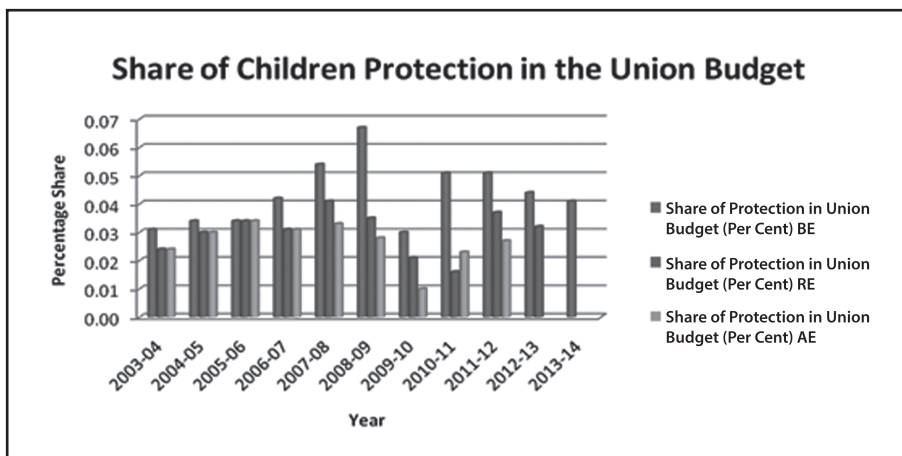
Up a blind alley, the demand for changing the juvenile justice law comes at a time when in the last ten years the average expenditure of Union of India on child protection has been under 3 paise out of every 100 Rupees spent by the government.

⁷ I. Pruin, *The evaluation of the implementation of international standards in European juvenile justice systems* in SAVE MONEY, PROTECT SOCIETY AND REALISE YOUTH POTENTIAL: IMPROVING YOUTH JUSTICE SYSTEMS DURING A TIME OF ECONOMIC CRISIS 27 (Marianne Moore ed, July 2013) http://www.oijj.org/sites/default/files/white_paper_publication.pdf (last visited Feb. 14, 2015).

Share of Protection in Union Budget (Per Cent)			
Year	BE	RE	AE
2003-04	0.03	0.02	0.02
2004-05	0.03	0.03	0.03
2005-06	0.03	0.03	0.03
2006-07	0.04	0.03	0.03
2007-08	0.05	0.04	0.03
2008-09	0.07	0.04	0.03
2009-10	0.03	0.02	0.01
2010-11	0.05	0.02	0.02
2011-12	0.05	0.04	0.03
2012-13	0.04	0.03	NA
2013-14	0.04	NA	NA
2014-15	0.04	NA	NA

Note: BE – Budget Estimates, RE – Revised Estimates, AE – Actual Expenditure, NA – Not Available

Source: Budget for Children (BfC) Analysis carried out by HAQ: Centre for Child Rights based on the Demands for Grants of the Ministry of Women and Child Development (MWCD).



Source: Budget for Children (BfC) Analysis carried out by HAQ: Centre for Child Rights based on the Demands for Grants of MWCD.

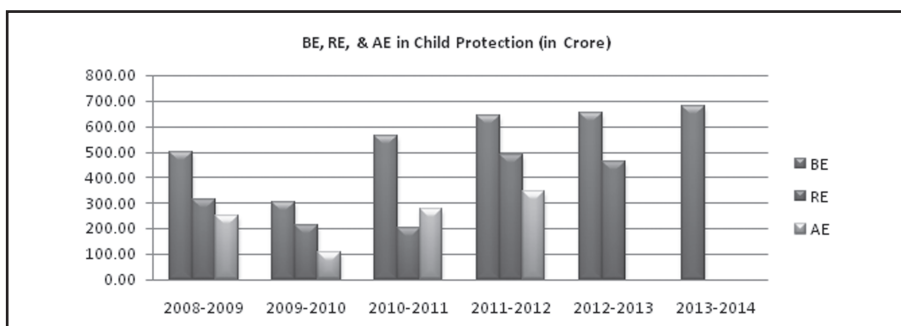
Child Protection has never been a real concern!

“The budget for child protection has always been least ‘Out of total union budget, only 0.04% are allocated for the child protection’. This covers Juvenile Justice System, child labour and provision for orphan and street children. These low investments result in different financial outlays in

different states. The training support is not uniform and the secretariat support to CWC and JJB is limited and most importantly the investment into developing infrastructure is negligible. The percentage share of children's budget within the Union Budget has been reduced from 4.76% in 2012-13 to 4.64% in 2013-14."⁸

There has been a consistent decline in children's budget in the last few years, going down from 4.76% in 2012-13 to 4.64% in 2013-14, 4.52% in 2014-15 and 3.26% in 2015-16. The dip this year is huge and there are no answers as to how will this improve the children's condition.

While there is no separate and distinct budget for implementing the juvenile justice legislation, the Integrated Child Protection Scheme (ICPS) is the main scheme which provides the financial resources for implementing various child protection laws, including the law on juvenile justice. The child protection budget in 2015-16 remains at a low of 0.04% of the Union budget, although there is a miniscule increase of 0.5% in the budget for the ICPS.



Note: BE – Budget Estimates, RE – Revised Estimates, AE – Actual Expenditure

Source: Budget for Children (BfC) Analysis carried out by HAQ: Centre for Child Rights based on the Demands for Grants of MWCD.

As of date, 35 States and Union Territories except Chandigarh have signed the ICPS Memorandum of Understanding (MoU) with the centre. The 12th Five Year Plan had estimated the need for operationalization of child protection programmes at Rs. 5300 crores over the Plan period i.e. Rs. 1060 crores per year. While this is the time to increase allocations substantially, the budget for ICPS continues to remain inadequate and underutilisation of existing funds remains a glaring gap.

⁸ Parliament of India, *supra* note 6 at 39, www.prsindia.org/uploads/media/Juvenile%20Justice/SC%20report-%20Juvenile%20justice.pdf (last visited Feb. 14, 2015).

Trends in ICPS budget and spending: A glimpse

In 2009-10, the ICPS budget was reduced by 25% from Rs. 400 crore to Rs. 300 crore. Mid-term appraisal of the Eleventh Five Year Plan suggested a requirement of Rs. 300 Crore for the year 2010-11.

A simple assessment of recurring costs required for setting up the basic structures reflected inept planning for rolling out the scheme and hence a highly inadequate budget of Rs. 300 Crore was allocated for ICPS in 2010-11. For instance,

- Recurring costs for setting up a State Child Protection Society in each of the 34 states and union territories that signed a MoU with the Centre for ICPS by the end of the 11th Five Year Plan was about Rs. 27 Crores;
- If only the District Child Protection Units were to be set up in each of the 638 districts in the country at that time (excluding the state of Jammu and Kashmir), the budget requirement as per ICPS norms came to a little over Rs. 235 Crores;
- To comply with the legal requirement of having one Child Welfare Committee (CWC) and one Juvenile Justice Board (JJB) in every district, an additional fund of approximately Rs. 60 Crores was required;
- The 259 childline services across the country required a budget of about Rs. 42 Crore;
- Going by the Ministry's figure of 698 institutions for children in 2011-12 (excluding open shelters, Specialised Adoption Agencies and specialised units for children with special needs), fund requirement as per ICPS norms came to approximately Rs. 141 Crores;
- An addition of these five basic structural components of ICPS came to Rs. 505 Crores; and
- Yet, the government's budget estimate in 2010-11 was only Rs. 300 Crore.

In 2013-14, not only did the budget estimates for ICPS go down to about 296 Crore Indian Rupees, even the meagre allocations could not be spent by the states.

Although the recent Budget 2015-16 allocates 402.23 Crore Indian Rupees for the ICPS, as mentioned earlier, this is only a 0.5% increase from the allocation made in 2014-15 (INR 400 Crore) and is still short of the requirement as per the revised financial norms set out for the ICPS.⁹

⁹ Ministry of Women and Child Development, Government of India, *Revised Integrated Child Protection Scheme (ICPS), Annexures*, 76-140 (2014) wcd.nic.in/icpsmon/pdf/icps/final_icps.pdf (last visited Feb. 14, 2015).

As per the revised norms, the cost of setting up a State Child Protection Society (SCPS) in the 35 states, and a District Child Protection Unit (DCPU), a Child Welfare Committee (CWC), a Juvenile Justice Board (JJB) in 675 districts, comes to INR 363.30 Crore. If only the recurring costs of other components of ICPS such as the Central Adoption Resource Authority (CARA), State Adoption Resource Agencies (SARA), Childline mother NGO, Regional Centres of Childline and Childline services on ground, National Institute for Public Cooperation & Child Development (NIPCCD) and its Regional Centres, various institutions for children, non-institutional care other than adoption such as foster care and sponsorship, and the Central Project Support Unit located in the Ministry of Women and Child Development are added, the amount would far exceed the current allocation of INR 402.00 Crore in the Union Budget 2015-16.

Under spending has been a norm!

As per the Appropriation Accounts...

2009-2010 – INR 600 lakhs remained unutilized due to re-appropriation of part funds/funds to functional heads for utilization on schemes for the benefit of North Eastern Region and Sikkim and surrender of the balance amount. Also a total of INR 1136.56 lakhs remained unutilized due to delay in finalization of MoU with States and Union Territories.

2010-2011 – Saving of INR 371.27 lakhs in GIA (against the sanction provision of INR 2200.00 lakhs) due to non- setting up of Central Project Support Unit and non-receipt of demand from Central Adoption Resource Agency and National Institute of Public Cooperation and Child Development. Saving of INR 14663.02 lakhs and INR 455.49 lakhs in State and UT component (against the sanctioned provision of INR 24000.00 lakhs and INR 800.00 lakhs) due to delay in signing of Memorandum of Understandings and non-receipt of detailed proposals or receipt of less number of viable proposals from the States and Union Territories.

2011-2012 – Saving of INR 6570.63 lakhs in State and UT component (against the sanctioned provision of INR 24300.00 lakhs) due to receipt of less number of viable proposals from the implementing agencies, States and Union Territories.

ICPS Budget and Expenditure (in Crore)

Year	Budget Estimates	Revised Estimates	Actual Expenditure
2008-2009	200.00	60	0
2009-2010	60.00	50	33.30
2010-2011	299.99	95.28	115.10
2011-2012	265.73	209.13	177.29
2012-2013	398.00	271.24	0
2013-2014	296.39	0	0

Source: Budget for Children (BfC) Analysis carried out by HAQ: Centre for Child Rights based on the Demands for Grants of MWCD.

The mistakes we continue to make

“Youth offending is often related to other problems that the juvenile justice systems cannot address in isolation (e.g. mental illness, substance abuse etc.). Therefore, juvenile justice systems need to be coordinated and cover the full spectrum of required services including early intervention, family and school-based therapies, drug and alcohol rehabilitation services, mental health services, foster care services, specialist indigenous services, housing and employment services and detention services etc.”¹⁰

Excerpts from General Comment 10 - Children’s Rights in Juvenile Justice Committee on The Rights of the Child, Forty-fourth Session, Geneva, 15 January-2 February 2007

“In order to ensure the full implementation of the principles and rights elaborated in the previous paragraphs, it is necessary to **establish an effective organization for the administration of juvenile justice, and a comprehensive juvenile justice system**. As stated in article 40 (3) of CRC, States parties shall seek to promote the **establishment of laws, procedures, authorities and institutions** specifically applicable to children in conflict with the penal law.

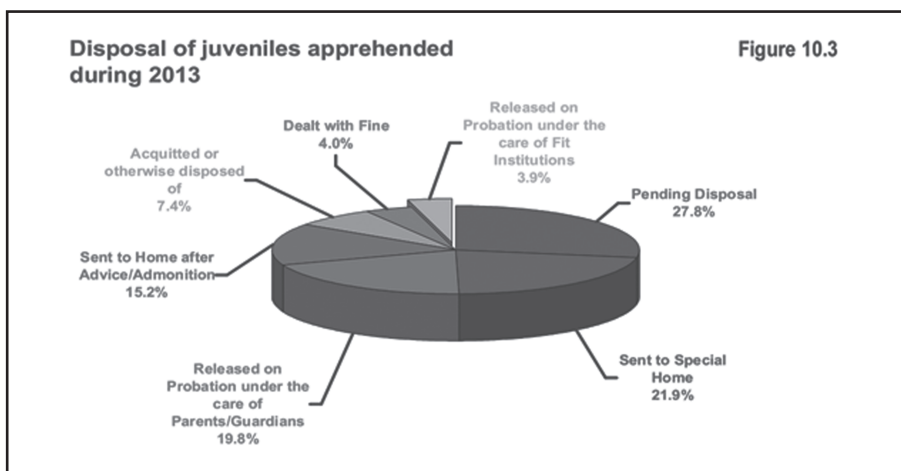
A comprehensive juvenile justice system further requires the **establishment of specialized units within the police, the judiciary, the court system, the prosecutor’s office, as well as specialized defenders or other representatives who provide legal or other appropriate assistance to the child**.

The Committee recommends that the States parties **establish juvenile courts either as separate units or as part of existing regional/district courts**. Where that is not immediately feasible for practical reasons, the States parties should ensure the **appointment of specialized judges or magistrates** for dealing with cases of juvenile justice.

¹⁰ Moore *supra* note 4 at 42.

*In addition, **specialized services such as probation, counselling or supervision should be established together with specialized facilities including for example day treatment centres and, where necessary, facilities for residential care and treatment of child offenders.** In this juvenile justice system, an effective coordination of the activities of all these specialized units, services and facilities should be promoted in an ongoing manner.”*

The juvenile justice system in India and many other countries of the world is an offshoot of the criminal justice system. As a result, policy makers and planners have always reflected confusion in the law and its administration, marked by the tension between the protective approach of juvenile justice and the traditional approach of dealing with crime.



Source: Crime in India, 2013, National Crime Records Bureau

The graph shows poor use of dispositional alternatives available under the present JJ Act. It is difficult to say if any children were put through counselling or released on orders of attending group counselling, de-addiction programme etc. or for that matter, if the sentence of community service was served on any child. Indeed no information is maintained by the Boards on follow-up post release.

An individual care plan is supposed to be part of every dispositional order made by the Juvenile Justice Board. But where are these plans? Cases get disposed without these plans. At the end of the day, performance of every judge is rated on their record of disposal and pendency of cases. Hence no Juvenile Justice Board waits for a probation officer or social worker to be given to them to prepare these individual care plans. No wonder data from India's National Crime Records Bureau's (NCRB) on 'Disposal' does not reflect on how many children were successfully rehabilitated. Should it not show how many

children received counselling services and for what duration? And what about follow-up? Can a case under the juvenile justice law be shown as 'disposed' until the need for follow-up is over and the Board accordingly orders closure of the case?

"Funds are rarely released under the heads of formal education, vocational training, counseling and drug detoxification which form the backbone of rehabilitation process."¹¹

While the present central government is vociferously promoting skill development, it has failed to make the connect between education, skill development initiatives and child protection. None of the skill development initiatives announced in the budget 2015-16 cater to the children in the juvenile justice system. Even the Economic Survey 2014-15 recognizes that "While the RTE Act and the Juvenile Justice Act 2000 were promulgated to bring children into education rather than employment, they have allowed youth in the 15-18 age-group to slip through the cracks."¹²

While several aspects relating to administration of juvenile justice have been looked into by various High Courts and the Supreme Court of India, the one that never catches the eye is Section 61 of the Juvenile Justice Act and Rule 95 of the Central Model Rules on Juvenile Justice dated 2007, which require states to create a Juvenile Justice Fund for welfare, rehabilitation and restoration of juveniles. Delhi was forced to create such a fund in 2009. According to Dasgupta, "Rs. 5 lakhs have been deposited in it. But in spite of pressing infrastructural requirements, it remains unused".¹³ Information regarding Juvenile Justice Fund in other states is unfortunately not available.

Clearly, the basic idea of juvenile justice across the world is to reintegrate the child into family and society and make the society a better place for both juveniles and others affected by their law breaking behaviour and actions. This calls for a proper network of rehabilitation and after care services. Unfortunately, such an arrangement is almost non-existent in the country.

Misguided Priorities: The Proposed Juvenile Justice Bill 2014 could weigh heavy on the State Exchequer

Internationally there has been growing recognition of the need for investing in prevention of juvenile delinquency, reviewing spending

11 Meghna Dasgupta *Rehabilitation through Education for Juveniles in Conflict with Law*, Working Paper No 238 (2010).

12 Ministry of Finance, Government of India ECONOMIC SURVEY 2014-15, VOLUME II, *Social Infrastructure, Employment, and Human Development*, 134 (2015) indiabudget.nic.in/es2014-15/echapter-vol2.pdf (last visited Feb. 14, 2015).

13 Dasgupta, *supra* note 11.

on youth criminal justice systems, and targeting resources away from de-tention and towards policies of prevention and diversion. In this regard, the questions that have guided this thinking are:¹⁴

- Is there a clear vision of the outcomes that need to be achieved for children and society? Without a clear picture in mind of what we want to accomplish, youth justice policies are vulnerable to emotion and knee jerk reactions that end up having a negative impact.
- Do we have data to understand what the current system looks like in practice, and to understand the baseline point from which we need to move forward? How else do we measure the improvements to be made for the children, the level of security felt by the population and the level of youth crime? And how else do we establish where we want to concentrate our resources?
- Ensuring value for money is key for any modern justice system. Therefore, have countries been able to test their services in order to ensure that they are delivering value for money to the public?

Instead of investing in juvenile justice adequately, countries tend to believe that incarceration will achieve the objective of deterrence necessary to achieve the goal of public safety. But there is little evidence to support this contention. The Council of Europe noted in 2003 that “popular responses to youth crime in Europe are repressive. In times of economic crisis, this has the potential to become even more marked, as there is increased instability and insecurity”.¹⁵

Indeed India has remained far from this discourse. Else, at a time when social sector spending is being reduced to invest in other sectors that can accelerate economic growth, pushing for increased incarceration of children would not have been the most sought after option.

Reality Bites!

Excerpts from the white paper of the European Council for Juvenile Justice, July 2013¹⁶...

In Toronto, Canada, PACT (Participation, Acknowledgement, Commitment and Transformation), a Life Plan Coaching Programme, was developed and designed to specifically address the needs of a small group of habitual young offenders between the ages of 12 and 18 years who were ultimately responsible for the majority of youth

¹⁴ Moore *supra* note 4 at 42.

¹⁵ *Id.* at 22.

¹⁶ *Id.* at 61.

crime committed in communities, and by extension made up the majority of the charges before youth courts. The programme has found that for an investment of \$5,000 (Canadian) for turning around the life of one habitual offender it can save society \$2 million (Canadian) over the course of the offender's lifetime.

Evidence from Estonia and Romania clearly suggest that probation is far more cost-effective than imprisonment. In Estonia, the cost of probation supervision is Euro 30 per month, while the cost of a prisoner is about Euro 300 per month. In Romania, the cost for one probation client is estimated at Euro 143 per year, while the average cost of one prisoner is Euro 1,685 per year, meaning that probation is at least ten times cheaper than prison.

In England and Wales, youth offending institutions cost £65,000 per child per year, secure training centres cost £178,000 per child per year and secure children's homes cost £212,000 per child per year. In the UK it can cost as much as £212,000 per child per year to keep them in custody.¹⁷

In the USA, the annual average cost per year of a detention bed – depending on geography and cost of living – could range from \$32,000 (\$87 per day) to as high as \$65,000 a year (\$178 per day), with some big cities paying far more. The Washington State Institute for Public Policy (WSIPP), an institute created by the Washington State legislature, conducts research to identify evidence-based programmes that reduce crime and generate significant returns on investment. This information is generated for the state's legislators and public agency leaders so they are able to make informed decisions about the allocation of limited resources.

Washington State Institute for Public Policy (WSIPP) found that:

- For every dollar spent on county juvenile detention systems, \$1.98 of 'benefits' in terms of reduced crime and costs of crime to taxpayers was achieved.
- Juvenile boot camps and 'scared straight' programmes cost more money and were not preventative. The 'scared straight' programmes had an estimated net cost of \$51 per participant, but as a result of higher recidivism among participants, they yielded an estimated loss of -\$24,531 because of increased criminal justice and victim costs. Similarly, child boot camps, which had an estimated net cost of \$15,424, yielded an estimated loss of -\$3,587.
- Aggression replacement training (ART), which was estimated to have a net cost of \$738 per participant, yielded benefits to taxpayers of approximately \$33,143. With a benefit-cost ratio

¹⁷ *Id.* at 9.

of \$44.91, this meant every dollar invested in aggression replacement training was estimated to yield almost \$45 in total benefits.

- Multi-systemic therapy (MST), which was estimated to have a net cost of \$4,743 per participant, saved \$131,918 in criminal justice costs and reduced victim costs. With a benefit-cost ratio of \$27.81, this means that every dollar invested in multi-systemic therapy is estimated to yield almost \$28 in total benefits.
- Functional family therapy (FFT), with estimated net cost of \$2,161 per participant, yielded benefits of \$59,067 per participant.
- Multidimensional treatment foster care (MTFC) with an estimated net cost of \$2,052 per participant, yielded benefits of \$87,622.

The number of children in pre-trial detention and other forms of detention in Europe as also in the United States is excessive. It has been recognised that not only is detention harmful to children, it does not prevent reoffending, is the most expensive way of dealing with children in conflict with the law, can cause psychological damage to children and make it more difficult for them to be mainstreamed. According to Holman and Zeindenbuerg,

“children who enter the prison system are more likely to be damaged in the short term through the trauma of the experience, and in the long term will find it more difficult to return to school or obtain employment or vocational training, and are therefore more likely to be a burden on the economy and society at large, rather than being able to contribute to its advancement and healing in times of economic crisis”.¹⁸

Concentrating resources on prevention yields considerable long lasting savings to society in terms of reduced welfare, criminal justice expenditure and higher tax revenues. It is better to rehabilitate a child in the community than in detention. Research by Sexton and Alexander shows that “Community sanctions have been proven to work even on serious and violent offenders, reducing recidivism by as much as 50%”.¹⁹

“Indeed, European and UN guidelines agree that community sentences are more beneficial than detention to young people. They recommend that a large variety of

18 Moore *supra* note 4 at 58, See also Holman, B. & Ziedenbuerg, J, *The Dangers of detention: The impact of incarcerating youth in detention and other secure facilities*, (2006).

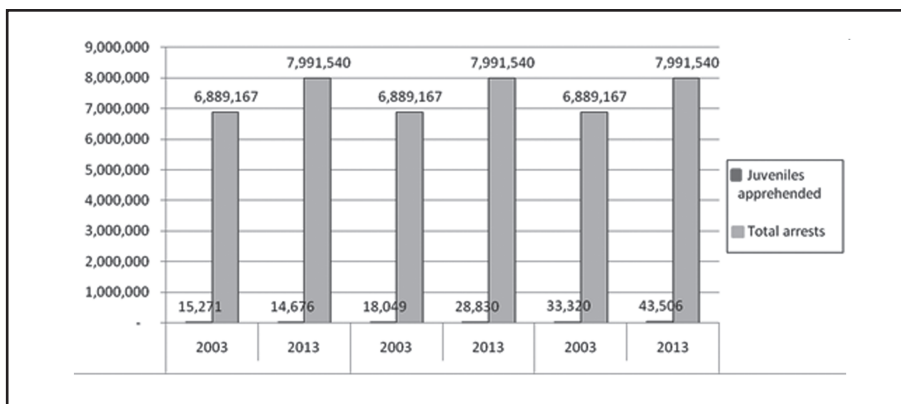
19 Moore *supra* note 4 at 59.

disposition measures shall be made available to the competent authority, allowing for flexibility so as to avoid institutionalisation to the greatest extent possible”.²⁰

While different measures may be evolved for children involved in serious offending, the principles of best interest of the child, rehabilitation and reintegration juvenile justice and international standards laid down in this regard should not be compromised.

Time to set the record straight and learn from others

While it would be popular at this hour to show 300% increase in rapes by juveniles, in doing so several critical aspects remain hidden from the public eye.



Juveniles apprehended in different age groups as percentage of total arrests made in 2003 and 2013

Age group	7-16yrs		16-18yrs		7-18yrs	
	2003	2013	2003	2013	2003	2013
Juveniles apprehended under IPC and SLL crimes across different age groups	15,271	14,676	18,049	28,830	33,320	43,506
Total arrested	68,89,167	79,91,540	68,89,167	79,91,540	68,89,167	79,91,540

Firstly, in absolute numbers, we are talking about 1884 rape cases involving 2074 juveniles, of whom 1388 juveniles were aged 16-18 years (Crime in India 2013, NCRB, Tables 10.2 and 10.8). This figure does not and should not be used to justify rape, but it also cannot

20 Convention on the Rights of the Child art. 40, Nov. 20, 1989, 1577 U.N.T.S. 3.

be used as an alarm bell to opt for a regressive law on juvenile justice. Being the second largest country in the world and one of the fastest growing economies with a population of over 1.2 billion, can India afford to take the plea that it is unable to deal with 1388 juveniles aged 16-18 years and hence these children should be subjected to the adult criminal justice system?

Secondly, if the number of rapes by children has gone up, the absolute number of children has also increase in the last ten years from 414,965,000 children in 2003 to 435,384,000 children in 2013. Thus, the percentage of children who were apprehended for rape as against total child population was 0.000112% in 2003, while in 2013 it stood at 0.000433%, showing an increase of 0.000321 percentage points.²¹

Thirdly, despite this increase, the share of juvenile crimes to total cognizable IPC crimes has hovered around 1% in the last ten years.

Share of “Alleged” crimes by children as percentage of total cognizable crimes under IPC

2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
1.04	1.05	1.04	1.12	1.15	1.17	1.13	1.02	1.08	1.17	1.2

Note: Data is from various Crime in India Publications of the NCR.

Fourthly, the percentage of juveniles apprehended for IPC and SLL crimes as against total arrests has gone up from 0.26% in 2003 to 0.36% in 2013, reflecting an increase of only 1 percentage point in a span of ten years.

Finally, it is equally important to know and acknowledge that despite an otherwise progressive law and efforts made in the last ten years to reduce detention of juveniles, children have not been spared by an essentially criminal justice outlook of law enforcement officials. A Right to Information (“RTI”) filed by HAQ: Centre for Child Rights with Jail No.7 in Delhi’s Tihar Jail, brought to light the shocking violation of child rights and juvenile justice. In a 10 month period between October 2010 and August 2011, 114 juveniles or children in conflict with the law, were transferred from the jail to the observation homes. A Public Interest Litigation (“PIL”) based on this finding was recently disposed off by the Delhi High Court [WP (C) 8889 of 2011]. Even during the pendency of the case, despite clear directions from the court that no child should have to be in an adult jail even for a single day, 280 boys lodged in the jail emerged as confirmed juveniles, who were subsequently transferred to the juvenile justice system. Age inquiry in the case of over 1500 inmates who were identified as possible juveniles is still pending.

21 Calculations provided by Ved Kumari, Faculty of Law, Delhi University.

Post these transfers, newspapers witnessed a series of stories on violence inside the homes for juveniles. Is there any other evidence required to show what living in a jail with adult criminals can do to young people and what it could cost a nation?

The Clarion Call

Since the decade of the 90s India witnessed a spurt in legal reform, strengthening the nation's commitment to child rights. However, strong laws do not necessarily imply proper enforcement and implementation. The track record of implementation of these laws remains poor. And yet, in the wake of anti-juvenile justice sentiments across the country, government's inability to implement the juvenile justice law in letter and spirit has come to be an argument for changing the law.

There is no juvenile justice policy to begin with and the thrust required on a preventive approach to juvenile justice is completely lacking. Sociological research on factors leading to increased incidence of children coming in conflict with the law, as is being reported, is also missing. To say the least, there has been no such research in the last ten years that could inform policy and decision making on juvenile justice.

“You cannot fight fear of crime and moral panics without tools. The best way to convince the public that what you are doing is preventing youth crime and ensuring that it ceases rather than proliferates is by being sure of this yourself. Instead of being swayed by emotional moral panics, youth justice policy needs to re-stabilise by ensuring that there is a bedrock of data being collected, projects and reoffending rates being monitored and evaluated, and good-quality research proving that the outcomes for children are improving.”²²

India is not new to the changes being brought about in the national juvenile justice laws and policies across the globe. The economics of emotions seems to be guiding the economics of juvenile justice and very little is available to assess its impact on society and national development. Diverting away from the well established principles of juvenile justice and child rights and preferring a punitive approach to the restorative justice approach, without creating scientific evidence to support such moves and without even implementing the existing law the way it ought to have been done, cannot be our policy on juvenile justice. Certainly not, unless we accept that we have lost the capacity to even think what impact such changes can have on generations to follow and the society at large.

22 Moore *supra* note 4 at 42.

PROTECTING CHILDREN FROM VIOLENCE: A SHIFT FROM REACTIVE RESPONSE TO RESPONSIVE CHILD-CENTRED APPROACH

*Maitryee Talukdar Ralte**

Introduction

Violence against children is a pan global phenomena transcending socio-cultural, educational and other such boundaries irrespective of gender and age. It appears uninhibited across numerous setting ranging from homes to formal institutions and even on streets and prisons. Child abuse can take many forms: physical, mental, sexual, exploitation and neglect. It is a well-documented fact that children exposed to any kind of violence have damaging consequences on their physical and mental health and overall well-being.

It is a crying shame for mankind that children suffer violence at the hands of those adults who are entrusted with their care and protection such as, family members and teachers. Children also experience violence in the playground amongst their peers in the form of physical fighting, bullying and gang activities.

Although children have suffered violence for centuries, it has only recently gained international consensus of condemnation. One of the hurdles in addressing violence against children effectively stems from the lack of clear legal definition as to what constitutes violence. There are no simple ways to conceptualize violence as it is a cumulative outcome of socio-cultural, psychological and economic factors. Since there is no universal definition of violence in the Indian context, this paper draws on the definition provided by the World Health Organization, which defines violence against children:

“as the intentional use of physical force or power, threatened or actual, against a child, by an individual or group, that either results in or has a high likelihood of resulting in actual or potential harm to the child’s health, survival, development or dignity.”¹

Background and Context

According to 2001 census,² India is a young nation with around 440 million people below the age of 18 years who constitute almost 42 percent of its total population. The large scale socio-economic transformations that have occurred in India brought along with it

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1 World Health Organisation, *World Report on Violence and Health*, (2002) <http://www.who.int/violence.pdf/> (last visited Feb. 14, 2015).

2 Government of India, *Census of India* (2001) <http://censusindia.gov.in/> (last visited Feb. 14, 2015).

similar changes in family structures as well as lifestyle of people. Such a change has also been largely responsible for increasing the vulnerability of children to newer forms of violence and abuse. Despite, commendable steps taken by our country in tackling problems of child education, health and development, the issue of child protection against violence still remains as an incipient issue confined to rudimentary stages of development. Such a laxity towards the issue is slated to systematically impede the overall progress of the country as children are its greatest human resource.

Factors Contributing to Violence

Risk factors

Risk factors make it more likely that a child will be a victim or perpetrator of violence while protective factors make it less likely.³ According to research it has been suggested that influences follow a pattern of change in conjunction with the developmental stage: for example, young children are more likely to be influenced by their families as compared to adolescents, who tend to be more influenced by their peers. Studies have cited certain personality traits and behaviour factors which are associated with violence such as, hyperactivity, history of early aggression, poor behavioural control, low academic achievement and intellectual functioning. Most often, the home environment characterized by poor supervision of children by parents, parental conflict in early childhood and the use of harsh punitive punishment have been accounted as risk factors contributing to violence. In addition, associating with delinquent peers, gender discrimination, income inequality, rapid demographic changes in the youth population and urbanization have all been positively linked with high rates of exposure to violence in children and adolescents.

Violence in any setting is not an isolated event but more about patterns of violence. It is seldom that risk factors operate in isolation, and there can be protective factors that modulate its impact on the child being exposed to violence. A child's resilience as a concept has consistently emerged in various literature as an imperative factor in influencing the child's response to violence.

Resilience and other protective factors

Resilience is often defined as a person's ability to positively adapt or achieve success despite having faced unfavourable situations - being abused or neglected, witnessing violence, or living in poverty - that could lead to negative outcomes such as delinquency. Several studies on resilient infants, young children, and youths exposed to community violence suggests that there exist certain crucial

3 United Nations, *Report on Violence Against Children* (2006), www.srsg.violenceagainstchildren.org/un_study (last visited Feb. 14, 2015).

protective factors for development such as, safe community spaces, conscientious and caring adults as well as the personal characteristics of the child itself. According to Osofsky, the child's most important personal quality is his/her average or above-average intellectual development in combination with desirable social skills.⁴ In similar studies, it has been suggested that there are additional protective factors such as feelings of self-efficacy, self-esteem, individual talents, religious affiliations, and contact with people and environment that promote positive interaction. Despite such factors it is to be noted that the child's ability to realise the value of such protective factors is crucially linked to the family and other such institutional supports as has been discussed above. For example, in a cross-sectional study conducted among 199 male students of classes 8 and 10 in rural and urban areas of West Bengal found that mental health issues like loneliness, worry and suicidal thoughts and violence related issues were higher in terms of prevalence amongst urban students in comparison to rural students, despite the former experiencing larger protective factors, suggesting the need for frequent supervision, monitoring and support of adolescents.⁵

Impact of Violence

Since most intimate relationships are forged and fostered during childhood, exposure to violence at this stage of growth can have significant effects in their responses to it. There exists a gap in scholarship in the area of impact on children as a result of such exposure to violence at such a stage of their development. This gap can be attributed to difficulties while conducting research on behavioural and emotional effects as collecting and collating data in this area is a challenging task. In spite such limitations one can still discern from existing studies the large scale of often negative impact that such exposure to violence can have on children. Despite the ability of such children to overcome these negative experiences many remain deeply affected and continue to have its impact into their adulthood. In a review of literature by Osofsky (1999) exposure to violence is strongly linked to and responsible for emotional and behavioural problems, the symptoms of which varies with age. Studies have suggested that very young children between 6-10 years witnessing violence either at homes or in their community displayed symptoms such as excessive irritability, immature behaviour, sleep disturbances, emotional distress, fears of being alone, and regression

4 Joy D. Osofsky, *The Impact of Violence on Children* (1999), http://www.princeton.edu/futureofchildren/publications/docs/09_03_2.pdf (last visited Feb. 14, 2015).

5 A. Samanta, S. Mukherjee, S. Ghosh, A. Dasgupta, *Mental Health, protective factors and violence among male adolescents: A comparison between urban and rural school students in West Bengal*, 56 INDIAN JOURNAL OF PUBLIC HEALTH 155-158 (2012).

in toileting and language. Furthermore, the presence of symptoms in these young children were similar to posttraumatic stress disorder (PTSD) in adults, such as repeated re-experiencing of the traumatic event, avoidance, numbing of responsiveness, having recurrent nightmares and increased arousal.

As we all know, adolescent is a transitional phase between childhood and adulthood characterized by a myriad of cognitive, physical and emotional changes as well as changes by social roles and expectations. Studies have indicated that exposure to violence during this developmental course interferes with their normal development of identity and autonomy, which is the hallmark of this stage. In addition, adolescent victims of violence tend to show high levels of aggression and acting out, accompanied by anxiety, behavioural problems, substance abuse, poor academic performance and dropping out of school. Consequently, such youths may attach themselves to anti-social peer groups as substitute family and incorporate violence as a method of dealing with disputes or frustration. A recent study conducted among 550 adolescents aged between 14-19 years in South Delhi found that 15.8% of respondents who were exposed to violence reported of having thoughts to commit suicide, while 28 (5.1%) had actually attempted suicide.⁶

Prevalence

The UN Secretary General's Study on Violence against Children (2006) has given the following overview of the situation of violence against children across the globe:

- 1) WHO estimates that almost 53,000 child deaths in 2002 were due to child homicide
- 2) In the Global School-Based Student Health Survey carried out in a wide range of developing countries, between 20% and 65% of school going children reported having been verbally or physically bullied in school in the previous 30 days.
- 3) An estimated 150 million girls and 73 million boys under 18 have experienced forced sexual intercourse or other forms of sexual violence involving physical contact.
- 4) Only 2.4% of the world's children are legally protected from corporal punishment in all settings.

In the Indian context, the Ministry of Women and Child Development (2007) released a nationwide study report on child abuse. The sample included 12,270 children between the age of 5 to 18 years in diverse settings spread across 13 states in the country. The study

6 R. Sharma, V.L. Grover, S. Chaturvedi, *Risk Behaviors Related to Inter-personal Violence Among School and College going Adolescents in South Delhi*, 33 (2) INDIAN JOURNAL OF COMMUNITY MEDICINE 85-88 (2008).

documented the nature and extent of namely four forms of child abuse: physical, sexual, emotional and child neglect. The following were some of the major findings of the study:

Physical Abuse

- 1) Two out of every three children were physically abused;
- 2) Out of 69% children physically abused in 13 sample states, 54.68% were boys;
- 3) Over 50% children in all the 13 sample states were being subjected to one or the other form of physical abuse;
- 4) Out of those children physically abused in family situations, 88.6% were physically abused by parents;
- 5) 65% of school going children reported facing corporal punishment i.e. two out of three children were victims of corporal punishment;
- 6) 62% of the corporal punishment was in government and municipal school;
- 7) The State of Andhra Pradesh, Assam, Bihar and Delhi have almost consistently reported higher rates of abuse in all forms as compared to other states; and
- 8) Most children did not report the matter to anyone.

Sexual Abuse

- 1) 53.22% children reported having faced one or more forms of sexual abuse;
- 2) Andhra Pradesh, Assam, Bihar and Delhi reported the highest percentage of sexual abuse among both boys and girls;
- 3) 21.90% child respondents reported facing severe forms of sexual abuse and 50.76% other forms of sexual abuse;
- 4) Out of the child respondents, 5.69% reported being sexually assaulted;
- 5) Children in Assam, Andhra Pradesh, Bihar and Delhi reported the highest incidence of sexual assault; and
- 6) Children on street, children at work and children in institutional care reported the highest incidence of sexual assault. 50% abuses are persons known to the child or in a position of trust and responsibility.

Emotional Abuse and Girl Child Neglect

- 1) Every second child reported facing emotional abuse;
- 2) Equal percentage of both girls and boys reported facing emotional abuse; and
- 3) In 83% of the cases parents were the abusers.

The statistics can only take us so far. Behind each number lies stories of individual trauma and tragedy and in many cases, a long legacy of suffering. This observation represents a violation of their rights, their basic right to life in particular. Although violence is widespread across different settings this paper will present the case of a 17 year old school boy he has experienced violence in different contexts within the school setting. The aim is to generate the awareness that even though violence in schools exist it can be prevented and must not be tolerated. The author endeavours to highlight the reality that for most children their immediate environments such as homes and schools expose them to violence. This represents a violation of their rights. The author recognizes that it is difficult to make generalizations based on a single clinical case study. However, when interpreting and analysing the study in the light of existing research and literature on the subject matter, common themes have emerged which will be discussed in the following sections.

Case Report

Mr J, 17 year old male is the eldest of two sons of a widowed father. His family describes him as sociable, resilient and self-respecting individual. Since the age of 13 he had been studying in various boarding schools away from home. In the past, there were no complaints pertaining to conduct or school related violence against him. In the year 2014, he was admitted into the 11th standard in a reputed school in Guwahati. The child was relocated from his previous school for the sake of convenience and proximity with his family. In his new school, he was reported to be well-adjusted and functioning within normal limits. However, approximately a month after his joining, he was suspended from school on accounts of scribbling derogatory comments on his personal diary about his hostel supervisor.

As reported by the child's guardians (his sister and her husband), the school authority took their decision without involving them. No formal notification was served to them prior to the suspension. The child's local guardians had taken initiative to search for a mental health professional as the school authority put forward a "judgment" to have him meet a professional and seek appropriate help for his misconduct. The child was assisted by his guardian for his first consultation at the Psychologist's clinic. On interview, the child painfully confessed to scribbling 'hate notes' about his warden as a means of coping with his feelings. He recounted about the incident and said,

"Our supervisor used to be very critical about everything I did. On the day of the incident I was in my room and he picked on me, wrongly scolding me that my room wasn't clean. But I defended myself and explained that I had just cleaned my room. I don't exactly know why but he went to

the warden and complained about me. I was yelled at for no fault of mine. This made me very angry and I scribbled my thoughts on my diary to deal with it. I was quite disappointed that the warden sneaked around my personal belongings without my knowledge...despite having obeyed their commands like kneeling down on my knees for almost an hour and writing an apology letter, they still suspended me from school for 3 weeks. They kept me from meeting my friends and excluded me from giving my class tests.”

Detailed clinical interview revealed nil significant psychopathology in the child. In terms of professional opinion, the child’s so-called misbehaviour was interpreted as a behavioural reaction to situational stress experienced by him. In the words of the child, *“I never meant any harm to my warden...I usually express unwanted feelings and thoughts by scribbling/ doodling on my rough pad, it’s one of my ways of dealing with stress”*. What caused him stress was the school’s intensive study schedule for its residents which allowed little time for personal or recreational activities. He explained that the warden would often taunt or make disgraceful comments if children would leave their study table for even a brief moment which he found unpleasant (*“it’s as though we are imprisoned to score high marks in our exams”*).

The findings of the interview were clearly summarised and communicated to the school authority through a formal letter. The Clinical Psychologist recommended the authority to ignore the incident as harmless and that any kind of punitive action would be detrimental to the child’s well-being. Hence, the school ought to make reasonable decision that is in the best interest of the child. However, the school authority had taken no constructive action in the matter even after 2 weeks from the date of suspension. The guardian and the child were left to wrestle with ambiguity. Due to lack of cooperation and perceived intimidation (School principal to the guardian: *“I’m afraid the decision of the school committee shall not be in favour of the student”*), the guardians voluntarily requested for TC of the child.

After spending a few months in search of a suitable school, the child was finally admitted into a residential school located in the suburbs of Guwahati. The child gradually resumed a regular school life once again. However, this normalcy was interrupted when he suffered serious peer violence in the school premises. As narrated by the victim,

“there was an informal football match between our class and my seniors (12th grade). We were excited and looking forward to play a good match. As the game progressed the players became competitive. Apparently, we were playing

better than the seniors as we were heading the game. During the match, there were minor squabbles between the players which gradually escalated. As the tension increased, our hostel warden and a few faculty members intervened. The game was prematurely ended and all participants were asked to proceed to the dining hall. However, both sides were still agitated and hurling abuses at each other. I was trying my best to calm my team members and earnestly wanted this to end. Then a few moments later, an agitated senior broke out violently...he was stabbing my friend with a kitchen fork. In order to save my friend from being seriously injured I pushed that senior away. Thereafter, the junior boys were directed to assemble in the infirmary. They were locked up, away from the reach of the senior boys. As the condition seemed calmer we returned to our respective rooms. Then all of a sudden while I was sitting and chatting with my roommates, the seniors suddenly barged in. They dragged me out and assaulted me mercilessly. I was shocked. The only thing I could remember thinking was why me? I had no personal enmity with anyone. I was hurt to witness my own friends turn against me and become a part of that violent gang of senior boys. Within a few minutes I think I lost consciousness. When I opened my eyes, I was painfully lying in the hospital bed.”

Following this unfortunate incident the child reported of feeling ‘traumatized and restless’. He also complained of disturbed sleep, distractibility, ‘feeling startled’ and having intrusive and fearful thoughts. The child’s concerns were systematically addressed over several therapy sessions. Referral was made to a Psychiatrist for anti-anxiety medications. The child continues to be in therapy in its middle phase. He has expressed apprehensions of returning to school. Given his own resiliency and provision of a ‘holding environment’ in therapy, he has made considerable recovery. His anxiety symptoms have decreased and he is able to concentrate and sleep better than before. Although he often struggles with feelings of hurt and loss he is making the effort to maintain an objective understanding of his experiences (“*the incident still tends to upset me, I feel occasional bouts of humiliation...I hope this feeling will get better with time...*”).

Since it was a difficult time for the family, a separate session with the guardian was also held to assess their reactions and means of coping with the situations. During the course of interview, they reported that even though they were advised by their wise well-wishers to lodge an FIR against the miscreants and the concerned authority they were reluctant to do so. They explained that “*it might complicate things further and were more in favour of making an amicable settlement*

without getting webbed in any kind of legal issue". With due respect to their right to make their choice in the matter, they were nonetheless encouraged to meet the school authorities with the intention of clearly communicating that such incidence of violence must be condemned and also urge the authority to make appropriate redressal for the damages caused. The guardian formally wrote to the school's principal demanding to organise a formal sessions with the concerned students. The broad objectives for these sessions were to facilitate discussions at reconciliation, psycho-educate them about violence and its consequences and impart conflict resolution skills. In addition they also requested to review the school's safety and security's measures with an emphasis on prevention and intervention and recruit a student counsellor who would support students for their emotional, psychological and mental well-being.

Summary of the Case

17 year old male adolescent studying in class 11, residing in the school hostel was punished by school principal. He was made to kneel down for about an hour in the presence of the school staff on account of scribbling derogatory comments on his personal diary against his hostel supervisor. Although he had written an apology letter to the warden he was suspended from school for 3 weeks and asked to consult a mental health professional for his alleged misbehaviour. The school authority ignored the recommendation of the Clinical Psychologist and plea of the guardians. Instead, they took no constructive actions and implicitly intimidated the guardians which led them to surrender the child's seat in the school.

