

**JUVENILE JUSTICE SYSTEM IN INDIA : A STUDY
WITH REFERENCE TO JUVENILE JUSTICE (CARE
AND PROTECTION) ACT, 2015**

Thesis

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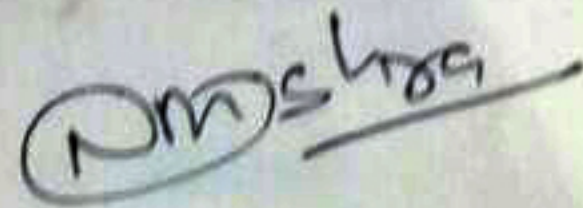
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DECLARATION

I, **NARENDRA KUMAR MISHRA**, hereby declare that research work embodied in this Ph.D. thesis titled "**JUVENILE JUSTICE SYSTEM IN INDIA : A STUDY WITH REFERENCE TO JUVENILE JUSTICE (CARE AND PROTECTION) ACT, 2015**" has been carried out by me under the supervision of **DR. PRADEEP KUMAR, Assistant Professor**, Department of Law, School for Legal Studies, Babasaheb Bhimrao Ambedkar University (A Central University) Lucknow. This Research work is an original work and it has not been previously submitted in part or full for any other degree or diploma in this University or any other University.

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Certificate

This is to certify that the thesis titled "*JUVENILE JUSTICE SYSTEM IN INDIA : A STUDY WITH REFERENCE TO JUVENILE JUSTICE (CARE AND PROTECTION) ACT, 2015*" submitted by *Mr. NARENDRA KUMAR MISHRA* is an original research work and has not been previously submitted in part or full for the award of any other degree or diploma to this or any other university.

The thesis submitted to Babasaheb Bhimrao Ambedkar University, Lucknow satisfies all the requirements as stipulated in the Doctor of Philosophy (Ph.D.) Regulation 1999 as amended in 2013 and it is fit for submission and evaluation for the award of the Degree of Doctor of Philosophy of the University.

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PREFACE

The issue of juvenile delinquency had been a very relative phenomenon since crimes and offences by juveniles have taken a centre-stage in the present day society. The menace of these offences had been growing in scary proportions and although we have the required legal statutes framed with the sole object of rehabilitation of the juveniles in conflicts with law, little have taken place in the reality.

A close study of various legislature and observations made by apex court reveals that Juvenile Justice is based on twin concept of “*mensrea*” and “*parens patriae*” and seeks to ensure best interest of juvenile. The concept of Juvenile Justice assumes that children do not have the same mental capacity as adults to take full responsibility for their actions and for that reasons they are more amenable to reform than adults.

Post independence, when Constitution of India was being enacted proper cares were taken for juvenile by imposing through the Articles 15(3), 39(e), 39(f), 45 and 47 of the Constitution a primary responsibility on the State to ensure that all developmental needs of the children are met with and that their basic human rights are protected.

Juvenile can be defined as a child who has not attained a fix age at which he is treated as like an adult person under the law of the land, can be held liable for his criminal acts. Delinquency is a type of abnormality. When an individual deviates from the course of normal social life then his behaviour is called ‘Delinquent’. When a juvenile, below an age specified under a statute exhibits behaviour which may prove to be dangerous for the society or for him, he may be called a Juvenile delinquent. Juvenile delinquents are such offenders which includes boys and girls who are under 18 years of age. A Juvenile delinquent is a young person incorrigible or habitually disobedient.

The Juvenile Justice (Care and Protection of Children) Act 2015 treats all the children below 18 years equally, except that those in the age group of 16-18 can be

tried as adults if they commit a heinous crime. A child of 16-18 years age, who commits a lesser offence (a serious offence), may be tried as an adult if he is apprehended after the age of 21 years. A heinous offence attracts a minimum seven years of imprisonment. A serious offence attracts three to seven years of imprisonment and a petty offence is treated with a three year imprisonment. No child can be awarded the death penalty or life imprisonment. It mandates setting up of Juvenile Justice Boards (JJBs) in each district with a metropolitan magistrate and two social workers, including a woman. The JJBs will conduct a preliminary inquiry of a crime committed by a child within a specified time period and decides whether he should be sent to rehabilitation centre or sent to a children's court to be tried as an adult. The board can take the help of psychologists and psycho-social workers and other experts to take the decision.

I have also discussed the international perspective of Juvenile Justice. The UN and other international organizations made effort to do well and good for juvenile.

Juvenile delinquency is a worldwide menace that has attracted so much in focus and attention. In the era of globalization the juvenile justice impacted as they have affected the areas of criminal justice operations. Globalization increased connectivity and interdependence that has evolved among countries. This sense of interconnection has been increased by technological advances as well as cultural sifts. e.g. internet, mobile. Despite commonalities throughout the world, there is still a wide degree variability in the way in which delinquency is measured from country to country around the world, and this makes it difficult to determine the exact extant of delinquency and its impact on the global community. Universal Declaration of Human Rights, 1948, Geneva Convention, 1949, United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (Beijing Rules), U.N. Convention on disabled child, Convention on the Rights of the Child, 1989, UN Rules for the Protection of Juveniles Deprived Of their Liberty: Havana Convention, 1990 etc.

The Constitution of India guarantees all children certain rights, which have been specially included for them. Article 14, 15(3), 23, 24, 39 (c), 45 deals with children and Article 51 1(K) put obligation on parents of child to give education. Section 82 and 83 of the Indian Penal Code gives immunity to children of up to the age of 12 years.

The Supreme Court in *Sampurna Behura vs. Union of India* (writ petition (civil) no. 473 of 2005, February 9 2018) M.B. Lokur and Deepak JJ. observed that-
“*Inquiries under the JJ Act and trials under other statutes such as the Protection of Children from Sexual Offences Act, 2012, the Prohibition of Child Marriage Act, 2006, trials for sexual offences under the Indian Penal Code and other similar laws require to be conducted with a high degree of sensitivity, care and empathy for the victim. It is often said that the experience in our courts of a juvenile accused of an offence or the victim of a sexual offence is traumatic.*”

“*...over the last decade or so, State Governments and Union Territories have not fully complied with the provisions of a law solemnly enacted by Parliament for the benefit of children. In many instances, only cosmetic changes have been introduced at the ground level with the result that voiceless children continue to be subjects of official apathy.*”

On the basis of it was found that the laws related to Juvenile Justice is not sufficient and lot of things to be done so that a good juvenile justice law may be enacted.

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LIST OF ABBREVIATIONS

A.I.R.	-	All India Reporter
A.S.I.L.	-	Annual Survey of Indian Law
ACHPR	-	African Charter on Human and People's Rights
ACHR	-	The American Convention on Human Rights
ACRWC	-	African Charter on the Rights and Welfare of the Child
Adm.	-	Administration
All. E.R.	-	All England Reporter
All.	-	Allahabad
Art.	-	Article
B.L.R.	-	Bombay Law Reporter
Bom.	-	Bombay
C.A.	-	Children Act
C.J.I.	-	Chief Justice of India
Cal.	-	Calcutta
CEDAW	-	The Convention on the Elimination of All Forms of Discrimination Against Women
CJM	-	Chief Judicial Magistrate
Cl.	-	Clause
CMM	-	Chief Metropolitan Magistrate
Cr.L.J.	-	Criminal Law Journal
CRC	-	Convention on Rights of Child
CrPC	-	Criminal Procedure Court
CWC	-	Child welfare committee
CWC	-	Children Welfare Committee
CWPO	-	Child Welfare Protection Officer
D.B.	-	Division Bench
Del.	-	Delhi
DRC	-	Declaration of the Rights of the Child
ECECR	-	The European Convention on the Exercise of Children's Rights
ECHR	-	European Convention on Human Rights
Ed.	-	Edition
Etc.	-	Etcetra

F.C.	-	Federal Court
Govt.	-	Government
Guj.	-	Gujrat
H.C.	-	High Court
H.C.P.	-	Habeas Corpus Petition
H.J.	-	Historical Judgment
i.e.	-	(id-est) That is
I.L.R.	-	Indian Law Reporter
Ibid	-	(Ibidem) in the same place
ICCPR	-	International covenant on Civil and political rights
ICCPR	-	The International Covenant on Civil and Political Rights
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
Id.	-	Ibid
IJJO	-	The International Juvenile Justice Observatory
IPC	-	The Indian Penal Code
IYC	-	International Year of the Child
J.	-	Judge
J.I.L.T.	-	Journal of Indian Law Institute
J.T.	-	Judgment Today
JJ.	-	Judges
JJA	-	Juvenile Justice Act.
JJA	-	Juvenile Justice Act, 1986
JJB	-	Juvenile Justice Board
JJCPCA	-	Juvenile justice (care and protection) Act.
JJS	-	Juvenile Justice System
Ker.	-	Kerala
L.R.	-	Law Review
M.P.	-	Madhya Pradesh
Mad.	-	Madras
N.	-	Note
N.O.C.	-	Notes of cases
Nag.	-	Nagpur
NGOs	-	Non Governmental Organization
OAU	-	Organization of African Unity
Pat.	-	Patna
Pun. & Hry	-	Punjab and Haryana
R.Cr.R.	-	Recent Criminal Report

Raj.	-	Rajasthan
S.C.	-	Supreme Court
S.C.C.	-	Supreme Court Cases
S.C.J.	-	Supreme Court Journal
S.C.W.	-	Supreme Court Weekly
S.C.Y.D.	-	Supreme Court Yearly Digest
Sec.	-	Section
Secy.	-	Secretary
SJPU	-	Special juvenile Police Unit
Supra.	-	Above
U.J.	-	Unreported Judgment
U.S.	-	United States
UDHR	-	Universal Declaration of Human Rights
UK	-	United Kingdom
UNCRC	-	The United Nations Convention on the Rights of the Child
USA	-	United State of America
YMCA	-	The Young Men's Christian Association,
YWCA	-	The World Young Women's Christian Association

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55. *Mohomed Alan v. The Crown*, 136 AIR 1950 (Sind) 16
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58. *Munna v. State of UP*, 1982 Cri LJ 620 (SC)
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60. *Nuruddin v. State of Assam*, 1984 Cri LJ 1724 (Gau)
61. *Om Prakash v. State of UP*, 1993 Cri LJ 1393
62. *Om Prakash v. State of UP*, 1997 Cri LJ 2710 (All)
63. *Om Prakash v. Child Welfare Board* AIR 1980 (Cal)
64. *Parbati Dasi v. Emperor* AIR 1921 (Call.) 190
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86. *Sheela Barse and Anr. v. Union of India and Ors*, AIR 1986 SC 1773
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93. *State of AP v. Vallabhapuram Ravi*, AIR 1985 (SC) 870
94. *State of Kerala v. Subbalakshmi*, 1959 Ker LR 1446
95. *State of Madhya Pradesh v. Shobharam*, AIR 1966 (SC) 1910
96. *State of MP v. Ashok Kumar*, 1995 Cri LJ 3955 (MP)
97. *State v. Jahlu*, AIR 1953 (HP) 40
98. *State v. Natrajan*, 1971 Cri LJ 1479.
99. *Subash Chand v. State of Haryana and Others*, AIR 1988 (SC) 584
100. *Sultan Singh v. State of MP*, 1997 Cri LJ 657 (MP-Gwalior).
101. *Sunil Kumar v. State*, 1983 Cri LJ 99 (Ker).
102. *Superintendent, Central Jail, Hyderabad v. C. Narsimhulu*, 1999 Cri LJ
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106. *Umesh Chandra v. State of Rajashtan*, 1982 Cri LJ 994
107. *Vinod v. State of UP*, 1999 Cri LJ 3729 (All)
108. *Vishal Jeet v. Union of India*, AIR 1997 SC 699
109. *Vishal Jeet v. Union of India*, (1990) 3 SCC 318