Similarly, in the second school the child suffered severe peer violence in the school premises. Consequently, he suffered from significant PTSD symptoms and had to seek the help of mental health professionals. However, the authority was callous in their response towards the incident and the affected child. They did not take any immediate disciplinary measures against the perpetrators and took no initiatives to rehabilitate the victim until the guardians formally demanded constructive actions to be taken. Furthermore, the guardians decided against taking any legal action regarding the matter as they were apprehensive in getting webbed in legal issues.

Insights: Emerging themes from the case report

Several themes have been identified from an in-depth analysis of the case in the light of existing research studies and literature. These themes and its implications are discussed as follows:

- 1) Reactionary Response:** Although there are different mechanisms and standard procedures to address violence against children, response to child victims of abuse has largely been more reactive and less focused on prevention and support.

As evidenced in the case report, response to abuse is mostly reactionary such as expulsion or harsh punitive measures. In addition, it is observed that instead of placing systematic support models aiming prevention at the right time, interventions mostly occur in its aftermath. There seems to be a gap between policy and its effective implementation. This implies that emphasis needs to be laid on pro-active prevention based on child-centred, non-violent ways of communication and conflict resolution.

- 2) **Child Participation:** Children are also individuals entitled with rights just as adults. Yet their voices against atrocities are frequently ignored or dismissed by adults. However, this needs to change. They have a right to be heard by everyone. Children can make valuable contributions in helping to understand the violence they face and the damage it does to them. As cited in the UN Secretary General's study on Violence against children (2005), one of the effective means for intervention is involving the children in the development and implementation of programmes to address violence in schools. Such a technique can bring a positive change through the disclosure of experience and sharing of feelings, while also educating the staff about children's experiences. This brings about a positive change in the general environment of the school. Therefore, encouraging children's participation in solving the problem of violence against children in a promising way forward. However, child participation in protecting and preventing violence against children is only possible if adults learn to value the child's views and engage in fruitful dialogue.
- 3) **Youth Violence:** One of the most visible forms of violence is youth violence. This global malice leads to fatal as well as non-fatal assaults leading to injury disability and premature death. It is not only the victim who is afflicted by the problems associated with this but also the victim's families, friends and the larger community. Similarly, fighting and bullying amongst young people have added to this global burden. According to the WHO report on youth violence (2002), mostly school-aged children in 27 countries surveyed had engaged in bullying at least some of the time. In a study conducted among classes 8 to 10 students of government schools in Chandigarh showed that 13% students self-reported violent behaviours and 60% were involved in physical fights at a frequency of more than once per week.⁷ In a similar study conducted on 550 students between the ages 14-19 years old male adolescents in South Delhi showed that one

7 M. Ray and P.Malhi, *Adolescent violence exposure, gender issues and impact*, 43 INDIAN PEDIATRICS 607-12 (2006).

in every two boys reported being involved in physical fights.⁸ Such observations imply that adolescents across different nations are susceptible to interpersonal violence and the youth in India are no exception.

- 4) **Lack of regulation about information sharing between institutions and professionals:** Weak collaboration and coordination between different sectors is an important issue in current systems to address violence. As is shown through the case report that decisions to report and refer child victim of violence is frequently subjective and conducted informally. This implies the development of protocols for cooperation that outline the roles and responsibilities of professionals in responding to violence against children, and how different sectors should coordinate their responses. Child protection being a shared responsibility, for any intervention to be effective there should be guidelines to synergize the efforts being made by different stakeholders to address the issues. For example, in the context of the case mentioned above, in the absence of official guidelines for the institution, professionals and family the matter was not dealt with effectively. This had adverse impact on the child's academic and psychological functioning which could have otherwise been prevented.
- 5) **Stigma of reporting against violence:** Studies have reported that cases of physical violence at home or at school were less likely to be identified as abuse and reported than cases of sexual abuse or child exploitation. Several reasons exist for this lack of reporting. Children consider their homes and schools to be most trusted and safe and they often think that violent disciplinary intervention is an acceptable model. Children also often tend to suffer in silence due to fear of retaliation by their perpetrators. Then there are many instances wherein parents, who instead of protecting their children against violence choose to remain silent when the perpetrator is another family member or more powerful member of the society such as a police officer or school principal. They are often found to succumb to the stigma of reporting against violence. The case of underreporting of violence against children is a global concern. Perhaps, this reluctance is due to lack of confidence in the existing services to respond to cases of violence which raises a number of significant challenges for policymakers.

There appears to be hesitation in the practice of reporting due to the absence of a clear and vivid legal framework of what constitutes violence, making it difficult for practitioners in decision making process. From the standpoint of child rights

8 Sharma *et al*, *supra* note 7, at 87.

and public health, this is an alarming issue since the system's capacity for data collection to subsequently aid policy and support services depends upon such reporting. This observation implies that authorities need to establish safe and accessible mechanisms for children and their families to report violence against children.

- 6) **Need for Positive School Environment:** Most children regard schools as a significant setting after their homes. Students' perception of the school environment is associated with their health and well-being. In contrast, schools often expose them to violence in the form of physical attack and emotional abuse by school staff and fellow students. Studies have consistently shown that victims of school violence are at increased risk for developing negative self-concept, substance abuse aggressive behaviour and suicidal attempts. Conversely, students who perceived high level supports from the school were found to have lower subjective health complaints, satisfactory school performance and increased physical activity (Sharma et al 2008). This implies that there is a need to promote healthy school environment that is free from violence, characterized by warmth, connectedness and respect for others with a larger aim at prevention of long-term impairments. Indeed, schools are excellent places to promote positive mental health. In doing so, mental health professionals should be integrated into the general school system who can provide psychological support and counselling to students.
- 7) **Prevention is the key:** As is prevalent and accepted in many traditional family structures, the act of physical and emotional violence is regarded as a valid form of disciplining the children. Notwithstanding the fact that proper legislation can steer and open policy debates on the issue, decrees cannot effectively change attitudes and proper engagement becomes highly essential. This implies the need to conduct methodically sound research to gain insight into the norms and attitudes surrounding these issues. This could further lead to meaningful engagement of the public through education and training and bring about a systemic change in their response to violence against children.
- 8) **Awareness and Advocacy of Child Rights:** As aforementioned, although there are mechanisms for protecting children from violence, families in need may not necessarily have adequate information about or even know how to access to such facilities. As a result, effective communication about the existence of such mechanisms becomes a very important issue. The media is a powerful means which could be used to enhance public

awareness and sensitivity on the relevance of child rights towards child protection. Everyone, including children need to be aware of and understand the rights perspective and together create an enabling environment wherein children are protected from violence

Conclusion

It is evident that violence against children is not an isolated event, the roots of which have a very deep permeability. Often these roots can be located in situations and conditions that helped the growth of such violence as well as nurtured such behaviour through inaction and passivity. It is within this context that some children become much more susceptible to violence, condoning it themselves, in comparison to other children. This paper concludes on the basis of secondary research and primary case study that the legal definition of what constitutes an abuse of a child needs to be clearly articulated. The present definition does not include many actions - in terms of physical, emotional and neglect - that would amount to an abuse.

Moreover, preventive mechanisms should be institutionalised, especially in spaces/ institutions which children directly/ frequently access such as schools, hospitals, playgrounds, parks etc. and shelter homes, street on the street, etc.

The duties and responsibilities of all caregivers and duty-bearers entrusted with the protection of children in all settings should be specified through clear guidelines to aid accountability. Families, professionals as well as children should be educated about child rights and together create an enabling environment for safe and secure childhood. In our spirit to safeguard children's rights and protect them from violence and:

“if we are to reach real peace in this world, and if we are to carry on a real war against war, we shall have to begin with the children.” - Mahatma Gandhi.

BASIC CHALLENGES IN THE PROTECTION OF CHILD RIGHTS IN THE NORTH-EAST INDIA

*Sapam Dilipkumar Singh**

Introduction

Child is the most valuable asset of mankind and the potential agent for continuation of millennium old human civilization. They require protection from parent, state and society at large for their full development as responsible human beings, because of the fact that they always depend physically, psychologically and morally on adult in all respects. The movement for the promotion and protection of child rights has actually been started since the adoption of the Declaration of the Rights of Child in 1924. The normative foundation, laid by the League of Nations, shows the commitment of the international community for the promotion and protection of child rights. Subsequently, the initiatives for welfare of child have been taken over by the United Nations by adopting the non-binding international human rights document called the Declaration on the Rights of Child, 1959. The non-binding declaration has been culminated into the legally binding international document - the Convention on the Rights of Child 1989 which has precisely dealt with the promotion and protection of child rights at the global level. The Convention has been further supplemented by twin Optional Protocols. Almost all states of the world including India have signed and ratified the Convention.

The Constitution of India incorporates specific provisions for the promotion and protection of child rights in the Fundamental Rights and the Directive Principles of State Policy. The state has enacted special laws and formulated policies in order to fulfill constitutional promise as well as international legal obligations. Apart from general laws which also protect child, protective legislations have also been enacted by the Parliament. These laws provide a wide scope for promotion and protection of child rights in India. However, the children of the North Eastern States have been victims of decade long insurgency both in the hands of state actor and non-state actors threatening their basic right to survival. There are hundreds of instances where children have been killed and seriously injured in the counter insurgency operations conducted by the security forces in the region. There are also hundreds of reported and unreported cases of recruitment of child in the armed opposition groups. In such situation, all the stake holders and people at large are in dilemma as the laws enacted and policies formulated by the state have little significance to it.

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Pre UN Initiatives

The League of Nations was adopted under the Treaty of Versailles 1919 as an international organisation to provide a system for ensuring peace and security and facilitating international co-operation among the states. The League adopted the Convention Prohibiting Traffic in Women and Children 1921. One of the major contributions of the League of Nations for protection of child rights was the adoption of the Declaration of the Rights of the Child 1924. The Declaration neither guarantees legal rights to children nor imposes obligations on states. However, it lays down seven important principles for the welfare of child:

- i. child must be protected beyond and above all considerations of race, nationality or creed;
- ii. child must be cared for with due respect for the family as an entity;
- iii. child must be given the means requisite for its normal development, materially, morally and spiritually;
- iv. child that is hungry must be feed, the child that is sick must be nursed the child that is mentally or physically handicapped must be help, the maladjusted child must be reeducated, the orphan and waif must be shuttered and succored;
- v. child must be the first to receive relief in time of distress.
- vi. the child must enjoy the full benefits provided by social welfare and social security schemes, must receive a training which will enable it, at the right time, to earn a livelihood, and must be protected against every form of exploitation; and
- vii. the child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.

The Declaration was based on relief oriented approach. It conferred the aforesaid obligations upon men and women of all nations. The Declaration was only the expressions of good will that mankind felt towards the future and the very existence of a civilized world. It represents a feeling that child is a part of sacred trust of civilization.¹

Initiatives of the United Nations

The Universal Declaration of Human Rights adopted by the UN General Assembly in 1948 is the basic international statement of the inalienable and inviolable rights of all members of the human family. The Declaration is a milestone in the history of human rights movement. The Declaration provides two special provisions for

¹ REBECCA WALLACE AND KENNETH DATE, INTERNATIONAL HUMAN RIGHTS: TEXTS AND MATERIALS, 137-139 (2nd ed. 2001).

promotion of child rights. Article 25 Para 2 of the Declaration states that motherhood and childhood are entitled to special care and assistance. The article further stipulates that all children, whether born in or out of wedlock, shall enjoy the same social protection. Article 26 of the Declaration provides right to education of every individual. The article further provides that education shall be force, at least in the elementary and fundamental stages. Child as a human being is entitled to enjoy all rights set forth in the Declaration. It is also found that special protection and promotion has been accorded to the child under the declaration.

In order to have an effective realization of the rights and freedoms set forth in the Universal Declaration of Human Rights 1948, the UN General Assembly adopted International Covenant on Civil and Political Rights 1966 (ICCPR) and International Covenant on Economic Social and Cultural Rights 1966 (ICESCR). Subsequently, the General Assembly of the United Nations adopted First and Second Optional Protocol to ICCPR in 1966 and 1989 respectively. These international human rights documents are commonly known as international bill of rights.

These Covenants have created legal obligation on the part of the high contracting member states. The Covenant pays special focus on child and seeks to safe guard the rights of the child in six articles. Article 6 (5) of the Covenant prohibits the imposition of sentence of death for crimes committed by persons below the age of eighteen years of age and such penalty should not be carried out on pregnant women. The Covenant provides that every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state.

There are three articles in the International Covenant on Economic Social and Cultural Rights 1966 which recognize socio, economic and cultural rights of child. Article 10(3) of the covenant prohibits discrimination of children in matters of special protection and assistance and provides for the prevention of economic exploitation of children and young persons. The article further stipulates that their employment in jobs that are harmful to their development should be punishable by law and that states should also set age limits below which the paid employment of child labour should be prohibited and punishable by law, The Covenant recognizes free and compulsory primary education to all. The secondary education shall be made generally available and accessible to all every appropriate means and in particular by progressive introduction of free education.

Convention on the Rights of the Child 1989

The UN General Assembly adopted the Convention on the Rights of the Child in 1989. It was the expression of international concern for special protection of rights of child. The Convention is not only a comprehensive international human rights instrument on the rights of the child but also lays down the solid foundation for protection of the rights of child. It is the most universally embraced human rights treaty in history. It represents the best ever articulation of child rights, setting high standards and procedure for the well being of children everywhere.

It is also unique in its nature since it is applicable to both at the time of peace and conflict. It has two parts comprising of a preamble and fifty-four articles, out of which forty-one articles are substantive and the rest deals with the implementation measures and the miscellaneous provisions. The Convention is based on four cardinal principles viz. non-discrimination, the best interest of the child, the right to live, survival and development and respect for the views of the child. The rights set forth in the convention includes, right against discrimination, right to life, survival and development, right to home and nationality, right to preserve identity, nationality and family relations, right not to be separated from parents except through lawful procedure, right to enter and leave the country for family reunion, right to freedom of expression, right to freedom of thought, conscience and religion, right to freedom of association and peaceful assembly, right against arbitrary or unlawful interference of privacy, family, home or correspondence as well as unlawful attacks on his or her honour and regulation (right to privacy), right to special protection and assistance, right to receive appropriate protection and humanitarian assistance by the refugee child, right of the disabled children to special care, right to health and health care, right to social security including social insurance, right to adequate standard of living, right to education, right of the minority or indigenous child to profess and practice their religion, right to rest and leisure, right against economic exploitation. The Convention articulates five sets of basic rights, namely, civil and political rights social and economic and culture rights.

Implementation Mechanism

The part II of the Convention provides for the establishment of the Committee on the Rights of the Child. The Committee is a body of independent expert consisting of eighteen experts bearing high moral standing and recognised competence in the field covered by the Convention which monitor the implementation of the Convention on the Rights of Child 1989. The reporting system is the only implementing

measure available under the Convention. The state parties shall undertake to submit the reports on the measures they have adopted which give effect to the rights recognised in the Convention and on the progress made on the enjoyment of those rights within two years of the entry into force of the Convention and there after every five years. The report shall indicate factors and difficulties, if any affecting the degree of fulfillment of the obligation under the convention. It shall also contain sufficient information to provide the committee with or comprehensive understanding the implementation of the convention. The Committee on the Rights of the child shall submit reports on its activities once in two years to the General Assembly of the United Nations through the Economic and Social Council.

Article 45 of the Convention, provides that for the effective implementation of the Convention and to encourage international co-operation, the Committee may invite specialized agencies, UN organs and UNICEF to be represented at the consideration of implementation of such provisions as they would fall within their respective mandates.

The world conference on human rights held in Vienna 1993 urges states to withdraw reservations to the Convention on the Rights of the Child contrary to the object and purpose of the convention or otherwise contrary to international treaty law. The conference also calls on states to integrate the convention of the Rights of the Child into their national action plans.

Optional Protocol to Convention on the Child Rights

The General Assembly of the United Nations also adopted two optional protocols to the Convention on the Rights of child in 2000 so as to supplement the child rights convention. Article 38 of CRC refrain states parties from recruiting any person who has not attained the age of 15 years into their armed forces. The article further obligates the state parties to respect for rules international humanitarian law which are relevant to child. The Article has been subject to considerable criticism for two reasons. First, because all other provisions of the convention protect child until he/she attained the age of 18 years. Second, because the provision adds nothing new and could even undermine existing standards contained in the international humanitarian law. The Optional Protocol has risen the age of possible recruitment of persons into armed forces and their participation in hostilities. The protocol sets the age limit for direct participation in hostilities and compulsory recruitment at eighteen years, and prohibits insurgents and armed groups under any circumstances from recruiting persons under eighteen years or using them in hostilities. The International Committee of The Red Cross

welcomes inclusion of non state actors in the optional protocol, but regrets imposition of moral, as oppose to a legal obligation.² India had signed and ratified the International Covenant on Civil and Political Rights 1966, International Covenant on Economic Social and Cultural Rights 1966, Convention on the Rights of Child 1989 and the Optional Protocol on the involvement of Children in Armed Conflict 2000. However, India made its reservation on the Article 3(2) of the Optional Protocol on the Involvement of Children in Armed Conflict with the declaration that :

- i) The minimum age for recruitment of prospective recruits into Armed Forces of India (Army, Air Force and Navy) is 16 years. After enrollment and requisite training period, the attached Armed Forces personnel is sent to the operational area only after he attains 18 year of age;
- ii) The recruitment into the Armed Forces of India is purely voluntary and conducted through open rally system/ open competitive examinations. There is no force or coerced recruitment into Armed Forces.

Apart from international human rights law, the international humanitarian law provides protection of child both in the International Armed Conflict and Non-International Armed Conflict. Article 77 of the Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts 1977 (Protocol I) obligates the parties to the conflict that children shall be object of special respect and shall be protected against any form of indecent assault. In the similar way, Article 4(3) of the Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts 1977 (Protocol II) provides protection of children during armed conflict. The Rome Statute of the International Criminal Court 1998 also prohibits and criminalizes recruitment of children which constitutes war crimes and punishable under the statute.

National Protection

The constitution of a state is the fundamental law for governance of a politically organized group of human beings. The constitution of India guarantees fundamental rights of citizens and individuals in the chapter III which is considered as the cornerstone of it. The significance of the fundamental rights is that any law which is enacted in contravention with it shall be invalid. Article 15 (3) of the

2 Daniel Helle, *Optional Protocol on Involvement of Children in Armed Conflict to the Convention on the Rights of Child*, 82 (839) INTERNATIONAL REVIEW OF THE RED CROSS 797-823 (2000).

Constitution of India incorporates special provisions for women and children which empowers the state to enact special laws for them. Besides, the Constitution (86th Amendment) Act 2002 incorporates Article 21-A in the fundamental rights for providing free and compulsory education to all children of the age of six to fourteen years. The right to education naturally flows from Article 21 of the Constitution which guarantees right to life and personal liberty. On top of it, the Article 23 of the Constitution specifically prohibits all forms of human trafficking including child trafficking and force labour. The fundamental rights provisions of the Constitution are made enforceable in the court of law under Article 32 and Article 226. The commitment and mandate of the Constitution for the promotion and protection of child rights is manifested in the various protective laws passed by the Parliament of India which includes the Child Labour (Regulation and Prohibition) Act 1986, the Juvenile Justice (Care and Protection of Children) Act 2000, the National Commission for Protection of Child Rights Act 2005, the Right of children to Free and Compulsory Act 2009 and the Protection of Child from Sexual Offences Act 2012. The Juvenile Justice (Care and Protection of Children) Act 2002 is the most comprehensive legislations ever enacted for the welfare of children of the nation, which deals with two categories of children. Section 2(d) of the Act defines child in the need of care and protection. According to definition, child who is the victim of armed conflict, civil commotion or natural calamity is included in the category of child in the need of care and protection.

The provisions of Directive Principles of State Policy contained in the part IV of the Constitution of India are not enforceable in the court of law unlike fundamental rights; however, they are the instrument of instructions which are found to be the fundamental for the governance of the country. Apart from enumerating socio economic rights of the citizens of the country, the directive principles of state policy in Article 51(c) stipulates that the state shall endeavor to foster respect for international law and treaty obligations in dealing of organized peoples with one another. In *People's Union of Civil Liberties v Union of India*³ the Supreme Court observed that it is almost accepted proposition of law that the customary rules of international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law. The Supreme Court in *Vishaka v State of Rajasthan*,⁴ further observed that in the absence of domestic law occupying the field the international conventions and norms are significant for the purpose of interpretation. Any international

3 *People's Union for Civil Liberties v Union of India* AIR 1997 SC 568.

4 *Vishaka v State of Rajasthan* AIR 1997 SC 3011.

convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof.

Problems of North-East India

The North-East India, comprising of Assam, Arunachal Pradesh, Manipur, Meghalaya, Mizoram, Nagaland, Tripura and Sikkim, presents an intricate cultural and ethnic mosaic with over 200 ethnic groups with distinct languages, dialects and socio-cultural identity. The region happens to be the most underdeveloped region of the country because of lack of communication, political instability, geographical location, being far away from the national capital and isolated from the rest of the country, in many respects. The entire region has directly or indirectly been affected by the movement of insurgency, ethnic conflicts for the last many years. In the name of adding civil administration and maintain law and order, the Armed Forces Special Powers Act, 1958 has been invoked in the region for nearly four decades, except a few parts of some states. The Asian Centre for Human Rights reports that there are 197 districts in India which are officially notified as the affected areas by the ongoing internal armed conflicts. Out of which 71 districts, notified as “disturbed” under the Armed Forces Special Powers Act (AFSPA) 1958 are in Assam, Arunachal Pradesh, Manipur, Meghalaya, Nagaland and Tripura in the north east India.⁵

Even though the security situation in some parts of the North Eastern States has shown improvement in 2013 as compared to the previous year in terms of number of incidents of violence and casualties of civilians and security forces, the States of Assam, Manipur, Nagaland and Meghalaya continue to account for the bulk of insurgency related incidents of violence in the North Eastern Region. Manipur is an insurgency ridden state affected by activities of Meitei, Naga, Kuki, Zomi, Hmar and Muslim UG outfits. The Kuki/Zomi/Hmar UG outfits are currently under the Suspension of Operation (SoO) Agreement with the Governments of India and Manipur. The violence by Naga UG outfits has been restricted mostly to extortion related incidents. A total of 19 UG outfits [under two umbrella groups i.e., United People’s Front (UPF) and Kuki National Organization (KNO)] are currently under SoO Agreement with the Government of India and the Government of Manipur.⁶

5 *People’s Union for Civil Liberties v Union of India* AIR 1997 SC 568.

6 Ministry of Home Affairs, *Annual Report 2013- 14: Government of India* 13-17 (2014).

The people of the region, particularly children have been the victims of such conflicts for the last many years in one way or other. It is reported that in 1987, the security forces slaughtered tribal children and pregnant women in taking revenge of insurgent attacks in army barracks in Senapati in Manipur. The Amnesty International has also documented in its 1990 report INDIA "Operation Bluebird". Tribal and ethnic children are the hardest hit victims of armed conflict in guerrilla zones in the country. In Assam, 1983, several hundreds of children had also been slaughtered in the infamous Nellie massacre.⁷ The basic and fundamental right to life guaranteed in the article 6 of the Convention on the Rights of Child, 1989 as enshrined in article 21 of the constitution of India has still been violated in such situation. There are many cases of arbitrary arrest and detention, torture, disappearance and extra judicial killing of children of the region. The fact finding team of the National Commission for Protection of Child Rights and the Asian Centre for Human Rights visited Manipur from 18-20 May 2012, the local human rights organizations has submitted a list of 92 cases of extra judicial executions of children. Killing of 13 years old boy, Rakhai Gaur on the 8th December, 2011 by the CRPF in Assam and killing of Md Ajad Khan, a 13 years old student by the combine team of Manipur Police Commando and the Assam Rifles on 4th March, 2009 are the examples of it.⁸ These are some instances in which the state actors have killed the children of the region mercilessly.

The Asian Centre for Human Rights reported a case of illegal detention of an 11 year old girl at a police station in Manipur. It is reported that in August 2009, an 11 year old girl daughter of S. Dewan of Nongmaikhong Mayai Leikai, was illegally detained for 5 (five) days at Mayang Imphal Police Station in Imphal. The victim was a student of 6th standard and was picked up by the combined team of Imphal West Police Commando and personnel of the 12th Maratha Light Infantry of the Indian Army. The combined team could not arrest her parents who were accused of providing assistance to a banned underground group from their house. The personnel asked the victim the whereabouts of her parents however, she could not stand the questioning and fainted. The combined team whisked her away on the pretext of taking her to hospital. After that, the combined team handed her over to the Mayang Imphal Police Station. It was also reported that the victim was further interrogated at the police station and finally was released after 5 (five) days.⁹ It is found that in most of

7 N. SANAJAOBA, RIGHT OF OPPRESSED NATIONS AND PEOPLES 262 (1996).

8 ASIAN CENTRE FOR HUMAN RIGHTS, NOBODY'S CHILDREN: JUVENILES OF CONFLICT AFFECTED DISTRICTS OF INDIA 53-58 (2013).

9 *Id.* at 49.

the cases of arbitrary arrest and detention and extra judicial killing of children in the North – East India, the perpetrators have not been prosecuted and punished as per law of the land for the simple reason is that they have been enjoying virtual immunity and impunity under the Armed Forces Special Powers Act, 1958. In such circumstances, it is found that the government has also conducted both magisterial and judicial inquiry only when the interventions have been made by human rights commission and public.

The recruitment of child soldiers is rampant in India. All the insurgent groups irrespective of their ideology or origin and place of operation often recruit children, not necessarily only for combat purposes. In May 2012, the National Commission for Protection of Child Rights (NCPCR) termed the matter of child soldiers being used by militant outfits in Meghalaya and Manipur as “serious”. In Meghalaya, children are being used as child soldiers by armed opposition groups such as the Garo National Liberation Army (GNLA). On 8 January, 2013, the NCPCR informed that the State government of Meghalaya has agreed to institute a ‘highlevel- inquiry’ headed by an Inspector General of Police to investigate the recruitment and use of children as “child soldiers” by militant groups, and “Goondas” by coal barons.¹⁰ However, the government of India denies the existence of armed conflict in its territory. In the India’s Third and Fourth Combined Periodic Report on the Convention on the Rights of Child the government declares that India does not face either international or non international armed conflict situations. India is a party to the 1949 Geneva Conventions and remains committed to fulfillment of its obligations thereunder.¹¹ In such situation, all the related stakeholders are in dilemma and the victim children of armed conflict have no legal protection.

Conclusion

Child is the future of man and protection of their rights is fundamental for future of mankind. Having realized the importance of promotion and protection child rights, the international community under the aegis of the UN has adopted special convention for the welfare of child. Thereafter, most of countries of the world including

10 ASIAN CENTRE FOR HUMAN RIGHTS, INDIA’S CHILD SOLDIER: GOVERNMENT DEFENDS OFFICIALLY DESIGNATED TERROR GROUPS’ RECORD ON THE RECRUITMENT OF CHILD SOLDIERS BEFORE THE UN COMMITTEE ON THE RIGHTS OF THE CHILD 14 (1st ed. 2013).

11 Government of India, *India: Third and Fourth Combined Periodic Report on the Convention on the Rights of Child, Ministry of Women and Child Development* 199 (2011), http://icds-wcd.nic.in/crc3n4/crc3n4_1r.pdf (last visited Feb. 14, 2015).

India have also enacted protective laws and formulated policies in matching with international human rights standards and norms relating to protection of their rights. Despite of having international and national legal regimes, child remains most vulnerable section of people specially in the midst of hard realities of armed conflict occurring in the region. The North – East India particularly, Assam, Nagaland, Meghalaya and Manipur have still found affected by low intensity conflicts because of the because of existence of armed resistance movement raised by the different insurgent groups operating in the region. The imposition of the Armed Forces Special Powers Act 1958 happens to add more salt to the wound to the life of children living in the North – East region. It is also quite apparent that such infamous Act has to be repealed once and for all to bring the end of this deep rooted practice of immunity and impunity. On the other hand, India being one of the keen contenders of the permanent members of the UN Security Council, the government of India needs to come forward and to sign and ratify Additional Protocol I and II to the Geneva Conventions 1949, the Rome Statute 1998 and amend the Geneva Convention Act 1960, among others. It is also high time to criminalize and punish those persons involved in the recruitment of child soldier so that the inhuman crimes committed against the innocent children both by the state and non state actors could be mitigated without creating much adverse impact on the civilian population.

FROM WELFARE TO ENTITLEMENTS: LEGITIMACY OF CULTURE AS A DEFENCE TO CORPORAL PUNISHMENT

*Mayashree Gharphalia**

There are diverse child rearing practices across the Globe. Physical force or more specifically Corporal Punishment is one of the child rearing practices the aim of which in many communities is said to socialise the child. After the devastation of World War II, the world witnessed a wave of constitutionalism in symbiosis with the revival of Natural Law Theory that culminated in the clarion call of United Nations Declaration of Human Rights 1948 the International Covenant on Civil and Political Rights 1966 and the other United Nations Protocols and Covenants. The paradigm shift from Welfare to Rights based approach to 'Rights' especially after World War II has kind of impacted the legal and societal stance vis. a vis. protection of the hitherto vulnerable groups including the Child. Countries are on an attempt to ban all sorts of Corporal Punishment in Schools. This attempt signifies that disciplining the child by physical force is inherently defective and such discipline violates the rights of the child, at least according to legal discourse. But such ways of discipline enjoys a public legitimacy when defended on grounds of inner logic of the community. This is Cultural Relativism, a concept according to which cultural norms and values derive their meaning within a specific social context and all cultures are worthy in their own right and are of equal value. Enculturation is an important aspect of cultural relativism a process by which people learn the requirements of their surrounding culture and acquire values and behaviour appropriate in the context. Corporal Punishment when administered takes different forms. These forms may be sometimes misinterpreted as maltreatment and at the same time when defended on grounds of relativism has the potentiality of undermining the universality of norms that has been all the more concretized as rights with the UDHR and the Convention on the Rights of the Child 1989. Therefore a mid way that can be devised is an approach that interest of the child is of paramount consideration and the defence of Cultural Relativism stands weak.

The Framework

Academic discourse on Corporal Punishment uses nomenclature of varied nature when it comes to abuse. The key question is when such discipline becomes so severe that it has to be classified as abuse. In Philosophy, Corporal Punishment may refer to the punishment of

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either adults or children.¹ In the social sciences the term may refer to various institutional settings: to the discipline of children at home and in schools as well as to be punishments of prisoners.² Corporal Punishment when administered takes many forms. And such forms are administered through hands. These techniques are varied across the Globe. The often sought for authority on the definition of Corporal Punishment is the United Nations Committee for the Convention on Child Rights that defines corporal punishment as “any punishment in which physical force is used and intended to cause some degree of pain or discomfort however light” and General Comment No. 8 of the same committee also adds that besides the use of the hand or a tool for striking a child corporal punishment:

“can involve for example kicking, shaking or throwing children, scratching pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example washing children’s mouths out with soap or forcing them to swallow hot spices.”³

Parents from Korea, Jamaica and Nigeria and other ethnic minority who have migrated to United States are taken to court when they use corporal punishment. In India, a class one student of Chanhoo in Ranchi district died of suspected internal injuries five days after being allegedly beaten by his school teacher. So the fundamental question is not whether a “differential association”⁴ among cultures gives rise to different child rearing practices rather it is when discipline becomes abuse. Therefore the courts have to read each case on a context and the use of law as a tool to curb corporal punishment proves more beneficial when based on the universal norm of dignity for everyone. This naturally opens up room for a look into the theory of cultural relativism.

The meaning of cultural relativism

According to the theory of Cultural Relativism, every culture is right in its own worth there is no universal moral rules. Moral rules are culture bound. Through a process of enculturation an individual gets the worldview of his community.⁵ His cognition and conduct are

1 David Benatar, *Corporal Punishment* as cited in Alison Dundes Renteln, *Corporal Punishment and the Cultural Defence*, 73 LAW AND CONTEMPORARY PROBLEMS 254, 254-279 (2010).

2 Alison Dundes Renteln, *Corporal Punishment and the Cultural Defence*, 73 LAW AND CONTEMPORARY PROBLEMS 254, 254-279 (2010).

3 General Comment No.8 of the Committee on the Rights of the Child.

4 Theory developed by Edwin Sutherland that through interaction with others, individuals learn the values, attitudes, techniques and motives for criminal behaviour.

5 *Supra* note 3, 256.

shaped by the norms of his community, most commonly through a process of which he might not be aware. His tendency to validate the values within his community creates an 'us' and 'them' which again might be the start of another process called 'ethnocentrism' which does not order in the present paper though. It is also said that ethnocentrism is nearly universal syndrome of discriminatory attitudes and behaviours. The attitudes include seeing one's own group (the in-group) as virtuous and superior, one's own standards of value as universal, and out groups as contemptible and inferior."⁶ It is worth quoting Alison Dunders Renteln:

"One of the most controversial aspects of cultural relativism is that it has been linked unjustifiably to tolerance. By casting theory as a prescriptive one that promotes a value. Some erroneously presume that the relativists must endorse tolerance that there are diverse moral systems requires us to embrace them all. Yet formulating cultural relativism as a prescriptive theory that requires a posture of tolerance is unnecessary. It can be regarded instead as descriptive a theory that simply acknowledges the existence of multiple moral systems."⁷

The descriptive interpretation of cultural relativism theory warrants some criticism to the customs of certain communities as according to such an interpretation cultural relativism are only two descriptive terms and does and as such they do not prescribe.

Customed or Abused?

The case against Adrian Peterson⁸ who was accused of injuring his 4 year old son with a tree branch multiple times has sparked debate about parents using force on their children. The key question is what kind of force is not abuse and is there any measure of 'reasonable force' that is culturally permitted and hence can be used as defence in cases of corporal punishment. In the case of *Ingraham v Wright*⁹ which is a case of Supreme Court of the United States, James Ingraham was a 14 year old eighth grade student at Charles R. Drew Junior High School. He was accused of failing to promptly leave the stage of the School Auditorium when asked to do so by a teacher. He was taken to the school principal's office and he was ordered to bend over so that the principal could spank Ingraham with a spanking paddle¹⁰. The boy refused and on his refusal he was held by his arms

6 Ross A. Hammond and Robert Axelrod, *The Evolution of Ethnocentrism*, 50 J CONFLICT RESOLUT 1, 1-11(2006).

7 Renteln, *supra* note 2, at 255.

8 American Football Running Back for the Minnesota Vikings of the National Football League.

9 *Ingraham v Wright*, 430 U.S 651 (1977)

10 An implement used to strike a person on the buttocks.

and legs and he was spanked for more than 20 times. He suffered a hematoma¹¹ requiring medical attention and he was instructed rest for several days. The school was sued on grounds of “cruel and unusual punishment” and loss of liberty by Ingraham. But the case was lost. The Court held that US Constitution’s prohibition against cruel and unusual punishment does not apply to corporal punishment of children in Public Schools and that the constitution’s due process clause does not require notice and a hearing prior to the imposition of corporal punishment in public schools.

In the case of *State v Kargar*¹² an Afghani Refugee kissed the penis of his baby boy. He was prosecuted for gross sexual assault. The Court held that the dispute is not whether what he did was acceptable in his community. The Court though acquitted him observing that “kissing a young son on every part of his body is only a sign of love and affection for the child”, his family had to suffer stigma and ostracization.

In *Dumpson v Daniel M*¹³ which is a case of 1974, a Nigerian immigrant beat his son in the presence of the school’s assistant principal at a conference for acting out in the class. The father on being intrigued indicated that the son’s action of acting out in the class brought shame to the family. His contention was considered and the court accordingly held that the defence was valid under Nigerian Culture and Nigerian Law. The Courts are faced often with dilemma in construing as to what is an abuse. Therefore a brief reading of the Convention on Rights of Child becomes important to see if universal norms as opposed to relativism can provide a contextual framework for dealing with cases of physical force on children.

Jurisprudence of the Convention on the Rights of Child

With the wave of the paradigm shift from welfare to rights in the rights discourse, children are considered as subjects of rights. Children’s rights are more complex as they are potentially vulnerable. The Convention on the Rights of Child is the foremost authority on Child Rights and ever since the Convention has come into force, 33 countries across the globe have abolished all forms of Corporal Punishment. The CRC creates international rights for children and also provides principles that guide states actions regarding children. According to Article 28(2) of the CRC the school discipline should be administered in a manner consistent with the child’s human dignity. The Convention provides that education is right¹⁴ and the purpose of

11 Localised collection of blood outside the blood vessels.

12 679 A 2d 81,82 (Me,1996).

13 As reported in JUDITH AREEN, CASES AND MATERIALS ON FAMILY LAW 1210-13 (2d ed. 1985).

14 Convention on the Rights of the Child art. 28, Nov. 20 1989, 1577 U.N.T.S. 3.

the school education should be to assist the child in developing his or her personality talents, mental and physical abilities to their fullest potential.¹⁵ Articles 3, 18 and 36 of the Convention deal with parental and adult responsibility in the private sphere and the right to protection from exploitation. Article 19 provides for measures to protect children against all forms of physical abuse and impose an obligation on member states to protect children from all forms of physical or mental violence, injury or abuse. Article 30 of the Convention provides for a principle that nations must act in the best interest of the Child. The CRC has been ratified by almost every country in the world. The norms of CRC are evolving as peremptory norms of *Jus Cogens*.¹⁶ No violence against children is justifiable and violence includes all forms of physical and mental violence. The definition forwarded by the UN committee on Rights of the Child says that violence includes corporal punishment, insults, torture, sterilization and many other harmful acts. The CRC also provides that every child has the right to enjoy one's own culture and this is specially in situations when the child belongs to an ethnic minority, such as the situation faced by immigrants in their new countries as provided in Article 30. But this culture must comply with the framework of human rights. This means that the rights of the child to protection from all forms of violence supersede the child's right to enjoy her culture. Therefore, any practice that is culturally permitted but violates the rights of the Child according to the CRC is not justified. Article 5 of the Third Optional Protocol to the CRC allows children and their representatives to directly challenge a State act that violates the CRC.

Legal Position in General

Jurisprudentially, children below 7 years are exempted from criminal liability on grounds of *Doli Incapax*, which means they are incapable of committing crime. Under Section 83 of the Indian Penal Code, children above 7 years and below 12 years are exempted from criminal liability. Again according to Section 89 of the Indian Penal Code an act by guardian or by consent of guardian done in good faith for benefit of child under 12 years of the age is protected but this protection does not extend to causing death or attempting to cause death or causing grievous hurt. These provisions extend to teachers having quasi parental authority on children. Then again Section 23 of the Juvenile Justice Act 2000 provides that whoever having the actual charge of or control over, a juvenile or the child assaults, abandons, exposes or wilfully neglects the juvenile or causes or procures him to be assaulted, abandoned, exposed or neglected in a manner likely to cause such juvenile or the child unnecessarily mental or physical suffering shall be punishable with imprisonment

15 Convention on the Rights of the Child art. 29, Nov. 20 1989, 1577 U.N.T.S. 3.

16 Principles of International Law that cannot be derogated.

for a term which may extend to six months or fine or both. It applies to both parents and teachers. This provision is in consonance with the CRC which also provides for separation of juveniles in conflict with law from ordinary judicial proceeding to avoid corporal punishment. Child Battery is also a serious form of violence. The Penal provisions in India were silent on the point until Juvenile Justice Legislation came in 1986. In Sri Lanka, its Penal Code does not include right of reasonable chastisement as a general defence for a prosecution causing physical harm to a child of the nature and type criminalised by the code. However reasonable use of force does not come within the scope of such offence. But if such reasonable use of force is a conduct which is punishable under other provisions of the code then, parental authority cannot be used as a defence to such conduct.

Then again in United Kingdom, parents can justify an assault or battery by way of chastisement provided reasonable force by way of correction is used, according to the Children and Young Persons Act 1983 under section 1(17). This provision applies to both Parents and School Teachers. Because a school master is an independent authority to discipline a child at school, a universal limitation is imposed on force that is moderate and reasonable.

In India, in one of the instances it was held that teacher who caned the students and inflicted fist blows, causing bodily injury and loss of tooth would be criminally liable and would not be benefitted for having acted in good faith for the benefit of the victim. Thus the protection of Section 88 of the Indian Penal Code 1860 would not be extended to the teacher.

Corporal punishment to children is also against the general principles of civil liability, resulting in damages or compensation it is against the general principles of criminal liability for assaulting causing injury or harm under Sections 89, 319, 320, 349, 350, 351 of the Indian Penal Code 1860. In regard to contractual liability the school can be made liable if the parents impose a condition that the school shall not impose any corporal punishment on the child. Liability under consumer laws is not yet developed in India. In the case of *Tilak Raj of Chandigarh v Haryana School Education Board, Bhiwani*¹⁷ it was observed that the imparting of education is not sovereign function and so it is a service. But discourse on whether inflicting corporal punishment amounts to deficiency of service are not yet developed in India.

Measure of Reasonable Force

There is no universal measure of reasonable force. Determination of what constitutes reasonable is a difficult task for the courts because reasonableness is culture specific. Notions of right

17 (1992) 1 CPJ 76 Haryana.

and wrong vary according to communities and a single standard definition of reasonableness is practically not possible. If courts employ a reasonable man test to corporal punishment cases then, they may have to accept different reasons for punishing children to socialise them.¹⁸ They might also have to entertain possibility that other methods of imposing punishment are legitimate. Again if in the absence of any precision of 'limitation', there may be a presumption that corporal punishment can be administered safely. And all these justify a total ban on corporal punishment of all forms in all settings as sought by the Global Initiative to End All Corporal Punishment. Because as long as we continue to have corporal punishment it will remain problematic to allow parent to impose it only for those reason designated as acceptable and in the manner authorised by the dominant culture.¹⁹ Because of the danger of using a double standard for emigrant families by punishing them at a much higher rate it might be safer not to attend to limit use of corporal punishment to avoid excessive use.

Apart from CRC, Article 5 of the Universal Declaration of Human Rights which states that no one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment and Article 7 of International Covenant on Civil and Political Rights that provides a right to freedom from torture and cruel inhuman or degrading punishment are the other authorities that serve as a framework for rights of child based on the universal norm of dignity for all. Though the CRC guarantees children a right to culture, Article 24 (3) prohibits tradition which are prejudicial to the health of children. If corporal punishment is argued for on the basis of religious freedom then general comment number 8 of the CRC can be used to counter argue which explicitly rejects article 18 of the ICCPR that religion warrants corporal punishment. In the case of *A v UK*,²⁰ the European Court of Human Rights held that use of corporal punishment was inhuman in schools. In the case of *Campbell v UK*,²¹ it was held that the caning of a young boy by his stepfather was violative of Article 3 of the European Convention of Human Rights.

The human rights of children to be free from threats and violence is a basic human right and supersedes his right to culture because sometimes the right to culture is interpreted as right to socialise according to the norms set up by particular culture. International human rights discourse has undoubtedly recognised child rights and it is evolving as a shared norm among the nations in the contemporary world.

18 *Supra* note 3, at 273.

19 *Id.*

20 *A v The United Kingdom* (100/1997/884/1096).

21 *Campbell v The United Kingdom* (Application no.13590/88).

Best interest of the child

The Best interest of the Child Principle has its genesis in the child custody cases in America. But it is ambiguous and imprecise. However the CRC provides some textual basis to this principle. Article 3 Paragraph 1 of the Convention on the Rights of the Child gives the Child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere. This principle is one of the four general principles of the CRC. The Right to protection from all forms of violence is a right for the child in his best interest and the same also creates an obligation for the state to protect the best interest of the child.

It is pertinent to quote one of the paragraphs of a paper by R Lee Strasburger Jr.,

“The principle of the Best Interest of the Child serves three functions in the CRC:

- 1) to support ,justify or clarify a particular approach to issues arising under the CRC which means the best interest principle is aid to statutory construction .For example when the cultural defence is employed to justify violence, that violates the right to protection from violence, the courts are to employ the best interest of the child principle;
- 2) to mediate conflicts arising between different rights in the CRC, which means when there is a conflict between two rights mentioned in the CRC, the best interest principle shall be employed by the state. For example if culture is used as a defence in child abuse cases, and the CRC also guarantees a right to culture to the child, the state shall be called upon to apply the best interest principle to determine which right shall prevail over the other if not at least balance the conflicting interests, and
- 3) to evaluate State actions not governed by the rights of the CRC which means that CRC in general influences any conflict regarding child rights. The reach of the treaty goes beyond the conflict between discipline and cultural defence to discipline and acts as a theoretical framework to address any child rights issue in the contemporary world.”²²

Apart from these, the scope of the best interest of the child principle is further authorised by Article 3 of CRC. The First part of this section is important as it provides for the principle itself. It

22 R. Lee Starasburger Jr, *The Best Interests of the Child?:The Cultural Defense As Justification for Child Abuse*, 25 PACE INTERNATIONAL LAW REVIEW 179, 161-208 (2013).

proposes a principle that governs all actions concerning children undertaken by courts of law. This principle applies to not a child but children. Then again courts of law includes the criminal and the civil courts. In view of this broad and all pervasive construction the decisions regarding the use of defences in cases related to children are acts concerning children no matter the court of law, and the best interests principle would apply to the determination of the use of defences.²³ The second part of the section says that the principle has to be enforced by the state with respect to the child's guardian and then the state has to enforce the principle with respect to the state's actions itself. The best interest of the child should be a primary consideration for the state.²⁴ That does not mean that the best interest of the child is of utmost importance to the state. It simply means that while deciding cases related to children the best interest is one of the more important interests that the courts need to consider upon.²⁵ This principle does not require the parents to apply it while deciding for his child. It simply requires the state to ensure that parents, or quasi parental authority such as teachers act in the best interest of the child. The ingredients of best interest are however not defined in the CRC. Though ambiguous and under determinate, it nevertheless proposes to eliminate certain practices such as corporal punishment and child abuse and it should be an important principle for states obliging the CRC.

An impasse on the protection of child rights is inevitable at this juncture. Because of the vagueness of the principle, its status in customary international law is still a debate. It is pertinent to quote Philip Alston.²⁶ He said "if human rights norms are inherently indeterminate, the best interests principle is located by most of its critics as the most indeterminate outer margins even of that body of norms." An impasse on the question of corporal punishment is inevitable. The American parenting technique is now in vogue. Then is there an alternative to inculcate good virtues in the child and make him a civic citizen without encroaching upon his physical and emotional integrity. What is the alternative to balance the rights of the child and the right of the parent to culture and autonomy to bring up the child in the way he wants? In this regard Abdullahi Ain Niam²⁷ in his monograph titled Cultural Transformation and Normative Consensus on the best interests of the child questions whether extraneous discipline of child is in his best interest and whether it

23 *Id.* at 179.

24 Convention on the Rights of the Child art. 3, Nov. 20 1989 , 1577 U.N.T.S. 3.

25 *Id.*

26 Philip Alston, *The Universal Declaration at 35: Western and Passe or Alive and Universal*, 31 INT'L COMM. JURISTS REV. 60, 61 (1983).

27 Abdullahi Ahmed An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives*, 3 HARV. HUM. RTS. J. 13, 15 (1990).

goes parallel with human rights standards. For this he proposes a cross cultural dialogue to build a universal consensus. A universal consensus is evident from the fact that 33 countries in the world have abolished corporal punishment. Such a consensus would mean that countries will enforce the CRC and any chances of mitigating penalty to parents and quasi parental authorities on the basis of culture shall be pre remedied by the state. And such an enforcement of the CRC would be supplemented by the country's own law and constitution.

Conclusion

It is not easy to have a clear, well defined line to distinguish between acceptable and excessive use of discipline. Each case has to be analysed in its contextual settings. The normative premise is that if the use of physical force exceeds what is culturally reasonable then the same cannot be justified. But even such reasonableness seldom meets the parameters of reasonableness as set by law because normativity in communities is not an end rather a process that actually keeps the community moving and retains its distinctiveness from the others which is at the heart of ethnocentrism. Such normativity is subjective. Therefore domestic laws banning corporal punishment is the need of the hour. When a child as subjects of rights is put in the same position as adults and the law protecting the same is clear, workable and simple, it can go a long way in protecting the children from physical and emotional violence. An ideal cannot be established. But at the same time can parents be debarred from disciplining the child? There may be alternate ways of disciplining the child which parents need to think upon. Indiscipline may be the result of many factors including peer pressure and surroundings. And at the same it is a matter of age. Because children are potentially vulnerable and are at a receiving end of guidance as well as punishments in a conventional set up, it is the duty of the Parents and the teachers to see that they grow up in healthy environment. Parenting is an art and art is not violent.

PROTECTION OF CHILDREN IN THE STATE OF ASSAM : A CASE STUDY ON CHILDREN INVOLVED IN BEGGING, RAG PICKING IN THE CITY OF GUWAHATI

*Chinki Agarwal and Minakshi Goswami**

Introduction

Children are the assets of the Nation. They must be nourished and persevere as a precious gift for the development in the future. They play a vital role in the nation building. In any country protection of children and young people is of prime importance. So the responsibility to provide healthy atmosphere to the children for their fullest physical and mental development rests on all the civilized society.¹ Protection of children is possible only when we eradicate the problems attached to children. Amongst these many problems the problem of rag picking and beggary are the most significant ones.² Beggary is an age-old social evil. It has of late assumed alarming proposition.³ In some cultures, beggars actually play an important role. In both Hinduism and Islam, for example, charity to beggars is required for all people of faith. By donating to beggars, the faithful can fulfil a major tenant of their religion, increasing the chances that they will be admitted into paradise or reincarnated in a good body, depending on the faith.⁴

This paper deals with the situation of child protection in those spheres where they are involved in begging and rag picking. The paper tries to bring the analogy that what are the available mechanisms for protection of the children in this particular problem which poses a threat the society at large. The first part of the paper would analyse the situation in general related to child begging and rag picking. Then it would try to formulate the reasons as to the socio-economic background which increased this menace.

The third part of the paper poses the questions over the legislations which shows that how the problem of beggary are only left to deduced from the existent provision except in dealing it exhaustively. None of the legislation addresses child begging as a prohibition except an inference in Child Right Act 1930 and Juvenile Justice Act 2000.

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1 Sandip B. Satbhai, *Child Labour in India- Issues and Responses*, <http://www.legalservicesindia.com/article/article/child-labour-in-india-945-1.html> (last visited Mar. 5, 2015).

2 *Id.*

3 Asuina Kartika, *Statistical Survey*, XXXV (118) SOCIAL DEFENCE 44 (1994); Rubina Iqbal, *Begging: A Growing Menace in India*, 2(8) INTERNATIONAL JOURNAL OF ADVANCED RESEARCH IN MANAGEMENT AND SOCIAL SCIENCES 37 (2013).

4 *Id.*

The fourth part of the paper is purely the field work where the researcher tried to gather the responses of the authority regarding child begging per se and their involvement in those particular situation.

Lastly, the conclusion and suggestion by the researcher which tried to articulate that child begging and rag picking are harsh reality of the society and there is an emergent need to protect the children from being rotten or exploited by some of the other groups. The state must strengthen the existing mechanism as well as incorporate these issues so that the children can spread their wings in the safe and sound environment. At this tender age, they must be educated well instead of being pushed into such vulnerable works which would not only hamper the physical and mental strength but also make them emotionally weak.

Child Begging and Rag Picking : Analysing the Reasons

We are living in the 21st century, a century better known for population explosion and growing urbanisation with increasing migration from rural areas and disintegration of the traditional family and community structure. Amongst these many problems a new vulnerable group has taken birth, i.e., the children. India is home to the largest number of children in the world. Every fifth child in the world is Indian. With 1.21 billion people, India is second most populous country in the world, while children represent 39% of total population of the country according to the 2010-2011 Census. In India, however, most of the children grow up in a state of neglect and deprivation, often without proper education and care that they deserve. They live, work and study for survival. During these struggles children leave school at a tender age and start begging on the streets or join their hands with the guardians to pick up rags from the dustbins to earn their livelihood. These children are not taking the benefits of the so called government policies⁵ and in such a situation government is also not being able to help them effectively.⁶ Beggars and rag pickers today have adopted it as a profession to earn easy money. However, in reality, the situation is not that pleasing. Beggars do nothing, except begging and leading a life of horrible moral corruption. Rag pickers on the other hand are exposed to such a polluted environment that they are prone to numerous diseases. Once a child gets into the profession of rag picking or beggary, it is almost impossible to bring them back to the society. Children get attracted to work because they get paid in cash and the monetary attraction provides psychological satisfaction of being

5 Mid day meal.

6 Helen R. Sekar, *Child Labour in Urban Informal Sector: A Study of Rag Pickers in Noida*, [http://www.vvgnli.org/sites/default/files/publication_files/Child % 2 0 L a b o u r % 2 0 i n % 2 0 U r b a n % 2 0 I n f o r m a l % 2 0 S e c t o r % 2 0 - % 2 0 A % 2 0 S t u d y % 2 0 o f % 2 0 R a g % 2 0 P i c k e r s % 2 0 i n % 2 0 N O I D A . p d f](http://www.vvgnli.org/sites/default/files/publication_files/Child%20Labour%20in%20Urban%20Informal%20Sector%20-%20A%20Study%20of%20Rag%20Pickers%20in%20NOIDA.pdf), (last visited Mar. 4, 2015).

economically independent. Child labour has been an important area of social concern both nationally and internationally. Millions of children worldwide start working at a very young age and these children are exposed to various forms of exploitation and abuse. Children continue to work in large numbers in various sectors of the economy. Numerous children are engaged in occupations and processes, which are plainly dangerous and hazardous and it is difficult to arrive at the actual number of working children in these occupations and processes. Some of the glaring examples are the children engaged in rag picking, employed in the carpet weaving, match and fireworks, glass and bangles, lock making, match, slate/pencils, diamond cutting and polishing industries, abattoirs/slaughter houses etc. Children are prohibited to work in these occupations and processes under the Child Labour (Prohibition and Regulation) Act 1986.⁷

Child begging and rag picking is the most common scene in cities like Guwahati. Anyone who's been to India has seen little kids near large areas of dumped waste, things we know and yet choose to ignore on a daily basis. Rag pickers are involved in recycling activities for instance picking up empty plastic bottles, paper, even hazardous materials like disposable batteries or materials with chemicals. Rag pickers pick trash door to door, or are potentially street children picking waste off the road or even whole family units that just live by sifting through garbage. Usually, they fend for recyclable materials e.g. glass, metal & plastic and sell these to scrap dealers. They earn some 200-300 rupees per day which hardly leaves anything for saving to meet their future uncertainties.

The Empirical Survey done by Jayprakash Institute of Social Change, regarding the Profile of Street Children and their Vulnerabilities, it shows that Kamrup (M) has topped among others in the charts. This survey is purely based upon the area of Assam.⁸

The problem of waste management, in India, is so complex and wide spread that it is very difficult to find out where to start. India needs a proper programme for waste management, the laws pertaining to child labour need to be enforced- all these activities are illegal, and mostly the scrap dealers who buy from these kids and families need to be held accountable- even punished, if that is possible. The companies should mandatorily be asked to have their own recycling methods and plans whereby the consumers can give back the worn out products to companies and have them recycle instead of throwing stuff outside to rot and for the rag pickers to struggle with it. Every small step here, is a step forward.⁹

7 *Id.*

8 Report on the Rapid Situation of Street Children in Assam obtained through Assam State Child Protection Society.

9 *Rag Pickers In India: Not painting a good picture*, <http://mief.in/rag-pickers-in-india-not-painting-a-good-picture/> (last visited Mar. 4, 2015).

Reasons for Child Begging and Rag picking

According to UNICEF, Human Rights Watch, and the U.S. State Department, these children aren't allowed to keep their earnings or go to school, and are often starved so that they will look gaunt and cry, thereby eliciting more sympathy-and donations-from tourists. And since disabled child beggars get more money than healthy ones, criminal groups often increase their profits by cutting out a child's eyes, scarring his face with acid, or amputating a limb. In 2006, an Indian news channel went undercover and filmed doctors agreeing to amputate limbs for the begging mafia at \$200 a pop. Who knows how the little boy I met in New Delhi lost his legs.¹⁰

The socio-economic problems lead to the enhancement of begging because of the condition they had to face for the survival. The most prominent reason can be said as the economic causes which entangle the child in the dirt of begging. This is done under two circumstances either the child is suffering in adverse economic condition or it has fallen in the trap of organised or exploitative beggary. In either of the two situations the child had to suffer. There are other situations as well which makes the child fall in the pit of beggary is that as: using child as bait by the parents as a source of income; the child is a street child; the child is a destitute child; religious causes which enhance the menace of beggary; and some casual factors. Among these the most brutal form is that of organised or exploitative beggary.

According to a report,¹¹ a person or any child controlled by the Begging Mafia (here as exploitative group) is beaten and tortured or have a part of the body crippled or disabled for lifetime to appeal to sympathy and pity from the people travelling on the road. This will help them get more and more alms. Mostly children are badly and brutally beaten by gang of mafia, sometimes they are burnt starved for basic meals for few days in order to get them look wretched and desolate.

Mafia targets victims between 2 to 8 years of age. They abduct kids from streets, parks, schools and other public places and put into bad and dump area and train them in begging on streets and red lights. This mafia also makes sure that the beggar and specially children adopt and addict to street life. So that, if 1% children set free in some rescue operation of this trafficking. Children are more likely to come back to streets only. Moreover they are being addicted to drugs by the exploitative groups so that the children would not try to escape from there reach and if at all they try then they had to come back due to

10 Jillian Keenan, *Keep the Change: Giving Money to Child Beggars is the least generous thing a tourist can do*, http://www.slate.com/articles/double_x/doublex/2013/09/giving_money_to_child_beggars_don_t_do_it.html (last visited May 9, 2015).

11 *Beggar Mafia Active in Many Big Cities of India*, <http://www.crimeindeli.com/childhood-lost-shades-beggar-mafia/> (last visited Mar. 5, 2015).

addiction. It acts as a stimulant to control the children.

Legislation related to Child Rights

Indian Constitutional Law

Constitution of India is the law of the land. The makers of our Constitution had used their vision and wisdom by providing protection and provisions for developments of children. The view was that if the children of the country are not nurtured and educated India cannot attain progress and development in the true sense. It is said because in reality children are the nation future.

Preamble of the Constitution clearly speaks about Justice - social, economic and political and Equality in terms of Status and Opportunity. It means no one can deprive children from all opportunities to develop their socio, economic and political status.

- | | |
|--------------------|---|
| Article 15(3) | - State shall make special provisions for women and child. |
| Article 24 | - Prohibit the employment of Children |
| Article 39(e) &(f) | - State shall safeguard health of children and offered opportunities and education of children. |
| Article 45 | - Promote Free and compulsory education to children. |
| Article 21(A) | - Free and compulsory education to all children of the age of 6 to 14. |

The Minimum Wages Act 1948

It provides for fixation of minimum time rate of wages by state government. It also includes the fixation of minimum piece rate of wages, guaranteed time rates for wages for different occupations and localities or class of work and adult, adolescence, children and apprentices.

The Factories Act 1948

The Factories Act expressly prohibited Child Labour under its significant provision. This is nothing but a protection given to the child workers against exploitation.

The Plantation Labour Act 1951

The employment of children between the ages of 12 years is prohibited under the Act. However, the act permits the employment of child above 12 years only on a fitness certificate from the appointed surgeon.

The Mines Act 1952

It states that no child shall be employed in any mines nor shall any child be allowed to be present in any part of mine, which is below

ground, or in any open cast working in which any mining operations being carried on.

The Merchant Shipping Act 1958

The act prohibits employment of children below the age of 14 in a ship except a training ship, home ship or a ship where other family members work. It also prohibits employment of young person below the age of 18 as trimmers and stokers except under certain specific conditions.

The Children Act 1960

This is also important legislation which prohibits employment of children for begging and exploitation of child employee.

The Apprentices Act 1961

It states that no person shall be qualified for being engaged as an apprentice to undergo apprenticeship training in any designated trade unless he is 14 years of age and satisfied such standards of education and physical fitness as may be prescribed.

The Child Labour (Prohibition & Regulation) Act 1986

The main object of the said Act is to prohibit the engagement of children in certain employments and regulation of condition of work of children in certain other employments.

The Indian Penal Code 1860

Section 363A, deals with the offence of kidnapping and maiming of a minor for purposes of begging. However, there is hardly any evidence on the part of law enforcement agency to arrest people who maim or coerce children, who were living off their earnings, for purposes of begging. The beggars of today are either too ill to do any work or too ideal for that, they, therefore prefer to beg to fill their bellies than doing work. They have adopted beggary as a profession.¹²

United Nations Declaration of the Rights of the Child

The said declaration dealt with special provisions and facilities to develop physical, mental, moral and social status. Also the right to social security and protection against exploitation has given special importance in respect to child.

The organizations like SAARC, National Commission for Protection of Child Rights and UNICEF also took efforts for protection and effective implementation of Child Right Convention. Child begging violates the basic human rights and protection framework of UN Convention on Right of Child (1989). Beggary fits into ILO Convention No.182 on the Worst Forms of Child Labour (1999), as an outcome of illicit human trafficking and is one work that is hazardous physically,

12 Iqbal, *supra* note 3.

emotionally, morally and intellectually to the child's well-being.

Furthermore, the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956) also defines forced begging as one of the forms of forced labour which is also supported by ILO Convention No. 29 concerning forced labour or compulsory labour (1930). Under the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000), children (under 18 years old) who are moved from one location to another for the purposes of exploitation are considered to be trafficked whether or not they "agreed" to the exploitation (Article 3(a)-(c)).

Child begging is very clearly part of the organised crime and mafia which benefits from this lucrative business of exploitation and mutilation. As with organised crime and the deep roots it has there are very few prosecutions against traffickers who bring children and force them to beg. However, there have been some good practices, where there government's strict enforcement of the law have supported victim protection for e.g., according to US Trafficking in Persons Report (2011), the Government of Bosnia demonstrated sustained law enforcement and victim protection efforts, and set a leading example in a forced begging case in 2010.¹³

However having all these mechanisms millions of children engaged in hazardous establishments. The Socio-Economic situation forced children to do work to sustain their family. Moreover negligent attitude of parents towards education is also one of the causes behind problem of Child Labour.

There are ample number of legislation for the protection and promotion of child rights but the most evident questions which it lead us to think is that whether the legislation are fully equipped to tackle each and every vulnerable condition which is faced by the children? Do the rights of these vulnerable group of the society is taken care of by the state? Is there is proper state machinery which can address each and every issues alarming in the society? Are state is fully complying with the International guidelines laid down by the United Nations for protection and promotion of the child rights.

These questions raise a doubt over the present system which is prevalent in the field of protection of child right.

13 *Children forced into beggary and coerced to produce earnings*, http://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=14&cad=rja&uact=8&ved=0CG8QFjAN&url=http%3A%2F%2Fwww.globalmarch.org%2Fcontent%2Fchildren-forced-beggary-and-coerced-produceearnings&ei=jwj4VOr_J5SKuATY5oDIBQ&usq=AFQjCNHRox6FNA6a_3pkr5kom4cv27WMog&sig2=3nclbn6ulpcSeni0xufsg (last visited Mar. 5, 2015).

NGOs and Government Organisations working in the field of protection of rights of children

Nelson Mandela, the former South African President observed that :

“Safety and Security do not just happen; they are the result of collective consensus and public investment. We own our children, the most valuable citizens in our society, a life free of violence and fear”

The words of Nelson Mandela thus show that safety, security and protection of children need a lot of effort and investment. Civil society organizations and government agencies are actively working around the world to address many of these problems and to provide better protections for children. During this research work, the researchers have visited a number of Government Departments and Non Government Organisations in order to analyse the efforts made by them for the protection and promotion of rights of children. Here is a brief report of what was been observed.

Visit to Childline

For this paper the Researchers visited Child Line¹⁴ where they had an interview with one of the team members Gobinda Deka. He informed the Researchers that the main office of Child Line is situated in Mumbai and it is a registered national NGO working all over India. Child Line is a project of Indian Council for Child Welfare. It works on phone calls¹⁵ and addresses any problems related to children.¹⁶ When they receive a phone call they immediately form a group of member of Labour Department, police, magistrate and this rescue team goes to the place where the child is living. They rescue the child and bring him within 24 hours to produce before Child Welfare Committee.

Visit to Assam State Commission for Protection of Child Rights

For this paper the Researchers also visited the Assam State Commission for Protection of Child Rights, Jayanagar, Six Mile which is the second State Child Rights Commission in North-East India. The Commission has been sincerely working towards fulfilment of the provisions of the United Nations Convention on the Rights of Child which India has ratified. The ASCPCR addresses any issues related to children¹⁷ so that their rights can be well protected. However they are

14 Child Line is a national, 24 hour, free, emergency phone outreach service for children in need of care and protection; linking them to long term rehabilitation and care.

15 1098 night and day.

16 Boys between the age group of 0-18 years and girls between the age group of 0-20 years are dealt by child line.

17 Children means any person below the age of 18 years.

not specifically dealing with the issues of child bagging and rag picking.

The 5th Annual Report, 2014 of Assam State Commission for Protection of Child Rights shows that there is no separate cell or body to tackle the burning issue of Child begging. Moreover, it is quite shocking to know that in last few years there was not even a single case registered for the problem of child begging.¹⁸

The Child Welfare Committee which is working for the protection of the rights of the children had a specific category which deals with the children found begging further enumerated in Section 2(d) but the commission has not registered a single case in this respect. This makes us to rethink the implementation and monitor mechanism of the existing commission.

Visit to State Child Protection Society, Assam

The authors, on their visit to State Child Protection Society, Assam talked to one of the female staff working there regarding the steps taken by State Child Protection Society for protecting the rights of child. SCPS, Assam works on aspects like preventive child protection, addressing social norms and behaviour change, issues with regard to protective environment in the context of schools etc. SCPS, Assam also maintains statistical reports on various issues of child. They believe that, most of the times, street children are the ones involved in professions like bagging, rag picking and petty offences. The statistical records show that the number of street children has grown in an alarming rate over the last few years and as compared to the other districts, it is highest in Guwahati. The more the number of street children is, the more the number of child baggers and rag pickers will be.

Visit to Sneha Bandhan

Sneha Bandhan¹⁹ is a residential home at Beltola for the children in distress and without parental care, built in the memory of Late Kailashnath Sarma²⁰. Sneha Bandhan also has its own Children Library cum Recreation Centre for the personality development of the kids. The Researchers observed that the standard of life in Sneha Bandha is quite good²¹. Sneha Bandhan has now completed its 4th year and

18 ASSAM STATE COMMISSION FOR PROTECTION OF CHILD RIGHTS, 5TH ANNUAL REPORT 32 (2014).

19 Sneha Bandhan is a children's house which has been set up by Himanta Biswa Sarma, the third son of Kailash Nath Sarma, in whose name the trust has been formed.

20 Kailashnath Sarma was a poet, writer and philanthropist.

21 The children are studying in some of the good schools of Guwahati. They are also given the chance to choose any co curricular activities that they are interested in and accordingly they are admitted to Bharat Natyam and Cricket classes. Every Sunday the kids are taken to the Children Library cum Recreation Centre as well.

currently there are 12 children living there though the capacity is 50. Sneha Bandhan believes in quality rather than quantity and hence they are not much concerned about increasing the number of kids living there, but rather, they try their best to give the 12 kids a homely environment. They generally do not disclose the details and background of the kids and hence it was difficult for the researchers to find out whether they have any kids who was a bagger or rag picker. However, they said that most of the kids involved in professions like bagging and rag picking generally are not orphans and their parents themselves allow them to do these things. Hence they do not allow the NGOs to take their children because the parents think that the kids are contributing at least something to the economy of the family. So it is very difficult for child care homes like Sneha Bandha to do something for the baggers and rag pickers.

Interview

It was one fine afternoon of February, 2015. A day prior to holi, the researchers were on their visit to Child Line. In the midst of their way, saw a very young rag picker near Ulubari flyover. His name was Maja Malik, 12 years of age, a student of class V. His father's name is Sahidul Rahman and mother's name is Majada Begum. His father is a rag picker who lives in Guwahati. His son stays in Mangoldoi with his mother and he goes to a nearby school. He had holidays in school and so he came to Guwahati with his father. The kid too was picking up plastic bottles from the dustbin to help his father and the smell near the dustbin was so pathetic that after inhaling such polluted air the kid may fall sick. His father earns about 200-300 rupees per month by selling the rag and he has been in this profession for about 3-4 years till now. The father wants to see his kid pursuing higher education one day. The kid was very shy and was hesitating to talk much. The father, with his little earnings could only send the kid to a government school. It is not easy for him to send the kid to some co-curricular activity classes so that he develops his personality. If the father takes the kid along with him to pick rag, there are chances that he too may one day choose rag picking as a profession.

Suggestions

- Child Rights should not only be protected in paper, it shall have to be implemented in reality with proper monitoring mechanism. To check the efficiency of legislation there must be a working panel to work for the welfare of the child rights per se. And in particular child begging which is not present till today;
- Laws must be enacted or there must be amendment in the present legislation to bring the concept of child beggary in its purview along with strict enforcement of the aforesaid;
- Effective planning should be done by the government to solve unemployment and Poverty of the parents so that they would not

involve their children in begging;

- Child Beggars should not be allowed to stay in public places like railway stations, bus stops, market places, etc;
- General and technical education should be given to orphans. So that lack of sufficient resources would not provoke child to start begging;
- In the contrary, all the orphans, Children and handicapped should be taken care of by opening more and more rehabilitation centres’;
- The people should be enlightened about the realities of beggary and its effects on the society as a whole and make them stop giving alms to the beggars;
- Strict implementation of Child Rights legislations and practical and healthy alternatives to replace this evil can go a long way to solve the problem of Child Begging in the society; and
- Application of Compulsory Education policy in a more vibrant manner so that it can contribute more in curbing the menace of Child Begging from the society.

Conclusion

After a detailed study of the situation on the rights of child in the light of child bagging and rag picking, it may be summed up that these practices are more prevalent among destitute children. These evil practices are among one of the main reasons why the rights of child are not been well protected and why children are not getting proper education and opportunities for their overall development. Both the government as well as the Civil Society Organisations are much concerned about problems like child trafficking, child marriage, child labour etc., and they are addressing these problems quiet efficiently. The problem of child begging and rag picking, no doubt, are present in every corner of the society. But in order to address these problems efficiently further awareness is needed. Thus these two social evils should be taken seriously and the concerned authorities need to take steps towards addressing these problems. Every single step taken would be a step forward.

After analysing the situation of child begging and rag picking which is quite evident in the prevailing socio-economic condition it could be concluded that though this problem has many reasons but its time is crucial to do something for the children as they are the future of our nation. They are entitled to each and every right enumerated in our Constitution as well as a special privilege by the state. Moreover the end product of the field visit shows that the mechanisms are available but it is not being implemented in that efficient manner. Moreover, it is very much difficult to infer that despite many legislations, child begging and rag picking are still prevalent in the society which is very harsh to speak but it is the naked truth.

PART - II

JUVENILE JUSTICE

COUNSELLING FOR CHILDREN IN CONFLICT WITH THE LAW: KEY CHALLENGES AND BOTTLENECKS IN IMPLEMENTATION

*Kalpana Purushothaman**

Introduction : Need for Counselling for Children in Conflict with the Law

It is a known fact that institutionalised children in general, and children and adolescents in juvenile justice institutions in particular, are more likely to suffer from a range of mental health issues. These may manifest as behavioural or adjustment problems to more serious mental illnesses. Research findings in the US show that there is a strong correlation between mental illnesses and children in conflict with the law. While research in this population is sparse in India, if we extrapolate the data from the West we can reasonably conclude that the same should hold good for the children in conflict with the law in India as well. A study by the National Coalition for the Mentally Ill in the criminal justice system on the type of disorders found among imprisoned youth states that:

“Youth who are involved with the juvenile justice system have substantially higher rates of mental health disorders than children in the general population, and they may have rates of disorder comparable to those among youth being treated in the mental health system. The prevalence of mental disorders among youth in the general population is estimated to be about 22 percent; the prevalence rate for youth in the juvenile justice system is as high as 60 percent”.¹

“Research indicates that from one-quarter to one-third of incarcerated youth have anxiety or mood disorder diagnoses, nearly half of incarcerated girls meet criteria for post-traumatic stress disorder (PTSD), and up to 19 percent of incarcerated youth may be suicidal. In addition, up to two-thirds of children who have mental illnesses and are involved with the juvenile justice system have co-occurring substance abuse disorders, making their diagnosis and treatment needs more complex.”²

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1 R. Otto, J. Greenstein, M. Johnson & R. Friedman, *Prevalence of mental disorders among youth in the juvenile justice system* in RESPONDING TO THE MENTAL HEALTH NEEDS OF YOUTH IN THE JUVENILE JUSTICE SYSTEM 7-48 (J. Cocozza ed., 1992).

2 P. Gendreau & C. Goggin, *Principles of effective correctional programming* 3 FORUM ON CORRECTIONS RESEARCH 1-6 (1996).

In the author's experience as a counsellor working with children in conflict with the law at an Observation Home at Bangalore for the last few years, children have shown a range of mental health disorders like depression, post traumatic stress disorders, drug and substance dependence, mood disorders and so on suggesting substantial psychiatric morbidity amongst juvenile detainees. There are also many children who enter the juvenile justice system who may not have any diagnosable psychiatric disorder but have many behavioural problems due to issues with their home, school or neighbourhood. These children would be tremendously helped through counselling and other support mechanisms that involve family, selective well-wishing community members.

Research on the effect of counselling on recidivism in the US has shown encouraging results. For example, the report by Kadish, Glaser, Calhoun, and Risler (1999) supported the effectiveness of counselling services. In their study about the effect of Juvenile Counselling and Assessment Program (JCAP) in Georgia, individual and group counselling services were provided for 55 adjudicated delinquent youths aged (9-17 years) over a 4-6 month period. The recidivism rates of the youths who had received counselling services were compared to the recidivism rates of a control group of 55 adjudicated youths who had **not** received counselling. A significant difference in the frequency of reoffending was found between the two groups. Of those juvenile delinquents who received counselling, only 25% reoffended, whereas 64% of the youth in the control sample reoffended.”³

It is the author's strong belief based on years of experience working with this population that **all** children coming into contact and /or conflict with the law **need and will benefit from counselling** – of different kinds and to varying degrees.

But, is counselling a reality for children in conflict with the law in India? Are such structured, developmentally sound, age and gender appropriate counselling services accessible and available to all juveniles coming into conflict with the law? Is counselling provided to juveniles at the institutions established under the JJ Act (like the Observation Homes, Special Homes, etc)? Does this counselling support extend to families who may also often go through intense emotional distress and social stigma on account of their child being involved in the justice system? Does the counselling continue even while the child is on bail or after legal closure of their case when often, the most crucial aspects of rehabilitation and reintegration into the community should take place? Are there any screening mechanisms

3 KEY SUN, CORRECTIONAL COUNSELLING : A COGNITIVE GROWTH PERSPECTIVE (2nd ed. 2013).

to assess the presence / prevalence of mental illness and associated behaviour problems in children?

These are some of the questions that would help understand the real issues regarding the role and effectiveness of counselling in the juvenile justice system.

The Juvenile Justice (Care and Protection of Children) Act 2000 describes two categories of children – namely Children in need of care and protection and Juveniles in conflict with the law as being under the scope for coverage under the Act. This paper addresses some of the key challenges in implementation of the Act, with specific reference to counselling and for children in conflict with the law only.

Definition of child in conflict with the law and child in need of care and protection according to the Juvenile Justice (Care and Protection of Children) Act 2000.

Who is a child in conflict with the law? The Juvenile Justice, (Care & Protection of Children) Act 2000 uses the term 'juvenile' to describe a child in conflict with the law and defines as, "A **juvenile in conflict with the law** means a person who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence"

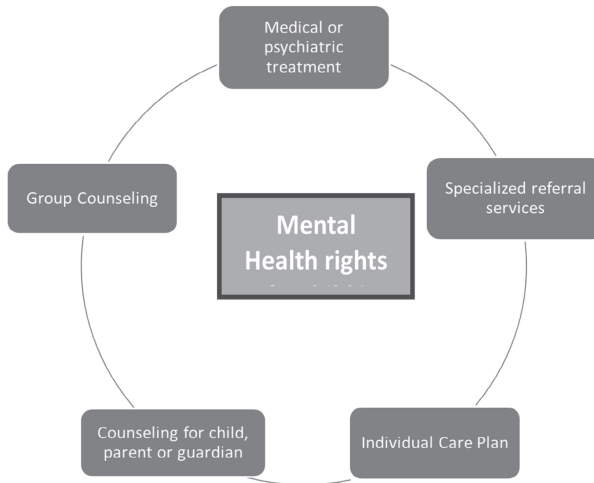
According to Section 2 (d) of the JJ Act, a **Child in need of care and protection means a child:**

- Who is found without any home or settled place or abode and without any ostensible means of subsistence;
- Who is found begging, or who is either a street child or a working child;
- Who resides with a person (whether a guardian of the child or not and such person
- has threatened to kill or injure the child and there is reasonable likelihood of the threat being carried out, or
- Has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person,
- Who is mentally or physically challenged or ill children or children suffering from terminal diseases or incurable diseases having no one to support or look after,
- Who has a parent or guardian and such parent of guardian is unfit or incapacitated to exercise control over the child;
- Who does not have a parent and no one is willing to take care of whose parents have abandoned (or surrendered) him or who is missing and run away child and whose parents cannot be found after reasonably inquiry;

- Who is being or likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts;
- Who is found vulnerable and is likely to be inducted into drug abuse or trafficking
- Who is being or likely to be abused for unconscionable gains; and
- Who is a victim of any armed conflict, civil commotion or natural calamity.

Mental Health rights of children in Conflict with the Law

Though the law provides for several mental health services including counselling, psychiatric services, specialized referral services, etc. there is need for the mental health community to actively advocate and champion for the need to look as mental health as a right for every child in conflict with the law.



Mental Health rights of a child in conflict with the law under the JJ Act

1. **Medical or psychiatric treatment and specialized referral services** Section 48 of JJA – (i)“When a juvenile or the child who has been brought before a competent authority under this Act, is found to be suffering from a disease requiring prolonged medical treatment or physical or mental complaint that will respond to treatment, the competent authority may send the juvenile or the child to any place recognized to be an approved place in accordance with the rules made under this Act for such period as it may think necessary for the required treatment.

- 2. Specialized referral services :** Section 58 (as amended in 2011): Transfer of juvenile or child as are mentally ill or addicted to alcohol or other drugs.—(1) Where it appears to the competent authority that any juvenile or child kept in a special home or an observation home or a children's home or a shelter home or in an institution in pursuance of this Act, is a mentally ill person or addicted to alcohol or other drugs which lead to behavioural changes in a person, the competent authority may order his removal to a psychiatric hospital or psychiatric nursing home in accordance with the provisions of the Mental Health Act, 1987 or the rules made thereunder.(2) In case the juvenile or child had been removed to a psychiatric hospital or psychiatric nursing home under sub-section (1), the competent authority may, on the basis of the advice given in the certificate of discharge of the psychiatric hospital or psychiatric nursing home, order to remove such juvenile or child to an Integrated Rehabilitation Centre for Addicts or similar centres maintained by the State Government for mentally ill persons (including the persons addicted to any narcotic drug or psychotropic substance) and such removal shall be only for the period required for the in-patient treatment of such juvenile or child.Explanation.—For the purposes of this sub-section,—(a) "Integrated Rehabilitation Centre for Addicts" shall have the meaning assigned to it under the scheme called "Central Sector Scheme of Assistance for Prevention of Alcoholism and Substance (Drugs) Abuse and for Social Defence Services" made by the Government of India in the Ministry of Social Justice and Empowerment or any other corresponding scheme for the time being in force;(b) "mentally ill person" shall have the meaning assigned to it in clause (1) of section 2 of the Mental Health Act, 1987;(c) "psychiatric hospital" or "psychiatric nursing home" shall have the meaning assigned to it in clause (q) of section 2 of the Mental Health Act, 1987.'
- 3. Individual Care Plan** Rules 2 (h) – Individual Care Plan – is a comprehensive development plan for a juvenile or child based on age specific and gender specific needs and the case history of the juvenile or child, prepared in consultation with the juvenile or child, in order to restore the juvenile's or child's self esteem, dignity and self worth and nurture him into a responsible citizen and accordingly the plan shall address the following needs of a juvenile or a child – (i) Health needs;(ii)Emotional and psychological needs;(iii) Educational and training needs;(iv) Leisure, creativity and play;(v) Attachment and relationships;(vi) Protection from all kinds of abuse, neglect and mal treatment;(vii)Social mainstreaming; and (viii)Follow up post release and restoration.

4. Counselling for child, parent or guardian and group counselling Section 15 (Final orders that may be passed by a JJB include: a) allow the juvenile to go home after advice or admonition following appropriate inquiry against and counselling to the parent or the guardian and the juvenile; and b) Direct the juvenile to participate in group counselling and similar activities.

Current Mechanisms to ensure Counselling Services to Children in Conflict with the Law – State, Civil Society and Individuals

The Juvenile Justice Boards (JJB) are entrusted with the responsibility of ensuring mental health rights of the children brought before them through orders for treatment, referral services and Individual Care Plans. These JJBs are made up of a three member bench with one magistrate and two social work members, of which at least one is a woman. The intent of setting up such a multi-disciplinary bench is to focus on the child and not only the offence, *understand the circumstances* which led to the commission of the offence, make recommendations to ensure **rehabilitation, reformation and restoration** of the child with the community.

The JJ Act also provides for Juvenile Justice Institutions to be set up, like the Observation Homes where children in conflict with the law are kept while their case is heard before the JJB, the Special Homes where children found guilty of an offence may be sent for rehabilitation, or the fit institutions/individuals which are authorized agencies who may be entrusted with the care and rehabilitation of the child in conflict with the law. Each of these institutions are mandated to appoint a counselor to provide counselling services to the children. At present, many of these counselors are appointed under the Integrated Child Protection Scheme (ICPS).

The law makes it possible for civil society to play an active role in ensuring mental health rights for children in conflict with the law. Social investigation reports, Individual care Plans, fit institutions / individuals, providing direct mental health services are some ways in which civil society may participate in providing services and contribute to the rehabilitation of children in conflict with the law. Counselors not appointed by the state could also offer to provide their services through this route.

Some key challenges and bottlenecks in ensuring Counselling for Juveniles

The nature of the counselling process for children in the juvenile justice system is unique in some ways.

First, much of the counselling involves **a legal context**. Since the reason that necessitated or initiated the counselling process is itself, the fact of the child coming in conflict with the law, a lot of the

counselling relationship and process involves discussions about the alleged offence, what were the circumstances prevailing and possibly leading/contributing to the alleged offence, impact of the alleged offence on the juvenile and his/her significant others, coping with experience of contact with the police, preparing for hearings, possible consequences (legal, social, educational, financial, etc.), exploring strategies and life skills to cope with life after the legal proceedings are over and so on. Enabling the child to understand the legal and non-legal consequences of his conflict with the law is one of the key goals of the counselling process;

Secondly, much of the counselling may **not be voluntary**. Counselling for juveniles is usually done either by the counsellor at the institution (Observation Home, Special Home, etc.) or an NGO-appointed counsellor who may be offering counselling services for this population. Very rarely do families of juveniles seek the services of a professional counsellor on their own. Counselling may also be done at the behest of the Juvenile Justice Board (JJB) or as part of referral services identified for a particular juvenile. The non-voluntary nature of this counselling relationship may also create resistance and obstacles in the effectiveness as well as the way the counselling relationship unfolds between the child and the counsellor; and

Thirdly, counsellors are working with juveniles who have been charged with having committed an alleged offence but who, **often are themselves victims** of abuse, neglect, violence, crime and so on. This calls for a deep understanding and appreciation (on the part of the counsellor) of the complex familial, social, economic and other factors that have brought this child who actually needs care and protection into conflict with the law.

This makes the role of the counsellor in the juvenile justice system a complex and challenging one. In addition, there are several systemic, infrastructural and resource constraints that pose a challenge in ensuring that the child in conflict with the law receives counselling services, which he /she is entitled to by law. Some of these are :

Lack of specifically stating counselling as a mandatory service under the law

Even though the JJ Act includes counselling as an essential part of the mental health components needed for children in the juvenile justice system, it does not list it as a fundamental right for children in conflict with the law, nor are there any penalties if this is violated. Hence, while it is widely recognized and established that the right to legal representation is a fundamental right for the child in conflict with the law, the right to counselling services is not mandated by law, not legally enforceable and therefore, often seen as an 'additional' or 'extra' service or a 'luxury' by many of the stakeholders

including JJBs, lawyers, functionaries, caregivers and families themselves.

Lack of understanding the role, importance of counsellors and the counselling process in enabling treatment, rehabilitation, reformation and reintegration of children in conflict with the law

While the JJ Act in its current form is a fairly progressive and enabling legislation that recognizes the importance of the counselling process and crucial role that a positive relationship and experience with a counsellor can have for a child in conflict with the law, many of the stakeholders in the juvenile justice system may not necessarily be aware, attuned or willing to invest time or resources in empowering the counsellors to play this transformational role. Examples of this lack of understanding are manifested in JJBs asking counsellors to do administrative work relating to cases before them instead of actually counselling a child, superintendents of institutions assigning administrative and even housekeeping tasks to counsellors, counsellors not being asked for their professional opinion by the JJBs about a child receiving counselling from them, counsellors inputs not included in Social Investigation Reports or Individual Care Plans, same counsellor being assigned to multiple institutions established under the JJ Act, counsellors asked to 'advise' or 'discipline' children who have difficulty respecting rules or boundaries, role of counselling assigned to any staff – like probationary officer, housefather, guard, teacher, etc. who may be available rather than appointing a specially trained counsellor, appointing social workers, retired teachers, etc with no experience of counselling special populations as counsellors, and so on.

Lack of a prescribed/ standard, developmentally appropriate, culturally sensitive counselling model / framework for children in conflict with the law in India

Counselling juveniles in conflict with the law is still an emerging practice and discipline in India and is yet to evolve a developmentally sound and culturally rooted practice framework that can be used effectively in correctional settings. As a result, practice guidelines, protocols for inter-disciplinary functioning, role of a counsellor in the juvenile justice system, in judicial hearings, in rehabilitation, etc are still in the process of being established. This is, however, part of a larger issue of lack of a regulatory or governing body for counselling as a profession in India.

Lack of an Individual Counselling Plan (for the child and the family) as part of the legal requirement

Each child coming into the juvenile justice system is unique and has his/her own set of needs, abilities and history. Some families are better able to cope with the experience through their journey with

the juvenile justice system than others. Both these are crucial factors in determining the effectiveness and outcomes of the counselling services received.

One the central bottlenecks in ensuring that the counselling services enshrined in the JJ Act is the lack of individualised counselling plans and processes – that are monitored, reviewed and customized to meet the individual needs of the child and the family. Though the JJ Act speaks of an **Individual Care Plan** which also calls for inputs from the counsellor, in practice, these plans are rarely prepared, rarely asked for or insisted upon by the JJBs and rarely implemented and there is no **Individual Counselling Plan**.

Lack of customized counselling services

Counselling services may be inadequate or ineffective or simply unavailable to meet the unique needs of the individual child. Some children may benefit from a group setting or from being counselled while at home or in a community setting, while some others with more severe problems may require individual counselling. The counsellor should be able to discern who would most likely benefit from a group setting and who needs individual counselling as well as what themes can be discussed in a group while what themes need to be discussed in individual sessions. Section 15 (Final orders that may be passed by a JJB) include directing that the juvenile be sent for group counselling or other similar activities. However, developmentally appropriate, specially customized, structured group counselling programs that can be delivered by trained professionals are yet to become a standard service offered to children in conflict with the law.

Lack of medical and psychiatric and other support services linked to counselling services:

The child may be suffering from other underlying medical or psychiatric issues which may not have been diagnosed or treated and offering counselling services at this point may not be helpful for the child. For example, the JJB may refer a child who refuses to attend daily classes at the OH for counselling. A possible reason for the child to refuse attending classes could be an underlying learning disability. The child's own negative experiences relating to learning may also make him resist any attempts to forcefully 'educate' him. Such a child first requires a formal screening process to assess the scale and nature of his learning difficulty and then have a tailor made learning plan that caters to his needs, capacities and limitations. There are also several examples where children who may be suffering from long standing or severe substance dependence are sent for 'counselling' and 'advise' to overcome their drug habit. Unless these children first receive de-addiction services for their addiction, any counselling or 'advise' given would not be of much use or help.

Counselling only the child and not the family

Though Section 15 (Final orders that may be passed by a JJB include) counselling for the parent or guardian of the child, this may not be a widespread or established norm. Their son or daughter being charged with an offence is often a traumatic and stressful experience for most parents and the juvenile being brought to the Observation Home often causes a great deal of emotional distress as well social stigma for families. Each family member often goes through disruptions to their lives to varying extents when a child in their family is charged with an offence and taken to an institution. Family members need counselling to understand their situation, what might have led their son/daughter/ sibling to this situation and what would be their role in helping the juvenile to be restored back to health, positive, socially and legally acceptable behaviour. They also need to be counselled to cope with their own emotions of loss, shame, guilt and helplessness. In addition, some parents / guardians themselves may be suffering from mental illnesses like depression and substance use disorders and referring the family for treatment would help the child as it would help to improve the family environment and enhance the parents' ability to cope with the added stress of the child in conflict with the law. Most importantly, unless they are counselled and helped to see their role in the child's landing in the juvenile justice system, they may be unable to cope with or support the juvenile when he returns to the home environment.