CHAPTER 1

INTRODUCTION

“Children are precious treasures of the future and they are the most valuable assets of a nation and society. It is the duty of State to look after them with a view to ensure the complete development of their personalities. Since society expect them to grow as responsible citizens of the future, they need special care, protection, affection and facilities because of their tender age, physique and underdevelopment mental faculties. There is no exaggeration if it is said that future well being of a particular nation depends upon how the children grow and develop”.¹

The legislature and apex court of our country have also off late started to take initiatives for the welfare and development of the children. The efforts mainly started with the enactment of the Children Act, 1960. Stating the objects and reasons of the Children Act, 1960, the Gazette of India, 1959 reads as under:

As we know children are the weakest part of the any population, and in need of extra protection. On basis of their weakness and dependence there is always a chance of exploitation and they can be thrown in to the world of crime. Obviously, it is the moral responsibility of state to protect their interest.

Our Apex court also emphasized this view and observed: Children require the protective umbrella of society for better growth and development, as they are not in a position to claim their entitlement to attention, growing up, food education and the like. It is the responsibility of the society and is one of the paramount obligations of those who are in charge of governance of the country today to attend to the children to make them appropriate citizens of tomorrow.

The rapid industrialization, urbanization and modernization of the society and economy on micro and macro level have no doubt given many material benefits, but it has also brought along some inevitable ill-effects of migration of population,

¹Lakshmi Kant Panday v. Union of India 1984(2) SCC 244

distribution of joint family system, breakdown of traditional values and norm, discontent and increase in criminality and deviance among adults and children. The significant point to note is that a majority of the under age population in conflict with law are street children. India has the largest population of street children as compared to any other country of the world. Majority of children are engaged in survival crimes, status offences and petty non-violent crimes. Many of them are first time offenders. Large scale of migration of families from rural to urban areas has also resulted in extreme over-crowding, dehumanizing working conditions, homelessness, deprivation of basic services and appalling living conditions in most cities².

Till the mid of 19th century, the issues related with children was being ignored but thereafter most of the states started recognizing this complex social problem and taking effective steps by enacting proper legislation for juvenile delinquents. The problem of juvenile delinquents has been on rise worldwide. India has also paid for its economic growth by rapid industrialization and urbanization by way of proliferation in juvenile delinquents. Since long it has been universally accepted that a juvenile delinquent, in view of his/her level of maturity and age, cannot be equated with the grown up offenders, and as such former has to be treated in different manner from the adult offender. For this reason and requirement various statutes have been passed by the legislature related to the juvenile delinquents.

Prior to independence, the British rulers enacted the law for the trial of people who were below the age of 15 years and had committed any offence. First time in the year of 1850, the Apprenticeship Act was passed in India to deal separately with children. Thereafter, the British Government enacted the Reformatory School Act, 1876 to provide that a juvenile convicted on a criminal charge be admitted to a reformatory school. But the experience revealed that these reformatory schools could not provide adequate facilities required for all round development of a child. Therefore provisions were included in the Code of Criminal Procedure 1898 to place youth upon the age of 18 years in a reformatory school. Thereafter, in accordance with the Indian Jail Committee Recommendation (1919-20) comprehensive Children Act were enacted in provinces of Madras (1920), Bengal (1922) and Bombay (1924). This is how the concept of “Juvenile Justice” developed.

²https://www.unicef.org/violencestudy/reports/SG_violencestudy_en.pdf

A close study of various legislature and observations made by apex court reveals that Juvenile Justice is based on twin concept of “*mensrea*” and “*parens patriae*”³ and seeks to ensure best interest of juvenile. The concept of Juvenile Justice assumes that children do not have the same mental capacity as adults to take full responsibility for their actions and for that reasons they are more amenable to reform than adults.

Post independence, when Constitution of India was being enacted proper cares were taken for juvenile by imposing through the Articles 15(3)⁴, 39(e),⁵39(f),⁶ 45 and 47⁷of the Constitution a primary responsibility on the State to ensure that all developmental needs of the children are met with and that their basic human rights are protected. Keeping in view the Constitutional provisions and to provide a uniform central legislation for children in the Union Territories, the Government of India enacted Children Act, 1960 for Union Territories, which was also supposed to serve as model legislation for other States, to deal with the destitute and delinquent children separately through specialized institutions. The Act was amended in 1978 to make it more efficacious. Following this legislation by Government of India, all the States also enacted their own Children Acts. However, as a result of the experience of implementing the Acts over a considerable period, it was felt that there was a lack of uniformity in the provisions of the Acts in different States. No minimum standard for basic needs, living conditions, corrective services etc. were maintained under the Children Act programmes. In view of these factors, it was felt necessary to have a uniform legislation. Therefore, the Parliament of India passed Juvenile Justice Act,1986 (hereinafter referred to as “JJA 1986”) to give care, protection, rehabilitation to delinquent juveniles which got President of India assent and implemented w.e.f. 2nd October1987. The Act envisages a comprehensive approach

³Webster Dictionary *ParensPatriae* means a doctrine that grants the inherent power and authority of the state to protect persons who are legally unable to act on their own behalf. In legal term it means where court take upon itself the status and standing of a parents to make a decision in their stead on behalf of their child.