Cultural beliefs & social value systems of counsellors, functionaries and significant caregivers in the juvenile justice system

The child in conflict with the law has to battle negative perceptions not only with the society and his family and school environment, but often with the very system and professionals meant to 'reform, rehabilitate and restore' him. If the counsellor holds the belief system that a boy who weeps a lot or indulges in aggressive / violent behaviour is 'bad' rather than depressed, counselling is not very likely to progress very far. Similarly, cultural beliefs and expectations about socially acceptable behaviour of adolescents amongst counsellors, JJB members, caregiving staff, etc can also have a significant effect on how and what type of counselling services are provided. For example, a counsellor was asked by the JJB to counsel a girl juvenile who wore anklets to the JJB hearings, because the Board felt that she was wearing those anklets to attract the attention of males present during the hearing – and this, in their opinion, was not 'the done thing' for a 17-year old girl. Similarly, when a 16 year old boy suffered a dissociative episode at an Observation Home, the staff performed an 'aarti' with camphor and vermilion believing that doing so would rid the child of the 'spirits' possessing him. For the juvenile who is already going through the distressing experience of

being in custodial settings, away from family, possibly coping with undetected mental illness, etc. these kinds of experiences may have a detrimental effect on his healing and recovery process.

Lack of training and sensitivity of JJBs towards the developmental and special needs of juveniles

Lack of awareness of problems in children and adolescents or sensitivity about how to handle the same can lead to JJBs passing orders or giving directions that undermine or negatively damage any progress made due to the counselling progress. For example, when a counsellor at a certain observation home put in an application for referring a child suspected to be suffering from post traumatic stress for psychiatric treatment, the JJB instead gave directions for the child to be placed in solitary confinement. The rationale was that the counsellor had stated in her application that the child was at risk of harming himself or others and would benefit from receiving in-patient psychiatric care from a specialized psychiatric team than at the observation home. The counsellor had based her recommendation on the presenting symptoms of hyper vigilance, dissociative episodes, aggressive behaviour towards younger children, etc. as well as the child's recent history of alleged murder of two other youth, history of chronic drug abuse, repeated suicidal ideation, risk to his life from other juveniles who were hostile towards him, etc. However, the JJB remarked that a juvenile charged with such a serious offence could not be sent to a psychiatric facility as it would mean he would live in 'luxury' compared to the situations at the Observation Home. The counsellor was directed to provide counselling to a child who clearly was not in a position to receive or benefit from counselling alone.

"The majority of youth who develop a pattern of delinquent behaviors and experience subsequent juvenile court involvement have faced both serious adversities and traumatic experiences."⁴ Research continues to show that most youth who are detained in juvenile detention centers have been exposed to both community and family violence and many have been threatened with, or been the direct target of, such violence.⁵ Studies also demonstrate that youth who have multiple exposures to violence or victimization are at higher risk for mental health problems, behavioral problems, substance abuse, and delinquent behaviors.

Risks to children in conflict with the law include re traumatisation, difficulty reintegrating with the family and acquiring anti social behaviours as a result of exposure to negative peers.

4 Kristine Buffington et al., *Ten Things every juvenile court judge should know about trauma and delinquency* TECHNICAL ASSISTANCE BULLETIN (2011).

5 K.M. Abram, L.A. Teplin, D.R. Charles, S.L. Longworth, G.M. McClelland, and M.K. Dulcan, *Posttraumatic stress disorder and trauma in youth in juvenile detention*, 61 (4) ARCH GEN PSYCHIATRY, 403-410 (2004).

Lack of information relating to the mental health status of children in conflict with the law in India

Children in conflict with the law have not been included in any health status surveys done for children or adolescents, so there is no reliable information on the presence or prevalence of mental health conditions that could serve as a reference for counsellors. We simply do not know the nature, the size or magnitude of the problem because we don't have the data.

The reasons for this lack of information include, among others, a lack of mental health services at JJ institutions, lack of access to referral services, lack of trained or qualified professionals to identify or screen for mental illness. In addition, in practice, mental health or psychosocial well being of the child in conflict with the law is not the primary priority for the legal system. The focus in practice, unfortunately, is more on establishing the guilt or innocence of the alleged offender and passing orders, despite the law stating that the focus should be on rehabilitation, reformation and restoration. Since establishing guilt or innocence is the basis for passing orders, many a time a child found innocent of the charges may be denied the services / rehabilitative opportunities under the Act, including counselling.

Lack of screening mechanism and qualified mental health professionals to carry out mental health assessment or identify counselling needs

The lack of information about mental health status of children in conflict with the law is directly related to the lack of qualified or trained mental health professionals who can identify the counselling needs or do an assessment of the juvenile's mental health status. There is also no mandatory, uniform or standard screening process prescribed for juveniles that should have been a part of induction process for a juvenile who is brought before the JJB. The counsellors or social workers in the JJ system (appointed under the ICPS scheme), who could have been trained to perform this role are instead, very often, engaged in administrative tasks related to running the institutions or providing clerical assistance to the JJBs. This means that there are juveniles living with undetected, undiagnosed and untreated mental health problems within the institutions under the JJ Act.

Human Resources challenges related to ensuring counselling for children in conflict with the law

This is probably the single largest barrier to providing counselling services for children in conflict with the law. There are delays in appointment of counsellors in institutions where juveniles are held in State custody. Counselling children and adolescents requires

specialized training which is different from counselling adults in many respects. In addition, counselling children in the juvenile justice system requires an understanding not only of counselling children and adolescents but also the legal context, the correctional and reformative framework in terms of rehabilitation and the skills to work in multi-disciplinary mode – none of which currently form part of professional syllabi training counsellors. There is a genuine shortage of specially trained counsellors who can offer correctional counselling services to juveniles because professional training for counsellors in correctional counselling and especially for children and adolescents is yet to emerge as a distinct discipline in India.

Not only is it difficult to recruit counsellors for children in conflict with the law, it is a huge challenge to retain them due to factors related to the high levels of stress involved in the nature of work, safety risks – perceived and real, low monetary compensation compared to other type of counselling (like in schools, hospitals, companies, etc.) compassion fatigue and burn-out due to intensity and number of children serviced and lack of support systems, lack of career growth and so on.

Lack of infrastructure for effective counselling

In my work with juveniles, I have often counselled children in one side of a classroom, a police van (with policemen listening on in the conversation), under the trees outside the JJB, in the corridors outside the hall where children out on bail and families are waiting to be called, in the dining hall, in auto rickshaws while accompanying children to the hospital for treatment, and so on. The crucial role that a formal setting provides in setting the tone, building rapport and establishing some ground rules in the counselling relationship are all damaged by the above mentioned examples of poor counselling settings. Investing in simple but much-required infrastructure like a counselling room, which is well lit and with a door which can be closed but not locked, seating arrangements in the form of chairs and a table will go a long way in helping to formalise the relationship the child has with the counsellor.

Girls in conflict with the law – different needs and challenges

The juvenile justice system is primarily designed for boys, historically focussing on protecting society from perceived out-of-control adolescents, mainly boys, and girls are largely neglected. There is a lack of gender-responsive programming for girl juveniles in conflict with the law as there is a lack of understanding that girls may have different patterns of behaviour and offending and therefore different and often unique needs and challenges from that of boys in conflict with the law.

A study of 305 juveniles⁶ in the US found the following differences between boys and girls:

1. Girls and boys get arrested for very different things.
2. Boys are more likely to be arrested for traditional criminal behaviour while girls more likely to be arrested for status offences.
3. Girls are at higher risk than boys for making choices that would return them to abusive environments /situations later in life.
4. For girls, the family matters so very much. Boys also are, but girls are particularly significantly affected by problems in the family.
5. The treatment for boys and girls need to be very different because the source of the problem is so different, but the juvenile justice system is completely not tuned into nature of needs or differences for girls.
6. Uneven expectations between boys and girls. Marginal behaviour of boys excused with 'boys will be boys', while girls are expected to conform.

According to a study of offence characteristics of a national sample of 38,749 arrestees from FBI's Supplemental Homicidal Records,⁷ it was found that homicides by adolescent girls were more likely to involve in interpersonal conflict rather than criminal motives (as seen in crimes by boys). The study supports the need for differentiated study of violence by juvenile girls, and for preventive interventions that target domestic and interpersonal stress.

While there might be some cultural differences, it might be useful to examine the findings of this study to understand the needs, behaviour and therefore, the requirements of girl children in conflict with the law, in order to be able to design, develop and establish a juvenile justice system that seeks to restore them as responsible citizens to society.

Counselling for girls in the juvenile justice system cannot be viewed in isolation. It is and has to be connected to larger issues of girls and women in society including gender roles, parenting, education, restrictions placed by social norms and patriarchy and so on.

6 Gavazzi M Stephen, Yarcheck M Courtney and Chesney Lind Meda, *Global Risk Indicators and the Role of Gender in a Juvenile Detention Sample*, 33 CRIMINAL JUSTICE AND BEHAVIOUR 597 (2006) <http://cjb.sagepub.com/cgi/content/abstract/33/5/597> (last visited Feb.15, 2015).

7 Ann B Loper & Dewey G Cornell, *Homicide in Juvenile Girls*, 5 (3) JOURNAL OF CHILD & FAMILY STUDIES 323-336 (1996).

Lack of a child-friendly and child-rights friendly culture in the juvenile justice system:

Counselling children in conflict with the law is a process, an experience and a relationship. None of this can happen if either the process, the experience or the relationship is not child friendly **and** child-rights friendly. Respecting the rights of the child – whether it is the right to health or play or participation by asking and listening to his views and feelings – can all be enabled and enriched through the process of counselling.

Potential for change through Counselling and the Way Ahead

Counselling is one aspect of the juvenile justice system that has the tremendous potential to turn the perception and reality of the way in which children and their families experience the juvenile justice system. Does a child experience the counsellor in the juvenile justice system as a safe, friendly and helpful person that he / she can trust and turn to, as a person who would support and guide him/her through their difficult journey to adulthood? Does the counsellor in the juvenile justice system believe it is his/her role to provide the young person in his care this belief and experience? That is the central promise and the challenge that lies before every counsellor working with children in conflict with the law. The counsellor needs to believe that their role is pivotal to help the troubled adolescent become the best version of himself/herself.

To see every child as **a unique person**. To advocate and champion for treating every juvenile as a ‘person’ worthy of fair and humane treatment. To teach **empathy** and compassion to the young persons they counsel who have probably seen very little of it in their young lives by showing them how it feels in a **safe counselling relationship**. To teach young people to take **responsibility** for their actions, behaviour and the consequences of their actions by being **positive role models**. Above all, to **instil hope** in the young person that he/she can change and can have a better life than the one they have settled for in many ways. This **faith in the young person’s ability to transform** must be unwavering as many people, including the young person, will not be able to believe it. Thus the counsellor’s belief must be strong enough to propel the young person to want to change a lifetime of bad choices. That is the real role and challenge of the counsellor working with children in conflict with the law.

For the counsellor to be able to deliver and perform this important role, the juvenile justice system has to empower the counsellor first and provide support systems that enable him/her to do so. To do that, all stakeholders in the juvenile justice system need to advocate for and treat the juvenile as a “person” in many ways and not only as a person who may or may not have committed an offence. This includes

remembering that this young person is a human “being” who is still in the process of ‘becoming’ an adult and needs all the support and skills we - as members of the State, civil society, community and family - can offer him to make that difficult transition into adulthood.

Collective responsibility of stakeholders

The main aims of the JJ Act with respect to children in conflict with the law are reform, rehabilitation and reintegration into the community. These are complex, inter-related, yet not impossible goals to achieve. However, to make either the counsellor or the child the only persons responsible for achieving these goals is to place a very huge burden on each of them. The entire juvenile justice system—including JJBs—magistrates as well as social work members, families, caregivers, functionaries—mainly probationary officers and social workers, lawyers, doctors and psychiatrists, counsellors and teachers, community leaders and children themselves, have to work together to achieve these goals. Adolescents with mental health problems pose a challenge to the juvenile justice system and after their release to the larger mental health system. There’s an African proverb that says, ‘it takes a village to raise a child’. It will take all of us within the juvenile justice system and outside to enable these children who have come into conflict with the law to become responsible citizens leading meaningful and fulfilled lives.

STOCKTAKING OF THE JUVENILE JUSTICE MECHANISM IN INDIA: A LONG OVERDUE NEED

Gitanjali Ghosh*

Introduction

Rule of law and access to justice are two of the fundamental requirements for the reduction of social differences as well as the development of a country. However, it is also recognised that if children are subjected to the same judicial mechanism as adults, they may stand victimized by the very system. This has led to the development of a separate system of juvenile justice system in many parts of the world. Stages of development of the law relating to juvenile justice vary from region to region, depending on their culture and history, human rights approach, legal capacities and governance system.

Internationally, the United Nations Convention on the Rights of the Child [hereinafter CRC] provides for a system of juvenile justice. India has also had quite a few laws relating to children and even before the CRC came in 1989, India had the Juvenile Justice Act 1986. It was, however, replaced by the Juvenile Justice (Care and Protection of Children) Act 2000 [hereinafter JJ Act, 2000] keeping in line with the mandate given in the CRC. The JJ Act 2000 was further amended in 2006 and in 2011 while Model Rules¹ were framed in 2007. The latest Juvenile Justice (Care and Protection of Children) Bill, 2014 [hereinafter JJ Bill, 2014] seeks to repeal and re-enact the JJ Act 2000. It must be noted at this juncture that the Indian law on juveniles deals not only with children in conflict with the law but also with children in need of care and protection.

This paper is divided into five parts. Part I of the paper gives a humble introduction to the paper. An effort has been made in Part II to provide the historical development of legislation dealing with juveniles in India. Part III of the paper presents a comprehensive picture of the JJ Act 2000 and its adequacy as against international standards laid down in the CRC. It also identifies the major challenges to the juvenile justice mechanism. An attempt has been made in Part IV to analyse the worth of the JJ Bill 2014 in being able to address the challenges faced by the current system of juvenile justice as well as against national and international standards. Part V of the paper concludes the paper with a few suggestions towards remedying the flaws of the current juvenile justice mechanism.

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1 Model Rules under the Juvenile Justice (Care and Protection of Children) Act 2000, 2007, Gen. S. R. & O. 679(E) [henceforth Model Rules].

History of Juvenile Legislation in India

The Apprentices Act 1850 was the first legislation to deal with children in conflict with law in India. It provided that children under the age of fifteen who were found guilty of committing petty offences were to be placed as apprentice in a trade.² The Indian Penal Code (IPC) 1860, was the next legislation to be passed in 1860 which had certain provisions governing commission of crimes by children. Section 82 of the IPC grants immunity to children below seven years of age considering them to be *doli incapax* while Section 83 provides qualified immunity to children between seven to twelve years of age. Subsequent to this, the Reformatory Schools Act 1897 was enacted which provided that children below the age of fifteen years who were sentenced to imprisonment should be kept in reformatory schools.³

A jails committee was appointed in 1919 and pursuant to its recommendations, different legislations dealing with children were enacted in different provinces. The first Children Act was the Madras Children Act 1920 followed by Bengal and Bombay in 1922 and 1924, respectively. The Bombay Children Act, however, was the first to become functional. In February 1924, a voluntary state-aided agency, the Children's Aid Society, was formed to implement the provisions of the Bombay Children Act in the municipal corporation of Bombay. The institutions established by the agency for care and protection of children which continue till date.⁴

Although the Children Acts had several common features, they provided different cut-off ages for the definition of children and included two different categories of children, *viz.* delinquent and neglected children. However, 'neglected children' was defined differently in these legislations. They also provided for establishment of separate children's court to deal with all cases falling under the Children Act. They also made provisions for establishment of residential institutions for children, both during the pendency of their proceedings as well as after disposal of their cases, directing them to be sent to an institution. Prison was permitted to be used but only in exceptional circumstances.

The Children Act 1960, the first central legislation, was enacted as a model legislation which was followed by the states while enacting their own Children Acts. The Central Act extended only to the Union Territories and its objective was to "provide for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected or delinquent children and for the trial of delinquent children in the Union Territories." The Act provided for a discriminatory

2 Ved Kumari, *Juvenile Justice: Securing the Rights of Children during 1998-2008*, 2 NUJS L. REV. 557, 558 (2009).

3 *Id.*

4 MAHARUKH ADENWALLA, CHILD PROTECTION AND JUVENILE JUSTICE SYSTEM FOR JUVENILE IN CONFLICT WITH LAW 13 (2006).

definition of child since a boy below 16 years of age was considered to be a child as opposed to 18 years for a girl child.⁵ The Act also established two separate bodies to adjudicate matters pertaining to children in conflict with law and children in need of care known as the Children's Court and Child Welfare Board respectively. It forbids imposition of death penalty, imprisonment, or use of police station or jails for housing children under any circumstance. It also did not recognize the right to a lawyer in the proceedings before the children's courts. However, the Children Act, 1960, as amended in 1978, permitted lawyers to appear before the children's courts but not the Child Welfare Board.

Despite all these legislative enactments, the juvenile justice system was still not devoid of problems. The most important was that several states had different acts concerning juvenile delinquency which resulted in children being treated differently in the same situations. Also, "child" was defined differently in different States.⁶ In *Sheela Barse v Union of India*,⁷ the Supreme Court was prompted to observe as follows:⁸

"...we would suggest that instead of each State having its own Childrens' Act different in procedure and content from the Childrens' Act in other States, it would be desirable if the Central Government initiates Parliamentary Legislation on the subject, so that there is complete uniformity in regard to the various provisions relating to children in the entire territory of the country. The Childrens' Act which may be enacted by Parliament should contain not only provisions for investigation and trial of offences against children below the age of 16 years but should also contain mandatory provisions for ensuring social, economic and psychological rehabilitation of the children who are either accused of offences or are abandoned or destitute or lost. Moreover, it is not enough merely to have legislation on the subject, but it is equally, if not more, important to ensure that such legislation is implemented..."

On November 29, 1985, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice⁹ was adopted by the UN General Assembly wherein the "juvenile" and "juvenile justice" were used for the first time in international law.

This led to the enactment of Juvenile Justice Act 1986 for the care, protection and rehabilitation of neglected children and juvenile delinquents. With the enactment of JJA 1986, two distinctive

5 The Children Act, § 2(e) (1960).

6 Adenwalla, *supra* note 4, at 14.

7 (1986) 3 SCC 632.

8 *Id.*

9 Popularly known as "the Beijing Rules".

machineries were set-up to deal with “delinquent juveniles” and “neglected juveniles”. Both the groups of children were housed in the Observation Homes as long as their inquiries were pending before the respective competent authorities.

This Act was soon replaced by the JJ Act 2000. The deficiency in the old Juvenile Justice Act, 1986 was the primary reason for such replacement as it did not provide for different approach towards neglected juveniles and delinquent juveniles. JJ Act 2000 specifically provides for “juveniles in conflict with law” and “children in need of care and protection” to be kept separately during the pendency of their inquiries.

Stocktaking of the JJ Act 2000

JJ Act 2000 vis-a-vis the CRC

The JJ Act 2000 invokes the international obligations of India under the CRC in its preamble. Whether the JJ Act 2000 conforms to the protections in the Convention with regard to children being confronted with the juvenile justice system will be examined hereunder. There are two kinds of provisions under the CRC which are applicable in case of children being confronted with the juvenile justice system. They are:

- (i) General principles of the CRC; and
- (ii) Specific protections for children being confronted with the juvenile justice system under the CRC

The general principles are Best Interest Principle (Article 3), Right to participation (Article 12), Non- discrimination (Article 2), and Right to life, survival and development (Article 6).

The specific protections are provided under Articles 37 and 40 of the CRC which aim at providing protection to the rights of children in conflict with the law. The principles under Article 37(a) and 37(c) that capital punishment and imprisonment are not to be imposed on children committing offences¹⁰ and that every such child while being deprived of their liberty shall be housed separately from adults¹¹

10 Article 37- States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

11 Article 37- States Parties shall ensure that:

- (c) 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. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

respectively have been incorporated in the JJ Act, 2000. However, some of the other principles enunciated in the above-mentioned articles have not been incorporated.

Article 37(a) provides that any child shall not be subjected to torture or cruel, inhuman or degrading treatment but this has not been incorporated in the JJ Act, 2000. Keeping in mind the fact that such instances of abuses are an unpleasant reality, it was pertinent for this provision to be incorporated in the Act.

Article 37(c) provides that the child shall have the right to maintain contact with his or her family through correspondence and visits, except under exceptional circumstances. This rule was required to be mandatory in view of the custodial nature of the institution but it has been left to the discretion of the respective States thereby providing ample room for its violation. For instance, the Rule 61(1) of the Juvenile Justice (Care and Protection of Children) Karnataka Rules 2010 provides that the parents and near relatives of the inmates be allowed to visit an inmate once a month or more frequently in special cases at the discretion of the Superintendent. Further, Rule 61(2) provides that there shall be no restrictions on the receipt of letters by the inmates of the institution and that they shall have the liberty to write as many letters as they like. Rule 61(3) provides that the Superintendent may go through any letter written to or by any inmate, and having regard to the inmate's well-being or health, may refuse to deliver or issue the letter or destroy the same if he considers it necessary after recording his reasons in a book meant for that purpose.¹² The arbitrary nature of the Karnataka Rules restricting the family to meet the child only once a month violates the child's right to maintain contact with the family. Further, with regard to the Superintendent's power to not only go through letters but also to destroy them violates Article 37(c) as Article 37(c) gives the power to restrict access only in exceptional circumstances and not in all cases. Further, the restricted access of only once a month and the superintendent's power to go through and destroy letters he finds objectionable cannot be said to make exceptional circumstances.¹³

Article 40 mandates the state to include certain basic safeguards for children confronted with the criminal justice system but such safeguards have not been included in the JJ Act 2000. Although it has been contended that such protections do apply to children in India

12 The Juvenile Justice (Care and Protection of Children) Karnataka Rules 2010, http://dwcdkar.gov.in/index.php?option=com_docman&task=doc_download&gid=36&Itemid=124&lang=en (last visited Nov. 29, 2013).

13 Arvind Narrain, *A Critique of the Juvenile Justice Act 2002*, <http://altlawforum.org/publications/a-critique-of-the-juvenile-justice-act-2002/> (last visited Aug. 4, 2015).

as provided in the Code of Criminal Procedure (CrPC) and Constitution of India but it has to be noted that the JJ Act, 2000 requires the procedure to be determined by State rules and not as per the procedure as in the CrPC, thereby leaving room for States to do away with the protections as provided the CrPC in their respective rules.

Article 40(3)(a) provides for fixing of a minimum age below which children shall be presumed to be devoid of the capacity to violate penal law. This provision finds expression in the concept of *doli incapax* under Section 82 of the Indian Penal Code.¹⁴ However, it has not been explicitly incorporated under the JJ Act 2000.

Article 40(3)(b) provides that States Parties shall seek to promote establishment of measures for dealing with such children without taking recourse to judicial proceedings while fully respecting human rights and legal safeguards, whenever appropriate and desirable. The establishment of a JJ Board (JJB) with two social workers is not in compliance with this provision as the JJB, instead of diverting the child away from the system, inquires into the situation thereby creating likelihood of stigmatizing the child.

Article 12 provides that the child shall be provided the opportunity to be heard in any judicial or administrative proceedings affecting the child through a representative or an appropriate body. Although the JJ Act 2000 allows the presence of a legal practitioner before the JJB for children in conflict with law as they are practically on trial, there is a violation of the right to be heard for children in need of care and protection. The current system lacks mechanism to ensure that the views of children are not only taken into account by the CWC but also being given due weightage.¹⁵

What is clear from the above analysis is that the CRC has not been complied with in terms of protections given to children confronted with the juvenile justice system. It is almost as if the JJ Act 2000 was a pre-CRC law in terms of its consonance with the CRC principles.

Apart from the above inconsistencies with the Convention, there are several glaring insufficiencies in the Act. Some of the very evident loopholes are discussed hereunder:

Use of 'juvenile in conflict with law' and 'child in need of care and protection'

Section 2(k) of the Act defines juvenile or child thereby implying that they denote one and the same. However, in the Act child in need of care and protection is denoted as such but child in conflict with law

14 Indian Penal Code, § 82 (1860). Act of a child under seven years of age- Nothing is an offence which is done by a child under seven years of age.

15 Juvenile Justice in Karnataka: A Case for Systemic Change, http://www.concernedforworkingchildren.org/wp-content/uploads/JJ_ArguingforChange_Jun2012.pdf (last visited Aug. 4, 2015).

is rather denoted as juvenile in conflict with law. This distinction in terminology actually attaches a negative or discriminatory connotation to child in conflict with law by terming him a juvenile.

Usage of the word 'may'

A major portion of the implementation of the Act has been left up to the States by way of the rules that may be formulated by the States. The usage of the word 'may' as far as the framing of rules by the States is concerned, is a major mistake because unless the formulation of rules is not made mandatory, the implementation of the Act is uncertain. Sections 8 and 29 of the Act are an apt example of this problem. According to Section 8(3) of the Act, the State may formulate rules and standards for management of the observation homes that may be established by it. Leaving something as important as maintenance of standards to the discretion of the State is a major problem. Again, under Section 29 the appointment of Child Welfare Committee inspection committees for child in need of care and protection has been left to the discretion of the States in that they 'may' constitute such committees. Apart from this, something as important as after care organizations who are required to check up on the juveniles who have left the special homes and have been adopted or rehabilitated, has also been made subject to the discretion of the States according to Section 44.

Period of inquiry

Section 14 mandates that any inquiry regarding a juvenile, needs to be completed within a period of four months unless there are some special circumstances in special cases. What the maximum period for inquiry should be and what may be the special circumstances under which the period should be extended has not been mentioned. This discretion results in pendency of cases in the system for indefinite period of time. Section 14 gives a lot of scope for arbitrariness and any lackadaisical attitude on behalf of the Juvenile Justice Board may be sought to be explained as the special circumstances of the cases. This is dangerous for a juvenile as the inquiry should be completed as soon as possible in his case.

Punishment for cruelty to a juvenile

Section 23 imposes imprisonment for a period of 6 months or fine or both on a person responsible for cruelty to a juvenile in conflict with law or child in need of care and protection. In the face of explicit evidence regarding the magnitude of cruelty with them in juvenile homes etc., the punishment prescribed is not deterrent in character. The duration of imprisonment and amount of fine needs to be increased so that it may discourage the potential law breakers in this area.

Adequate training for the officials dealing with juveniles

Although Section 63 provides for specially instructed and trained special juvenile police unit, this is nothing more than mere lip service to the requirement of special training because no proper guidelines have been provided in this respect. Lack of properly trained officials defeats the entire purpose of the Act.

Training in child psychology required for Magistrate and members of Juvenile Justice Board

Section 4(3) of the Act provides that any Magistrate shall not be appointed as a member of the JJB unless he has special knowledge or training in child psychology or child welfare. Similarly, any social worker shall not be appointed as a member of the JJB unless he has been actively involved in health, education, or welfare activities pertaining to children for a minimum of seven years. The reality is definitely not in consonance with this provision.

Lack of accountability

Accountability mechanism of the statutory bodies under the JJ Act, 2000 i.e. CWC's and JJB's are poorly defined and there is no monitoring or performance appraisal of these bodies and other support mechanisms for building their capacities.

Infrastructural shortcomings

One of the major shortcomings is insufficient investment in the juvenile justice system. Juvenile Justice covers almost 40% of the Indian population (0- 18 years) but the percentage share of children's budget within the Union Budget has been reduced from 4.76% in 2012-13 to 4.64% in 2013-14. Further, maximum cuts have been made in the component of child protection.¹⁶

Another shortcoming is the lack of adequate number of Juvenile Justice Boards and Child Welfare Committees.¹⁷ To add to this, many JJBs and CWCs exist only on paper and are not functioning. Further, populous districts are likely to produce larger CWC caseloads and therefore, need additional CWCs.

Apart from these, the manner of appointments of CWC and JJB members also suffer from problems. In the absence of common guidelines in the states, appointments of CWC and JJB members have been made without following norms. There were also long delays in making these appointments that rendered these statutory bodies ineffective during those periods. The uniform understanding on the

16 264th Report of the Parliamentary Standing Committee on The Juvenile Justice (Care and Protection of Children) Bill, 2014, 39 (2014).

17 A list of the number of Juvenile Justice Boards and Child Welfare Committees is provided in Annexure I.

functions and deliverables amongst the appointed members suffered in absence of orientation and regular trainings.

Lack of homes as well as trained manpower has blunted the whole objective of this legislation.

Lack of Monitoring

There is no institution nominated either at state level or at national level to monitor the progress and provide support to the child protection structures. The JJ Act requires concurrent training and capacity building of CWC, JJB, Police, Child care institution officials and other stakeholders. However there is no such training institution at the state level. The central training institution of NIPCCD provides capsule courses of two days, which is inadequate as all the members are not sufficiently trained.

Rehabilitation

Rehabilitation facilities are very poor and psychological counselling and treatment were practically non-existent. There has been gross failure in the existing juvenile justice system primarily because its provisions relating to rehabilitation, vocational training and social reintegration have not been implemented in letter and spirit.

Procedural loopholes

The procedural requirements under the JJ Act, 2000 lie mainly on the shoulders of two stakeholders, viz. the police and the probation officer. However, there are several shortcomings associated with their functioning which have been discussed hereafter.

The police are the first to come into contact with almost all the children entering the juvenile justice system. They have a considerable degree of discretion while handling children in conflict with law, the exercise of which is pertinent as it determines whether or not the child will face the formal system. However, it is also the genesis of discrimination and other abuses by the police.¹⁸ There are a number of instances of abuse of discretion by police in the form of dishonest arrests and obnoxious interrogation methods. Absence of accountability, wide discretion afforded to police and oversight from court officials contribute to this culture.

The police are responsible to reporting to the child's parents after apprehending him or her. They are also obligated under the JJ Act, 2000 to immediately produce the apprehended child before a member of the JJB.¹⁹ This procedure, however, is not always followed.

18 LARRY J. SIEGEL, BRANDON C. WELSH & JOSEPH J. SENNA, *JUVENILE DELINQUENCY: THEORY, PRACTICE, AND LAW* 404 (9th ed. 2006).

19 The Juvenile Justice (Care And Protection) Act, § 13(a) (2000).

Probation officers are the *sine qua non* of a thriving juvenile justice system. They perform an important role at each stage of the child's contact with the system, beginning at the child's initiation into the system to follow-up after the child is out of formal contact with the system.²⁰

The JJ Act, 2000 provides for probation services while the Model Rules lays down a list of duties for probation officers.²¹ The role of the probation officers is quite vague. The JJ Act, 2000 indicates that they are required to provide information on the child's background to assist the JJB in issuing an order in addition to reporting non-compliance with any such order.²² However, there are no guidelines as to how the probation officer is supposed to accomplish these tasks.

Although the Model Rules have set out fourteen general responsibilities of probation officers,²³ they are devoid of any guidance as to what these tasks entail, as many of the tasks are listed very generally without being of any practical assistance.²⁴ The most important requirement by the Model Rules is the social investigation report *i.e.* a mandatory component of a juvenile's case before an order is rendered.²⁵ However, this becomes the focus of the probation officers' duties, resulting in their transformation to courtroom clerks and not field investigators in several cases. Also, there is no standard report format which makes the reports less helpful to the JJB than intended by legislation.

Lack of accountability is another concern with probation officers. There is no clear authority to watch over the operations of probation officers. The magistrate may exercise informal authority but the JJB has no formal authority over the probation officers.

Juvenile Justice (Care and Protection) Bill 2014 - An Analysis

On a comparative analysis of the JJ Act, 2000 and the JJ Bill 2014, it can be seen that the Bill is a comprehensive legislation when compared with the JJ Act 2000. The Bill provides for general principles of care and protection of children, procedures for cases of children in need of care and protection in conflict with law, social re-integration and rehabilitation measures for such children and offences committed against children. It also contains elaborate procedures relating to

20 Erika Rickard & Jason M. Szanyi, *Bringing Justice to India's Children: Three Reforms to Bridge Practices with Promises in India's Juvenile Justice System*, 14:1 UC DAVIS JOURNAL OF JUVENILE LAW & POLICY 107, 147 (2010).

21 Model Rules, Rule 71.

22 The Juvenile Justice (Care And Protection) Act, § 13(b), 15(3) (2000).

23 Model Rules, Rule 71(1)(a).

24 One task is "social reintegration of juveniles and to ensure the necessary follow-up." *Id.* Rule 71(1)(j).

25 *Id.*

adoption which was absent in the earlier Act. However, the Bill is also not devoid of shortcomings, a few of which have been discussed as follows:

Title of the Bill

It is a welcome move that the words 'child in conflict with law' have replaced 'juvenile in conflict with law' in the text of the Bill but the title still continues to include the words 'Juvenile Justice' thus, making the Bill not completely free from the negative connotation associated with the word juvenile.

After care

Clause 2(5) of the Bill deals with the definition of the word "aftercare" and reads as follows:

"Aftercare means making provision of support, financial or otherwise, to persons, who have completed the age of eighteen years but have not completed the age of twenty-one years, and have left any institutional care to join the mainstream of the society."

A plain reading of the definition of 'aftercare' shows that its availability is restricted to only persons between 18 to 21 years of age who have left institutional care. However, there is also a possibility that a child may leave an institution before he or she attains the age of 18 years and be in need of after-care services. This definition has failed to address this obvious possibility.

Clause 2(14)(ii)

Clause 2(14)(ii) of the Bill provides that a child found working in contravention of labour laws for the time being in force or found begging, or living on the street would be considered to be in need of care and protection. A reference to labour laws restricts the extension of care and protection measures to only those children who come under the protection ambit of labour laws. Consequently, children between 14 to 18 years of age who are engaged in labour would be deprived of rehabilitation measures available under the Bill.

Clause 2(14)(viii)

Clause 2(14)(viii) of the Bill provides that a child who is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts would be considered to be in need of care and protection. This provision is laudable but plain reading shows that it excludes those children who may have been abused in the past. Children who have been abused undergo considerable trauma and are faced with stigma and hence, they may be in need of support and linkages to services. Therefore, this sub-clause should apply to children who have been abused as well.

Juvenile Justice Board

Clause 4(2) of the Bill provides for the JJB and reads as follows:

“A Board shall consist of . . . and two social workers from two different reputed non-governmental organisations . . .”

Clause 4(3) of the Bill further provides for the following:

“No social worker shall be appointed as a member of the Board unless such person has been actively involved in health, education, or welfare activities pertaining to children for at least seven years or a practicing professional with a degree in child psychology.”

The condition requiring the two social workers to be from reputed NGOs only and that too having seven years of experience is a very restrictive provision.

Placement of a person above age of twenty-one years for committing any offence when he was a child

Clause 7 of the Bill allows for a person who was a juvenile on the date of offence to be dealt with under the criminal justice system if he was arrested after completion of twenty one years of age. This provision violates Article 20(1) of the Constitution of India which provides that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

It also violates Article 40 of CRC which provides that persons under the age of eighteen at the time of commission of an offence must be treated as per the rules of juvenile justice.

Besides this, the provision is also in complete violation of Article 15 of the ICCPR, a non-derogable right under the Convention which provides that any one shall not be held guilty of any criminal offence for any act or omission which did not constitute a criminal offence, at the time when it was committed under national or international law nor shall a heavier penalty be imposed than the one applicable at the time of its commission.

Clause 21

Clause 21 of the Bill, which allows the Children’s Court to transfer a child in conflict with law on attaining twenty one years of age from a place of safety to jail is also violative of not only Article 20(1) but also of established principle of juvenile justice which prohibits co-mingling of a child offender with hardened criminals.

Inquiry by JJB regarding Child in Conflict with Law

Clause 15(3) deals with the procedure for inquiry by JJB with regard to a child in conflict with law. This provision requires JJB to conclude a preliminary inquiry in case of heinous offences within one month from the date of first production of the child before it. Even in normal course of crimes committed by adults, a charge sheet cannot be filed within a period of one month. It is not prudent to believe that the JJB will be able to properly conduct such inquiry within a month. This provision proceeds on the assumption that the child has committed the alleged offence and is contrary to the presumption of being innocent till proved guilty. It violates fundamental rights guaranteed under Articles 14 and 21 of the Constitution of India by directing the JJB to inquire into the culpability prior to prima facie establishment of the guilt.

Preliminary Inquiry into Heinous Offences by the JJB

Clause 16 specifically deals with cases of such children who have completed or are above sixteen years of age and have committed a heinous offence. It lays down the procedure regarding holding a preliminary inquiry in such cases. In other words, a distinction is sought to be made between children below and above the age of sixteen years in the context of gravity of an offence. Clause 16 reads as follows:

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

Provided that for such an inquiry, the Board may take the assistance of experienced psychologists, psycho-social workers and other experts.

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

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

The foremost flaw with this provision is that it requires the JJB to assess whether a child above sixteen years of age charged of committing a heinous offence has the physical and mental capability to commit the offence, along with circumstances in which he has

committed the offence. It, thus, implies an assumption that the child has already committed the alleged offence. It is in clear contravention of fundamental guarantees under Articles 14 and 21 of the Constitution of India as it violates the presumption of innocence apart from being an arbitrary and irrational procedure. Differential treatment of children who have completed or are above sixteen years of age and below eighteen years of age and are in conflict with law as a result of commission of heinous crimes is also in complete contravention to the CRC.

Orders regarding Child found to be in Conflict with Law

Clause 19 reads as:

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

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

Implementation of clause 19(3) would lead to automatic transfers of several children aged sixteen and above, alleged of committing a heinous offence, to the criminal justice system meant for adults. The notion behind the formation of Children's Court was to hold trials for offences against children and not offences by them. These courts were Sessions Courts that have been also given the task of ensuring speedy trials of offences against children. The entire objective of creating a separate law for children was to not include them in the criminal justice system. This provision erases the distinction between child victims and children in conflict with law by sanctioning the courts under the Protection of Children from Sexual Offences (POCSO) Act 2012, the jurisdiction to adjudicate the cases involving children in conflict with law.

Conclusion and Suggestions

The very fact that a huge majority of children in India are in a condition of suffering evidences the inability of the laws to provide protection to them despite the fact that they were primarily enacted to meet this end. The CRC celebrated its silver jubilee last year but there is no reason for the children to rejoice, at least in India. This paper has clearly highlighted the shortcomings in the Indian juvenile justice mechanism which have contributed to their failure in providing protection to the children.

At this juncture, a few suggestions to remedy the current state of juvenile justice in India have been made hereinafter. The Juvenile

Justice Board is of immense importance in the entire juvenile justice system and hence, a special training programme in child welfare and child psychology must be prepared for the officers of the JJB including the Principal Magistrate.

Further, the ambience of the JJB should be child friendly. It should not bear the look of a normal court room. The child must be made comfortable and not be treated in like manner as an accused is in a court room. It will be even better if the Board can conduct its affairs in the observation homes itself.

Also, the Principal Magistrate should not be entrusted with any other work of the criminal court except that of the Juvenile Justice Board as the Board is required to complete the enquiry within 4 months.

Due to the variations in state rules from state to state, there is an ambiguity regarding proper implementation of provisions of the Act. Therefore, common rules should be followed throughout India in all Juvenile Justice Boards.

It is common knowledge that the homes meant for children in conflict with law as well as those in need of care and affection are in a shabby state of affairs. It is important that there should be separate homes for both these categories of children not only in law but also on ground. Further, the homes for children should be under CCTV coverage to facilitate inspection and supervision by the Board and surprise visits be made at these homes. It is also desirable that senior citizens be involved in these homes as community resource persons to look after the well-being of the children.

Nevertheless, the Indian legislature's effort at enacting this law for child protection has to be appreciated despite the inadequacies. It is commendable that the Indian legislature has tried to fulfil its obligations under the Convention. As far as the law is concerned, apart from correcting the loopholes in the law, its implementation has to be stressed upon. Until and unless, black and white written on the paper is transformed into colour in the real world, the achievement of the Conventions goals will remain a distant dream for the Indian state.

ANNEXURE I

Sl.No.	Name of State/ UT	No. of Districts	CWC's	JJB's
1	Andaman and Nicobar Island	03	01	01
2	Andhra Pradesh	23	23	23
3	Arunachal Pradesh	17	16	16
4	Assam	27	27	27
5	Bihar	38	38	38

6	Chandigarh	01	01	01
7	Chattisgarh	27	27	17
8	Dadra and Nagar Haveli	01	01	01
9	Daman and Diu	02	02	02
10	Delhi	09	07	02
11	Goa	02	02	02
12	Gujarat	26	26	26
13	Haryana	21	21	21
14	Himachal Pradesh	12	12	12
15	Jammu and Kashmir	22	-	-
16	Jharkhand	24	24	21
17	Karnataka	30	31	30
18	Kerala	14	14	14
19	Lakshwadeep	01	01	01
20	Madhya Pradesh	50	50	50
21	Maharashtra	35	35	35
22	Manipur	09	09	09
23	Meghalaya	07	07	07
24	Mizoram	08	08	08
25	Nagaland	11	11	11
26	Orissa	30	30	30
27	Puducherry	04	03	04
28	Punjab	22	22	22
29	Rajasthan	33	33	33
30	Sikkim	04	04	04
31	Tamil Nadu	32	32	32
32	Tripura	08	04	08
33	Uttarakhand	13	13	13
34	Uttar Pradesh	75	72	72
35	West Bengal	19	19	19
	Total	660	626	612

Source: 264th Report of the Parliamentary Standing Committee on The Juvenile Justice (Care and Protection of Children) Bill, 2014, 44 (2014).

THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000: KEY CHALLENGES AND BOTTLENECKS IN IMPLEMENTATION

*Sukanya Baruah and Ankita Sharma**

Introduction

A “Juvenile” or “Child” means a person who has not completed eighteen years of age. According to International Law, a ‘Child’ means every human being below the age of 18 years. Today this is a universally accepted definition of a child, which comes from the United Nations Convention on the Rights of the Child (UNCRC). Under the Indian Laws, Section 2 (k) of the Juvenile Justice (Care and Protection of Children) Act, 2000 defines “juvenile” or “Child” as a person who has not completed eighteenth year of age. Section 2 (l) of the Juvenile Justice Act, 2000 has defined “juvenile in conflict with law” as a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence.

Constitution of India 1950 and certain legislations have provisions to ensure protection and justice to children. There is a plethora of legislations but the Juvenile Justice (Care and Protection of Children), Act 2000 (JJ Act) is the overarching legislation on child protection, and covers children in conflict with the law and those in need of care and protection. The Juvenile Justice (Care and Protection of Children) Act, 2000 is the primary legal framework for juvenile justice in India. The Act provides for a special approach towards the prevention and treatment of juvenile delinquency and provides a framework for the protection, treatment and rehabilitation of children in the purview of the juvenile justice system.

The Act is not free from blemishes hence it needs a strong review. There are a series of challenges and bottlenecks in implementation that Juvenile Justice Act faces and to name a few is that the location of the Juvenile Justice Board office. The offices need to be located outside courts, in a child-friendly environment with better infrastructure. Also, unsuitable premises of welfare homes for children often cause problems due to lack of infrastructure. Besides the importance of location of welfare homes and Juvenile Justice Board offices, the need for social reintegration of the juveniles, this should be the main aim of all stakeholders. Spreading of awareness in the society and proper, mandatory training for those involved in the rehabilitation of the children is what is required. Another problem that arise is due to the lack of cooperation among neighboring states. Cooperation among the States is of great significance. Anti-social

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elements may use children as means of conducting serious crimes, Juvenile Justice Act needs amendment as it does not talk about the physical or mental maturity of a juvenile, The records do not at all times presents the actual age of the juvenile. Laws should be dynamic in nature and should change with the changing society, the aim of the Juvenile Justice Board is not to punish but reform offenders as there was no concrete data to prove that stiff punishment resulted in the lowering of the crime rate anywhere in the world.

Historical Background

Though there were a number of laws in the ancient and medieval society guiding the actions and behaviour of people in India, none of these laws had any specific reference to juveniles or neglected children. By the nineteenth century, a concern to establish some sort of justice system to combat the growing problem of delinquent children grew.

In 1850 the Apprentices Act was passed as the first juvenile legislation in India to deal with children.¹ Under this Act, destitute children, or children between the ages of 10 to 18 who were found committing petty offences, were placed as apprentices into a trade. The Reformatory School Act of 1876 was the next landmark in dealing with juvenile delinquents. The Act empowered local governments to establish reformatory schools and in accordance with the Indian Penal Code (1860), exempted all children under the age of 12 years from all criminal offences.² These acts are developmental trajectory in the field of legislations pertaining to juvenile justice across the world. All these legislations emphasise the paternalistic role of the State and the primacy was accorded to welfare and rehabilitation of 'children in conflict with the law. Though after independence practically all states and union territories had their own children acts to address the problem of delinquent youth, it was found that no minimum standards for basic needs, living condition and medical standards were provided under this Acts. Thus a uniform legislation, which could provide for all these and more, was needed. This gave rise to the Juvenile Justice Act of 1986 for the care, protection and rehabilitation of neglected children and juvenile delinquents. This act has been amended and the Juvenile Justice (Care and Protection of Children) Act 2000 has come into picture.

The welfare nature of the Juvenile Justice Act, 2000 first came under public scrutiny with the Delhi Gang Rape Case, where one of the six murders of a twenty three year old woman was a juvenile,

1 <http://www.bprd.nic.in> (last visited Jan. 10, 2015).

2 Tapan Chakrabortey, *Juvenile Delinquency And Juvenile Justice In India*, in JUVENILE JUSTICE SYSTEMS: INTERNATIONAL PERSPECTIVES 267, 268 (John A. Winterdyk ed., 2002).

aged seventeen and a half years. While the other five accused were awarded the death penalty, the sixth accused, a 'juvenile' as per the definition provided under the Juvenile Justice Act, 2000 will be tried under the aegis of the said Act and be consequently subjected to a maximum of three years in a remanded home—a much more lenient punishment as compared to his co-actors.³ This led to immense public outrage and consequently, a clarion call for amendment to the Juvenile Justice Act and reduction of age of criminal responsibility.

Key Challenges and Bottlenecks in Implementation

The term juvenile justice has many different connotations around the world, depending on societal norms, values and culture. Some juvenile justice systems are highly developed and well integrated into functional legal systems. Other juvenile justice frameworks barely function, often because the underlying legal system is corrupt or fragmented or because the notion of juvenile justice has historically resided in local and informal resolution mechanisms.

India is an example of fundamental political stability and functionality in the developing world. It is also the world's most populous democracy.

The Juvenile Justice (Care and Protection of Children) Act is the governing legislation for 'Juveniles in Conflict with law' in India. The main objective of this act was to set up an alternative justice system for their rehabilitation. The onus of its implementation is on the Department of Women and Child Development and the Juvenile Justice Boards. Though the necessary infrastructure has been set up under the 'Programme for Juvenile Justice', the delivery mechanism in the form of both institutional and non-institutional services is severely lacking.⁴

The Act is not protected from blemishes. There are several challenges and bottlenecks in its implementation:

- There are numerous challenges to implementation of legislation. These challenges include some inherent shortcomings, and at times, misinterpretation of the laws, and poor implementation and oversight mechanisms and a weak child protection system.
- Across laws, there are divergent, and sometimes conflicting provisions relating to children; e.g., the age of childhood is defined differently in different legislation. The cross-references and linkages between provisions and structures under various laws also mean that one law needs to work perfectly to ensure effective implementation of the other law.

³ Juvenile Justice (Care and Protection of Children) Act, § 15(3) (2000).

⁴ M. Dasgupta, *Rehabilitation through Education for Juveniles in Conflict with Law*, (Centre for Civil Society, Working Paper No 238, 2010).

- In addition to the challenges that come with the complex and conflicting legal provisions, there are also challenges relating to governance within the justice system. There are numerous delays in notifications and/or establishment of Special Courts and Children's Courts and the appointment of Special Prosecutors. Victim compensation programmes are not funded and implemented effectively, and there is an absence of a structured witness protection programme. Fast-track courts are few and far between, and the prolonged judicial processes further disenfranchise children who seek justice. Community-based justice systems in some communities (e.g., tribal communities and Khap Panchayat) also provide informal justice at the community level, which could be speedy, but could significantly contravene children's rights.
- One of the major challenges is that the age of juvenile is fixed at 18 years. But in practice, children below the age of 18 years are committing heinous crimes. The best example is that of the Nirbhaya Case.
- Another issue that has to be looked into is that the Juvenile Justice Act lacks dynamics. It is not dynamic in the sense that it is very rigid. The law should change as per the changing society. It is a famous saying that whatever will not change with the changing time, will ultimately result in failure and so stands for the law as well. Society is not static, it is dynamic. Its needs change with time to survive. It is correct to reform and rehabilitate a child in conflict with law; however we should not send a signal in society that a person below 18 years of age can commit any kind of heinous acts and still get away with a minor penalty. So, need is to take into account mental maturity age of person and not just chronological age while deciding the case. Facilities at reformation center should be improved so that real rehabilitation happens rather than just lip service.
- These days, with the collapse of the joint family system, nuclear families are on the rise. A child today does not get the same attention and affection at home as a child did a decade back. Add to that an ever-increasing influence of social media. Children are exposed to a number of threats, which include, but are not limited to psychological, physical, and sexual. We might have political equality in India, but inequalities on the basis of socio-economical and regional factors are wide spread. The need of the hour is to focus on the character-building of the future generation. The society needs to develop a procedure for supervising and guiding children during their adolescence in order to make sure that they learn to respect fellow citizens. Secondly, optimum use should be made of the Right to Education Act in order to include children up to 18 years of age into

education system, because education can transform and reform a person and it trains them to deal with all sorts of crisis in life. Most importantly, it helps in changing the patriarchal attitude of society towards females.⁵

- The main aim for enacting the JJ Act as well as establishing the JJ Boards was not to punish but for the reformation and rehabilitation of the offenders. The aim and style with which the JJBs are supposed to work is to help in the reformation of the child and not to punish him like an ordinary criminal in a court of law. Because if the JJBs are only set up to punish the child, then there is no need to set up any JJBs as that can be done in a very nice manner by our judicial courts of law. The basic philosophy for enacting an act with such a type of differential approach was to save children from disturbing effects of criminalization, penalization and stigmatization; we want the “well-being” of the children and not to scar them for life.

It is no doubt that the Juvenile Justice (Care and Protection of Children) Act 2000 (amended in 2006) is not being implemented in its entirety. The Supreme Court in 2010 observed that the operation of the Act is very poor. The Act visualized treating minors on the wrong side of law with care and to put them through a reformatory program to make sure they do not turn into hardened criminals when they grow up. That was the precise reason why the Act envisioned proper remand homes, juvenile justice boards and child welfare committees in every district. A great deal of the problem would have been tackled already if these provisions were followed properly. The lack of sufficient number of Observation Homes and Special Homes, to be set up under Sections 8 and 9 of the Juvenile Justice Act, is an issue that needs to be resolved at the earliest. Under the provisions of the Act, any State Government may establish and maintain either by itself or under an agreement with voluntary organizations, Observation Homes⁶ and Special Homes⁷ in every district or a group of districts. But this requirement is not being met with as it should be. A report submitted by the Asian Centre for Human Rights in 2012 identified that there is a severe scarcity of homes for juveniles in conflict with the law as well as children in need of care and protection. For instance, the State of Assam consists of 27 districts. There are only four Observation Homes and three Children Homes run by the State. These homes are located in Kamrup, Nagaon and Jorhat districts while the shelter homes run by NGOs are located in Guwahati. The Jorhat Observation Home set up in 1987 caters to over 11 districts - Jorhat, Golaghat, Karbi Anglong, Dibrugarh, Tinsukia, Sivasagar, Lakhimpur, Darrang, Udalguri and Sonitpur. Trafficking prone districts like Dhubri,

5 *Id.*

6 *Supra* note 3, § 8.

7 *Id.* § 9.

Kokrajhar, Baksa, Chirang, Bongaigaon, etc. do not have any home.⁸ The State of Assam has been steadily ranking top in juvenile criminal behavior among the eight states of northeast India. In 2011, Assam topped the list with 405 cases (402 of Indian Penal Code crimes and 3 Special or Local Laws crimes), followed by Meghalaya with 98 IPC crimes, Arunachal Pradesh with 78 IPC crimes, Tripura with 73 IPC crimes, Sikkim with 63 IPC crimes, and Mizoram with 58 IPC crimes.⁹ This, along with the lack of competence of the Special Juvenile Police Units, poses to be a big threat to the security and well-being of juveniles who are in conflict with law and children who are in need of care and protection. The Act also talks about “the police officers who frequently or exclusively deal with juveniles or are primarily engaged in the prevention of juvenile crime”.¹⁰ It says that such police officers shall be particularly competent to deal with the juveniles or children under this Act. Further, it states that every police station shall have “at least one officer with aptitude and appropriate training and orientation” who may be designated as the ‘juvenile or the child welfare officer’ in order to handle the juvenile or the child in co-ordination with the police.¹¹

A Special Juvenile Police Unit may be constituted in each district and city to co-ordinate and to upgrade the police treatment of the juveniles and the children. It is important that these officers should not only be trained really well, but they should also be empathetic and gentle when dealing with impressionable and vulnerable children. The Special Juvenile Police Unit and Child Welfare Officer at the police station are supposed to deal with cases of both juveniles in conflict with law and children in need of care of protection. It shall also function as a watchdog and provide legal protection to the said children against all kinds of cruelty, abuse and exploitation and report occurrences of non-compliance for further legal action. The Unit must take serious cognizance of adult perpetrators of crimes against children and ensure that they are detained immediately and booked under the appropriate provisions of the law. Registering, linking and monitoring of information regarding missing children received at the police station and immediate investigation should be done. The Units are to work with volunteer groups, local governing bodies and community based organizations in identifying children in conflict with law as well as reporting cases of violence against children, child neglect, child abuse and exploitation. Besides this, the Units shall also maintain a list of NGOs and other voluntary organizations in their respective jurisdiction, and shall monitor the activities to prevent all crimes

8 *Assam: The State of Juvenile Justice*, <http://www.achrweb.org/reports/india/JJ-Assam-2012.pdf> (last visited Mar. 4, 2015).

9 National Crimes Records Bureau Report, 2011.

10 *Supra* note 3, § 63.

11 *Id.*

against children especially crimes of the nature of trafficking, illegal adoption and detention of children. The Units are supposed to establish & maintain contacts with expert persons from various fields with the right authorizations and qualifications, and seek their assistance and cooperation in child related matters, as and when required.

Another area that needs immediate focus is the Juvenile Justice Board. Sections 4, 5 and 6 of the Act talk about the composition, powers and procedures of the Board. However, it can be seen that the language used in the legislation is vague to a great extent and does not help as much as it should. The frequency of the number of the meetings of the Board has not been specifically mentioned. The Act only says that “the Board shall meet at such times and shall observe such rules of procedure in regard to the transaction of business at its meetings, as may be prescribed”.¹² The nature of the said prescription is unclear. It is important for the welfare of the children that the Board meets as frequently as possible to discuss and handle the sensitive issues relating to children and juveniles. The Act also fails to mention anything regarding the location of the office of the Board. It goes without saying that for practical purposes, it is understandable that more often than not, the office of the Board is located on the Court premises of the district or city. This, however, is not in the best interest of the young minds that the Board deals with. The Court premises are anything but child-friendly. It is always abuzz with activity, a lot of which may not be pleasing to the eyes, ears and mind. The offices need to be located outside courts, in a child-friendly environment. The aim is to make the child in need of care and protection or a juvenile in conflict with law, feel absolutely comfortable and relaxed, so that it becomes easier for them to share their problems. Harsh surroundings can have an adverse effect on them. A child or juvenile may get scared and it may become difficult for the members of the Board to help them. Alternatively, being on the same premises as hardened criminals and watching them may also have an unpleasant effect on the young minds and it may influence them. Thus, it is very important that the office of the Board be located on at such a place that is not as unkind as the Court premises.

While on the topic of location, it is also important that the Observation Homes and Special Homes also be located at more sensible locations and have better infrastructure. Optimum use needs to be made of the funds that are being allocated for child welfare. These Homes should be made to look less like prison cells and more like a “home”. The aim is not to intimidate the children living in these homes, but to make their stay pleasant, to ensure their mental as well as physical well-being. It must be ensured that the Homes have sufficiently private bedrooms for the inmates, proper toilets and

¹² *Id.* § 5(1).

bathrooms, a recreational center, provisions for indoor and outdoor activities and requirements for learning as well. The children should be given options to choose between traditional education and vocational training. The food being served should be tested regularly to ensure that it is not of sub-standard quality. The staff should be trained specially and specifically to deal with children. It should be kept in mind that most of the children being dealt with under this Act come from broken families and/or have lived in acute poverty all their lives. The slightest lapse in care towards them can easily make them go back to their old ways and land them in trouble again. Infrastructure of the Homes and a proper trained staff are one of the most important requirements. Unsuitable premises of welfare homes for children often cause problems due to lack of infrastructure. The positive side is that this is a minor hurdle that can be dealt with easily.

Besides training for the staff of the Observation Homes and Special Homes, training should be made mandatory for all the other stakeholders as well. Rehashing the point already, it should not be forgotten even for one minute that the persons being dealt with are young, impressionable, vulnerable minds and the future of the country. It is important to make all the stakeholders empathetic towards the cause. Sensitization is the key to success in this case. Methods of reform that work with seasoned criminals will not only fail here, but they might also bring unpleasant results.

It is shocking to note that children and juveniles are more often than not treated brutally, even beaten up, by the same people who are supposed to protect them. It makes us want to question the entire system. What hope is there is for the future of these children if the people who are supposed to be their protectors turn into violators? There have been reports of numerous cases where policemen have beaten and locked up juveniles in conflict with law, just like they would have beaten and locked up any adult criminal. On June 11, 2009, a police team led by the Officer-in-charge of Nitaiphukuri police outpost in Assam picked two young victims, on the allegation of theft of mobile phone recharge cards resulting from a complaint lodged by their neighbor. The two victims were imprisoned in the police station, stripped and tortured throughout the night. The police personnel present are believed to have rubbed chillies on their naked bodies and even forced it down their throats.¹³ In another incident that happened on August 16, 2009, the Officer In-Charge at the Chungajan police station in Golaghat district of Assam tortured a 12-year-old boy of Sanitpur village.¹⁴ The National Human Rights Commission had to

13 <http://www.nhrc.nic.in/display.asp?fno=53/3/15/09-10> (last visited Mar. 5, 2015).

14 <http://www.nhrc.nic.in/display.asp?fno=135/3/22/09-10> (last visited Mar. 5, 2015).

interfere in both these cases. It goes without saying that, without a doubt, there be a number of cases like these, most of which, unfortunately go unreported and no help reaches the victims of such horrific acts on time in order to protect them.

Chapter IV of the Act talks about rehabilitation and social-reintegration. The Act of 2000 says that the rehabilitation and social reintegration of a child shall begin during the stay of the child in a children's home or special home.¹⁵ The various ways suggested by the Act to achieve this goal of rehabilitation and social reintegration of children shall be carried out alternatively by adoption (Section 41), foster care (Section 42), sponsorship (Section 43), and sending the child to an after-care organization (Section 44). The Act is, however, silent about putting in place a monitoring mechanism so as to keep a check on the children who have been rehabilitated using one of the above-mentioned ways. Given the rising number of trafficking cases, a child could very easily fall prey to a crime-racket. The rehabilitation and social-reintegration of children is important. But it is also important that a committee be constituted in order to monitor the progress of the children as well as the institutions or families that have taken them in. Frequent visits should be made to the said institutions and families to make sure that:

- 1) the child is not being ill-treated,
- 2) the child has not been abandoned,
- 3) the child is getting proper care,
- 4) the child is not being made to work as a domestic help under the garb of adoption or foster care,
- 5) the child is getting proper education and/or vocational training in whatever interests her/him, and
- 6) all the needs of the child are being met with in an appropriate manner.

Also, an active participation must be sought from the parents and guardians of the children in order to keep the family ties alive. Often, when the child is put in welfare homes, the parents are kept in dark about the condition of the child. This acts negatively on the child's psyche, resulting in the child becoming emotionally distant from her/his family.

Reports of the National Crime Records Bureau suggest that there is a grave backlog of cases that fall under the Juvenile Justice (Care and Protection of Children) Act 2000. This backlog is causing delay in the dispensing of justice, resulting in the fact that the future of thousands of children stands in the dark. Children and juveniles are forced to stay in the inhospitable and unfriendly environment of

¹⁵ *Supra* note 3, § 40.

Observation Homes or Special Homes, not allowed to reunite with or even meet their families. The high number of pending cases before the Juvenile Justice Boards simply contradicts the claim of the government that the Juvenile Justice Boards are functioning efficiently. According to replies received from various Juvenile Justice Boards under the Right to Information Act 2005, as many as 1,363 cases were pending before different Juvenile Justice Boards across Assam as of April 3, 2012.¹⁶ By July, 2012, more than 16,000 cases were undecided in the various Juvenile Justice Boards in various districts of Bihar. It is beyond argument that the reliability of these Juvenile Justice Boards is almost shaken. And this is just the data from two states. To put it in perspective, it means that the number of pending cases on the national level is much higher. This should serve as a wakeup call for the Government and all the authorities involved directly or indirectly. Even though a number of initiatives have been taken in the recent past by the higher judiciary to bring down the backlog, but the progress is very slow and not much has been achieved to clear the excess workload. It is high time that some practical solution be found to reduce the pending number of cases in Juvenile Justice Boards.

Conclusion

Even though there is legislation in place to handle cases related to children who are in need of care and protection and juveniles in conflict with law, there is a huge gap between the Act and the ground reality. The key challenge facing the correct application of the Juvenile Justice (Care and Protection of Children) Act 2000 is that the requirements listed in the Act are not being met with. There is a dearth of suitable homes and shelters for the children. Whatever homes and shelters do exist, are run by incompetent, unsympathetic and untrained staff. These homes and shelters also lack the proper infrastructure that is needed to make the place more hospitable and welcoming for the young human beings who are already scared, disturbed and distressed. If anything, the inhospitable environment only makes the children more depressed and makes them develop a negative attitude towards any genuine help being given to them. The homes and shelters also lack facilities for constructive recreational activities for the children, which leads them further into using their time in a non-productive way; time that could have been used to achieve something fruitful. As far as practically possible, it must be ensured that the child or juvenile does not dropout from mainstream education even after she/he leaves the Home after disposal of his case. There is pressing need for creating a satisfactory structure essential for the implementation of the Act with a larger participation of informal systems specially the family, NGOs and the society. The

¹⁶ *Supra* note 2.

members of the Juvenile Justice Boards need to take their responsibilities more seriously. The Boards and other committees constituted under this Act should meet as frequently as possible. All stakeholders, including the Board members, police personnel and staff of Observation Homes and Special Homes should be given appropriate training in order to make them learn to be more sensitive when dealing with children. There should be a consistent training program for all stakeholders involved either formally or informally, at the national level.

There is also the need of a standardized monitoring mechanism, also at the national level, so as to ensure that the children are comfortable in the Homes. Among the various functions of such a monitoring mechanism should also be the duty to monitor regularly the children, who have been adopted by other families; have been put in foster care; are being sponsored by the Government or any agency to take care of their medical, nutritional, educational and other needs with a view to improving their quality of life; or have been put in an after-care organization. This monitoring mechanism will ensure that the child is living a healthy life and will prevent the State from shunning its responsibilities towards all such children. The job of the Government, the judiciary and all other organizations does not end once the case has been disposed of. The State should make sure that the juvenile in conflict with law does not have a relapse and go back to doing activities that got her/him into trouble in the first place.

Needless to say, steps need to be taken to ensure a stricter implementation of the Act. The bodies involved must be made accountable and answerable. Once a tight system of checks and balances is in place, attempts should be made at clearing up the backlog of cases. A new outlook and a fresh start is what are needed at the moment. After all, we must not forget that it is the future of the nation that is at stake here.

JUVENILE JUSTICE IN INDIA: NEED FOR RECONSIDERATION

Shivani Dutta* and
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Introduction

Children are considered as the future of the nation and it is of utmost importance to look into all matters which hampers all round development of them. The legal framers in order to keep the children out of the normal procedure prescribed by law, enacted a separate piece of legislation for children who came in conflict with the law. Thereby the Juvenile Justice (Care and Protection of Children) Act 2000 was enacted keeping with the standards for child protection provided by the UN Convention on the Rights of the Child. The Act was amended in the year 2006 to strengthen the Juvenile Justice process. The Act provided for a special approach towards the prevention and treatment of juvenile delinquents and also provided a framework for the protection, treatment and rehabilitation of children in the purview of the juvenile justice system. This Act, the first central legislation on Juvenile Justice was passed in 1986, by the Union Parliament, thereby providing a uniform law on juvenile justice for the entire country. The Act is a uniform law enacted in India for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles. The Act defines a juvenile who is under the age of eighteen years and who need reformative measures to transform them into a law abiding citizen rather than punishing them, in case they came in conflict with the legal system of the country. Further, the children who came in conflict with law are to be integrated into society and encouraged to lead a normal life through rehabilitative programs and correctional services.

But in the recent past, there has been increase in the number of crimes attributed to children, it seems necessary that the Act which provided umbrella protection to the juveniles certainly needs reconsideration due to the inherent bottlenecks present. The gruesome rape of a young woman on 16th December 2012 in Delhi popularly known as 'Nirbhaya' case raised a heated debate at national level with respect to the juvenile's who is accused of a heinous crime but receives a maximum punishment of three years at correctional homes because he comes under the protection of the Act. On 27th February 2013, the Minister for Women and Child Development told the Rajya Sabha, "*We are not changing the age of juvenile as defined in the juvenile justice act, as it may hurt the larger interests of children in the*

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country. All those under 18 years of age are juvenile.” However the legislature keeping in mind the changing needs of the society thought it pertinent to make stringent provision with respect to juveniles in India without changing the basic crux of the legislation, that is, to provide reformation and rehabilitation with respect to juveniles who comes in conflict with law. Thus, the legislature has re-enacted the Juvenile Justice (Care and Protection of Children) Act 2000. The Juvenile Justice (Care and Protection of Children) Bill 2014 was introduced in Lok Sabha on 12th August 2014.¹ The Standing Committee examining the Bill submitted its report on 25th February 2015. The Lok Sabha on 7th May 2015 passed the Juvenile Justice (Care and Protection of Children) Act 2014 which will now allow children in the 16-18 age group to be tried as adults if they commit heinous crimes. The House agreed to pass the Bill after a clause that any 16-18 year old, who commits a less serious offence, may be tried as an adult only if he is apprehended after the age of 21 years, was deleted.² The Bill is placed before the Rajya Sabha for debate. If passed, it will be considered as an Act governing the juveniles in India.

Thus, with the enactment of the new Act and making stringent provision for juveniles committing heinous crimes in the age group of 16-18 years, where punishment could even be imprisonment, it would definitely put a retributive effect on the juveniles. As well said by the Parliamentary Affairs Minister Venkaiah Naidu ‘as individual he feels that if a person is capable of committing a heinous crime of rape then the punishment will have to be in accordance to the crime.’ Moreover, the umbrella protection to the juveniles under the 2000 Act has definitely seemed to change the dimension of the Juvenile Justice in India. But at the same time the reformatory approach of the legislature should not be touched upon and should also not violate the UN Conventions of Children and also the Constitution of India. It would also be necessary to see that the juveniles who are imprisoned should not be kept along with other criminals as that would make the juveniles a more hardened criminal. The Act also makes certain changes with respect to adoption of a child and also for the speedy disposal of cases.

Juvenile Justice Act 2000: A Critical Analysis

The Juvenile Justice Act (JJA) 1986 was replaced by the JJ Act, 2000 for promoting, protecting and safeguarding the rights of the children in India. The JJA, 2000 conforms to the UN Convention on

1 *The Juvenile Justice (Care and Protection of Children) Bill, 2014*, <http://www.prsindia.org/uploads/media/juvenile%20Justice/Juvenile%20justice%20Bill,%20%202014.pdf> (last visited May 21, 2015).

2 <http://www.m.firstpost.com/india/lok-sabha-passes-amendments-to-juvenile-justice-act-to-face-rajya-sabha-test-2232674.html> (last visited May 21, 2015).

the Rights of the Child³, the 'Beijing Rules',⁴ and all other relevant national and international instruments clearly defining a child as persons up to the age of 18 years. The Act conforms to the Indian Constitution which provides special status to the children through Articles 15(3), 24, 39(e) and (f), and 45.

Although the Act was enacted with the idea of protecting and reforming the juveniles in conflict with law, but due to certain loopholes in implementing the Act, it did not prove to be satisfactory. We shall now analyze some of the major factors which led the legislatures to think for re-enacting the Act in order to keep pace with the changing needs of the society. The various factors are discussed hereinafter:

Inappropriate Ratio of Juvenile in Need of Care and Protection with that of the Homes

Under the Juvenile Justice Act (JJ) 2000, juvenile in need of care and protection are meant to be rehabilitated through non-institutional care such as foster care, mentoring, sponsorship and adoption with institutional care as a last resort. Further, the basic idea of the Act is to re-integrate the juvenile in conflict with law into the society and lead a normal life through rehabilitative programs and correctional services. However, there are lacunae's in the manner in which the homes are run, and in the response of government and police to such children. In the process, it is noticed that the juvenile justice system has often ceased to provide dignity and freedom to children, and instead caused them harm. The system itself has become part of the problem instead of the solution, thus violating the spirit and preamble of the JJ Act. There are nearly 480 CWCs and close to 400 JJBs in the country and it is estimated that there are 117 million children who are in need of care and protection⁵. The inappropriate ratio brings the scenario of the violation of the rights of the juveniles in need of care and protection.

There has been acute shortage of homes for juveniles in conflict with law as well as children on need of care and protection in the State of Assam. According to the report of Asian Centre for Human Rights on "Assam: The State of Juvenile Justice" it was brought to limelight that out of 27 districts in Assam there are only four

3 The first UN document specifically focused on child rights was the Declaration on the Rights of the Child, but it was more like a moral guide of conduct for Governments. It was in 1989 that the global community adopted the United Nations Convention on the Rights of Child, making it the first internationally legally binding document concerning child rights. The convention consists of 54 articles covering all four major categories of child rights: Right to life, Right to development, Right to protection and Right to Participation.

4 The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, A/RES/40/33, 29th November 1985.

5 Shantha Sinha, *National Commission For Protection Of Child Rights (Npcr)- The First Six Years (2007-2013)* (2013).

Observation Homes and three Children Homes run by the State.⁶

In the State of Manipur where Armed Forces Special Powers Act 1958 is in force, there is only one Government run Observation cum Special Home at Takyelpat in capital Imphal whereas the Army and para-military forces are deployed all over the State. This indicates that children who are apprehended by the Army and para-military forces are not produced before the Juvenile Justice Boards and Observation Homes but detained in their camps and in the best circumstances sent to the police lock up or prisons⁷. This shows the failure in implementing effectively the provisions of the JJ Act and providing a proper shelter for the juveniles in India.

Exploitation at the Juvenile Homes

The Act mandates the establishment of child care institutes for the juveniles in need of care and protection in every district. However, several such homes run by the union and state governments and NGOs have come to symbolize rampant abuses which have been taking place at these reformatory homes. At Apna Ghar, a child care institution in Rohtak, which grabbed headlines in early 2012, more than 100 female residents said they were raped by caretakers and outsiders for more than a year. At least 10 girls had to undergo abortions. The report of the committee appointed by the Punjab and Haryana High Court, immediately after the rampant sexual abuse in the institute was highlighted, observed that children were filmed for pornographic purposes and more than a dozen minor inmates were sold.

According to the report, "Every inmate, irrespective of age, was forced to consume liquor at night, especially on the occasion of Holi" and was subjected to abuse by the shelter home staff and outsiders.⁸

A recent study by the Asian Centre for Human Rights, labels juvenile homes as "India's hell holes" because of the predominance of child sexual abuse that takes place within their confines. In almost all the cases recorded on the report, a member of the staff of the home carried out the sexual abuse be it security guards, managers, cooks,

6 These homes are confined to Kamrup, Nagaon and Jorhat districts while the shelter homes run by NGOs are located in Guwahati. The Jorhat Observation Home set up in 1987 caters to over 11 districts-Jorhat, Golaghat, Karbi Anglong, Dibrugarh, Tinsukia, Sivasagar, Lakhimpur, Darrang, Udalguri and Sonitpur. While the trafficking prone districts like Dhubri, Kokrajhar, Baksa, Chirang, Bongaigaon etc do not even have home.

7 ASIAN CENTRE FOR HUMAN RIGHTS, MANIPUR: JUVENILE JUSTICE SUSPENDED, <http://www.achrweb.org/press/2012/IND10-2012.html> (last visited May 25, 2015).

8 <http://www.hindustantimes.com/india-news/homes-of-horror-when-juvenile-shelters-become-exploitation-centres/article1-1305566.aspx> (last visited Feb. 15, 2015).

wardens or others.⁹ Among the States, Madhya Pradesh recorded the highest number of child rape cases at 9,465 from 2001 to 2011, followed by Maharashtra with 6,868 cases, Uttar Pradesh 5,949, Andhra Pradesh 3,977 and Chhattisgarh 3,688, 316 from Assam.¹⁰ However, there are cases which have been reported from other States as well. This shows the excessive abuse which has been meted out to the juveniles who needs care and protection but instead faces the dreadful consequences. Thus, it is of outmost necessity that proper checks should be put on the children who are in observation homes and also to make sure that anyone who abuses the children in the observation homes should face the appropriate law.

Mishandling of cases by the Police

As the JJ Act was concerned with the reformation of the juveniles, proper persons well trained in the field of handling the cases of juveniles in conflict with law should be appointed. There are many instances where the police authority fails to take proper care in handling the cases relating to juveniles. There are many instances where the juveniles are not produced before the Juvenile Boards instead detained in police custody and also subjected to inhuman torture. Some of the cases has been briefly dealt with, which shows the picture of juveniles being treated in police custody

On 11 June 2009, two victims residing in the district of Sivasagar, Assam were picked by a police team led by the Officer in Charge of Nithaipukhuri police outpost on the accusation of stealing mobile phone recharge cards following a complaint lodged by their neighbor, Biren Phukan. Both the victims were detained in the police station, stripped and tortured throughout the night. The police allegedly rubbed chilies on their bodies and forced it down their throats. The chilies locally called as “bhot jolokia or naga jolokia”, are reportedly the hottest chilies in the world. The SP, Sivasagar has failed to submit the clarifications as directed by the National Human Rights Commission.¹¹

In yet another case from the State of Assam, on 16th August 2009, a 12 year old boy of Sonitpur village was tortured by Manoj Boruah, Officer in Charge at the Chungajan police station in Golaghat district of Assam. No entries were made in the General Diary in this regard. Thus, there was an apparent violation of human rights of the victim boy by the public servant by misusing his office, for which he must be

9 <http://www.dnaindia.com/analysis/standpoint-reforming-the-juvenile-homes-first-188344> (last visited Feb. 15, 2015).

10 <http://www.thehindu.com/news/national/juvenile-homes-are-hellholes-says-report-on-childrape/article4637540.ece> (last visited Feb. 15, 2015).

11 <http://www.achrweb.org/press/2013/IND02-2013.html> (last visited Mar. 15, 2015).

compensated under the provisions of the Human Rights Act, 1993. The National Human Rights Commission recommended an amount of Rs.50,000 as compensation to the victim for breach of his human rights.¹²

Yet another case from the State of Manipur brought to notice by Asian Centre for Human Rights stated from 14 February to 1 March 2012, four persons including three minors identified as Sonkhopao Mate (15 years), Ngamminlun Mate (17 years) and Ngambom Haokip (17 years) were arbitrary arrested and illegally detained in the custody of 36th Assam Rifles and at Lamphel police station in Imphal. The personnel of the 36th Assam Rifles arrested them on 14 February 2012 after a civilian Gajendra Singh pointed his finger at the three minors and one adult villager stating that they are the one who murdered his friend and business partner Mangal Ram. Gajendra Singh and the deceased were running a civil canteen under the 36th Assam Rifles and their canteen was situated inside the Assam Rifles camp at Sehlon village. Later, the children were sent to judicial custody at Sajiwa Central Prison in clear violation of the provisions of the JJ Act, 2000. Even the Chief Judicial Magistrate, Imphal West sent them to the prison without verifying their age. In the meanwhile, the investigation into the murder of Mangal Ram [FIR No. 2(2) of 2012] registered at the Molcham Police Station under Sections 302/34/195/203 of Indian Penal Code was continuing. After investigation, the Police arrested Gajendra Singh, who pointed fingers to the juveniles, and three others for the murder of civilian canteen owner late Mangal Ram. They have been sent to jail. It is clear that the arrested juveniles had nothing to do with the murder case but had to undergo the trauma.

This shows the clear violation of the JJ Act 2000 and also the lack of training facilities provided to the police unit to deal with cases relating to juveniles in India. This is yet another factor which led to the failure in implementing the Act.

Pendency of cases

The Juvenile Justice Boards established under the Act has failed to provide speedy disposal of cases and piling up of cases relating to juveniles in conflict with law in most of the States in India. In the State of Assam till June 2013, atleast 1,789 cases were pending before the Juvenile Justice Boards in Assam, of which many are as old as ten years.¹³ Till February 2013 there are 1,205 cases pending in the Juvenile Justice Board Pune. Only 36 cases have been cleared from

12 <http://www.archweb.org/press/2013/IND02-2013.html> (last visited Mar. 15, 2015).

13 <http://www.assamtribune.com//scripts/mdetails.asp?id=jun2813/city07> (last visited Mar. 15, 2015).

April 1, 2012 to January 2013. The cases involved are mainly of rape, murder and dacoity. Maharashtra has the highest pendency of juvenile crime cases, nearly 16,000.¹⁴

With the improper functioning of the Juvenile Justice Boards and backlog of cases across the country the matter came under the scrutiny of the Apex Court of the country with the filing of a petition by Sampurna Behrua in the year 2005 about the government's apathy in implementing the welfare legislation. On April 10, 2015 the Supreme Court asked the Centre, State Governments and NALSA to appraise it about the exact number of Juvenile Boards functioning in the districts across the states. It instructed the concerned authorities to coordinate and submit data on the pendency of cases involving juveniles and frequency of Juvenile Justice Board sittings. The Apex Court also sought details of the number of vacant posts in the Juvenile Justice Boards, as well as the number of legal aid lawyers and probation officers working in such boards.¹⁵

Thus, once should wait until the report submitted by the proper authorities as asked by the Supreme Court is submitted to analyze the actual reason for failure of proper functioning of the Juvenile Justice Board.

Crimes Committed by Juveniles

As per the Compendium prepared by the National Crime Records Bureau the figures shows that there has been an increase in the rate of crimes committed by juveniles in the year 2013. Some of the figures prepared are given below to have a clear picture of the rate of crime committed by juveniles. Some of the areas which showed increase in the rate of crime by juveniles are:¹⁶

- The number of Juveniles in conflict with law under both Indian Penal Code and Special Local Law has increased by 13.6% and 2.5% respectively during the year 2013 over 2012.
- The share of IPC crimes committed by juveniles to total IPC crimes was reported as 1.2% during 2013.
- The highest increase in the incidents of crimes committed by juveniles was reported under assault on woman to outrage her modesty (132.3%) followed by insult to the modesty of women (70.5%) and rape (60.3%).
- The highest number of juveniles were apprehended for thefts (7,969) followed by hurt (6,043) and burglaries (3,784). These heads

14 <http://www.archive.indianexpress.com/news/1200-cases-pending-in-juvenile-court—allweek-hearings-on/1070678/> (last visited May 22, 2015).

15 <http://www.m.firstpost.com/india/pending-cases-vacant-posts-functioning-juvenile-justice-boards-sc-scrutiny-2192601.html> (last visited May 21, 2015).

16 National Crime Records Bureau, *Juveniles In Conflict With Law* (2013).

taken together accounted for 40.9% of total juveniles apprehended under IPC crimes.

- The percentage of juveniles apprehended under IPC was 66.3% in the age group of 16-18 years during 2013.
- Out of the total juveniles (43,506) involved in various crimes, 8,392 were illiterate and 13,984 had education up to primary level. These two categories together accounted for 51.9% of the total juveniles arrested during the year 2013.
- A large number of juveniles (50.2%) belonged to the poor families whose annual income was up to 25,000.

Although there has not been increase in the rate of crimes committed by juveniles but the brutality with which it is committed is a cause of concern. The data provided above gives a clear picture that there has been an increase in the rate of crimes amongst the juveniles between the age group of 16-18 years. The recent inhuman gang rape in Delhi on December 16, 2013, has shocked the nation of the brutality with which the heinous crime was committed. Among the five accused in the crime, one of them was minor and the most barbaric one. As he was below the age of 18 years he was tried by the Juvenile Justice Board. Thereafter the juvenile was sent to reformative home for three years as that was the maximum punishment under the JJ Act 2000. This raised a public debate to amend the present JJ Act which gives protection to juveniles who commits such heinous crimes.

Although in the *Salil Bali case*,¹⁷ the Supreme Court of India stated, "the age of 18 has been fixed on account of the understanding of experts in child psychology and behavioral patterns that till such an age the children in conflict with law could still be redeemed and restored to mainstream society." There are other instances where the Apex Court of the country has also urged the Government for a more deterrent effect of the JJ Act as the rate of the crime and the nature of crime, in which the juvenile are getting involved have increased and also to send a message to the society that life of the victim was equally important under the rule of law. The court was hearing a case where an accused in a murder case had claimed he was juvenile at the time of the incident and hence he should be accorded the immunity under the Act.¹⁸

Thus, with the demands from various groups of the society to amend the JJ Act and also due to certain deficiencies in implementing the Act which has been already discussed above the law makers thought it essential to re enact the JJ Act.

17 *Salil Bali v Union of India*, W.P.(C) Nos.14, 42, 85, 90 and 182 of 2013.

Key Features of the Juvenile Justice (Care and Protection) Bill 2014

The Juvenile Justice (Care and Protection) Bill, 2014 has been drafted with certain new stringent provisions without hampering the reformatory structure of the Act. The Bill has been passed by the Lok Sabha on 7th May 2015. The Bill will now be introduced in the Rajya Sabha for discussion. We shall now enumerate some of the key features of the Bill.

Treating Juveniles as Adults

One of the important clauses which have been incorporated in the present Bill is treating juveniles committing heinous crimes such as rape, murder, acid attack etc in the age group of 16-18 years as adults. Under the Bill the authorities will conduct an assessment of certain factors including the “premeditated nature” of the offence and “the child’s ability to understand the consequences of the offence”. Based on the assessment, children can be prosecuted in an ordinary criminal court, and punished as adults if convicted. They cannot be sentenced to death or life imprisonment without the possibility of release.

This clause has been opposed by many child rights organizations as it will destroy the basic crux of reforming the children. India’s National Commission for Protection of Child Rights has described the proposed amendments as “retrograde in nature and against the principles of reformatory and restorative justice” and said they would “defeat the intent and purpose of the juvenile justice system”.¹⁹

Also the Standing Committee observed that the Bill is not in conformity with the United Nation Convention on Rights of Child (UNCRC) to which India is a signatory. The UNCRC states that signatory countries should *treat every child under the age of 18 years in the same manner and not try them as adults*. However, many other countries try juveniles as adults, in case of certain crimes. All of these countries, except the United States, have ratified the UNCRC. To cite a few countries in United Kingdom is 17 years whereas in United States of America it is 13 years if they are able to understand their actions. In Canada and Germany the age is 14 years.²⁰ Thus as

18 <http://www.indianexpress.com/article/india/india-others/supreme-court-urges-govt-to-make-juvenile-law-more-deterrent/> (last visited Feb. 15, 2015).

19 <https://www.amnesty.org.in/show/news/children-must-not-be-treated-as-adults-under-new-juvenile-justice-law> (last visited May 23, 2015).

20 **United States:** U.S. Code Chapter 403- Juvenile Delinquency, <http://www.law.cornell.edu/uscode/text/18/part-IV/chapter-403>; **United Kingdom:** Children and Young Persons Act (1933), <http://www.legislation.gov.uk/>

discussed above with the increase in the crime specially against women by juveniles in the age group of 16 to 18, it does not seem unjust to try juveniles as adults in India for committing heinous crimes with brutality. No doubt reforming the juvenile is an important aspect but the human right of the victim also needs to be kept in mind.

Juvenile Justice Boards and Child Welfare Committees

The Juvenile Justice Boards and Child Welfare Committees will be constituted in each district. Juvenile Justice Board will conduct the starting inquiry to assess if the juvenile offender should be sent for rehabilitation or tried as an adult. The Juvenile Justice Board is to assess the mental/physical capacity of the juvenile to commit the crime and understand its consequences. The Board may recommend interventions such as counseling, community service, and stay at observation homes. The Child Welfare Committee will determine institutional care for children in need of protection.

Adoption Options

The Bill also seeks to provide adoption procedures for three categories of children such as orphaned, abandoned and surrendered. Statutory status has been proposed for the Child Adoption Resources Authority (CARA). The idea of foster care in the country, for those who don't want to adopt has also been incorporated in the Bill. This will help people who want to keep children in their homes and give them affection without adopting them.

Penalties For Various Offences

The Bill specifies penalties for various offences such as for giving a child narcotic substances, employing a child for begging, etc. For the purpose of begging a person shall face a term of imprisonment of five years and also be liable to fine of rupees one lakh or both. A person giving narcotic to a child shall face a term of imprisonment for a term which may extend to seven years and also be liable to fine of rupees one lakh or both Any person who sells or procures a child for any purpose shall be punishable with rigorous imprisonment for a term which may extend to five years and shall also be liable to fine of rupees one lakh or both. Corporal punishment and ragging of a child in an institution has also been incorporated under the Bill.

Inference could be argued drawn from the penalties prescribed under the Bill that, a person giving a child a tobacco product or liquor

ukpga/Geo5/23-24/12/contents; **Canada:** Youth Criminal Justice Act (2002), <http://laws.justice.gc.ca/PDF/Y-1.5.pdf>; **Germany:** Courts Law (1974), http://www.gesetze-im-internet.de/englisch_jgg/englisch_jgg.html#p0097; German Criminal Code, http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (last visited Feb. 15, 2015).

will attract a higher term of imprisonment and fine than a person who engages in child trafficking. This provision needs to be re looked as the amount of punishment prescribed under the Bill is not in accordance with the crime committed.

Conclusion

The JJ Act is one of the important legislation in the history of child legislation in India. The JJ Act provides for the rehabilitation of Juveniles in Conflict with Law thereby helping them to reintegrate into the society as a better individual. But due to certain bottlenecks as already discussed in this paper it definitely projects a picture that the basic purpose with which the Act was enacted seems to have lost vision. The various infrastructural deficiencies as well as the unskilled people appointed in the Observation homes and the various tortures meted out to the juveniles, gives a dreadful picture in which the juveniles must be lagging in the homes. With the increase in the rate of heinous crimes such as rape, murder etc committed by the juveniles mainly in the age group of 16-18 years and with outmost brutality, has raised a public debate for punishing the juveniles as an adult. Keeping all these issues in mind the lawmakers has re-enacted the JJ Bill 2014 as discussed above. The Bill definitely tries to go away with the bottlenecks which the 2000 Act contained. But it is certainly not enough that provisions are just made in papers. The important part is its proper implementation and coordination among the various functionaries appointed under the Act to make it a successful piece of legislation.

CONTEMPORARY PERSPECTIVES ON AGE OF JUVENILITY: REVISITING JUVENILE JUSTICE LAWS IN INDIA

Saksham Dwivedi* and Saptarishi Das**

Introduction

“The problem of the delinquent child, though juristically comparatively simple, is, in its social significance, of the greatest importance, for upon its wise solution depends the future of many of the rising generation.”¹

Children constitute the principle assets of any country.² A child’s development is as important as the development of material resources and the best way to develop national human resources is to take care of children. India has the largest child population in the world³. The Indian Constitution has a framework within which ample provisions exist for the protection, development and welfare of children such as Article 21A, which says that the State shall provide free and compulsory education to all children within the ages of 6 to 14 in such manner as the State may by law, determine.⁴ Article 45 of the Constitution specifies that the State shall endeavor to provide early childhood care and education for all children until they complete the age of 6.⁵ Article 51(k)⁶ lays down a duty that parents or guardians should provide opportunities for education to their child/ward between the ages of 6 to 14 years.

Furthermore, Article 39(f) guarantees the right to equal opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and guaranteed protection of childhood and youth against exploitation and against moral and material abandonment.⁷ There are a wide range of laws that guarantee children their rights and entitlements as provided in the Constitution of India and in the UN Convention such as the Juvenile Justice (Care and Protection) Act 2000, the Child Labour (Prohibition and Protection) Act 1986, Prohibition of Child Marriage (Prohibition) Act 2006.⁸ It is easily comprehensible that there is no dearth of legislations in India

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1 Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

2 National Policy For Children, Resolution No. 1-14/74 CDD (1974).

3 <http://www.cry.org/resources/> (last visited Dec. 6, 2014).

4 P. M. BAKSHI, *THE CONSTITUTION OF INDIA* 16 (8th ed. 2007).

5 *Id.* at 26.

6 *Id.* at 32.

7 *Id.* at 21.

8 http://www.unicef.org/india/children_3220.htm (last visited Dec. 6, 2014).

aimed at the welfare of children but the question is do they possess the requisite effectiveness or execution? In India, children's vulnerabilities and exposure to violations of their protection rights remain widespread and multiple in nature. The manifestations of these violations are various, ranging from child labour, child trafficking, to commercial sexual exploitation and many other forms of violence and abuse.⁹ This neglected treatment of many children acts as an impetus for them to commit acts which the general notion terms as 'crimes' ranging from petty offences like theft to serious offences viz. sexual assaults, robbery, murder, etc.¹⁰ There are essentially two questions that are very important in this regard, firstly, who is a child? and secondly, how should they be treated? In the course of this article, we shall examine and touch upon the practical niceties of both, society and law, to understand the probable answers to these questions.