⁴Article 15 (3) enacted that nothing in this Article shall prevent the state from making any special provisions for woman and children.

⁵Article 39(e) of Constitution enjoins a duty on the state in form of Directive principles of state polices that the health and strength of workers, men and women and tender age of children are not abused and citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

⁶Article 39 (f) protects children against exploitation and against moral and material abandonment.

⁷Article 45 and 47 imposes moral duty on the state to make provision for free and compulsory education for children and to raise the level of nutrition and the standard of living and to improve public health.

and provisions towards justice for juvenile institutions of abuse, exploitation and social mal-adjustment. The basic aim of JJA 1986 was to segregate the neglected juvenile from the delinquent juvenile and to provide treatment and training to the different categories of children separately, viz. in juvenile homes and special homes. The Act was not properly implemented and it did not provide for any special provision for children who were in the need of care. Moreover, rehabilitation machinery for the children was not structured in the Act. A survey of various cases decided under the JJA 1986 had shown that issues raised and decided by Higher Court under the Children Act; continue to rise again and again and at times, in ignorance of the earlier decisions.⁸ Therefore, strong urge was felt to bring about necessary changes in the JJA 1986 to convert the JJA 1986 from welfare legislation to an instrument for the empowerment of the children for the protection of their rights.⁹ To fulfill this objective and to overcome the shortcomings of JJA 1986, the legislature enacted the Juvenile Justice (Care and Protection of Children) Act, 2000 by repealing JJA 1986.

The Government of India also enacted at different point of time various social legislation, for the protection and development of the children. These are:

- i. Guardian and Wards Act, 1890.
- ii. Factories Act, 1948, for regulations of work by children between the age group of 14 to 18.
- iii. Hindu Adoption and Maintenance Act, 1956.
- iv. Probation of offenders Act, 1958.
- v. Bombay prevention of Begging Act, 1959.
- vi. Orphanages and Other Charitable Homes (Supervision and Control) Act, 1960-to provide for the supervision and control of orphanages, homes for neglected children and like institutions and to penalize criminal activities indulged in such institutions.

⁸ Ved Kumari, "Dealing with Delinquents", Seminar No. 430, (June 1995) at 26.

⁹ Ved Kumari, "Juvenile Justice Act- A plea for Review", *Indian Journal of Criminology and Criminalities*, Vol. 17, No.1, (1996) at 1.

- vii. National Policy for Children, 1974.
- viii. Child Marriage Restraint Act, 1929 - with a view to preventing child marriage.
- ix. Immoral Traffic (Prevention) Act, 1956- for Suppression of Immoral Trafficking Women and Girls.
- x. Child Labour (Prohibition and Regulation) Act, 1986 - To ban employment of children in specified occupations and processes.
- xi. National Policy on Child Labour, 1987.
- xii. SC/ST (Prevention of Atrocities) Act, 1989.
- xiii. Young Persons (Harmful Publications) Act, 1956 - the Act seek to prevent the dissemination of publications, which are harmful to young persons.
- xiv. Prevention of Illicit traffic in narcotic Drugs and Psychotropic Substances Act, 1987.
- xv. Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992and its Amendment Act 2003.
- xvi. National Nutrition Policy, 1993.
- xvii. Transplantation of Human Organ Act, 1994.
- xviii. Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.
- xix. Information Technology Act, 2000.
- xx. Persons with Disabilities (Equal Protection of Rights and Full Participation) Act, 2000.
- xxi. National Health Policy, 2002.
- xxii. National Charter for Children, 2004
- xxiii. National Plan of Action for Children, 2005 Commission for the Protection of Child Rights Act, 2005

xxiv. Prohibition of Child Marriage Act 2006

In 2005, UNICEF published a report on children under the heading “Child under Threat”, highlighted that millions of Indian children are deprived from their right. Majority of the children getting the same treatment, although they are the future and national asset of the country.¹⁰

India has signed the document of United Nation Declaration on the Rights of the Child, 1959 which has contained numerous rights of the children. It includes rights related health care, protection against abuse, protection from exploitation, right to express their thought and right to get the proper nutrition etc. These rights are fundamental rights given under the UN declaration. This UN declaration has inspired the India to adopt national policy on children in 1974 to achieve the purposes given under the UN document.

Children having been recognized supremely assets of the Nation. The government of India through its National Policy for Children stated that their nurture and solicitude are our responsibility. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our larger purpose of reducing inequality and ensuring social justice.

1.1 JUVENILE DELINQUENCY AND ITS MEANING AND IMPORTANCE

Juvenile can be defined as a child who has not attained a fix age at which he is treated as like an adult person under the law of the land, can be held liable for his criminal acts. Delinquency is a type of abnormality. When an individual deviates from the course of normal social life then his behaviour is called ‘Delinquent’. When a juvenile, below an age specified under a statute exhibits behaviour which may prove to be dangerous for the society or for him, he may be called a Juvenile delinquent. Juvenile delinquents are such offenders which includes boys and girls who are under 18 years of age. A Juvenile delinquent is a young person incorrigible or habitually disobedient.