Juvenile Justice Act 2000: Fundamental Principle and Object

From the early 1920s, when states enacted their Children Acts, legislation provided for juvenile offenders and adult offenders to be treated differently. Juvenile legislation has always focused on reformation and rehabilitation instead of penalizing the child where it is not the past misdemeanors of the child, but his future welfare that concerns the juvenile justice system.¹¹ The age at which a person is considered to be a juvenile or a minor, or a child or an adolescent for the purpose of criminal law depends upon the countries and their jurisdiction and it ranges from 14 in some countries to 21 in others.¹² In India, various legislations prescribe different age for a person to be considered a child¹³ but with regard to criminal law, a person below the age of 18 is considered to be juvenile.¹⁴

The Juvenile Justice Act 2000 (hereinafter JJA, 2000) defines 'juvenile in conflict with law'¹⁵ as a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence. Apart from the

9 N. K. CHATURVEDI, LAW AND CHILD 283 (2nd ed. 2011).

10 NATIONAL CRIMES RECORDS BUREAU, ANNUAL REPORT ON CRIMES IN INDIA, 2012, <http://ncrb.nic.in/> (last visited Dec. 6, 2014).

11 D. Das, *Determining the Age of A Juvenile: A Controversial Approach*, <http://bprd.nic.in/> (last visited Dec. 6, 2014).

12 T. Chakraborty, *An International Comparison of Juvenile Justice Systems*, LV(3) THE INDIAN POLICE JOURNAL (2008).

13 See Child Labour (Prohibition and Regulation) Act (1986), Merchant Shipping Act (1958), Motor Transport Workers Act (1961), Apprentices Act (1961) which fix the age at 14 while Mines Act (1952), Indian Majority Act (1875) fix the age at 18.

14 Juvenile Justice (Care and Protection of Children) Act, § 2(k) (2000) (*hereinafter* JJA, 2000).

15 *Id.*, § 2(l).

constitutional mandates, the JJA 2000 came in response to Convention on the Rights of the Child,¹⁶ to which India is a party having ratified it, which prescribed a set of standards to be adhered to by all State parties in securing the best interests of the child and it emphasizes the social reintegration of child victims, to the extent possible, without resorting to judicial proceedings¹⁷. Furthermore, The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, (1985)¹⁸ and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990)¹⁹ have also provided the international momentum for the recognition of juvenile rights. In India, the age of criminal responsibility has been fixed at the age of seven²⁰ i.e. a person below the age of seven years cannot be prosecuted. Rephrasing this, a person above the age of seven can be held criminally liable but if he is under twelve years of age, the want of maturity may absolve him²¹ but no such immunity is available to persons above that age.

However, the persons above twelve years of age but below eighteen may be held criminally responsible after trial under the JJA 2000 but not as per the procedure laid down for the trial of adult persons.²² Section 27 of the Code of Criminal Procedure 1973, deals with the provision relating to 'jurisdiction in the case of juveniles' and it provides that no offender will be punished with death penalty or imprisonment for life if the person is less than sixteen years of age. It also provides that any other offence by such person may be tried by the Chief Judicial Magistrate or in accordance with any other law for the time being in force. Thus, such persons are now tried in accordance with the JJA 2000 that provides special procedure to deal with the juveniles in conflict with law.²³ In order to remove uncertainty, the Act provides "notwithstanding anything contained in any other law for the time being in force the provisions of this Act shall apply to all cases involving detention, prosecution, penalty or sentence of imprisonment of juveniles in conflict with law under such other law".²⁴

16 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> (last visited Dec. 6, 2014).

17 *Id.*

18 *U.N. Doc A/RES/40/33*, <http://www.un.org/documents/ga/res/40/a40r033.htm> (last visited Dec. 7, 2014).

19 *U.N. Doc A/RES/45/113*, <http://www.un.org/documents/ga/res/45/a45r113.htm> (last visited Dec. 7, 2014).

20 Indian Penal Code, § 82 (1860).

21 *Id.*, § 83.

22 MAHARUKH ADENWALLA, CHILD PROTECTION AND JUVENILE JUSTICE SYSTEM 16 (2006).

23 *Supra* note 14, JJA.

24 *Id.*, § 1(4).

The Juvenile Justice Act 2000: Provisions and Analysis

The object of JJA 2000 is to provide for the care, protection, treatment, development and rehabilitation of delinquent juveniles and for the adjudication of certain matter relating to, and disposition of, 'children in conflict with law'. The result of this enactment is the provision of setting up of Juvenile Justice Board in every state, a special court to deal with delinquent juveniles.²⁵ consisting of a Judicial Magistrate of the first class in a non-metropolitan area and two social workers of whom one should be a woman.²⁶ The fundamental principle behind this legislation is that persons below this age are incapable of forming a guilty mind or the requisite *mens rea* essential for constituting a crime. An act does not become criminal unless it is done with a criminal intent or guilty mind i.e. *actus non fact reum nisi mens sit rea*.²⁷ A child in conflict with law cannot be handcuffed or be tried jointly with persons who are not juveniles²⁸ and after the proceedings of a particular case are complete, the JJB may decide that the rehabilitation of the child is not complete and hence place them in a Special home for no longer than three years.

Juvenile Justice Boards do not have the power to impose punishment and can impose only rehabilitative measures or assistance by government programmes that may include group counseling or community service.²⁹ No sentence of death or life imprisonment or any other sentence in default of fine can be imposed on such a juvenile.³⁰ Furthermore, any disqualification that is attached to any offence punishable under any law of which the juvenile is guilty cannot be enforced on him nor his name can be published in newspaper, magazine, etc. that may reveal his identification.³¹ An important rule in this regard is that when the Juvenile Justice Board is confronted with the question of age of juvenile, it shall determine so on the basis of evidence of matriculation certificate or birth certificate which shall be the conclusive proof of his age and only when none of these are available should a medical board be constituted.³²

The sole objective of such a beneficial legislation is to give children, who have, for some reasons or the other, gone astray, to realize their mistakes, rehabilitate them, rebuild their lives and

25 *Id.*, § 4.

26 *Id.*, § 4(2).

27 EDWARD COKE, INSTITUTES, PART III (1797).

28 JJA, § 18.

29 *Id.*, § 15.

30 *Id.*, § 16.

31 *Id.*, § 21.

32 Juvenile Justice (Care and Protection of Children) Rules, Rule 12(3) (2007).

become useful citizens of society, instead of degenerating into hardened criminals. This kind of benefit should be given to a child who is mentally immature and does not have a sense of criminal responsibility.³³

Delhi Gang Rape: The Aftermath

These provisions, from a pro juvenile perspective, are quite elaborate to suffice the rehabilitative and reformatory need of juveniles. However, the December 16th 2012 Delhi gang rape, (*NCT of Delhi v Ram Singh & Ors*³⁴) where a 23 year old physiotherapist was brutally gang raped and murdered while her friend was grievously injured inside a moving bus by six persons whereby one of them was a minor,³⁵ has prompted the debate for revisiting and broadening the age of criminal responsibility for heinous criminal offences by juveniles. Out of these six accused, one was declared juvenile while one of them committed suicide in jail³⁶ and the other four persons have been sentenced to death by the Sessions Court on being held guilty for offence of gang rape, unnatural sex, murder, criminal conspiracy among other offences.³⁷

In this case, they brutally ravished her by raping her; doing unnatural sex and also damaged her internal organs and genitals by inserting iron rods; hands into it³⁸ and causing injuries that proved fatal for her life.³⁹ The child in conflict with law, who was considered to be the most brutal of all according to police chargesheet,⁴⁰ has been remanded to three years in correctional home as he has been held guilty as charged.⁴¹

The learned Sessions Judge who awarded capital sentence to the other accused held that “The gravity of the incident depicts hair-raising, beastly and unparalleled behavior, the subjecting of the victim to inhuman acts of torture before her death had not only shocked the collective conscience but calls for the withdrawal of the protective

33 R. N. CHOUDHARY, LAW RELATING TO JUVENILE JUSTICE IN INDIA 345 (3rd ed. 2010).

34 Sessions Case No. 114/2013, District Court, Saket, New Delhi.

35 *Id.* at 1.

36 *Id.* at 6.

37 *Id.* at 237.

38 *Id.* at 9.

39 *Id.* at 7.

40 *Nirbhaya gang-rape case: lieutenant governor not satisfied with juvenile's punishment*, http://articles.timesofindia.indiatimes.com/2013-09/03/delhi/41725160_1_lieutenant-governor-juvenile-justice-board-najeeb-jung (last visited Dec. 7, 2014).

41 *Nirbhaya gang-rape case: Juvenile found guilty of rape and murder*, http://articles.timesofindia.indiatimes.com/2013-08-31/delhi/4164178437_nirbhaya-juvenile-found-guilty/ (last visited Dec. 7, 2014).

arm of the community around the convicts. Accordingly, the convicts be hanged by the neck till they are dead. The facts show that the entire intestine of the victim was perforated, splayed and cut open due to repeated insertion of rods and hands. The convicts, in the most barbaric manner, pulled out her internal organs with their bare hands as well as by the rods and caused her irreparable injuries, thus exhibiting extreme mental perversion not worthy of human condonation".⁴² The judgment with regard to juvenile and the very fact that he was being tried by the Juvenile Justice Board had received sharp criticism for the greater part of the society which asked for the same treatment to him as was done with the other accused i.e. the juvenile should have been tried⁴³ along with them considering the crime was too heinous to be taken a lenient view and the mere technicalities of law should be avoided so as to uphold the public faith in the criminal justice system. Furthermore, the public response in support of this view rose after the recent gang rape of a photojournalist in Mumbai⁴⁴ where again one of the accused has been declared to be a juvenile.

Administration of Justice: Lacunae in Juvenile Justice System

The juvenile in the Delhi gang rape case has been sent to correctional home for three years including the time he has already spent during trial⁴⁵ for the same offences which he committed conjointly with the other accused who have been sentenced to death. The Justice Verma Committee⁴⁶ set up soon after the incident recommended that the age of juvenility be continued at age of eighteen years while the Parliamentary Committee on Empowerment of Women⁴⁷ took the other view of lowering the age to sixteen years on account of the fact that most of the crimes by the juveniles are committed by those belonging to age group of 16-18 years including heinous crimes like rape, murder, etc. The Supreme Court has already held that the age of juvenility should not be reduced to sixteen years⁴⁸, though a fresh petition filed by Dr. Subramaniam Swamy considering

42 *Delhi gang rape: Death to 4 for 'dastardly diabolical, brutal' crime*, <http://timesofindia.indiatimes.com/india/Delhi-gang-rape-Death-to-4-for-dastardly-diabolical-brutal-crime/articleshow/22563094.cms> (last visited Dec. 14, 2014).

43 http://zeenews.india.com/news/delhi/gang-rape-victim-s-brother-regrets-juveniles-name-being-left-out_820733.html?pagenumber=1 (last visited Dec. 14, 2014).

44 http://zeenews.india.com/news/maharashtra/mumbai-gang-rape-case-crime-branch-files-chargesheet-in-juvenile-court_877546.html (last visited Dec. 14, 2014).

45 *Supra* note 40.

46 <http://www.prsindia.org/parliamenttrack/report-summaries/justice-verma-committee-report-summary-2628/> (last visited Dec. 14, 2014).

47 <http://www.asianewsnet.net/Indian-parliament-seeks-lowering-juvenile-age-from-46627.html> (last visited Dec. 18, 2014).

48 *Salil Bali v. Union of India*, Writ Petition (Civil) No. 10/2013.

this very question is pending before the Hon'ble Supreme Court⁴⁹ which felt the need to relook in the earlier judgment by the Apex Court. However, in that case also, the Court refused to read down the provisions of Juvenile Justice Act. In the contemporary scenario, the differentia that separates juveniles and adults with regard to criminal law cannot be termed as reasonable because there is a need to understand the societal realities whereby the person belonging to age group of 16-18 are not immature and their sense of judgment regarding an act being right or wrong cannot be termed as devoid of any rationale bearing. The juvenile, in this case, got a different treatment because he did not attain the age of eighteen years at the time of commission of offence.⁵⁰

The mere fact that he was a few months short of the statutorily fixed eighteen years entitled him to a mere three year term in a correctional home while the others were condemned to death for the same hair-raising and beastly act of gang rape and murder among other offences.⁵¹ It is undeniable that justice has not been done to the deceased victim entirely as the most brutal of her attackers would walk free within three years as a free man devoid of any disqualification. The public conscience is unable to absorb the harsh reality that the sheer want of a few months resulted in such a lenient view towards the juvenile. The law, in no way, takes into accounts the physical and mental capacity of the juvenile who very well knew the repercussions of penetrating the private parts of a women and putting his hands and iron rods in there. The law will not take into consideration that the deceased was crying in pain and subsequently lost her senses when this juvenile, who will be set free within three years of his barbarous act, did acts the actual recount of which would shame every human capable of reasoning.

Furthermore, the law will certainly not take into account the fact that it is a general trend in India to provide a lower age in the certificates in a hope that it might accrue some benefit like prolonged employment, etc. and the age in such certificates is not correct in majority of the case. If such an age in the certificate is considered as conclusive proof irrespective of the actual age of the person, the offenders will exploit the technical approach of the law and will always be beyond the shackles of justice. The argument that juveniles are incapable of forming criminal intent for the commission of crime and efforts must be done for his rehabilitation seem ineffectually feeble in front of the brutal and wicked acts of inhumanity. It is irrefutable that there is no possibility of human condonation when the juvenile

49 *Subramaniam Swamy v Union of India*, Special Leave Petition (Cri.) 1953/2013.

50 <http://www.indianexpress.com/news/trying-juvenile-as-adult-would-violate-right-to-life-centre/1148916/> ((last visited Dec. 18, 2014).

51 *Supra* note 41.

demonstrates such mental perverseness yet nothing could be done because the law does not provide for retrospective effect when it comes to criminal law. Probably, the culminated effect of all these prompted Dickens⁵² to remark that “Law is an Ass”. The law is futile and it is useless if it is confined into the very boundaries it created for the preservation of society and administering justice.

Positive Discrimination and Equality: Whether Justified?

The JJA 2000 creates a distinction between juveniles and adults and provides for distinct set up for the trial in case of juveniles. However, the author submits that the distinction is too vague and inconsistent with the contemporary scenario in India. The law provides a strait jacketed differentia on the basis of age so as to protect the interest of persons who, according to the law, are incapable of forming a guilty mind and there is a need for their rehabilitation⁵³. Thus, if two persons conjointly commit a serious offence like gang rape and one of them is two months short of the statutorily required eighteen years while the other person’s age is eighteen years and two months, the law will provide them with different punishment if held guilty under a separate procedure for both of them.

In the Delhi gang rape,⁵⁴ two of the four accused who have been awarded death penalty are of the age of nineteen and twenty years respectively⁵⁵ while the juvenile who turned eighteen years three months after the incident will be home within three years.⁵⁶ The argument that the juvenile was incapable of forming the guilty intention or *mens rea* and there is a need for his rehabilitation is grossly unjustified because he was very well aware that two persons were being harmed in the most brutal manner possible and even with that knowledge and understanding he, not only participated, but played the most active role, in the ghastly act that led to the death of the prosecutrix.⁵⁷ The argument that there is a possibility of his rehabilitation is true for the rest of accused as well including the two who were less than two years older than the juvenile. All the accused, including the juvenile, are guilty of the horrifying act to the same degree and any differentia that tends to separate them, specifically speaking, is unconvincing, arbitrary and devoid of any reasonable basis.

Undoubtedly, children require special attention and they cannot be treated as adults but when their actions are as horrifying as in the above case, the distinction on the basis of age between them and

52 CHARLES DICKENS, OLIVER TWIST 65 (1837).

53 *Supra* note 16.

54 *Supra* note 33.

55 *Id.* at 24.

56 *Supra* note 40.

57 *Id.*

adults seems superfluous. The differentia in such serious offences should not be on the basis of age but rather on the nature of crime committed and the understanding of the accused concern. A strait jacketed distinction on the basis of age, as is evident from the above case, leads to injustice. The Constitution of India certainly provides⁵⁸ that the State is empowered to make special provision for women and children but the same should pass the test of reasonable classification as put forth by S. R. Das, J. in *State of West Bengal v Anwar Ali Sarkar*⁵⁹ i.e. there must be reasonable classification that separates the class and such a differentia must have a rational nexus with the object of law. However, in case of serious offences, the distinction as put forth by the JJA 2000 seems irrational and arbitrary.

The goal of juvenile justice systems has traditionally centered on rehabilitating juvenile offenders.⁶⁰ However, many stakeholders now openly advocate punishment of juvenile offenders who commit serious crimes⁶¹. Supporters of punishment based juvenile justice systems maintain that because traditional juvenile justice systems have not achieved meaningful results through rehabilitation, punishment might deter or incapacitate violent juveniles and, at a minimum, satiate the public's desire for retribution.⁶² There are various theories of punishment⁶³ and administration of justice that must be referred to while considering the debate on the present question of fixing the age of criminal responsibility.

The prominent theory is based on rehabilitation and the proponents of rehabilitation in the juvenile justice system claim that modification of a juvenile's improper conduct can occur only through altering the juvenile's thinking, goals, and values.⁶⁴ By providing a nurturing environment for juvenile offenders, rehabilitationists believe that the former offenders will develop new, positive self-images which will, in turn, result in lower juvenile crime rates⁶⁵. In case of deterrence theory, deterrence accomplishes at least two interrelated objectives. First, punishment conditions the offender to refrain from

58 Constitution of India, Article 15(3).

59 *State of West Bengal v Anwar Ali Sarkar*, 1952 SCR 284.

60 F. B. McCarthy, *The Serious Offender And Juvenile Court Reform: The Case For Prosecutorial Waiver Of Juvenile Court Jurisdiction* 38 ST. LOUIS U. L. J. 629, 641 (1994).

61 J. K. Day, Comment, *Juvenile Justice In Washington: A Punitive System In Need Of Rehabilitation* 16 U. PUGET SOUND L. REV. 399 (1992).

62 R. Daniel O'connor, *Defining The Strike Zone- An Analysis Of The Classification Of Prior Convictions Under The Federal "Three-Strikes And You're Out" Scheme* 36 B. C. L. REV. 847, 848 (1995).

63 V D MAHAJAN, JURISPRUDENCE & LEGAL THEORY 122 (8th ed. 2012).

64 A. R. Mahoney, *Serious Juvenile Offender* 5 NOTRE DAME J. L. ETHICS & PUB. POL'Y 443, 454 (1991).

65 *Id.* at 457.

taking future action, such as committing additional crimes that will lead to additional punishment.⁶⁶ Second, by punishing the offender, individuals contemplating criminal conduct may refrain from engaging in similar conduct to avoid similar punishment⁶⁷.

Another theory is the theory of retribution and it maintains that individuals who commit crimes deserve punishment in proportion with their moral culpability. For retributionists, punishment is not related to deterring future crimes or rehabilitating the offender rather, the sole reason for punishing offenders is because they deserve it.⁶⁸ The theory of rehabilitation is the sole basis in case of JJA 2000 whose ineffectiveness is evident from the rise in juvenile crime statistics. Juveniles in remand homes and correction homes are often subjected to various kinds of inhuman treatments including sexual assaults and thus, after their release, most of them return to the society as hardened criminal in complete opposition to the aim of JJA 2000. This has prompted the sharp public reaction towards juveniles committing serious offences and thus voices have started asking for stringent punishment for such juveniles irrespective of the JJA 2000. A blend of rehabilitative, deterrence and retributive theory is essential for proper administration of justice.

A certain degree of arbitrariness necessarily exists when drawing lines for the purpose of imposing adult criminal sanctions.⁶⁹ Often, age based classifications are more a desire for administrative convenience than a determination of criminal capacity. Imposing adult penalties on juvenile offenders is also not inherently unfair.⁷⁰ Several studies indicate that children under eighteen are capable of mature decision making and suggest that fixing the threshold for criminal liability for juveniles at the age of eighteen or lower would not subject juveniles to criminal sanctions without culpability.⁷¹

Conclusion

Juveniles may be, as a general matter, more trammled by forces beyond their control than adults, but it can fairly be said that like any human being they make choices and when these choices result in incidences like the Delhi gang rape or any other like incident, the

66 F. G. Carrington, *Deterrence, Death, and the Victims Of Crime: A Common Sense Approach* 35 VAND. L. REV. 587, 588 (1982).

67 *Id.* at 591.

68 IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 195-197 (1887).

69 B. C. Feld, *The Decision To Seek Criminal Charges: Just Desserts And The Waiver Decision* 3 CRIM. JUST. ETHICS 27, 37 (1984).

70 J. F. Yeckel, *Violent Juvenile Offenders: Rethinking Federal Intervention In Juvenile Justice* 51 J. U. C. L. 331, 342 (2003).

71 J. P. Sheffer, *Serious And Habitual Juvenile Offender Statutes: Reconciling Punishment And Rehabilitation Within The Juvenile Justice System* 48 VAND. L. REV. 479, 482 (1995).

society deserves justice. The mere technicalities of law should not become the grounds for injustice. These persons should not be given the easy way out on the insufficient grounds of age and rehabilitation. Assuming that an individual understands the nature and quality of his actions, punishing all offenders equally regardless of age is less arbitrary than the current blanket immunization of many younger juveniles from criminal liability. In case of these persons, the malice of their acts supplies the want of maturity and as a result, the potential risk to society by releasing these violent offenders following an unsuccessful attempt at rehabilitation is unacceptably high. Despite the danger presented by violent juvenile offenders, the state has refused to punish these offenders in proportion with their crimes. Accordingly, to ensure the adequate protection of society, it is necessary that the JJA 2000 be suitably amended and the differentia on the basis of age be dissolved which may allow that such persons should be tried as adults who are capable of understanding the consequences of their grossly criminal activities.

PART - III

PROTECTION OF CHILDREN FROM SEXUAL ABUSE

SHARED PARENTAGE IN INDIA: A PARADIGM SHIFT IN CHILD CUSTODY LAWS

Monmi Gohain and Nibedita Kalita***

Introduction

Laws prevailing in a society are always prone to changes. The changes are not only confined to one branch of law, rather stability of laws for a longer period of time is not desirable to the present society. The adaptability of laws depend upon how well it is accepted by people within the country. At the same time a framework of principles is nessecary to give laws consistency and continuity.

In many countries there has been introduction of new regime of laws and personal laws are not and exception. Changes are being brought regarding direction of parenting orders and child support which poses new goals and challenges in context of family. Previously various discussions of divorce have been usually taken up by the courts. People condemned the consequences when the spouses separate from each other. There is lot of discussion on the disruption of the marital bond. Efforts are also being made for the reconciliation of the marital bond. But no attention has been made to the ethical issues involving the condition of the children after the parents separates from each other. Also no such development has been brought regarding the negotiation or maintaining parental bond in divorce. The issue of parental responsibility of the child comes from the fact that the child is the worst sufferer in case of the default of the parents. The parents prefer separation from each other but what really matters after that is that the child has to be given proper care and attention. This can only be done when the parents agree to take responsibility of the child after divorce.

Efforts to maintain parental bonds in divorce rest in diverse considerations. The consideration differs in terms of shared parenthood or the sole parental responsibility given to a particular parent. The issue of the best interests' of the child has become controversial. Its presumption differs from case to case basis and it is information intensive.

Background

With the changing nature of the society and mentality of the people the basic idea of the family and the responsibility is also changing. One of the most difficult challenges facing parents as well as the law makers at the time of separation is deciding how they will divide responsibility for and time with their children.¹

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1 R. Glover and C. Steel, *Comparing the effects on the child of post-divorce parenting arrangements*, 12 J DIVORCE REMARRIAGE 2, 2-3 (1989).

There is a constant fear in the minds of the parents that the breakup of their relationship might end up in the loss of parent- child relationship. They are also concerned their separation may also effect the healthy development of their child because they may fail to provide healthy mental support. It may also sometimes happen that no single parent is willing to take the custody or the responsibility of the child or it is not interests of the children that he should be assigned to a single parent. In this kind of situation it is always a dilemma in front of the judges in giving orders regarding the responsibility of the child. Many factors have to be considered before taking a particular step.

In order to preserve the best interests of the child, a new trend is emerging which is termed as the joint parentage or shared parental responsibility of the children after the parents get divorced. The concept of shared parental responsibility is that equal responsibility has to be taken by both the parents regarding the children after divorce.

The notion of shared parental responsibility can be derived from gender equality, the adoption of modern ideas regarding maintaining family relationships, developmental psychology, feminist thinking and many other psycho analytical factors. Now a days with advent of new laws and principles the notion that the mother should take all the care at home of the children and the father is only the bread owner are not so prominent. The model of intensive mothering is fading away. This is being replaced by the idea that since the mother has also the right to work outside the home, there should be some kind of sharing of the parental responsibilities by both the parents.

It is been rightly pointed out that parenthood can be best described by the notion of gender equality including norms of parental rights and responsibilities which ought to be shared by both the parents jointly. Also the interest of the child is of utmost importance. It is a well-known fact the child will be best reared if the responsibility is borne by both the parents.²

Presumption of Shared Parental Responsibility

The presumption of shared parental responsibility comes into picture when the question before the court comes regarding who should be given the custody of the child³ after divorce so that the best interests will be taken care of.

Since the best interest of the child is very hard to be decided on the basis of presumptions and it is information intensive, the courts

2 M. L. Baylis, *Planning for shared parenting-A Guide for Parents Living Apart*, ASSOCIATION FOR FAMILY AND CONCILIATION COURTS, (Jan. 1, 2013), <http://www.mass.gov/courts/docs/courts-and-judges/courts/probate-and-family-court/afccsharedparenting.pdf> (last visited Feb. 14, 2015).

3 Satu Perälä-Littunen and Marja Leena, *The Beginning and End of Parental Responsibility* 43 JCFS, 926, 925-941 (2012).

requires the parents to decide among each other and make joint decisions about issues regarding the care and protection the child has to be given after divorce. The concept of shared parental responsibility comes from the fact that after the parents are separated the child goes through lot of mental and emotional distress. So an effort is being made from the fact that if the joint effort will be made by the parents to take care of the child at least the child will not be deprived of the care and protection of both the parents.

The presumption of shared parental responsibility does not apply if there has been violence or child abuse or there is a risk of creating violence so that the child can be kept in the safe hands. In these circumstances, the court is not obliged to consider the parents' sharing responsibility⁴ and take a decision which will suit the child in the best possible way. It follows that if there has been violence or abuse or there is risk of it, the court is not obliged to consider spending equal time or substantial time with both parents.⁵ If the circumstances are such that no parent should be awarded the sole responsibility of the child and it will be fruitful for the child then the court will give orders to the parents to take joint responsibility of the children after separation.

Definition

While interpreting shared parentage in a particular country more emphasis should be given to defining the term what actually it is and what are its implications. Shared parentage refers to the sharing of responsibility of the children by both the parents equally after separation. It is basically connected taking care of the child and the problems which might be faced by them after their parents get a divorce including the fact that a court must take into account when it needs to define a child's best interests.⁶ It will ultimately change the idea of how the people think about family breakdowns. Conceptually shared parental responsibility means sharing of parental responsibility by both the parents equally after divorce so that no one parent is overburdened by the parental responsibilities.⁷

4 Sally Nicholes, *Shared Parental Responsibility & Child Support*, NICHOLLES FAMILY LAWYERS, (Jan. 2, 2014), http://nicholeslaw.com.au/wp-content/uploads/2014/05/shared_parental.pdf (last visited Feb. 14, 2015).

5 Justice Michael Kirby, *Children and Family Law – Paramount interests and Human Rights*, INTERNATIONAL ASSOCIATION OF YOUTH AND FAMILY JUDGES AND MAGISTRATES XVI WORLD CONGRESS, (Oct.2,2012).http://www.hcourt.gov.au/assets/publications/speeches/formerjustices/kirbyj/kirbyj_children_and_family_law_oct_2002.htm (last visited Feb. 14, 2015).

6 Nicole L. Sault, *Many Mothers, Many Fathers: The Meaning of Parenting around the World*, 36 Santa Clara L. Rev. 395 (1996).

7 Caruana Catherine, *Shared Parental Responsibility and the Reshaping of Family Law: Amendments to the Family Law Act 1975 Made Law*, 74 Family Matters, 56, 56-59 (2006).

Major Contentions

Conceptually shared parentage can simply be defined as joint responsibility among the parents for taking care of children. But legally it is not easy for the courts to decide on what basis the order for parental responsibility will be given. The courts have to look into various factors and try to keep both the parties in a balanced situation. Some of the issues which come in front of the court are given as under:

- a. What are the specific limits in which the term best interests should be put into?
- b. Should the law establish a framework of presumption for the joint custody or for sole custody?
- c. What will be the ultimate effect of these two different systems of custody on the children?
- d. Whether joint custody should be granted when only both the parents agree to it or whether the court can order it in its historic role of "*parens patriae*" (parent of the country)?⁸

Shared Parentage: A Global Concern

The problem of the responsibility of the child after the parents are separated has gained profound importance. The most prevalent practice is individual responsibility. The consequences of the individualization for parental responsibility can be manifold. Individualization can lead to increased selfishness and abandonment of parental responsibilities. In addition to that, the individualistic and nuclear family in modern times in which parents and children consider themselves to be more or less equal tend to make things more difficult now than when parents were more in control and could tell their children how to lead their life. Nevertheless, parents can be the basis for nurturing and nourishing their children and their youth. Things are even more difficult when separation of the parental bond takes place and question of parental responsibility comes into picture. The problem at this juncture is to carry the responsibility and welfare of the child in a parallel way.

Owing to tender nature of the child it is obvious that they should get adequate care and protection from the parents. But sometimes the circumstances are such that it is not possible for the parents to stay together. In such a case what happens is that there is the disruption of the marriage relationship and the ultimate victim is the children. Now if the disruption of the parents occurs at the tender age of the children and the children are not capable of knowing their rights and the responsibilities. So there was the need of a specific legislation which could set up as a model law for each and every country and so that the children of the divorced parents would be taken care of.

8 Susan M. Jekielek, *Parental Conflict, Marital Disruption and Children's Emotional Well-Being*, 76 SOCIAL FORCES 906, 905-936 (1998).

Convention on the Rights of the Child: A Re-Look at Parental Responsibility

The United Nations Organization came up with a Convention called the UN Convention on the Rights of the Child (UNCRC) 1989, which aim was to give worldwide protection to the child. Various issues related to the child were included. One of such matters is the parental responsibility regarding the child.

There are two core principles on shared parental responsibility as given in the Act. They are stated as under:

1. The first is that the preservation of best interests of the child are the primary consideration in all matters concerning children.
2. The second guiding principle is that of equality in responsibility. It says that all parents should be treated equally in respect of their relationship with their children regardless of gender or marital status.

Article 18 of the UNCRC⁹ provides that: “States parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents, or as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.”

If we interpret the provision of CRC then we can form the idea that it is the utmost responsibility of both the parents to take good care of the child. This responsibility is not only limited to the period of time when both the parents are together. It extends to the period when the marital relationship of the parents is being disrupted. So there has to be some specific domestic law provisions which will compel the parents to think for their children. This invites the responsibility of the government in implementing certain laws and regulation which will lead to the welfare of those children who are forced to distress because of the separation of parents. The law should not be confined to only one country but the children worldwide need the care and protection. The main idea behind including the provision in the UNCRC was to bring a common platform which could be applicable to all the countries equally without any ambiguity. This also helps those countries which lack specific child rights laws to protect their children.

Best Interests of the Child: The Meaning

As mentioned in Article 18 of UNCRC 1989, the paramount consideration in deciding the parental responsibility of the child is the “best interest” of the child. The best interests of the child have

9 Convention on the Rights of the Child art. 40, Nov. 20, 1989, 1577 U.N.T.S. 3.

been a matter of global debate. It is very difficult to define where exactly the best interest of the child lies. It differs from case to case basis. The 1989 Convention on the Rights of the Child had in fact already evoked the principle, stating that ‘the best interests of the child shall be the paramount consideration’ in the enactment of laws relating to children, as well as ‘the guiding principle of those responsible for (the child’s) education and guidance’.¹⁰

Apart from Article 18, there are several other articles which deal with the best interest of the child. The ‘best interests of the child’ is mentioned in several articles of the Convention relating to the separation of the child from the family (Art. 9); parental responsibility (Art. 18); foster placement (Art. 20); adoption (Art. 21); deprivation of liberty (Art. 37); and juvenile justice (Art. 40).

The basis for the child protection and care, however, is found in the first paragraph of Article 3 of the said Convention:¹¹

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”¹²

Article 3 refers to executive authorities, law-makers (parliaments) and judicial bodies. It applies to *all* actions by these authorities as well as by relevant private institutions. Importantly, it also concerns ‘children’ in the plural. The Committee on the Rights of the Child has interpreted this word “children” to mean that the rules are applicable in both individual cases and in relation to groups of children or children in general – which makes it even more relevant in political and policy terms.

Thus, the best interests of the child may not be the only consideration, but should be among the most important aspects to be considered and should be given considerable preference in all decisions affecting children.¹³ As it has been already said the concept of the best interest of the child can vary on case to case basis. It is rather information intensive. So a careful interpretation of the term best interests has to be given.¹⁴

10 UNHCR Guidelines on Determining the Best Interests of the Child, 2008.

11 *Supra* note 9.

12 Thomas Hammarberg, *The Principle of the Best Interests of the Child*, COUNCIL OF EUROPE LECTURE (20 May, 2008) <https://wcd.coe.int/ViewDoc.jsp?id=1304019> (last visited Feb. 14, 2015).

13 Children’s Bureau, *Determining the Best Interests of the Child*, CHILD WELFARE INFORMATION GATEWAY (1 Nov. 2012), https://www.childwelfare.gov/systemwide/laws_policies/state/index.cfm (last visited Feb. 14, 2015).

14 *Dodd v Dodd* 93 Misc. 2d 641, 403 N.Y.S. 2d 401, 402 (1978).

In a normal way, the best interest of the child means considering the welfare of child before a decision affecting his/her custody is given by the court. This is a principle established to include all the matters affecting the well-being of the child. It is basically a common law principle that has been used to assist the courts and other institutions in the decision-making process concerning the child.¹⁵ However the concept of best interests is shifting under the impact of various notions stressing the child's resourcefulness and flexibility. The child is in the need of different environments which can be provided by different parents. In short, children do better through ongoing contact with both parents than with only one. In fact, what emerges is that children have rights to be defended. Specifically, they have rights to the maintenance of their bonds with their parents. The language of interests begins to shift to the language of rights. A second factor is the recovery of a theory of parental rights that does not treat the child as household property which one adult can hold in custody, but as a person with whom both parents have a right to maintain a particular kind of relationship intrinsic to their status as citizen parents.

Shared Parental Responsibility and Domestic Laws

So far we have seen that in order to give a paramount importance to the shared responsibility of the children after divorce of the parents certain rules and regulations were formed which could be accepted by the countries globally in a common platform. Still many countries are not willing to adopt the same. Many issues crop up when the questions comes regarding the adaptability of such rules in domestic laws of various countries. While adapting these rules the law makers have to look into various socio-cultural factors which will determine the adoption of global rules and regulations relating to shared parental responsibility.

Social Transformation

Over the past century, we have seen the crystallization of a general cultural pattern in which women and men do not have to be actually married in order to have social statuses in the society. We can see that some were never married, some were divorced and some are single parents by adoption or the death of the spouse. There has been a pronounced differentiation of parenthood from marriage and household in the present times. Clearly the exercise of parenthood takes on a number of forms under these circumstances and these forms demand ethical and legal attention.

15 Rachel Coomer, *Protecting The Next Generation: Have Your Say On The Child Care And Protection Bill*, The Namibian, (9 October 2009), http://www.namibian.com.na/columns/full_story/archive/2009/may/article/protecting-t..2006 (last visited Feb. 14, 2015).

One of the social shifts at this juncture is that we experience considerable lag between our legal institutions and cultural myths on one hand and the social reality on the other hand. We are ready to bring about a change in or life style but we are not ready to accept these changes in our real life. We want dynamism but the basis on which this dynamism can be brought about is not acceptable to the society.

Now regarding shared parental responsibility, there has been some mis-match between the prevailing systems around the world. Legally most of the countries and their legal systems have moved to a no fault divorce pattern in which divorce is granted on the fact the marriage is irretrievably broken down. In this case the parents are not compelled to yield their parental rights. Then how should the courts react while deciding the responsibility of the child.

The distinction between marital and the parental bond is yet to be reflected in our legal system. To reconstruct these cultural and legal forms we need to turn first to the religious and ethical concepts underlying them. So when there is disruption of the marital bound, legally the parents are separated but the parental bond still remains. This is again backed by the cultural practices which are prevalent. At this juncture accepting a common global standard becomes difficult. We must examine the implications of this social change for our religious conception of marriage and parenting.

A question arises that if we assume that the family breakdown is the “end of relationship” then the question arises that how will the best interests of the child be preserved. The greatest challenge at this juncture is regarding the real impact of the shared responsibility on family matters and is it really the welfare of the child. So if there is the breakdown of the relationship after a divorce then how will the parents react to the notion of shared responsibility for the children? They may have the contention that it is ultimately hampering their right of living apart after divorce. So if we see from the social context there are quite a lot of factors which come in the way of the adopting shared parental responsibility. But what is to be seen is the best interests of the child must be taken care of. Whether it is shared responsibility or sole responsibility, the tender age of the child has to be protected.

Religious perspectives

If we have to consider various pros and cons of shared parentage laws we have to see the same from different aspects. The religious commitments have a major role to play in determining marriage and parenthood. Our religious formulations assume a fusion between marriage and parenthood, family and household. The religious values of fidelity, permanence and service and have all adhered to the

composite reality of marriage. The differentiation of marriage from parenthood and household forces us to revise the way we have tried to advance our religious values. The primary values attached with marriage are the parental values. This gives us an implication that the religious values should be reassigned where as much attention should be given to the parenthood of the children as it is given to marriage. This will add to the sustenance of parenthood. It is very important because rearing of the child determines the future of the child. The religious back up is very essential to make the common man accept some socio-legal transformations in a particular country. Normally people put up questions before accepting a particular change, but when it is linked with religion it becomes quite acceptable.

Psycho-social perspective

When the parents cannot agree on a parenting plan after divorce, the court will make the decision for them after considering the totality of the circumstances, with the overriding consideration being the child's best interests. But the courts have to look into the emotional attachment of the parents with their children after divorce. To make that determination, the court considers the following aspects:

1. The capacity and disposition of each parent to facilitate and encourage a close and continuing parent-child relationship after divorce
2. The anticipated division of parental responsibilities after separation, including the extent to which parental responsibilities may be delegated to third parties apart from the parents.
3. The capacity and disposition of each parent to determine, consider, and act upon the needs of the child which may be at times in opposition to the needs or desires of the parent.
4. The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity of the same by the parents.
5. The social viability of the parenting arrangement, with special attention paid to the needs of school-age children and the amount of time to be spent to effectuate the parenting plan.¹⁶

A New legal framework

From the above analysis it can be inferred that the domestic environment plays an important role in determining the global legal

16 Emma Swart, *Issues under the Umbrella of Parental Responsibility*, VICTORIAN BAR LAW ON THE LOUNGE, (2 June 2013), [http://www.foleys.com.au/resources/Issues% 20under %20the %20Umbrella %20of%20Parental % 20Responsibility_Emma%20Swart_02Jun2013.pdf](http://www.foleys.com.au/resources/Issues%20under%20the%20Umbrella%20of%20Parental%20Responsibility_Emma%20Swart_02Jun2013.pdf) (last visited Feb. 15, 2015).

change is not an exception. An appropriate legal framework for shared parenting in divorce rests on changed assumptions, definitions, and provisions. Just as the law is not to treat the child as a kind of property, so it should not treat the parents as a species of criminal whose divorce has shattered their parental bond and delivered it into the hands of the court. It has to balance the interests of the parents to some extent. But since the children are not competent enough to take appropriate decisions at the tender age some sort of preference should be given in preserving the interests of the child. That's the reason why the notion of best interest came up. This means that the child is not some indivisible "thing" over which a person is to have "custody" or not. Similarly, children are not guests to be "visited" by their parents. The law's focus should be on preservation of a relationship between the parents and the children. It can be achieved by maintaining the parental bond. This parental bond is a bundle of rights and responsibilities shared by parents and their children. They involve care, contact, and nurture.

It should be the presumption of the law, therefore, that this bundle remains intact in time of divorce, unless there is good reason that it be altered. That alteration should be as slight as possible. For instance, courts have frequently severed the rights of "legal custody" from those of "physical custody" in a shared custody order. However, this focuses entirely on the parents' rights without realizing that the child's right to real living can be established when they are in contact with both parents. A "legal" right without a living parental bond is no right at all for the child. Nor does it enable parents to carry on real parental relationships. The law should maximize the parental bond, not some legal abstractions of adult rights. This can be one result of a focus on the parent-child relation in legal reform.

Shared Responsibility versus Sole Custody

Sometimes while deciding the issue of parental responsibility of the children after the divorce, the courts always feel that what should be the best way of protecting the child. So there is always some sort of comparison between the sole responsibility and joint responsibility.

Sole custody may not be sometimes effective because the entire responsibility of the child is entrusted to only one particular parent. Sometimes the child may be neglected but it does not happen in case of shared parental responsibility. If one parent may neglect the other can always come into his rescue. Also the authoritative behavior in case of the sole responsibility may sometimes prevail but there are very less chance of it when it comes to shared parental responsibility.¹⁷

¹⁷ Rockwell-Evans, Kim Evonne, *Parental and Children's Experiences and Adjustment in Maternal Versus Joint Custody Families*, Doctoral Dissertation, North Texas State University (1991).

Some of the critics of the shared parentage state that in joint custody the fathers have used it to decrease their support payments or to continue abusive relationship with their former spouse. This is not an issue to be used against the joint custody and could be dealt by providing safeguards against abusive parents and carry out guidelines for meeting financial responsibility. Another critique is that it is presumed that that joint parentage should be a starting point. It should not continue. That means that courts should not impose their decision on the parents but should leave it to their discretion.

But with the changing nature of the society, the traditional ways of inking has to be done away with and the news changes have to be accepted. If we are ready to accept that man and women are considered as equal after marriage and both have the same responsibility in upbringing children, then why don't we carry the same idea to the time when there may be disruption of marriage. The position of the child does not change. They need care and protection after in their tender age. This should be realized by both the parents. Thus, shared parentage will help to a great extent in this context.

Development of Shared Parentage Laws in India

In the present stage of development of child rights in India, a paradigm shift has come up in laws towards preservation of the rights of the child after separation of their parents. The shift has taken into it the entire set of laws relating to the marital relationships and child care. This has also changed the pre-established notion that the mother can be only the best guardian of the child. This has happened because of the changing social conditions and awareness among the people. The old notion that only the mothers should be the natural guardian of the children has been done away with and revolution has been bought which tries to place the mother and father both in equal footing when it comes to child rearing. To achieve the said objective, even the amendments of various laws relating to the custody of the children are being taken into account. So far no proper legislation has come up in India regarding the shared parental laws in India

Existing Legislations in India

Traditional laws in India, whether religious or customary, emphasize the aspect of family support. The people are free to follow the laws according to the own religion and a preference is not given to any one religion. This applies to even family matters. Apart from the personal laws both criminal and civil legislations in some way or the other speak of the parental responsibility of the children

The obligation of support of children under Hindu Marriage Act has, in fact, been used in India as a basis for the post-Independence codified legislation for regulating the subject of child support in Hindu law.¹⁸ Thus, both parents have an obligation to maintain a child out of

marital bond or not.

According to Section 20 of the Hindu Adoptions and Maintenance Act 1956, a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children. Further, the provision lay down that the legitimate and illegitimate child may claim maintenance from his or her father or mother as long as the child is a minor. Section 24 of the Guardians and Wards Act 1890, makes the guardian duty-bound to looking to the support, health and education of the ward.

Islamic law recognizes a man's duty to support his wife and children. Rule 133 of the Islamic law states that every man is bound to maintain his children and grandchildren till the time of weaning. After the time of weaning, in the absence of property, through which they can be maintained, the children and grandchildren shall be maintained:

- a. In the case of sons and grandsons who have not attained puberty and unmarried girls, by the father; and if the father is poor, then by the mother, if she is rich, and if both father and mother are poor, then by the nearest grandparent—paternal or maternal if they are rich. Such maintenance is subject to reimbursement against the person liable to maintain.
- b. In the case of major children, excluding married daughter disabled on account of some disease or physical or mental infirmity, by the father only, but if both the father and mother are rich then by both of them in proportion of 2/3 : 1/3.

In the case of illegitimate sons who have not attained puberty and legitimate unmarried daughters, shall be maintained by the mother only.

The Criminal Procedure Code, which applies uniformly to all citizens of India, creates a parallel statutory remedy on the subject of family support in relation to children. This statute is the major law on child care and protection in India, and reflects a different approach to the issue of parental responsibility for financial support.¹⁹

Under the Juvenile Justice (Care and Protection of Children) Act 2000, the competent authority which makes an order for sending a neglected juvenile or a delinquent juvenile to a juvenile home or a special home or a fit institution, may make an order requiring the parent or other person liable to maintain the juvenile to contribute to his maintenance, if able to do so, in the prescribed manner.

18 SAVITRI GOONESEKERE, CHILDREN, LAW AND JUSTICE - A SOUTH ASIAN PERSPECTIVE 103-04 (1st ed. 1998).

19 S.P. SHAW, ENCYCLOPAEDIA OF LAWS OF THE CHILD IN INDIA 217 (2000).

From this fact we can say that the matter regarding the responsibility of the child after the parents depart are already present in various legislations but they don't directly focus on the parental responsibility of the children. So apart from these laws there was a need to bring some specific laws directly focus on the parental responsibility. The ultimate aim behind bringing a separate set of laws was to give paramount interests to the interests of the child.

Law Commission of India Recommendations regarding shared parental responsibility

With the changing nature of human relations, the role of the male and females members in a particular society is also changing. So the role of the parents needs to change in relation to rearing of child. With respect to socio-cultural set up in our country, we need to change our traditional views regarding personal liabilities.

The first effort regarding the shared parentage was triggered by the Law commission of India. Some of the arguments are given as under²⁰:

- a. Shared parenting is needed because of the changing familial role of man. Now in the present time the notion had regarding the fact that only the women are the caretakers of the family. Even women play a role in the bread earning of the family
- b. Psychological studies suggests that the involvement of both the parents in child rearing is very important and is preferable then child custody in the hand of hands of a sole parent.
- c. This is in the best interests of the child. This in the well being of the child which is the paramount consideration.
- d. Child care is unpredictable and information intensive and the role of both the parent is very important.
- e. Everything being similar, a child from shared parentage background is likely to fare better in regard to family to family relationships. They have lower chance of misbehavior in the society. They are much aware of family relations.

Other things that are to be kept in mind while introducing shared parental responsibilities in India is that a broad statutory definition of the term parental responsibility should be included. This

20 Department of Legal Affairs, *Consultation Paper on Adopting a Shared Parentage System in India*, LAW COMMISSION OF INDIA (1 Nov. 2014) [http://lawcommissionofindia.nic.in/Consultation %20Paper%20on%20 Shared %20Parentage.pdf](http://lawcommissionofindia.nic.in/Consultation%20Paper%20on%20Shared%20Parentage.pdf) (last visited Feb. 14, 2015).

should be included particularly in those laws which are to be formed in the future regarding the development of shared parental responsibility in India. While defining the shared parental responsibility some things are to be kept in mind such as whether such definitions should include a requirement to consult with third parties who may share parental responsibilities regarding the custody of the child. It may include other family members who are concerned with the custody of the child. For the fulfillment of the same a consultation is very much required. But the other thing that has to be also considered is that the consultation should not operate to do away with the exercise guardianship/ parental responsibility of each child. It is important to recognize the equal status of both the parents and the power to act independently unless a court orders in otherwise.

Recent Trends

As of now, there is no specific provision for child custody in India. While the present law says that the children below five years should be made to stay with their mothers, but it's high time that the notion has to change. The Supreme Court of India has given judgments that no one parent can be denied access to the children. So the ultimate solution required for this dilemma is that there should be introduction of the joint custody laws which will give equal access to the children to both the parents backed by preservation of the best interest of the child.

For the first time joint custody was decreed in September 2013 for an estranged couple in Karnataka , and the Karnataka High Court divided the custody of a the child between his quarrelling parents for six months each in a year.

It has been realized time and again that there are various pitfalls of the child without both parents. This would also lead to the lessening of the custodial fights between the parents. The ultimate aim of such a law is to benefit the child and draw out his best interests and preserve the broken home. In India, the principle that father is the natural guardian is put to rest as it has earlier said that the best interest of the child has to be look into. In this principle, custody is mainly awarded to mothers and the father gets visitation rights. Also the custody rights to the father are denied by many High Courts even when they had greater economic prosperity.

In a recent judgment in *Kumar V Jahgirdhar v Chethana Ramatheertha*²¹ SC has reversed the observation that the mother should be always the natural guardian and the custody will be given to her always. Owing to the changing role of women in bearing the responsibilities of the family it is very important that the father should

21 (4230-31 / 2003).

also take the equal responsibility of the child rearing. Shared parentage has a hope of reconciliation of many relationships after the court orders. Child is the medium of bonding between the parents even if there may be disruptions.

This shared parenting judgment was delivered in the case of *KM Vinaya v B Srinivas*,²²

- i. The minor child was directed to be with the father for a period and with the mother for another period each year.
- ii. The parents were directed to share equally, the education and other expenditures of the child.
- iii. Each parent was given visitation rights on Saturdays and Sundays when the child is living with the other parent.
- iv. The child was to be allowed to use telephone or video conferencing with each parent while living with the other.

In *Re Kamal Rudra*, Das J. expresses views regarding the custody of child in the following way:

“ I doubt in my mind that the mother’s lap is god own cradle for a child of this age and that as between the mother and father , other things being equal, child of such tender age should be with the mother.”

But it may happen sometimes that a mother who neglects the infant child as she does not want to sacrifice the type of life she has been living can be deprived of custody. In respect of older children what happens is that the courts take the view that the male children above the age of sixteen years and female children who are of sixteen years should not be ordinarily compelled to live in the type of custody they object. However, even the wishes of the mature children will give consideration on the basis that their welfare should be consistent.

In another case of *Venkataramma v Tulsi*, the court disregarded the wishes of children as it found these to be induced by wholesale persuasions and were even tortured.²³

Similarly, in *Gaurav Nagpal v Sumedha Nagpal*,²⁴ although the son had been with the father since the time of his birth, which was a strong argument in favor of the father, the Supreme Court reversed this arrangement and awarded custody to the mother with visitation rights for the father.

22 MFA.NO.1729/2011 (G & W).

23 Custody under Hindu, Muslim, Christian and Parsi Law.

24 Civil Appeal No. 5099/ 2007, Supreme Court of India, Judgment dated 19 November, 2008.

It has been held by Courts have held that greater economic prosperity of the father and his relatives is not a guarantee of the welfare of a minor and that it does not disturb the presumption in favor of the mother while deciding custody which was held in the case of *Ravi Shankar v Uma Tiwari*.²⁵

A reflection of this attitude was seen in *Ashish Ranjan v Anupama Tandon*,²⁶ where the Court, referring to the mother, who had been given custody originally, noted: “The mind of the child has been influenced to such an extent that he has no affection/respect for the applicant (the father)” It has been held by the Supreme Court of India that in custody disputes, the concern for best interest of the child supersedes even statutory provisions on the subject outlines which was held in the case of *Mausami Ganguli v Jayant Ganguli*.²⁷

Prospects of shared parentage

Sharing can mean something different to every couple. It means sharing of responsibility in different aspects or different responsibilities of the children by the parent in turns. When the work is done in turns it implies that no individual is stressed out with the parental responsibilities and it gives a prospect that the particular work will be done in an efficient manner.

The shared parentage has also lot to do with the responsibility of one parent with another. As it is well known there should be some sort of cooperation when one responsibility will be borne by both the parents. This will help to improve the relationship between the parents which will be ultimately beneficial to the children. It is a well known fact the question of the custody of the child comes whenever there is the disruption of the relationship between the parents. So if the shared parentage can bring some sort of improvement on the inter parent relationships then there can be lot of better consequences in the future.

The perception of the wives regarding the role of the father also changes. The more wives perceive that husbands were engaged in routine work and family tasks the better relationships were created for both the partners. The involvement of the father in household chores and being engaged with the children seem to be important ways for husbands to connect with their lives and the connection is related to better couple relationships.

It is high time that there should be some kind of paradigm shifts in the care of the child after and before marital disruption. This is because the welfare of the child is of paramount importance. The child should not be made to suffer in the tender age with no fault of

25 (1999) DMC 585 MP.

26 Contempt Petition (Civil) No. 394 of 2009, Supreme Court of India, Judgment dated 30 November, 2010.

27 (2008) 7 SCC 673.

their own. They should be made to feel neglected. In the initial stage there may be certain socio cultural factors which may hamper the implementation of shared parental responsibility of children but we should look more into the long term benefits of the child and future security. The initiation has been triggered by the Law Commission of India and there are lots of prospection attached to it.

Conclusion

The above analysis clearly asserts the dominance of the rights over all other claims, even though still drawing on elements of the argument from best interests. It is time, however, to move the discussion away from the primacy of parental claims and ask what rights the children have after divorce of their parents, especially on the right of both the parents. The question of joint custody forces us back to a re-examination of the emotional bonds underlying our cultural, ethical and legal forms. We are dealing here with a reconstruction of some of our most basic relationships that is the relationship of the parent and child which is of the paramount interests. So it's high time that we draw up a more liberal view regarding family relationships and ultimately help in the maximum development of human personality.

PROTECTION OF CHILDREN FROM SEXUAL OFFENCES : A SOCIO-LEGAL ANALYSIS

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Introduction

Sexual abuse of children has become global problem nowadays. Almost every part of the world faces this problem.¹ In a study by the Ministry of Women and Child Development Government of India reported that 53.22% children face one or more forms of sexual abuse that included severe and other forms. Among them 52.94% were boys and 47.06% girls.² International studies reveal that 1 in 5 women and 1 in 20 men report having been sexually abused as a child.³ And in armed conflict and refugee setting, girls are particularly vulnerable to sexual violence, exploitation and abuse by combatant, security forces, member of their communities, aid workers and others. And children in the teenage years are most vulnerable to sexual abuse.⁴ The World Health Organization defines child sexual abuse as:

“the involvement of a child in sexual activity that he or she does not fully comprehend and is unable to give informed consent to, or that violates the laws or social taboos of society. Child sexual abuse is evidenced by this activity between a child and an adult or another child who by age or development is in a relationship of responsibility, trust or power, the activity being intended to gratify or satisfy the needs of the other person.”⁵

Child sexual abuse includes touching and non-touching activity. Examples of touching activity includes:-

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1 M.M. Singh, Shradha S. Parsekar, and Sreekumaran N. Nair, *An Epidemiological Overview of Child Sexual Abuse* 3(4) JOURNAL OF FAMILY MEDICINE AND PRIMARY CARE 430–435 (2014) <http://doi.org/10.4103/2249-4863.148139> (last visited Feb. 15, 2015).

2 Ministry of Women and Child Development, Government of India, *Study on Child Abuse: India* (2007) at <http://www.wcd.nic.in/childabuse.pdf> (last visited Feb. 15, 2015).

3 The National Center for Victims of Crime, *Child Sexual Abuse Statistics* (2012) at <http://www.victimsofcrime.org/media/reporting-on-child-sexual-abuse/child-sexual-abuse-statistics> (last visited Feb. 15, 2015).

4 World Health Organization, *Child Maltreatment*, (2014) at <http://www.who.int/mediacentre/factsheets/fs150/en/> (last visited Feb. 15, 2015).

5 World Health Organization, *Report of the Consultation on Child Abuse Prevention, World Health Organisation (1999)*.

- Touching a child's genitals or private parts for sexual pleasure.
- Making a child touch someone else's genitals, play sexual games or have sex putting objects or body parts (like finger, tongue or penis) inside the vagina, in the mouth or in the anus of the child.

Examples of non-touching activity includes:-

- Showing pornography to a child.
- Deliberately exposing an adult's genitals to a child.
- Photographing a child in sexual poses.
- Encouraging a child to watch or hear sexual acts.
- Inappropriately watching a child undress or use the bathroom

It is a shocking revelation that a large number of child sexual abuses go unreported and only few gets reported. Peter W. Choate, assistant professor of Child Studies and Social Work at Mount Royal University in Canada during his interview with *The Hindu* in Chennai revealed that often the offender is a person known to the family. Not only has the child been subjected to a betrayal of a relationship, but also the family. He further went on that children who have been subjected to sexual violence of any kind hesitate to disclose the assault to anyone. It's essential and need to create an environment of trust and his or her courage in telling the truth must be acknowledged.⁶

Risk Factor of Child Sexual Abuse

Children's complaints are often not only dismissed by family but also police, doctors and persons having authority as well. Victims may be re-traumatized by how they are treated when they disclose their abuse to public. In most cases, perpetrators are hardly identified or allowed to remain free. The abuses are also repeated. Sometimes, the response of adults to abuse cases is completely inadequate rather to protect them especially when they need assistance and compassion. On the other hand, government's failure to create faith in social institutions discourages them from coming forward. So, it is absolutely essential to protect children from such abuses at a prior stage.

Abuse within the family and community

In a case, a victim named Vishakha (changed name), was sexually abused by a tutor when she was six-years-old.⁷ Parents hired a tutor for her studies but he used to abuse her by touching her private

6 Nitya Menon, *Of disclosure in cases of Child Sexual abuse*, *The Hindu*, (Jan. 2, 2015) <http://www.thehindu.com/news/cities/chennai/of-disclosure-in-cases-of-child-sexual-abuse/article6745804.ece> (last visited Feb. 14, 2015).

7 Human Rights Watch, *Breaking the Silence: Child Sexual Abuse in India* 20 (2013) <http://www.hrw.org/sites/default/files/reports/india0113ForUpload.pdf> (last visited Feb. 14, 2015).

parts. She further told that tutor was her cousin's friend and well-liked by the family. Also she was unable to expose crime for a long time as she was living in a traditional family. Parents knew that tutor used to beat her but instead of protecting, they too hit her. Several years later, after undergoing therapy, she was not even good enough to tell that what had happened to her. She felt embarrassed to talk about sex with parents. She claimed that warning signs of sexual abuse was there but her parents could not understand them.

Another case provides an example of a family member failing to respond properly to an incident of abuse. In *State v Nandan Prasad Shah*⁸ case, the accused was convicted and sentenced for the abduction and rape of a six-year-old girl who was member of his family. It was found during the trial that the accused had previously attempted to rape another female member of the family and had also attacked another girl. The family did not take any action against him in earlier instances.

Case of Government school in Uttar Pradesh- a group of 15 mothers filed a complaint and alleged that the headmaster called girls one by one and took off their clothes and touched their private parts on the pretext of health examination.⁹ Later, the police arrested the accused headmaster for assaulting a woman with intent to outrage her modesty under section 354 of Indian Penal Code.

Abuse in social institutions

One study reveals that around 20 million children live in institutional residential care.¹⁰ Parents are unable to support them that is why they are placed into institutional care. These institutional residential cares are run by the government or by private or religious charities. And sexual abuses in institutional care are common in contemporary society. There are still large number of cases which shows the failure of the current system in registering and monitoring children's residential care. There are many institutions in our country that are not registered at all and many more institutions are registered under different legislations. This indicates that nobody knows about the exact number neither of institutional residential care nor about the condition of children who live in them.

Drone foundation case - Geeta (name changed), 12-years-old girl living with HIV, was placed in a resident of Drone Foundation which was supposed to provide her with medical care as well as schooling.

8 *Id.* at 22.

9 *Supra* note 6 at 28.

10 Chetan Chauhan, *About 20m kids in India orphans: Study*, Hindustan Times (July 26, 2012), <http://www.hindustantimes.com/india-news/NewDelhi/About-20mn-children-in-india-are-orphan-study/Article1-725905.aspx> (last visited Feb. 14, 2015).

This residential facility was run by Sunita Gupta and her son, Ankur Gupta. She told that Ankur Gupta used to rape her and threatened her too. She got slapped when she told other people about this incident.¹¹ Also another girl, Pooja, told that two boys used to do 'wrong things' to the girls.

In *Vikram Deo Singh Tomar v State of Bihar*¹² case, a petition was filed on the allegation that the condition of "care home" in Patna was inhuman and whose inmates were ill-treated. The Supreme Court held that it is incumbent upon the state when assigning women and children to "care home" to provide the minimum conditions ensuring human dignity.

Reason for Unreported Cases

Inadequate response within family

Usually, sexual matters are not discussed within family. Also the family does not create an atmosphere of trust, confidentiality and openness. So, children hesitate to discuss the matter with his family. Moreover, even if the children do tell family, most families hush the children in fear of pride and prestige.¹³

Failure of criminal justice system

"When a case is reported, there needs to be a simple response, by the police, by the health services and by the whole system. But at the moment it is a three-ring circus."¹⁴ Only a small proportion of child sexual abuse cases are ever reported. One of the most apparent reasons is that people do not have faith in legal system. Victims believe that they would be treated unsympathetically during intimidating interviews by police officer and painful medical examinations. Also the court proceedings can be unpleasant for victims since they can last for many years. This may probably deter people to come forward and to report cases in police station.

A case in which, a victim named Neha belonging to low-caste rural family, was raped when she was 16 years old. When she went to police station, the police officer told her to shut her mouth and go home. Also police doubted on her that she had herself chosen to go with the accused.¹⁵

In another case, a girl named Krishna, aged 12, was raped by a man belonging to a politically influential family. When she complained to the Police and in turn, the police detained her at the station for 12 days. Also police insisted and threatened her to change the statement.

11 Human Rights Watch, *supra* note 7 at 49.

12 AIR 1988 SC 1782.

13 Human Rights Watch, *supra* note 7 at 20.

14 *Id.* at 31.

15 *Id.* at 36.

Police did not even allow her parents to talk with her. She further told that the police refused to accept her case and abused her too.¹⁶

Traumatic medical examinations

Under Indian criminal law, the prosecution can secure conviction of the accused on the basis of testimony of the victim. However, medico-legal reports also play a vital role in proving the commission of rape. Many doctors perform the sensitive role often without having any skills. Victims are also ill-treated by the doctors who examine them for the evidence of rape. In many cases, child sexual abuses do not involve penetrative sex and victims washed their organs after incidents. Then doctors usually report that there is no evidence of rape.

In the same case of Krishna who was alleging being raped, had to undergo medical examination. She said that the doctor removed her clothes and inserted a single finger inside her vagina. She was scared due to whatever the doctor was doing with her and thereafter doctor told something like, “oh it was just a small rape , it’s no big deal.”¹⁷

Myths about Child Sexual Abuse

It has been argued that¹⁸ the following could be considered as child sexual abuse. However, there are myths about child sexual, such as:-

Child sexual abuse takes place at the hands of strangers on the streets

In one of the instances, it was reported that a 13 year old child was raped by her father, brother and uncles for about two years in Kannur. In a study by Sarva Siksha Abhiyan and Mahila Samkhya Society about ninety five abusers are the dear and near ones of the children; their parents, siblings, uncles and teachers. Most of the cases go unreported since the close relatives of victims are afraid that their family’s reputation will be at stake and in cases in which teachers are villains, school principals or management impose tremendous pressure on victims to not report the cases. Even the juvenile homes are not safe. Children of the Tiruvanchoor juvenile home at Kottayam complained of sexual abuse has become a daily routine at nights after day’s physical harassment.¹⁹

16 *Id.* at 35.

17 Human Rights Watch *supra* note 7 at 20.

18 MAHARUKH ADENWALLA, CHILD SEXUAL ABUSE AND THE LAW 35 (2008).

19 J.Binduraj, *Kerala Becomes Home to rampant child sexual abuse*, INDIA TODAY (Dec. 10, 2012) <http://indiatoday.intoday.in/story/kerala-becomes-home-to-rampant-child-sexual-abuse/1/237088.html> (last visited Feb. 14, 2015).

Child sexual exploiters are monsters or psychopaths or mentally ill persons

Child sexual abusers could be anyone even a nice neighbor with whose children plays every evening. Child sexual exploiter attempt to justify their action in different ways. In a report “Sexual assault in schools is all too real” reported by Maroosha Muzaffar and Amulya Gopalakrishnan that a five year old girl had been waking up in the middle of the night, complaining that her stomach hurt. One day when she returned from the playschool her mother found bloodstains in her underwear. Further, revealed that a “Bhaiya”, who was the son of the playschool’s owner did this. After medical examination her parents were confirmed that Sasha was sexually abused. Thus, a case was filed under the Protection of Children from Sexual Offences Act 2012.²⁰

Child abusers have been victims of child abuse themselves

Not all victims turn to be an abuser. It’s a hasty generalization that if one turns out to be an abuser then all are the same.

Child sexual exploiters are distinct from prostitute users

Child sexual exploiters are mainly prostitute users and do not form a sub-group. The majority of prostitutes’ children are integrated into the prostitution industry which serves all those who purchase sex.

Seductive children entice the perpetrator and enjoy the abuse

A pre-pubescent child cannot give informed consent to the abuse. Moreover, the most extreme seductive behaviour can never make the child responsible for the adult act of sexual abuse. Sexual activity with children is performed for the satisfaction of sexual gratification of an adult and not in response to a child’s needs. Exploiters at first financially help the poor and needy children then they blackmail and abuse the children.

Reporting of child sexual abuse causes more harm than good

The statement is incorrect and damaging. It is essential to report the case as it will act as a deterrent for the others, and also create a database of vulnerable children and child abusers.

Thus, many cases go unreported due to lack of awareness and social stigma and negligence. While the issue is upsurging rampantly people are becoming aware to report cases. In India, the Ministry of Women and Child Development Government reported that 53.22% children face one or more forms of sexual abuse while the actual figure is much higher as many case goes unreported.

20 Muzaffar Maroosh and Gopalakrishnan Amulya, *Sexual Assault in schools is all too real* INDIA TODAY (Dec. 22, 2014) <http://indiatoday.intoday.in/story/india-today-39-anniversary-issue-child-abuse-human-rights-sexual-abuse-in-schools/1/406278.html> (last visited Feb. 14, 2015).

By passing years, the pain and tissue injury do heal but the psychological and medical consequences can persist through the child's entire life. In a report,²¹ on complain by the parent to doctor that Sasha wets her bed and can't tell when she needs to use the bathroom the doctors told the parent of Sasha that she will take a long while to overcome the trauma.

Protection of Children from Sexual Offences Act (POCSO)

After rampant increase in the number of child sexual abuse cases in India, there was an intense clamoring for an Act against the child sexual abuse. As a result, the Protection of Children from Sexual Abuse Act 2012 was drafted. The Protection of Children from Sexual Offences Act (POCSO Act) 2012 received the President's assent on 19th June 2012 and was notified in the Gazette of India on 20th June 2012.

This Act covers clear definition of penetrative²² and aggravated penetrative sexual assault,²³ sexual²⁴ and aggravated sexual assault.²⁵, sexual harassment,²⁶ and using a child for pornographic²⁷ purposes like five offences against children. Also envisages punishing even abatement or an attempt to commit the offences defined in the Act.²⁸ The punishment for the attempt to commit is upto half the punishment prescribed for the commission of the offence.²⁹ POCSO Act establishes Special Courts for speedy trial of sexual offences against the children. Statutory provision of the offences and their punishment:-

Penetrative Sexual Assault

Section 3 defines that a person is said to commit penetrative sexual assault if he penetrates his penis to any extent into the vagina, mouth, urethra or anus or makes the child to do so with him or any other person or, he insert to any extent any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person or, he manipulates any part of the body of the child so as to cause penetration into the vagina, anus, urethra or any part of the body of the child or makes the child to do so to such person or any other person.

Section 4 deals with punishment with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, or fine or both.

21 *Id.*

22 The POCSO Act, § 3 (2012).

23 *Id.*, § 5.

24 *Id.* § 7.

25 *Id.*, § 9.

26 *Id.*, § 11.

27 *Id.*, § 13.

28 *Id.*, § 17.

29 *Id.*, § 18.

Aggravated Penetrative Sexual Assault

Section 5 (a) to (u) describes the more intense form of penetrative sexual assault. It includes offence committed by the police officer, member of armed force or security force or a public servant in his capacity or premise, staff of jail, remand home, observation home or other place of custody or care, management or staff of a hospital irrespective of government or private or management or staff of an educational institution or religious institution. Includes gang aggravated penetrative sexual assault. Section 6 provides provision for the punishment thereof.

Sexual Assault

Section 7 deals with the sexual assault that whoever with sexual intent touches the vagina, penis, anus or breast of the child or makes the child do so, or does any other act with sexual intent which involves physical contact without penetration is said to have committed sexual assault. Section 8 deals with the punishment with imprisonment for 3 years which may extend to 5 years and fine.

Aggravated Sexual Assault

Section 9 deals with the aggravated sexual assault. It includes offence committed by the police officer, member of armed or security force or a public servant in his capacity or premise, staff of jail, remand home, observation home or other place of custody or care, management or staff of a hospital irrespective of government or private or management or staff of an educational institution or religious institution. Section 10 provides for the punishment thereof with imprisonment which shall not be less than 5 years and which may extend to 7 years and fine.

Sexual Harassment

Section 11 deals with sexual harassment which includes person who with sexual intent utters any word or makes any sound or makes any gesture or exhibits any object or part of body, makes a child exhibit his body or any part of his body, shows any object to a child in any form or media for pornographic purposes or repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other media or threatens to use in any form of media, a real or fabricated depiction through electronic film or digital or any other mode or entices a child for pornographic purposes. Section 12 deals with the punishment therefore with imprisonment for one year which may extend to 3 years and fine.

Use of Child for Pornographic Purpose

Section 13 deals with offence committed by person who uses child in any form of media for the purpose of sexual gratification which includes representation of the sexual organs of a child; usage of a

child engaged in real or simulated sexual acts (with or without penetration); the indecent or obscene representation of a child. Section 14 deals with the punishment thereof.

Indian Laws dealing with Child Sexual Abuse in contrary with POCSO Act 2012 and their loopholes

Indian Penal Code

Rape is defined under section 375 of the Indian Penal Code but no separate law for sexual assault has been defined. The word ‘man’ denotes a male human being of any age, and the word ‘female’ denotes a female human being of any age. Whereas fails to include rape of a boy victim under this. However, section 377 of the Code deals with ‘unnatural offences’ and covers sexual abuse of a boy child. Section 511 of the Indian Penal Code provides punishment for attempting to commit an offence punishable with imprisonment for life or other imprisonment.

The statutory rape in India prescribes that a girl being under 18 years, her consent is no defence. Once, it is proved that the girl victim is under 18 years of age, it is irrelevant that no injury was detected on her private parts, that she was sexually active, or that she had invited the accused to have sexual intercourse with her.

The age of consent specified under section 375(6) was originally 10 years bars and has been gradually increased to 18 years. The POCSO Act 2012 prescribes meaning of child below the age of 18 years. The five offences prescribed by the Act is gender neutral, also prescribe provision of punishment for abatement or an attempt to commit the offences. Section 90 of the IPC includes the definition of consent for the purpose of the code. However, Section 90 cannot be construed as an exhaustive definition of consent in contrary with the offence of rape. In a case Court has observed that if a “woman is under 16 years of age, her consent is irrelevant, if she is subjected to sexual intercourse and any person having sexual intercourse with such women under 18 years of age shall be said to commit rape on her.”³⁰

The user of the child prostitute is liable for rape under section 376 of the Indian Penal Code also POCSO Act provides punishment to those who makes the child to commit offence on him or ask to do on any other person, but fails to clearly define raiding brothel keepers, pimps and users thatswwhy these go scot-free. Section 372 and section 373 of the Indian Penal Code provides provision for punishment who sells or buy the minor for the purpose of prostitution individually. Organization works in this business and that’s need to be destroyed. Picking the mediators won’t affect much.

30 *Sushanta alias Tutan Chakraborty v State of Tripura* 2000 Cri LJ 195 (Gauhati).

Section 366B of the Indian Penal Code deals with importation of girl from a foreign country under the age of twenty-one years with intent to force or seduce to illicit intercourse with another person but fails to include trafficking of a boy child. Also, POCSO Act doesn't include trafficking of child for sexual exploitation.

Criminal Procedure Code

The Criminal Procedure Code lays down the law relating to criminal procedure. Certain provisions in the code relate to children. Unfortunately, the code is not child friendly and certain fundamental changes are necessary to ensure appropriate relief to victims of child abuse.

Section 27 of the Criminal Procedure Code deals with the jurisdiction in the case of juveniles. There is no provision relating to the children who are victims of the sexual abuse. However, POCSO Act provides speedy trial courts for such victims.

Section 43 of the Code empowers a citizen to make an arrest. Therefore, a citizen can make an arrest to prevent the trafficking of children, or commission of sexual abuse.

Section 125 of the Criminal Procedure Code deals with the maintenance of wives, children and parents. According to the code any person who has sufficient means is duty bound to maintain legitimate or illegitimate minor child till the child attains majority. Both POCSO Act and the Criminal Procedure Code fails to provide provision for the rehabilitation of the victims of child sexual abuse.

Constitution of India

The Constitution of India contains provision which directly or indirectly deal with children; child-related laws are framed in pursuance of these provisions.

Article 38 requires the state to secure a social order for the promotion of the welfare of the people.

Article 39 (e) and (f) deals with the exploitation of children. The state is to direct its policy towards securing health of the men, women and children. So as the children are not abused. And children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that the childhood and youth are protected against exploitation and against moral and material abandonment.

Article 14 of the Constitution guarantees equal protection of the laws, i.e. the right to equal treatment in similar circumstances. A law can be struck down as ultra vires the Constitution if it does not adhere to this principle.

Article 15 (3) is an exception, it permits the state from making special provisions for women and children. It has been tested before the courts, the courts have upheld the validity of special provisions favouring women and children.

In *Yusuf Abdul Aziz v State of Bombay & Anr.*³¹ the Supreme Court held that, "Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children."

Thus a law granting certain favours and benefits to children cannot be struck down as unconstitutional.

Article 23(1) prohibits the trafficking of human beings and forced labour. Also, Article 24 prohibits the employment of a child below the age of 14 years in any factory, mine, or any hazardous employment. The provision fails to clearly define whether the child prostitution can be called employment or labour. However, there's a strong opinion against such use of terminology as then it would legitimize a heinous crime.

Case Studies

Leading judgments on child sexual abuse -

*Ghanashyam Misra v State*³²- In this case, a minor girl aged 10years, was raped by the accused who was her school teacher. The accused used to induce her to come inside the room and committed rape. The High Court convicted the accused under section 376 IPC and enhanced the sentence to 7 years rigorous imprisonment and a fine of Rs.200 as the perpetrator had taken advantage of the teacher-student relationship.

*Tukaram & Anr. v State of Maharashtra (Mathura rape case)*³³- Mathura, a minor girl, was raped by two policemen attached to police station when she had gone with others for recording of a statement. The session court acquitted the accused on the ground that the victim was surrendered her body to police constable with her own will. As per the medical report, only old injuries were found on the hymen, and no semen stains were traced. Thus, the prosecution had failed to prove the case.

While the High Court convicted the accused and held that mere passive submission of the body and its resignation to other's lust induced by threats or fear cannot be equated with the desire or will. On the other hand, Mathura was alone at the station at the dead of

31 AIR 1954 SC 321.

32 AIR 1957 ORISSA 78.

33 AIR 1979 SC 185.

night. Probably, initiative for sexual desire must have proceeded from the accused and the victim must not have been a willing party to that act. Also her subsequent conduct in making statement to her relatives as well as members of crowd proved that she was subjected to forcible sexual intercourse.

Later, the Supreme Court set aside the conviction on the ground that no circumstances proved that there was a case of fear of death or of hurt on the part of the girl. Therefore, sexual intercourse is not proved to amount to rape in the present case.

Sexual abuse of children in jail

*Munna & Ors.v State of Uttar Pradesh & Ors.*³⁴ In this case, it was alleged that juveniles are sexually exploited by adult prisoners in the Kanpur Central Jail. Also a boy named Munna was unable to sit after the way he was used according to the news report.

The session judge was unable to meet the juvenile victims said in the petition as they had been released within a few days of publication of news report. The court directed magistrate that no person apparently below the age of 16 years is sent to jail according to the provisions of Uttar Pradesh Children Act 1951. Juveniles, under 16 years, must be detained in children's home or other place of safety set up by the government.

The need for legislation on child sexual abuse

In *Sakshi v Union of India & Ors.*³⁵ Case, the Supreme Court has recognized the need to enact a new law or amend existing laws to deal with child sexual abuse cases. The existing sections 375/376 of the Indian Penal Code and other sections cannot be said to be in tune with the matter of sexual abuse of children.

Moreover, the Law Commission of India reviewed the laws and recommended amendments pertaining to child sexual abuse in its 172nd report after the order passed by the Supreme Court in this case.³⁶

Social Approaches on Child Sexual Abuse

The African proverb, "it takes a village to raise a child", typify the importance of community in raising a child. Children are often sexually abused by relatives and neighbors at home, by teachers and staff at school and in residential facilities which are known to them. People even do not feel the need to report sexual abuse cases due to fear of social stigma or fear of being shunned by friends, family and society and lack of faith in social institutions. In fact, victims may be mistreated a second time by justice system that often does not want to believe or take actions against perpetrators and by traumatic

34 AIR 1982 SC 806.

35 (1999) 6 SCC 591.

36 *Id.*

medical examinations.³⁷ This indicates the need of more effective as well as systematic social institutions.

Role of Panchayati Raj Institutions in controlling child sexual abuse cases

Recognition and acceptance of child sexual abuse cases is the first step towards dealing with this issue. Child needs assistance and support that elders are always there in case of abuse.

So far as the issue of child sexual abuse is concerned, members of panchayat must create awareness regarding this issue among the people. This would help in prevention and would also reduce the ratio of unreported cases of abuse.

Panchayat members can create forums where children receive information within the village from the school teachers, the anganwadi worker and the ANM. In case of abuse, child would be comfortable to report against the offenders in such forums. Also the confidentiality of the victim could be maintained. Infact, panchayat has a critical role in monitoring the status of all children.

Role of Social and educational institute

School or church religious education programs must include a sex abuse prevention curriculum. So that, parents as well as children can take knowledge about the sexual abuse. Even parents can make a crucial difference towards the child abuse prevention with the support of communities, experts and commitments. Also, parents with the help of other parents can establish a committee where they can talk about the child sexual abuse issues. Child sexual abuse prevention materials should be added to existing child safety programs.³⁸

Role of Government

To encourage people to come forth and report the matter, Government can issue to give satisfactory compensation to the victim as well as to the family, who reports the matter. Also, Government can create awareness against child sexual abuse and encourage people to report such matters.

Need to protect child by parents

People are perhaps even acutely aware of the need to protect the child from sexual abuses in the contemporary society, but they either avoid the matter altogether and keep their fingers crossed or

37 Human Rights Watch, *Breaking the Silence: child sexual abuse in India* (2013), <http://www.hrw.org/sites/default/files/reports/india0113ForUpload.pdf> (last visited Feb. 14, 2015).

38 Virtus Excellence Builds Trust, *Practical Advice for parents on preventing child sexual abuse* (2003) <https://www.virtus.org/virtus/ParentHandbook.pdf> (last visited Feb. 14, 2015).

become very overprotective rather giving them skills to protect themselves. Parents usually hush up the matter pertaining to sexual abuse for risk of spoiling their child's future. Actually, people do not give skills to children to cope effectively if the worst does happen. Awareness, education and responsible parenting are the best tools for a child for his or her defense.³⁹ Children should never bear the burden of preventing their own abuse. In fact, these are the 'parents' who bear the primary responsibility for the safety of their children. Parents should learn about the child sexual abuse and the myths surrounding it. For instance- most abuse involves coercion rather than force and Cooperation is gained with threats of injury to children or their loved ones. Also, most abuse is not sexual intercourse but rather involvement of touching sexual organs or watching pornographic materials. Often abusers use psychological methods to coerce children.⁴⁰ It is the need of time to make aware each parents about the reality of child sexual abuse. This would be the first crucial step towards the protection of child from sexual abuse. So, here are some practical suggestions that parents should do in order to protect their child from sexual abuse.

Parents should teach children the proper names of their body parts. By giving the knowledge of body parts, everyone will be able to comprehend that what has actually happened to them and this would certainly minimize the misinterpretation. Teaching children about the body parts in an open way will help children to develop body image and awareness of "private Zones". Also child will be more likely to tell, if something happens. This will probably decrease the ratio of cases which go unreported.

Parents should convey messages to their children about values and beliefs related to sexuality. As we start learning about sexuality form the moment we are born and continues till the life ends. So, it is good to talk about sexuality at an early stage. These messages could have a long-lasting impact on children.

Parents should also teach the children that they have a right to say 'No' if they will feel uncomfortable. Teach children that they are allowed to move away from an adult behaving in a odd way. For instance- if a 5-year-old son does not want to kiss uncle. Use this as a learning and teachable moment. Respect the child's decision. Let him know that this is his decision to make and that it's okay to say 'No'. Parents must teach their children how to discern between the appropriate and inappropriate things.

39 *Id.*

40 Stephens Karen, *Sexual Abuse of Children: Prevention and response steps to Take*, PARENTING EXCHANGE (2007), <http://www.easternflorida.edu/community-resources/child-development-centers/parent-resource-library/documents/prevent-and-respond-sexual-abuse.pdf> (last visited Feb.14, 2015).

Develop a habit in children to tell someone, especially parents, if they are scared, hurt or have experienced an uncomfortable touch. Moreover, warn children directly that some people encourage children to keep secrets. Secrets pertaining to touching and pictures are never okay, it is immaterial that who asks them to keep secrets. Games are the easiest way to teach lesson to children about safety issues. Children often ask parents, “what if”? For instance- “what if an adult asked you to touch them between their legs?” Using these games, parents can raise their own concerns and help them to make decisions on various situations. Parents should know where child spend their time and with whom. Pay attention to adults who seems more interested in interacting with a child and usually hangs out with children for a long time than with other adults.

Last but not least, parents must be approachable to their children. Parents must make their children believe that they can talk to you at any time and about anything. Infact, Parents should try to be consistent and reliable source where children can go through any number of times with any number of questions.

Warning signs of sexual abuse

- Child asks questions using vulgar sexual terms.
- Child gets nervous in presence of a specific adult.
- Child shows sexual actions or knowledge beyond his normal development stage.
- Child shows behavior in a weird way, from lack of emotions to aggressive.
- Child feels scared in a particular location or situation.
- Treats, gifts, vacations or special favors offered to one specific child.
- Child displays extreme personality changes or mood swings.
- Child starts having sudden problems at school. For instance- lower grades, lower attendances.
- Child suddenly wants to spend time with a certain person.
- Child suffering with a venereal disease is also a sign of abuse.
- Sleep disturbances or nightmares, change in craving, fear of being left alone, depression could be the symptoms of abuse.
- Self-injures like- cutting, burning; self-medicates with drugs and alcohols, becomes sexually promiscuous.⁴¹

⁴¹ Vermont: Agency of Human Services Department for Children & Families, *STEP UP: Protect children from sexual abuse* (2010) <http://dcf.vermont.gov/sites/DCF/files/pdf/protectkids/GuideforParents.pdf> (last visited on Feb. 14, 2015).

Conclusion

This article analyses the issues related to child sexual abuse in the context of social and legal reform. Protection of children from sexual offences Act 2000 is an outcome of continuous advocacy for more than a decade by people with combined efforts of child right groups.

The prevalence of child sexual abuse cases is found to be high in India and throughout the whole world as well. Child sexual abuse is a global problem with grave life-long outcomes and even in the low prevalence areas; there are large number of victims.

Although, a plethora of documents in the form of provisions have been laid down but somewhere it's not fulfilling the criteria in making full justice to the child sexual abuse victims and abusers are successful in escaping from their crime. A culture of silence around this major issue, rampantly increasing of child sexual abuse cases, no proper implementation of law and lack of adequate mechanisms especially in underprivileged sections to control sexual abuse of children are some of the significant challenges of this modern era.

Therefore, stringent measures should be taken in order to prevent and control child sexual abuse. Apart from statutory provisions and legislations by perceiving warning signs of the children, parents can prevent the child from being abused. It is the need of hour to eradicate this problem of child sexual abuse by joining the hands of entire humanity.

AN APPRAISAL OF THE SECULARITY OF THE JJ ACT: REVIEW OF SHABNAM HASHMI CASE

*Rashmi Patowary**

Adopting one child won't change the world: but for that child, the world will change.

- *Anonymous*

Introduction

Human beings are social creatures. They are born and raised in the cradle of love, care and affection of a *family*; in the warmth of their kith and kins. But, sadly, not everyone is blessed. According to UNICEF (United Nations Children's Fund), it is estimated that there are between 160 million and 210 million orphans worldwide. In India! the orphan crisis is staggering with over 11 million abandoned babies in the country (ninety percent of these are little girls).¹

Adoption is a beautiful way to give a child a family; a bond that may not have borne out of blood and flesh but will be out of love. As someone had said - 'Not flesh of my flesh, Nor bone of my bone, But still miraculously my own. Never forget for a single minute, You didn't grow under my heart - but in it'. Adoption is a complex socio-legal phenomenon. In simple words, it means the process by which a child establishes new relationship ties with the adopted family and simultaneously, severs all ties with the biological parents. Since time immemorial, adoption has been a wonderful way to provide the child with a home and the parents with a child. It plays an important and multifarious role in our society. It offers care and protection to an abandoned, and neglected child. It adorns the vulnerability with a pleasant atmosphere of love of a family.

Though with an age-old tradition² of child adoption, there exists no uniform law in India. The concept of adoption varies from one religion to another. Adoption is recognized under Hindu Law but Muslims, Christians, Parsis and Jews do not recognize complete adoption. Currently, legislations related to adoption are the Hindu Adoption and Maintenance Act 1956 and the Guardians and Wards Act 1890. Recently, a landmark judgment delivered in the case *Shabnam Hashmi v UOI & Ors.*³, re-defined the folds of adoption law in

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1 Orphan Facts, *How to Help Orphans*, ORPHAN'S LIFELINE INTERNATIONAL (March 6, 2015), <http://www.howtohelporphans.org/bythenumbers.html> (last visited Feb. 15, 2015).

2 Mahabharata has more in common with the practice of adoption, as it existed today. Karan's story also portrays the intense loyalty of the adoptee the adoptive parents.

3 AIR 2014 SC 1281.

the country. It granted adoption rights to Muslims, Christians, Parsis, Jews and other communities (irrespective of the personal laws of the adoptive parents) under the Juvenile Justice (Care and Protection of Children) Act 2000.

Adoption Law in India: A Brief Insight

Adoption comes from heart but the adoption process comes from the law. You should follow your heart but be sure you also follow the law.

Irina O Rear (Member, International Bar Association)

In India, adoption is a part of the personal laws. Since, various communities treat an adopted child in numerous ways; from treating them equally to not recognizing them at all, adoption laws in India are not uniform. Only Hindu law recognizes adoption. It holds a natural borne son and an adopted son at the same pedestal. Among Hindus, adoption is recognized and allowed from a concern that is rooted in both material and spiritual welfare⁴ (i.e. to continue family legacy and also ensure performance of funeral rites) of the father's family.⁵

Hindu Adoptions and Maintenance Act 1956 (HAMA 1956) codified the practices as prevailing under Ancient Hindu in relation to adoption. Through amendment, the Act incorporated a significant feature of adoption of a female child, which was unknown to the Ancient law. As this was a personal law, the adoption was confined to Hindu parents and that too of a Hindu child. Prior to the enactment of the HAMA 1956, adoptions were governed by customs.⁶ The HAMA 1956 (amending Act 45 of 1962) brought a reformation; the sections, which were added after amendment, threw light upon the following vital issues:⁷

- (i) To enable adoption and provide a congenial home for an abandoned child.
- (ii) To authorize the Fondling or Remand Homes to give children (who have been abandoned) in adoption, with the permission of the Court.
- (iii) To include a child, legitimate or illegitimate, who has been abandoned by both of his parents or whose parentage is not

4 In *Bal Gangadhar Tilak v Shrinivas Pandit* [42 IA 135], the Privy Council observed that adoption among Hindus is necessary not only for the continuation of the childless father's name, but also as a religious means to make those obligations and sacrifices which would permit the soul of the deceased (father) passing from the Hades to Paradise. In *Amarendra Mansingh v Sanatan Singh* [60 IA 242], the Privy Council has again observed: 'The foundation of the Brahmanical Doctrine of adoption is the duty which every Hindu owes to its ancestors to provide for the continuation of the line and solemnization of the necessary rites.'

5 KUSUM, FAMILY LAW LECTURES: FAMILY LAW I 321 (3rd ed. 2011).

6 Id at 322.

7 Id.

known, but who, in either case is brought up as Hindu to be a Hindu by religion.

The Parsis, who are governed by the Parsi Marriage and Divorce Act 1936 and Part III of the Indian Succession Act 1925 have no provision for adoption. However, there exists a customary form of adoption prevalent among the Parsis wherein the widow of a childless Parsi can adopt a child on the fourth day of her husband's death, so as to perform certain annual religious ceremonies. This is known as palak and the child adopted does not get any property rights. With regard to Christians, the Christian Marriage Act 1872, the Indian Divorce Act 1869 and the Indian Succession Act 1925, which deal with Christian family law make no mention of adoption. Amongst Muslims⁸ too, there is no law of adoption.⁹

Legally, it was only a Hindu citizen who, under the HAMA 1956, could adopt a child. The non-Hindus, that is, Muslims, Christians, Parsis and Jews, could make an adoption only through procedures under the Guardians and Wards Act 1890. However, it was one, which was hardly a substitute for a full-fledged adoption law. It does not bestow upon the adopted child, the same legal rights as a biological child. Parents are just the guardians of the adopted child. Such an adoption can be revoked by the child after the age of 18.¹⁰

The laws of the country also lag behind with regard to statutory provisions for inter-country adoption. The Gujarat High Court in the case *Re, Rasiklal Changalal Mehta*¹¹ highlighted this inadequacy. It was in the case – *Lakshmi Kant v Union of India*¹², that the Hon'ble Supreme Court laid down normative and procedural safeguards with regard to foreign and inter-country adoption (the reference of which has been duly made in the Shabnam Hashmi Case). A few of the noteworthy guidelines laid down are as follows¹³ –

8 Putative or presumed father is not recognised under Muslim Law. It firmly believes in the concept of filius nullis, which means, a son of nobody or an illegitimate son who has no legal rights as a son in respect to the inheritance of property. While, raising someone else's child is allowed and even encouraged in case of an orphan, the child does not become a child of the new parents. This form of adoption where children retain membership to their original family is called, in Arabic kafala. This implies for example that the new father cannot name the son after him, and that the child is counted as a non-Mahram.