Generally the act of delinquency may include, running away from home without the permission of parents, habitual behavior beyond the control of parents, spending time idly beyond limits, use to of vulgar languages, wandering about rail

¹⁰<https://www.lawctopus.com/academike/juvenile> (visited March 2nd,2016)

roads and streets market places, involve in gambling acts, committing sexual offences, shop-lifting, stealing, robbery etc. The definition of delinquency often takes on a specific meaning depending on the interests of the group or individual examining juvenile misconduct. In every definition of delinquency there is an implicit assumption of what constitutes a juvenile. This means that persons subject to the juvenile statutes in one location may not be in another place. The majority of states recognize juveniles as individuals below the age of 18. Under these ages the individual is considered a juvenile and is handled in the juvenile justice system.

In summary it can be said that a person who is under the age of 18 years should be considered as juvenile. Juvenile can be also defined as a person who is not adult according to the law of nation. The juvenile has committed an offence or violated any norms set by law.

On the basis of following acts any person can be categorized as delinquent:

- a. Ran away from home without the permission of parents
- b. Abnormal behaviors not under the control of parents.
- c. Spending time on unnecessary work beyond limits
- d. Using abusive language
- e. Wondering on roads, railway stations, street marks etc.
- f. Going to gambling places
- g. Commit sexual offence
- h. Shop breaking
- i. Stealing etc.

Juveniles may do such activities singly or through a gang.

1.2 EFFORT OF UNO AND ITS CONTRIBUTIONS

Meanwhile, the international community expressed its desire to do much more than what was being done for children world over. The United Nations has also been making efforts to secure best interest of children. The year 1985 is significant towards this effect. The United Nation Standard Minimum Rules for Administration of 'Juvenile Justice' (Beijing Rule) were framed and in 1989, the conventions on the Rights of the Child¹¹ declared that in all countries in the world children were living in

¹¹U.N. Assembly Resolution No.44/22 of 20 November, 1989.

exceptional difficult conditions and that such children need special consideration, in particular in the developing countries. Various other United Nation resolutions also came in to force:

- a. United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).¹²
- b. United Nations Guidelines for the Prevention of Juvenile Delinquents (the Riyadh Guidelines).¹³
- c. United Nations Rules for the Protection of Juveniles Deprived of their Liberty.¹⁴
- d. Convention on the Rights of the Child¹⁵.
- e. United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules).¹⁶

In order to give effect to various resolutions of the United Nations as adopted by the international community, and to overcome the weakness of the JJA 1986, the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred as JJCPA 2000)¹⁷ was enacted to consolidate and amend the law relating to juvenile in conflict with law and children in need of care and protection, by giving them proper care, protection and treatment so that their full development can take place with child friendly approach into the matters of foster care etc. It provides for an institutional rehabilitation programme for social integration through adoption, foster care, sponsorship and aftercare of the abandoned, destitute, neglected and delinquent juvenile and child. The primary intention of this legislation is also that juvenile offenders should be treated differently from adult offenders. The Act amended in 2006 and Rules were framed under the Act in the year 2007, known as Juvenile Justice (care and Protection) Rules, 2007.¹⁸ The amendment was brought to revise the Act in order to strengthen the Act and instill a child-centric rehabilitation and family restoration focused system. It takes care of every aspect of the children in need of care and protection of the state, which includes their health care, diet education, vocational

¹²General Assembly Resolution 40/33, 1985.

¹³General Assembly Resolution 45/112.

¹⁴General Assembly Resolution 40/113.

¹⁵General Assembly Resolution 44/25.

¹⁶Adopted on 14th December 1990

¹⁷Act No 56 of 2000.

¹⁸Vide G.S.R. 679(E) dated 26th October, 2007, Published in the Gazette of India.

training, recreation facilities etc. as also their personal requirements of clothing, toiletries, sanitation etc. After the 2012 Delhi gang rape, it was found that one of the accused was a few months away from being 18. So, he was tried in a juvenile court. On 31 July 2013, Subramanian Swamy, a BJP politician filed a Public Interest Litigation in the Supreme Court of India seeking that the boy be tried as an adult in a court. The Court asked the juvenile court to delay its verdict.

After the Supreme Court allowed the juvenile court to give its verdict, the boy was sentenced to 3 years in a reform home on 31 August 2013. The victim's mother criticized the verdict and said that by not punishing the juvenile the court was encouraging other teenagers to commit similar crimes.

In July 2014, Minister of Women and Child Development, Maneka Gandhi said that they were preparing a new law which will allow 16-year-olds to be tried as adult. She said that 50% of juvenile crimes were committed by teens who know that they get away with it. She added that changing the law, which will allow them to be tried for murder and rape as adults, will scare them. The bill was introduced in the Parliament by Maneka Gandhi on 12 August 2014. On 22 April 2015, the Cabinet cleared the final version after some changes. The Act will allow a Juvenile Justice Board, which would include psychologists and sociologists, to decide whether a juvenile criminal in the age group of 16–18 should be tried as an adult or not. The Act introduced concepts from the Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption, 1993 which were missing in the previous act. The Act also seeks to make the adoption process of orphaned, abandoned and surrendered children more streamlined.

The Act introduces foster care in India. Families will sign up for foster care and abandoned, orphaned children, or those in conflict with the law will be sent to them. Such families will be monitored and shall receive financial aid from the state. In adoption, disabled children and children of physically and financially incapable will be given priority. Parents giving up their child for adoption will get 3 months to reconsider, compared to the earlier provision of 1 month. Finally on dated 31st December, 2015 the bill gets the assent of the President and got published in the Gazette of India on dated 1st January, 2016 and on dated 15th January, 2015 the Act came into enforcement.

1.3 SALIENT FEATURES OF THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT 2015

It treats all the children below 18 years equally, except that those in the age group of 16-18 can be tried as adults if they commit a heinous crime. A child of 16-18 years age, who commits a lesser offence (a serious offence), may be tried as an adult if he is apprehended after the age of 21 years. A heinous offence attracts a minimum seven years of imprisonment. A serious offence attracts three to seven years of imprisonment and a petty offence is treated with a three year imprisonment. No child can be awarded the death penalty or life imprisonment. It mandates setting up of Juvenile Justice Boards (JJBs) in each district with a metropolitan magistrate and two social workers, including a woman. The JJBs will conduct a preliminary inquiry of a crime committed by a child within a specified time period and decides whether he should be sent to rehabilitation centre or sent to a children's court to be tried as an adult. The board can take the help of psychologists and psycho-social workers and other experts to take the decision.

A Children's court is a special court set up under the Commissions for Protection of Child Rights Act, 2005, or a special court under the Protection of Children from Sexual Offences Act, 2012. In absence of such courts, a juvenile can be tried in a session's court that has jurisdiction to try offences under the Act. Children in need for care and protection Child Welfare Committees (CWCs) should be set up in each district with a chairperson and four other members who have experience in dealing with children. One of the four members must be a woman. The committee decides whether an abandoned child should be sent to care home or put up for adoption or foster care. The Central Adoption Resource Agency will frame rules and regulations for adoption of orphaned children. Inter-country adoption is allowed when no Indian adoptive parents are available within 30 days of child being declared free for adoption. Adoptive parents should be financially and physically sound. A single or divorced person may adopt a child. A single male may not adopt a girl child. Disabled children will be given priority for adoption.

Children in need of care and protection can allowed to be placed in foster care based on the orders of the CWC. The selection of the foster family is based on the family's ability, intent, capacity and prior experience of taking care of children.

Buying and selling of a child attracts imprisonment up to five years. Giving an intoxicating or narcotic substance to a child attracts imprisonment up to seven years. Institutions for childcare must be registered. Corporal punishment of children in childcare institutions is also punishable and Non-disclosure of identity of juvenile offenders by media.

1.4 OBJECTIVE OF THE RESEARCH STUDY

The object for bringing separate legislation for the children was to provide special care, protection, affection and facilities to the children for their proper care. As society expects them to grow as responsible citizens of future, they need care, protection, affection and facilities because of their tender age, physique and underdeveloped mental status. But there are many causes that lead to become juvenile delinquent. The main object of the JJCPA 2000 is rehabilitation and social reintegration of juvenile or child. The object of discussion is whether the Act is implemented in accordance of the objective spelt out in the Act.

It cannot be overemphasized that implementation of the JJS is extremely demanding in India. Both the stakes and risk is high as the Act is for children who are supremely important national asset and the future well being of the nation depends to the great extent upon the fact how the children grow and develop.

The research work will aim to find out whether the Act has been implemented and enforced as per the aim and the objective of the Juvenile Justice (Care and Protection) Act, 2015. The subject in the present study is a matter of tremendous significance. The research main focus is on:

- a. To make assessment as to the contribution of judiciary, NGO's, other instruments in achieving the objective enshrined in the JJCPA 2015.
- b. To analyses the cases came before higher judiciary and their impact on the implementation of the JJCPA 2000 and JJCPA 2015.
- c. To analyses whether the Act has been implemented in its true letter and spirits. The compliance of the Act includes framing of Rules, establishment of homes, JJB, CWC, SJPU, Advisory Board etc. by each and every state in the country.
- d. To suggest remedial measures to make JJS more effective within the existing framework or what more changes is required.

1.5 STATEMENT OF PROBLEM

- a. A considerable number of children are victims of terrorism and natural disasters. 30,000 children were orphaned by terrorism in Punjab. In Jammu and Kashmir, terrorism led to a high dropout rate of 48 per cent among boys and 60 per cent among girls. Poverty, neglect, ill treatment, and family discord are forcing an increasing number of children to run away from home and take shelter on the streets. The Government of India has mentioned the number of children living on the streets as fifty lakh in 1998.
- b. The nomenclature and the categories of children under the Juvenile Justice (Care & Protection) Act changed to children in need of care and protection and included many more categories within its purview. This definition excludes child beggars from its purview and includes three new categories: namely, children living with guardians posing a threat to their safety, ill and disabled children, and child victims of armed conflicts, civil commotion, and natural disaster.
- c. According to the statistics made available to the UN secretary general's report, "We the Children", India has a long way to go in meeting the needs of its children. The figures state that 63 per cent of children born in India today would not be registered at all, 25 per cent will not be immunized against any disease, 26 per cent will not have access to clean water, 47 per cent will suffer from malnutrition in the first three years of their life, 6 per cent will be born with weight less than 2500 grams, 15 per cent will never go to school, and only 52 percent of children who begin at the first class will reach the fifth.
- d. The profile of children in India reveals that a majority of them are living in conditions of want, deprived of basic survival, subsistence, and developmental opportunities. High rates of child mortality, school dropouts, child labour, handicapped children, and the problem of juvenile delinquency are indicators of the need for intervention by the state.
- e. The basic data relating to the number of juveniles in need of care and protection and their location continues to be non-existent. Therefore, it is difficult to ascertain the criteria by reference to which the number of juvenile courts or juvenile welfare boards, homes, and other services at various places may be determined.