9 Kusum, *supra* note 5, at 339.

10 *Supra* note 6.

11 AIR 1982 Guj 193.

12 AIR 1984 SC 469 [The case arose out of a letter that was treated as a petition. The letter was based on a report by the Mail, which revealed that hundreds of unwanted babies were transported from the slums of Calcutta to the USA].

13 Kusum, *supra* note 6, at 342.

- (i) Only Government recognized agencies should be entrusted with the task of scrutinizing applications by foreign parents wishing to adopt Indian Children.
- (ii) The antecedent of the applicants should be verified, i.e., their family background, financial status, health, etc.
- (iii) Preferably, the child should be given for adoption before he/she completes the age of three (However, the court felt that this need not be a strict rule).
- (iv) A periodic progress report of the child along with a recent photograph should be provided.
- (v) The proceedings on the application should be confidential and as soon as an order is made all documents should be sealed.

JJ Act: Augmenting the Blessing of Adoption or Thwarting the Realms of Personal Laws?

The Juvenile Justice (Care and Protection of Children) Act (JJA) 2000 is a legal framework for juvenile justice in India. It is essentially social welfare legislation, crafted specially to deal with offenders under the age of 18 and aimed at their proper care, protection and treatment through catering to their development needs. The Act provides a framework for the protection, treatment and rehabilitation of children in compliance of CRC, repealing the earlier Juvenile Justice Act of 1986 and has been further amended in 2006 and 2010.¹⁴

Deriving strength from the Constitutional Provisions – Article 15, clause (3)¹⁵; Article 39, clauses (e) and (f)¹⁶; articles 45¹⁷ and 47¹⁸; and the Convention on the Rights of the Child¹⁹, the JJ Act aims to

14 Shilpa Khatri Babbar, *Child Welfare: A critical analysis of some of the socio-legal legislations in India*, 19 (8) IOSR-JHSS 54, 56 (2014).

15 Nothing in this article shall prevent the State from making any special provision for women and children.

16 The State shall, in particular, direct its policy towards securing – (e) 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; (f) 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.

17 The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

18 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.

19 Convention on the Rights of the Child art. 40, Nov. 20, 1989, 1577 U.N.T.S. 3 (hereinafter referred to as CRC).

consolidate and amend the law with regard to juveniles who are in conflict with law and children who are in need of care and protection. It aims to provide proper care, protection and treatment and initiate a method of adjudication which adopts a child-friendly approach. Wholly, the act aims to work for the best interest of children.²⁰

The salient features are as follows²¹;

- (i) It is applicable to all Indian Citizen.
- (ii) It allows adoption of two children of the same sex.
- (iii) It confers status of parents & child and not guardian and ward.
- (iv) It confers rights available to child on the adopted child.

Initially, the Juvenile Justice (Care and Protection of Children) Act 2000 did not contain anything regarding custody, guardianship or adoption of children. These were introduced in Juvenile Justice (Care and Protection of Children) Amendment Act 2006. The concept of adoption has been well defined in Sec.2 (aa) of the said Act, which is as follows: Adoption means 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.” The Act introduced an expression “child in need of care and protection” and it has been defined in Sec. 2 (d) of the Act. This definition covers what is meant by orphan, abandoned and surrendered children. Sec. 40 of the JJ Act provides that the rehabilitation and social reintegration of a child shall begin during the stay of the child in children’s home or special home, but as the family is the best option to provide care and protection for children, *adoption is the first alternative for rehabilitation and social reintegration of orphan, abandoned or surrendered children.*²²

Sec. 41 of JJ Act 2000 read with Rule 33(1) of Central Rules expresses the following aspects of adoption: “The primary aim of adoption is to provide a child who can’t be cared for by his biological parents with a permanent substitute family. The family of a child has the primary responsibility to provide him care and protection. Orphan, abandoned or surrendered children can be adopted for their rehabilitation through such mechanism as may be prescribed. Such children may be given in adoption by a Court in keeping with the provisions of several guidelines regarding adoption issued by the State Govt. Central Adoption Resource Authority and notified by the Central Govt. But the Court should be satisfied with the investigation having carried out which are required for giving such children in adoption.

²⁰ Preamble to the CRC.

²¹ *Supra* note 7.

²² *Id.*

For placement of the orphan, abandoned or surrendered children for adoption in accordance with the said guidelines, the State Govt. shall recognize in each district one or more institutions or voluntary organizations as specialized adoption agencies.” The Children’s Homes and institutions run by the State Govt. or voluntary organizations for children in need of care and protection who are orphan, abandoned or surrendered, should ensure that these children are declared free for adoption by the Committee (Child Welfare Committee)²³ and such cases shall be referred to the adoption agency of that district for their placement in adoption.²⁴

An Insight into the Shabnam Hashmi v UOI

In February 2014, the Hon’ble Supreme Court of India in a landmark judgment gave Muslims the right to adopt a child with a view that the laws of land had to get primacy over personal law till the country achieves Uniform Civil Code.²⁵ The judgment came on an 8 years old petition by Shabnam Hashmi, who had approached the apex court after being refused permission to adopt.

Observations and Conclusions of the Court

The judgment was borne out of a writ petition under Article 32 of the Constitution and that made the following prayers –

- (i) Firstly, to recognize the right to adopt and the right to get adopted as a Fundamental Right under Part III of the Constitution.
- (ii) Secondly, a request to the Court to lay down optional guidelines enabling adoption of children by persons irrespective of religion, caste, creed etc.

23 Juvenile Justice Act, § 29 (2000), provides for the Child Welfare Committee. The Committee has the sole authority to declare the child in need of care and protection who are orphan, abandoned or surrendered free for adoption. CWC shall determine legal status of all orphan, abandoned and surrendered children. Functions and powers of the Committee, procedure in relation to the Committee, production of child before committee, procedure for inquiry, procedure related to orphan and abandoned children and procedure related to surrendered children shall be governed as laid down in the Juvenile Justice Amendment Act 2006 and its Rules. On clearance from CWC that a particular child’s free for adoption, there will be termination of parental right.

24 *Supra* note 7.

25 According to Article 44 of the Constitution of India: “The State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India.” Over the years several attempts were made to formulate a general secular law on adoption. The attempts of Parliament in this direction did not bear fruit, all these went in vain on account of a number of reasons. The history of all such efforts does not bring credit to the secular credentials of the Indian polity.

With regard to the first prayer, the Hon'ble Supreme Court by placing reliance upon the views of the Bombay and Kerala High Courts in *In re: Manuel Theodore D'souza*²⁶ and *Philips Alfred Malvin v Y.J.Gonsalvis & Ors*²⁷ stated that the 'natural' evolution of the right to adopt and the right to get adopted to the status of a Fundamental Right will have to await the harmonization of the numerous conflicting views with regard to practices and beliefs prevailing in the country. The court made a reference to the vision contemplated by Article 44 of the Constitution (which is a goal yet to be achieved) and stated that it is not the 'appropriate time and stage' to raise the right to adopt and right to get adopted as a fundamental right.

With regard to the second prayer, the court said that 'it has been substantially fructified' through the judicial verdict in *Lakshmi Kant Pandey v Union of India*.²⁸ It led to the creation of elaborate guidelines so as to protect and further the interest of the child. It also recommended the creation of a regulatory body. Thus, the Government of India set up Central Adoption Resource Agency (CARA) in 1989. The said body has been playing a focal role in the matter of inter as well as in country adoptions. It lays down norms, both substantive and procedural.

The court emphasized that, the provisions relating to adoption under the JJ Act,²⁹ can be availed by any person, notwithstanding the position of adoption under a personal law. This Act, unlike HAMA, is a general law that does not exclude any section of persons from its ambit.

The Supreme Court has also emphasized the enabling nature of the provision and exclaimed it to be a stepping-stone in reaches the goal of Article 44 of the Constitution of India.

"The act does not mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the provisions of the act, if he so desires. Such a person is always free to adopt or choose not to do so and, instead, follow what he comprehends to be the dictates of

26 (2000) 3 Bom CR 244.

27 AIR 1999 Kerala 187.

28 (1984) 2 SCC 244.

29 The JJ Act 2000 stands on a very different footing as compared to the JJ Act of 1986. The 1986 Act dealt with only "neglected" and "delinquent juveniles". The JJ Act, 2000 introduced a separate chapter i.e. Chapter IV under the head 'Rehabilitation and Social Reintegration' for a child in need of care and protection. Such rehabilitation and social reintegration was to be carried out alternatively by adoption or foster care or sponsorship or by sending the child to an after-care organization. Section 41 contemplates adoption though it makes it clear that the primary responsibility for providing care and protection to a child is his immediate family. Sections 42, 43 and 44 of the JJ Act, 2000 deals with alternative methods of rehabilitation namely, foster care, sponsorship and being looked after by an after-care organisation.

the personal law applicable to him.

To us, the Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. At the cost of repetition we would like to say that an optional legislation that does not contain an unavoidable imperative cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a uniform Civil Code is achieved. The same can only happen by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date.”

Challenges Unanswered

The Shabnam Hashmi Case has been noteworthy in asserting the secularity of the JJ Act. However, a few of the contentious issues remain unaddressed. For instance – the Hon’ble Court has not mentioned anything about the status of the child. Although the court has asserted that, the provisions of the act cannot be dictated by the mandates of any personal law and any person is “legally free to ADOPT” a child irrespective of their caste, creed and religion, it remains silent on the status of the child i.e., if a child is “legally free to be ADOPTED” irrespective of their caste, creed and religion.³⁰ Ambiguousness in this aspect makes things critical when it comes to adoption of a Muslim/ Parsi/ Christian child.

The JJ Act versus the HAMA 1956 – Harmonizing the Conflict³¹

As already discussed above, one of the salient features of the JJ Act is that it allows same gender adoption. However, under the HAMA 1956, the same is not permissible. In such a scenario, the JJ act enacted to provide for rehabilitation of orphaned, abandoned and surrendered children apparently seems to be in conflict with a codified personal law.

This conflict has been aptly solved by a 2009 Bombay High Court Judgment - Payal @ Sharinee Vinay Pathak. In this case, the petitioners already had a daughter. They got guardianship rights of a surrendered five months old girl baby after fulfilling all pre-requisites. After four years, they filed an application for the adoptions of the girl. The court held that - “The right to adopt ... is a constitutional right

30 *Supra* note 14 at 57. Also See Still a Question Mark, The Indian Express, (February 25, 2014), <http://indianexpress.com/article/opinion/columns/still-a-question-mark/2/> (last visited Feb. 15, 2015).

31 Kusum, *supra* note 6 at 338.

guaranteed under Article 21³². The right to life includes those things which make life meaningful...” The court also acknowledged the conflict between the JJ Act and the HAMA 1956 and went on to harmoniously construct a solution for the same. The court said that, it is the later act, which will prevail over the previous act. This is on a well-settled principle that, when there are two special acts dealing with the same subject matter, legislation that is enacted subsequently will prevail. Thus, the court held that the prohibition asserted by the HAMA, 1956 with regard to same gender adoption, would remain in force. The JJ Act simply makes an exception in case of abandoned children. In the case, so discussed, the child in question (with regard to whose adoption) an application has been filed by the parents aptly fit within the description of a child in need of care and protection under section 2 (d) (v)³³ of the JJ Act, 2000 and of surrendered child under section 41 (2)³⁴ and hence is eligible for adoption. Thus, the parents were declared as adoptive parents and were granted with all the rights and obligations under the law.

Conclusion

The judgment of the Shabnam Hashmi Case has received numerous applauds as well as criticisms. For instance: The All India Muslim Personal Law Board (AIMPLB) termed it as a covert attempt to slip in a uniform code by the backdoor which would infringe the Shariat law. “We have our own personal law and no step should be taken to covertly formulate a uniform adoption code without taking into account our stand on the issue,” AIMPLB had said before the apex court.³⁵

Syed Zafar Mahmood, former OSD to the Sachar Committee and Zakat Foundation of India president, welcomed the verdict saying that the popular perception that Islam does not allow adoption is “wrong”. “In fact, the Prophet encouraged adoption,” he added. But Dr. Mahmood termed the Supreme Court’s observation about achieving Uniform Civil Code as “Obiter dicta” or “something without which also the judgment would have been complete”. He said the idea of not tampering with the Muslim Personal Laws originates from the overriding provisions enshrined in the Constitution. “The overbearing necessity of this judgment arise out of the need to enable Muslim parents to

32 Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

33 Who does not have parent and no one is willing to take care of or whose parents have abandoned [or surrendered] him or who is missing and run away child and whose parents cannot be found after reasonable inquiry.

34 Adoption shall be resorted to for the rehabilitation of the children who are orphan, abandoned or surrendered through such mechanism as may be prescribed.

35 *Supra* note 1.

adopt as an option, but, of course, within the four corners of the Islamic law,” said Dr. Mahmood.³⁶

“Secularism is the religion of humanity; it embraces the affairs of this world; it is interested in everything that touches the welfare of a sentient being; ... It proposes to let the gods take care of themselves. It is another name for common sense; that is to say, the adaptation of means to such ends as are desired and understood.”

*Robert Green Ingersoll
(The Independent Pulpit, 1887)*

The Juvenile Justice (Care and Protection) Act is a secular act extending the warmth of a home and care of a family to every child possible. The assertion of its secularity in the Shabnam Hashmi case is noteworthy and is a harbinger of good times for the 11 million abandoned babies in the country. It is also a step forward to the realization of Article 44³⁷ of the Constitution of India. However, some ambiguity persists which needs to be addressed at the earliest in order to effectuate the objective enshrined in the act. In the meantime, it is necessary that a more refined and uniform adoption law is created which addressed the difficulties and challenges of both domestic as well as international adoption. This will ensure that a better care and protection is extended to the children. It will enable to strongly address problems like child trafficking which forms one of the ever growing concerns with regard to adoption.

Lastly, the society must view adoption and adoption laws as a strong tool to provide less privileged children a healthy and protective atmosphere of growth. The cause of a happy upbringing of a child should be seen as a priority among the various sections of the society. In the midst of the various conflicts of interests, a holistic model of law should be given shape and would wholly devote for the cause of a child; for every child is the father of a man.

36 *Mohammad Ali, SC ruling does not interfere with Muslim personal law, THE HINDU* (February 22, 2014), <http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/sc-ruling-does-not-interfere-with-muslim-personal-law/article5715679.ece> (last visited Feb. 15, 2015).

37 Activists' attempts to advocate for a uniform civil code have routinely been overridden by concerns from religious groups, who site the freedom to practice their religion, which is a fundamental right under Article 25 of the Constitution. *Shannor Seervai, Why Muslim's Still can't Adopt in India?*, THE WALL STREET JOURNAL (March 19, 2014), <http://blogs.wsj.com/indiarealtime/2014/03/19/why-muslims-still-cant-adopt-in-india/> (last visited Feb. 15, 2015).

CHILD TRAFFICKING: VIOLATION OF HUMAN DIGNITY

Debasree Debnath*

Introduction

“All human beings are born free and equal in dignity and rights.”¹

Children are born free and they have also equal rights in our society. The basic unit of the society is the family, where the children are born. But, today, the family itself sometimes plays an oppressive role in violating the rights of the children. The State also played a role of violating the rights of the children by giving permission to various industries, where children work. For example in factories children are often seen working in their early age. Children are the beautiful gift of God, but, they are also not free from the dark side of our society. The reality of life is not rosy for them also at times.

The struggle for human rights started in the Western World in the beginning of the 13th century. The great Charter known as the Magna Carta was the first document which protects the rights of the people. Child rights are violated in each and every day in our society in many forms. Recently, the practice of trafficking in children is the worst form of violation and exploitation of their rights. Stories of child trafficking show a harsh reality of today's era. Trafficking deny the basic human rights of the people. Trafficking is considered as the third largest form of transnational organised crime after firearms and drugs.² In trafficking human beings are purchased and sale for the purpose of forced labour, child soldiering, sexual slaves, begging, spies, domestic servants in the cities etc. Child trafficking is the worst form of violation of children human rights. Children are trafficked often by child sex tourists.

In the history, if we look there is no specific reference to prostitution in the Vedic literature and Vedic hymns, ancient Indian mythological works such as Ramayana and Mahabharata do contain reference regarding prostitution.³ Academic writings have mentioned the existence of maintenance of prostitutes by the kings and they were provided maintenance by the state.⁴

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1 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> (last visited Mar. 1, 2015).

2 Bindu Jindal, *Trafficking of Women: Violation of Human Rights Dictate*, in HUMAN RIGHTS AND GENDER JUSTICE 175 (2012).

3 Deva M Prasad, *Legal Perspective of Women Trafficking for Commercial Sexual Exploitation in India*, 1 INDIAN HUMAN RIGHTS LAW REVIEW 243 (2010).

4 *Id.*

In recent years this ill practice is increasing in our society because of the globalization, poverty, the growth of the global commercial sex industry etc. Trafficking is a modern form of slavery, where the women and children are owned by the traffickers. Crores of rupees are earned by the traffickers every year for selling and reselling the human beings who are trafficked.

Definition of Human Trafficking

The term trafficking was first used in the mid 20th century as ‘white slave traffic’ and ‘the trafficking in women and children’ to refer to forcing women and children into prostitution.⁵

Article 3, paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, defines Trafficking in Persons as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.⁶

Trafficking is synonymous with the trade in children and women for prostitution, bonded labour and other forms of slavery. Trafficking can also be used to describe the smuggling of male and female persons for monetary gain. In the late 1990s, the Organization for Security and Cooperation in Europe (OSCE) pointed out that “despite divergent definitions, there is a growing agreement that the problem of “trafficking in human beings” involves two key elements,⁷

- (i) recruitment or transport and
- (ii) forced labour or slavery-like practices (actual or attempted)

Human trafficking involves issues of human rights and rule of law, law enforcement and crime control, of inequality and discrimination, of corruption, economic deprivation and migration.

5 KATHRYN CULLEN DUPONT, HUMAN TRAFFICKING 75 (1st ed. 2009).

6 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime art. 3, Nov. 15, 2000, 53/111.

7 Organization for Security and Co-operation in Europe, *Combating Trafficking as Modern-Day Slavery: A Matter Of Non-Discrimination And Empowerment Combating human trafficking* (2012) <http://www.osce.org/secretariat/98249?download=true> (last visited Feb. 15, 2015).

Global Alliance Against Traffic in Women (GAATW) definition of trafficking includes forced labour alongside sexual exploitation. It has trained anti-trafficking activists on human rights in the context of trafficking since 1996. The Human Rights Standards for the Treatment of Trafficked Persons (HRS) aims to promote respect for the human rights of individuals who have been victims of trafficking, including those who have been subjected to involuntary labour and/or slavery-like practices. The HRS can be used as a guide in providing assistance to women and taking legal action against traffickers.⁸ From the past ten to fifteen years the crime of trafficking has increased in our society. In trafficking the victims are illegally smuggled outside the country or it can be within the country, from one State to another State. The traffickers profits from the efforts of their victims. The victims are forced to do the works which the traffickers told them to do. Some trafficking victims are captured and kept by force. Some are imprisoned in chains or under guard, but there are other forms of force as well. Some traffickers physically did not torture the victims but they psychologically tortures the victims.

Present Scenario of Child Trafficking

Every year many children are trafficked. Children are also human beings, they have also equal rights in our society. Their rights are violated when they are got trafficked by the traffickers. Human rights are the basic right which are applicable to all, without discriminating on the grounds of race, religion, caste, creed, language, sex, place of birth etc. These rights are essential for all the individuals as they are indispensable for their freedom and dignity and are conducive to physical, moral, social and spiritual welfare.⁹ They are also necessary as they provide suitable conditions for the material and moral uplift of the people.¹⁰ Children are the future of the society. Their rights are also important. According to the United Nations Convention on the Rights of the Children, that India ratified in 1992, all children are born with fundamental rights,¹¹ like—

- (i) Right to Survival - to life, health, nutrition, name, nationality.
- (ii) Right to Development - to education, care, leisure, recreation, cultural activities.
- (iii) Right to Protection - from exploitation, abuse, neglect.
- (iv) Right to Participation - to expression, information, thought, religion.

8 Global Alliance Against Traffic In Women, *Human Rights Standards For The Treatment Of Trafficked Persons* 14 (3rd ed. 2001).

9 *Supra* note 2, at 175.

10 *Id.*

11 Convention on the Rights of the Child art. 40, Nov. 20, 1989, 1577 U.N.T.S. 3.

Children have the right to an adequate standard of living, education and services, and to play and recreation. They have also the right to meet basic human needs such as food, shelter, education, health care, and gainful employment. To reside in a healthy environment also is a basic right of Children. The child rights are important because of many reasons, some of them are,

- (i) Children are innocent, trusting and full of hope. They are the future of the country.
- (ii) The United Nations Convention on the Rights of the Child (UNCRC) recognizes that child rights are essential to the proper development of a child. It grants all children and young people (aged 17 and under) a comprehensive set of rights.¹²
- (iii) The children rights are important not only for children, but for all of society. A society that doesn't recognize these rights and doesn't make the adequate investments in young people will do damage to itself in the future since its youth will not develop to their fullest ability not having lived a healthy childhood.

Every year children and women are trafficked in many countries from India and out of India. Trafficked children are sent to brothels, factories, child soldiers, dance bars, homes etc. Once child are victimised they are being subjected to physical as well as psychological torture. They are subjected to unconditional exploitation for an unlimited time. Children who are used as child soldiers are tortured brutally. They are forced to take intoxicated things and the girls are often victimised of rape and sexual violence. The United Nations Children's Fund (UNICEF) defined "child soldier" as—

"Any child boy or girl under 18 years of age, who is part of any kind of regular or irregular armed force or armed group in any capacity, including, but not limited to: cooks, porters, messengers, and anyone accompanying such groups other than family members. It includes girls and boys recruited for forced sexual purposes and/or forced marriage."¹³

Children are sent to fight on the front lines and have been sent into minefields ahead of adult soldiers. Even children of seven to eight years are also recruited to serve the military officers. Children are serving the armies also in Asian countries. Child soldiers are increasing day-by-day and are used in armed conflicts. The child

12 *Id.* art. 1.

13 United Nations International Children's Emergency Fund, *Factsheet: Child Soldiers*, <http://www.unicef.org/emerg/files/childsoldiers.pdf> (last visited Feb. 15, 2015).

soldiers are at high health risk also. They got affected by various viral diseases like HIV/AIDS. Women and children create the largest group of victims of trafficking for sexual and labour exploitation. Male victims are trafficked for the purposes of labour in bars, child soldier, construction sites, bars, restaurants etc. Traffickers also forced the victims to beg in streets.

The bitter truth relating to child trafficking is that, they are abused by their own family members and the known persons. Poverty can be traced as one of the reason of trafficking that makes it easier for traffickers to commit this heinous crime in our society. Many promises are made to the victim to acquire their consent. Even young boys and girls are kidnapped for child soldiers and sexual slaves. The parents are giving their child to the traffickers without knowing the consequences and in false believe that, the children will receive education or good job or a better life. The victims are sometimes also recruited by the false promises of marriage.

Now-a-days, millions of girls and boys worldwide are becomes victims of sexual exploitation. The availability of child pornography in online is growing day-by-day. This reveals the horrific truth of child trafficking. For sexual exploitation children are trafficked by the commercial sex industry persons who forced the victims and compel them to work as a sex worker for the purpose of monetary gain. These victims even do not know the situation which they have to face after they are trafficked and until they find themselves being forced to take clients. Some children are deceived and kidnapped before being trafficked for commercial sex purposes.

The children who are used as prostitutes are retained in terrible conditions and it also violates their fundamental human rights.¹⁴ Women and girls have also been trafficked into internet pornography. Even some seemingly legitimate enterprises, such as matchmaking organizations may, in fact, sell women into a form of sexual servitude though the mail-order bride industry.¹⁵ Women also travel to another country, in the belief that they will be married and are then are forced into prostitution when they arrive.

Children are often also trafficked for the purposes to work in the factories. They work in carpet factories, mine factories etc. In South Asia most of the workers are children between the ages of four to fourteen years. They tied the knot of the carpet very beautifully because of their little fingers. The carpet employers recruited many labour every year, mostly the male child to work in the factories. The

14 Vanessa von Struensee JD, MPH, *Globalized, Wired, Sex Trafficking In Women And Children*, 7 MURDOCH UNIVERSITY ELECTRONIC JOURNAL OF LAW 20 (2000).

15 *Id.*

children who work very slowly are often beaten by the employer and remain unfed.

The children are also trafficked to work in the mine factories, although it is prohibited under article 24 of the Constitution of India. Among the other groups in our society, like the women, mostly, the orphan children are trafficked in a large number, because, they are looked as a burden. Sometimes, females are sold by the male members of family to earn some money or obtain a share of their future income.¹⁶

In *Labourers Working on Salal Hydro-Project v State of Jammu and Kashmir*¹⁷ the Court held that, construction work being a hazardous employment, children below the age of fourteen years cannot be employed on any such work, because such work is prohibited under Article 24 of the Constitution of India.

Trafficking can be seen as an illegal business in which the traffickers make profit from this. Trafficking is the violation of human rights and the persons who are trafficked are deprived of their right to life, health care, liberty and slavery.

Children are also exploited by giving marriage at their early age. In the day of Akha Teej many children are given marriage in Rajasthan, because they thought that day is lucky for the marriage couple. They believe that, the marital life bring good fortune if they got married at that day.

The children who are given marriage at the early age are deprived of their rights, such as, right to education, rights to live in a healthy environment etc. The child brides suffer a lot and it becomes a loud cry which the society sometimes cannot hear and they cry silently in the dark night. Marriage before the age of eighteen is a reality in today's society. Child marriage is a violation of the rights of the children. Sometimes child marriage leads to early pregnancy at an age when her body is not even physically fit for given birth to a child.

Child sexual exploitation is increasing because of the demand from the global sexual industry. Children are the vulnerable group, so, it becomes easier to hire them. They are trafficked from many states like Andhra Pradesh, Bihar, West Bengal, Uttar Pradesh, Punjab, Haryana, Odisha, North-eastern region etc. and they sent to places like Delhi, Goa and abroad. They are trafficked for the commercial sexual exploitation and for other reasons as well, like begging, workers etc. It was proven that, the children who are rescued have been trafficked in some place.

16 *Supra* note 7, at 177.

17 AIR 1984 SC 177.

In spite of changes in the legislation providing for a broader definition of human trafficking, still this harsh practice is prevailing in our society. The children are exploited in the sex industry, although a growing number of Non-Governmental Organisation (NGO) and organisations are dealing with this ill practice to stop such heinous practice in our society.

Causes and Contributing Factors

Economic Factors

The economic conditions are becoming worse day-by-day. In our society a large number of people are residing below the poverty line. It pushed the poor families to give their children in the hand of the traffickers in the false believe that, their children will be given job and education by the traffickers. Moreover, now-a-days, trafficking becomes a lucrative business that has become a significant source of income for organized crime enterprises.

Demand for Sexual Services

The demand for sexual services is increasing and is a major reason for trafficking. The traffickers who are related with such kinds of heinous crime because of such demands trafficked the children and forced them to become sexual slave. The online demand for child pornography is again a root cause for child trafficking.

Domestic Violence as a Cause of Trafficking

It can also be a cause for trafficking. The women who become victims of domestic violence sometimes do not have a place to go. So, to become self-sufficient they left the home and sometimes come under the web of the traffickers.

Effects and Consequences

Violence against women and girls is one of the most prevalent human rights violations in the world. Victims of trafficking face many problems, like, legal consequences, health consequences etc.

Health Consequences of Trafficking

The children who got trafficked face serious health consequences, both physical and mental. The victims who are forced to work as sexual worker are more often suffered by sexually transmitted diseases, like HIV/AIDS. The sexual activity involves many different experiences. The victim can be unwontedly touched, grabbed or sexually assaulted. This type of health hazards leads to the mental distress, disorder etc. They work in a poor health condition. They are forced to take the drugs which lead to severe health consequences.

Legal Consequences of Trafficking

Sometimes the trafficked children caught by the local authorities and are detained in the police station. They face problems because of the violation of the laws. It was found that, the children are unable to cooperate with the police with regard to the trafficked persons who brought them in a particular place for this heinous business. They do not know about all the members of that business and even if they know they do not tell this to the police because of the fear of their own life. Because, in this situation it may happen that, the traffickers murdered that victim.

Global Consequences of Trafficking

The most direct effect of trafficking is on individual victims, but it also has consequences for the entire world community. It leads to the breakdown of societies by removing individuals from their own social networks and family structures. Trafficking also affects the workforce. According to the International Labour Organization, trafficking contributes to an irretrievable loss of human resources for developing countries.¹⁸

Legal provisions relating to Trafficking

Law as a controlling instrument plays a major role in the State response to the issue of trafficking.¹⁹ Laws are essential and first step to protect human trafficking both nationally and internationally. There are many laws and Acts to prohibit this heinous crime in our society. The definition of trafficking has also been broaden time to time to restrain such ill practise. But, till the crime relating to trafficking is increasing and the victims of trafficking are exploited in many forms.

Provisions under the Constitution of India 1950

The expression 'traffic in human beings' commonly known as slavery, implies the buying and selling of human beings as if they are chattels, and such a practice is constitutionally abolished.²⁰

The Constitution of India bans the traffic in persons under Article 23. This right is given as a fundamental right in our Constitution which prohibit "traffic in human beings and other similar forms of forced labour."²¹ The legal framework plays a vital role in prohibiting this evil practice in our society.

Article 24 of the Constitution of India also prohibits employment of children in factory or mine or in any other hazardous employment.

18 U.S. Department of State, *Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report* (2003) <http://www.state.gov/j/tip/rls/tiprpt/2003/> (last visited Feb. 15, 2015).

19 *Supra* note 3, at 243.

20 M.P. JAIN, *INDIAN CONSTITUTIONAL LAW* 1730 (6th ed. 2013).

21 Constitution of India, art. 23 (1950).

Now-a-days child labour has also become a growing problem in our society. The poor families appoint their children in work at an early age for economic purposes.

Judicial Pronouncements

The judiciary as a custodian and protector of human rights plays a very important role in providing proper mechanism and guiding principles for implementation and enforcement of human rights. The Supreme Court of India and various High Courts have time to time given judgements to protect the rights of the people. The judgments with regard to the matters involving trafficking, prostitution and sexual exploitation play a vital role in eradicating these evil practices from our society. In *People's Union for Democratic Rights v Union of India*,²² the Supreme Court considered the scope and ambit of Article 23 in detail. It was held by the court that the scope of Article 23 is wide and unlimited. It strikes at traffic in human beings and beggar and other forms of forced labour wherever they are found. It is not merely begging which is prohibited by Article 23 but also other forms of forced labour.

In *M. C. Mehta v State of Tamil Nadu*²³ the Supreme Court has held that children below the age of fourteen years cannot be employed in any hazardous industry, mines or other works and has laid down exhaustive guidelines how the State authorities should protect economic, social and humanitarian rights of millions of children, working illegally in public and private sections.

In *People's Union for Democratic Rights v Union of India*,²⁴ the Court held that the construction work is a hazardous employment and therefore under Article 24 of the Constitution of India, no child below the age of fourteen years can be employed in the construction work even if construction industry is not specified in the schedule to the Employment of Children Act, 1938. So, the children below the age of fourteen years are not allowed to work in the construction work of Asiad Project in Delhi in this case.

In *Gaurav Jain v Union of India*²⁵ public interest litigation was filed before the Supreme Court regarding the issues relating to social justice, right to equality of statues, dignity of person and social integration of the prostitutes, before the Court. The Court has pointed out that the prostitutions are also citizens of this country but they have become victims of the trap of poverty, illiteracy and ignorance. Further they are always seen as an object and not as a human being. The Supreme Court also made direction for the formation of a

22 AIR 1982 SC 1943.

23 AIR 1997 SC 699.

24 AIR 1983 SC 1473.

25 1997 (8) SCC 114.

committee to look into problems of prostitution, child prostitutes for the purpose of rehabilitation and rescue.

In *Vishal Jeet v Union of India*²⁶ the Supreme Court has directed the State Governments to instruct their law enforcing authorities to take action under the law to eradicate child prostitution.

Suppression of Immoral Traffic in Women and Girls Act (SITA) 1956

Pursuant to Article 23 of Constitution of India and the UN Convention for Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950, to which India is a signatory, the Suppression of Immoral Traffic in Women and Girls Act (SITA) 1956 was enacted. The Act aims at suppressing the evils of prostitution in women and girls and achieving a public purpose, *viz*, to rescue the fallen women and girls to stamp out the evils of prostitution and also to provide an opportunity to these fallen victims so that they could become decent members of the society.²⁷ But this Act has its lacuna in itself. SITA is actually contrary to the UN Convention on Trafficking as no victims of prostitution should be punished as per the convention. At the same time the legislation in no way criminalised the prostitution in itself. This Act acknowledges that prostitution was a necessary social evil. Although SITA has undergone amendments twice. The first amendment took place in the year 1978, named as, Immoral Traffic Prevention Act (ITPA) 1986. This amendment made the legislation applicable to men as well as women and has some punishments for certain offences.

The ITPA (Amendment) Bill was introduced in the year 2006 to amend the Immoral Traffic (Prevention) Act 1986. The Bill tries to tackle the problem of trafficking through both supply sides (by taking measures to punish traffickers) and demand side (penalties for clients) mechanisms.²⁸

Provision under the Indian Penal Code (IPC) 1860

The Indian Penal Code, 1860 also provides some provision by which such kind of ill practice should be abolished from our society. Like, Section 366A makes it a crime to induce any minor girl under the age of eighteen years to go from a place with intent that such girl may be forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.

Section 366B deals with extra-territorial offences, penalising importation into India of a girl below the age of twenty one years for

26 AIR 1990 SC 1412.

27 *Supra* note 25, at 1740.

28 Editorial, *Human Trafficking Bill: Limited Priorities*, ECONOMIC AND POLITICAL WEEKLY 3680-3681 (2007).

illicit intercourse or prostitution. These two sections were inserted in the IPC by the Indian Penal Code (Amendment) Act 20 of 1923 to give effect to certain articles of the International Convention for Suppression of Traffic in woman and Children. These sections are inserted for the purpose of giving punishment to the persons who import or export girls for prostitution. Section 372 and 373 of IPC punish the trade of selling and buying minors for purposes of prostitution. Section 371 of IPC also deals with the provision relating to the habitual dealer who steals the children in order to sell them as slave. This section provides punishment for such kind of person.

To stop such evil practice brought special law in the year 2012. The Protection of Children from Sexual Offences Act, 2012 was enacted for the protection of children from sexual abuses.

Apart from all these laws the Government also take initiative to eradicate trafficking by creating awareness programmes and give education to the peoples of the society, so, the people become aware of such heinous crime. In the countries and States where there are no strict law or anti-trafficking laws to prohibit trafficking, by raising awareness among the people, this crime may be shorten. The media also play a vital in exposing stories of trafficking to the Government and to take action.

Child trafficking has an alarming rate in Tamil Nadu and Goa. In these States the ratio of commercial sexual exploitation, pornography, etc. are very high. The National Human Rights Commission issued notices to the two State Governments as well as to the Ministry of Women and Child Development, Government of India, calling for reports on the situation.²⁹ Simultaneously, it also decided to have this issue considered on a regular basis by a Core Group, consisting of representatives from the National Commission for Women, the Ministry of Women and Child Development, UNICEF and selected NGOs.³⁰

International Laws to Prohibit Child Trafficking

The Victims of Trafficking and Violence Protection Act 2000, the Trafficking Victims Protection Reauthorization Act 2003, the Trafficking Victims Protection Reauthorization Act 2005, and the Trafficking Victims Protection Reauthorization Act of 2008 provide the tools to combat trafficking in persons both worldwide and domestically.

29 Savita Bhakhry, *Role of National Human Rights Commission in Protecting and Promoting Children's Rights*, NATIONAL HUMAN RIGHTS COMMISSION 51 (2012).

30 *Id.*

The Trafficking Victims Protection Reauthorization Act of 2008 is also known as the 'William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008'. This Act was enacted to enhance measures to combat trafficking in persons.³¹

A bill namely, Trafficking Victims Protection Reauthorization Act of 2013, was introduced on February 28, 2013 in the Congress Session (113th Congress, 1st Session), but was not enacted.

International Conventions Suppressing Human Trafficking

The sex trade flourishes at the cruel expenses of the most vulnerable and voiceless people in the world. Human trafficking is a criminal activity that is widely acknowledged as a major and fast-growing industry.

The Universal Declaration of Human Rights (UDHR) is a milestone in the history of human rights. This Declaration was proclaimed by the United Nations General Assembly on 10th December, 1948. This declaration includes the children rights and gives recognition of the child as an autonomous individual. The UDHR has stipulated that childhood is entitled to special care and assistance. The General Assembly recognised some essential rights to the children so that they have a happy childhood and be enabled to grow up to enjoy their own good and also enjoy their fundamental rights and freedoms.

The various International Conventions also established for the protection of the child rights. The optional protocol to the Convention on the Rights of the Child, adopted by the General Assembly established eighteen as the minimum age for direct participation in armed conflict, for forced or compulsory recruitment, and for any recruitment or use by non-governmental armed groups. But, the real truth behind this is that, then also children are forced to become the child soldier at an early age. This problem now-a-days become a global phenomenon.

Article 4 of the Universal Declaration of Human Rights provides, no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. But, this ill practice is still in existence in many countries in its new guise, for example trafficking. The trafficking is one of the modern forms of slavery. The victims of trafficking lose their freedom. They are forced to work and they are paid very little or paid nothing. They are sometimes confined under threat, violence or even death.

Article 7 of the International Covenant on Civil and Political Rights, 1966 also prohibits torture or cruel, inhuman or degrading treatment or punishment. Although the Conventions are protecting such rights, all these rights are violated in our society. The United

31 William Wilberforce, *Trafficking Victims Protection Reauthorization Act*, 122 STAT. 5044 (2008).

Nations Children's Fund (UNICEF) estimates that, 1.2 million children become trafficking victims every year,³² while International Labour Organization (ILO), a United Nations Agency, estimates that there are 12.3 million trafficked people.³³ UNICEF and other organisations provide child soldiers education, training and in some cases, psychosocial support.

Article 6 of the Convention on the Elimination of all Forms of Discrimination Against Women states "All Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."

The League of Nations was taken initiative also give some provisions to protect the rights of the children. It focused on the children who are employed in the factors and mines and the minimum age of the children to work. Several bodies were established to deal with the issues of working conditions of children, trafficking and stateless children. The needs to protect the rights of the children are felt because children are the future of the human civilization.

In *State of Rajasthan v Om Prakash*,³⁴ the Court held that children require special treatment on account of their very nature. They need special care and protection. They are the county's future. Hope of the future rests on them.

Another Convention relating to child right is the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, which is also known as the Worst Forms of Child Labour Convention. This Convention was adopted by the International Labour Organization (ILO) in the year 1999. It prohibits debt bondage, forced or compulsory labour, prostitution and the production of pornography, and other work likely to harm the health and safety or morals of children.

The Convention on the Rights of the Child recognises the rights of the child. The State parties recognise the right of every child who are alleged as an accused of having infringing the penal law to be treated in a manner which is inconsistent with the dignity of the children. The Convention is a moral code on how the children should be treated. Its objective is to ensure that appropriate legislative changes are made to ensure the rights of the child in each country. It confers a new status on the child who is no longer only provided with services or in need of protection, but someone who must be called

32 Continuing needs of children: United Nation's International Children's Emergency Fund, A/RES/417 (Dec. 1, 1950).

33 Patrick Belser, *Forced Labour and Human Trafficking: Estimating the Profits* (Mar. 2005) http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-declaration/documents/publication/wcms_081971.pdf (last visited Mar. 5, 2015).

34 (2002) 5 SCC 745.

upon to participate in decision making processes related to his/her life and whose perspective must be noted and heard.

The UN Trafficking Protocol namely, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, calls for special protection for trafficked victims. This protocol includes the measures to prevent trafficking and includes punishing the trafficker. The purposes of this Protocol are:³⁵

- (a) To prevent and combat trafficking in persons, paying particular attention to women children;
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights and
- (c) To promote cooperation among States Parties in order to meet those objectives.

Other Measures to Prevent Trafficking

Raising Awareness

The awareness campaigns played a very important role to prevent the crime in our society. It makes the people aware of the laws and regulations and the crimes in our society. The people who are not able to get education by attending these awareness camps can be able to know regarding the society much better.

Education

Education is the biggest tool to prohibit the crime in the world. It helps to gather knowledge which helps to curtail the crime in our society. There are a number of ways by which the information can be disseminated to the people, like, press conference, media campaigns, documentary films etc. Education makes the people aware about the various crimes. Children are the beautiful gift of God and we must protect them. By acquiring knowledge they will be able to know their rights.

Lobbying

Many Non-Governmental Organisation (NGO) at the national and international level can involve in lobbying for the changes in the laws which are there to protect the trafficked victims and to get a more strong legislation to protect the victims. Effective lobbying necessitates specific strategies such as the need to clearly identify the desired change, to develop a plan of action and to gather support for the issue.

35 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime art. 2, Nov. 15, 2000, 2237 U.N.T.S. 319.

Incidents of Child Trafficking

Case study of Childline³⁶

Rani is from Majhasaur village, Mirzapur district of Varanasi. Her father had expired and her mother unable to look after the family had tried to poison the family. Rani and her siblings survived the attempt, however her mother expired. She was married off to a 40-year-old man. In reality she was sold to him for Rs. 10,000. When Rani went to the police to complain about her land being taken over by the villagers, the police sexually abused her. She was given Rs. 1000 by the police stating that he would help her. Rani was introduced to people who pulled her into the racket of child trafficking. She was sent to various places such as Banaras, Azamgarh Ambedekar Nagar and Allahabad etc.

Rani was sent to Raja Talab to meet a prospective client, but when he did not turn up till 10.P.M late in the night she had to return to Varanasi. While waiting in the bus stand she was found by the RPF. Rani handed over the phone numbers and the SIM card containing all the information to the team.

CHILDLINE Varanasi received a call from RPF Inspector informing about having found a 17 year old at the Varanasi Cantonment railway station. The girl was brought to the CHILDLINE office by one of the team members.

The details of the case were handed over to the CWC. The next phase was to contact the Superintendent of Police. A raid was organized and the child trafficking racket was cracked down. Four men and three women involved in the racket were arrested.

After rescue, Rani was temporarily kept at a Girl's home in Lucknow and subsequently rehabilitated with her elder sister.

Case study of Nagpur, Maharashtra³⁷

A baby girl was found abandoned near a garbage heap. She was picked up by some people and brought to a woman, apparently a widow, and in need of money. She was promised a handsome monthly allowance and asked to take care of the baby as if it were her own daughter, with enough to pay for her food, education and clothing. In fifteen years, the little girl grew with the woman, believing her to be the mother. The widow too developed a strong bond with the girl. The girl was a student of class X when a man came to the woman, told her that her "duties" with regard to the child were over, handed her some

36 Case of Child traffickers, CHILDLINE <http://www.childlineindia.org.in/1098/caseofchildtraffickers.htm> (last visited Jul. 20, 2015).

37 John Dayal, *Some recent examples of human trafficking in India*, http://creative.sulekha.com/some-recent-examples-of-human-trafficking-in-india_595493_blog (last visited Feb.15, 2015).

money and took the girl away. The story came to light when anti-trafficking activists subsequently rescued the girl.

Suggestions to Prohibit Trafficking³⁸

- The state must establish industrial units in backward areas and provide them special incentive to industrials such as tax concession, power supply and linkage with marketing including export.
- The right to education must be applied in clear sense of the word and state must ensure that all children go to school. Education of girls also has impact on early marriage and health care.
- The anti-trafficking laws should be assisted with the international agreement for extra-territorial jurisdiction to arrest and prosecute traffickers or for recording the evidence.
- Legal procedures should be victim friendly and the court should order for compensation to restore the dignity of the victim.
- Some of the immediate needs of rescued victims are treatment of trauma, medical treatment, counselling and safe shelter.
- The specific treatment should be given to the HIV/AIDS affected victims. The co-operation of NGOs and public health services can do better in this field.

Conclusion

To conclude, children need special care. Their rights should be protected. Now-a-days trafficking is a major subject of concern and it must be eradicated globally. The law against trafficking focused more on the victim rather than on traffickers, so, it needs to be reformed. Children are born free and they have as much rights as any other humans in our society. Their rights become even more significant because they much more vulnerable than the others. The basic unit of the society is the family, where the children are born. But, today, the family itself sometimes plays an oppressive role in violating the rights of the children. Hence, the abolition measures should be taken up by the legislature, so, that these evil practices are eradicated from our society from the grass root level beginning from home.

38 *Supra* note 8, at 178-179.

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