- f. Barring a few instances, there has been no organized pressure on the state either from the beneficiaries of the system or any other group to improve the JJS policy or operations. The beneficiaries of the JJS are children. Most of these children come from low economic, social, and educational backgrounds. Neither does their physical and mental growth or their status in the society give them the ability to organize themselves and lobby for the protection of their interests in any articulated fashion.
- g. In India, various voluntary workers and organizations have been involved in the welfare of children but they have not evolved any mechanism of co-operation among themselves, or dialogue with one another, or joint action for a place of priority for the children by the state. Individual persons or organizations have taken up the issue with the state on individual instances of injustice to children involved, but there has been no consistent pressure from the social workers on the state to brace it seriously to ameliorate the conditions of children.
- h. The Juvenile Justice (Care & Protection) Act has been enacted with the apparent objective of bringing the law in accordance with the rights approach of the CRC but its provisions fail to reflect that policy change
- i. The Act requires change in the policy is from piecemeal implementation to implementation of the Juvenile Justice (Care & Protection) Act as a whole. Cooperation of various agencies involved in the system and coordination of their activities is necessary for ensuring care, protection, and developmental opportunities to all children as envisaged in the Act.
- j. There is no dearth of evidence in the field of juvenile justice of the large-scale unawareness of the law itself among the very personnel of the states who are supposed to operate and function under it. The need for orientation, in-service training, and periodical refresher courses for them in these circumstances can never be overemphasized.

1.6 SIGNIFICANCE OF THE STUDY

- a. This study on juvenile justice will examine the statistics relating to implementation of the legislation to find out the direction, rate, and lacunae in the growth of the JJS.

- b. This study on juvenile justice will identify the areas of fragmentation in the JJS.
- c. This study on juvenile justice will bring to light the vision and commitment of the policy makers of the Juvenile Justice System.
- d. This study on juvenile justice will describe the nature, scope, and structure of juvenile justice in India.
- e. This study on juvenile justice will analyze the strengths and weaknesses of the existing legislation for evolving a comprehensive and integrated Juvenile Justice System.

1.7 RESEARCH HYPOTHESIS

- a. A special provision for juveniles in Juvenile Justice Act is in consonance with Art 15(3) of the Indian constitution.
- b. The present Juvenile justice Act, 2015 is inadequate for the safeguard of juveniles in present scenario.

1.8 RESEARCH METHODOLOGY

The proposed study would be based mainly on the method of doctrinal explanatory, in addition to descriptive, analytical research methods shall also be applied in accordance with the need of prospective study. Where the things are of introductory in nature, the method to be applied will be analytical.

The information shall be gathered using secondary source of data. The research would be descriptive and narrative information using secondary sources of data. It will include governmental and semi-governmental publications, earlier research, personal records, mass media reports and law journals, public and personal documents, internet magazines and other similar good sources of data. Some primary source of data could also be used in accordance with the requirements of study. The proposed study will definitely enrich the existing knowledge about the legal aspects of ‘Juvenile-Justice.

1.9 FRAME WORK OF THE THESIS

The study has been divided into seven chapters:

Chapter First - The first chapter introduces the subject matter and defines the scope of the work.

Chapter Second - Deals with the International Perspective of Juvenile Justice: An overview. It sets down the international as well as regional human rights instruments that form the legal framework for the protection of the Juvenile. It not only looks at the specific protections to the juveniles but also at the way to juvenile justice is being given increasing recognition in more recent International documents and Conventions.

The 1985 United Nations guidelines on Standard Minimum Rules for the Administration of Juvenile Justice, worked as foundation for the major changes in the attitude of Indian law. It has changed the law in wide manner. This inspire the State to make a uniform legislation for all States. The uniform legislation aim to that ensure that no child, under any circumstances, is lodged in jail or police lock-up. Provision was to be made for a specialized approach towards prevention and treatment of juvenile delinquency. Appropriate machinery and infrastructure would be required for the care, protection, treatment, development and rehabilitation of various categories of children coming within the purview of the juvenile justice system. The Juvenile Justice Act passed in 1986 initiated uniform legal provisions for children all over the country for the first time. The Act replaced other State legislations. Ironically, even the Juvenile Justice Act, 1986, considered a landmark step towards uniform juvenile justice measures, the execution of the act could not be done in proper manner. The juvenile cannot be tried in adult court.¹⁹

Chapter Third - Discusses the Constitutional Provisions relating to Juvenile Justice, that is to say, from the constitutional protection to the enactment of a Juvenile Justice (Care and Protection) Act, 2015. This chapter has enumerated the provision given under the constitution such as article 14, 15(3), 23, 24, 45 and 51(1)(K). This chapter not only deals with constitutional provisional but also mention other laws related to juvenile e.g. Indian Penal Court, the Apprentice Act., Industrial Dispute Act, etc.

¹⁹Juvenile Justice Rules have to be developed by each State which specifies the operational mechanisms for implementation of the Act. In the absence of State Rules, the Central Rules would be adopted by that State.

Chapter Fourth - Deals with critical analysis of the Juvenile Justice (Care and Protection) Act, 2015 and the salient features of the *JJ Act*, 2015. This chapter has analyzed the Act in great depth, so that the actual functioning of the Act can be understood. This chapter has criticized the loop holes under the Act.

Chapter Fifth –Juvenile Justice and Indian Judiciary, the role of judiciary in defining the rights and liabilities of juveniles is the subject matter of fifth chapter. This chapter had tried to discuss all the cases related to juvenile justice. The latest case which has been decided on 9th Feb 2018, is also included. In this judgment, The Supreme Court has given various guidelines for the protection of juveniles, so that their interest can be protected for future.

Chapter Sixth - Deals with the Comparative Analysis of Juvenile Justice in UK, USA and India. The chapter focuses on the comparative analysis in these countries. The researcher has tried to establish the comparative analysis. This chapter has mentioned The Young Offender Act., and other legislations in order to bring a comparative and analytical approach towards the juvenile justice.

Chapter Seventh - Comprises conclusion and suggestions of the effective working and implementation of Juvenile Justice (Care and Protection) Act, 2015. It discusses the various possibilities of better enforcement of the *JJ Act*. It examines the ways in which the *JJ Act* can practically be implemented at the National level.

CHAPTER 2

INTERNATIONAL PERSPECTIVE OF JUVENILE JUSTICE

Juvenile delinquency is a worldwide menace that has attracted so much in focus and attention. In the era of globalization the juvenile justice impacted as they have affected the areas of criminal justice operations. Globalization increased connectivity and interdependence that has evolved among countries. This sense of interconnection has been increased by technological advances as well as cultural shifts. e.g. internet, mobile. Despite commonalities throughout the world, there is still a wide degree variability in the way in which delinquency is measured from country to country around the world, and this makes it difficult to determine the exact extent of delinquency and its impact on the global community. The erstwhile League of Nations (1924) and the United Nations (1959) had adopted Declarations on the Rights of Children- significant but non-binding. The seeds for the right-based approach were sown in the ICCPR 1966. The United Nations Conventions on the Rights of Child, 1989, has been ratified by India in 1992. There is a worldwide recognition to the rights of children. The following are the conventions and treaties for the protection of children before 1989:

- a. Declaration of the Rights of Child, 1924 (Human Rights Instrument Specific to the Rights of the Child).
- b. Universal Declaration of Human Rights, 1948.
- c. Geneva Convention, 1949.
- d. European Convention of Human Rights, 1950.
- e. U.N. Declaration of the Rights of the Child, 1959.
- f. Convention on Elimination of all forms of Racial Discrimination, 1965.
- g. International Covenant on Civil and Political Rights, 1966.
- h. International Covenant on Economic Social and Cultural Rights, 1966.

- i. Convention on Elimination of all Forms of Discrimination against Women, 1979.
- j. Convention against Torture and other Cruel, Inhuman or Degrading Treatment Or Punishment, 1984
- k. United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (Beijing Rules)
- l. U.N. Convention on disabled child.

After the adoption of the convention on the rights of the child in year 1989 the following international legal instruments are in the protection of the rights of the child.

- a. Convention on the Rights of the Child, 1989.
- b. UN Convention for Prevention of Juvenile Delinquency, 1990
- c. UN Rules for the Protection of Juveniles Deprived of their Liberty: Havana Convention, 1990
- d. International Convention Concerning the Prohibition and Immediate action for the Elimination of worst form of Child Labour, 1991
- e. Guidelines for Action on Children in the Criminal Justice System: Vienna Guidelines, 1997
- f. The UN Guidelines on Justice in Matters Involving Child Victim And Witnesses of Crime: Adopted By the Economic and Social Council In Its Resolution, 2005
- g. Children's Rights in Juvenile Policy Adopted by United Nations General Assembly, 2007
- h. Council of European Rules on Sanctions and Measures, 2008.
- i. Crime Prevention for Children: Developments and Good Practices, 2009.
- j. Report on the Application of the European Union Charter of Fundamental Rights, 2010
- k. Implementation of SAARC Convention: The Way Forward.
- l. Guidelines for Legislative Reforms on Juvenile Justice, 2011

2.1 DECLARATION OF THE RIGHTS OF THE CHILD 1959

The foundation of DRC, 1959 is based on declaration of league of nation 1924. The preamble of the convention states that children need “special safeguards and care, including appropriate legal protection, before as well as after birth,” more or less on the 1924 Declaration’s pledge that every child has right for better future, for this purpose mankind has to serve in proper manner.¹ The DRC is based on the main principle to give special protection and opportunities, facilities by law and other means. For better healthy and normal physical, mental, moral, spiritual, and social development to ensure freedom and dignity. The most important of DRC is to give primacy to save the best interest of the child, following are the principles of DRC: a child has the right to a name and nationality; to proper nutrition, shelter, entertainment, and health services; to a proper schooling; and, for the disabled, to “special treatment, education and care.”²

The eloquent evolution of the Juvenile Justice system has culminated in the Convention on the Rights of the Child (CRC) 1989, a legally binding instrument. It brings those less than 18 years of age under the ambit of the term 'children'. Articles 37 and 40 specifically and when read with the General Comment No. 10, Children's Rights in Juvenile Justice, lay down a comprehensive mechanism that States must comply with, taking note of the overall framework of the CRC and its main 'umbrella rights'. The aforesaid provisions must be read with the following international guidelines:

- a. United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985;³
- b. UNCRC, 1989;⁴
- c. Havana Rules 1990⁵; and

¹The U.N. Declaration of the Rights of the Child comprises a Preamble and ten principles. G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354.

²The 1924 Declaration stated children “must be the first to receive relief”; the DRC specifies more pragmatically that they are to be “among the first” to receive protection and relief (principle 8)

³In 1980, the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, meeting in Caracas, Venezuela, set out several basic principles that it felt should be reflected in a set of rules to be developed for the administration of juvenile justice in order to protect the fundamental human rights of juveniles in trouble with the law

⁴This Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990.

- d. Riyadh Guidelines 1990.

2.2 THE UNITED NATIONS STANDARD MINIMUM RULES FOR ADMINISTRATION OF JUVENILE JUSTICE, 1985

The United Nations has adopted sets of Standard Minimum Rules addressing the following topics:

- a. Standard Minimum Rules for the Treatment of Prisoners, 30 August 1955
- b. Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), 29 November 1985
- c. Standard Minimum Rules for Non-custodial Measures (“The Tokyo Rules”), 14 December 1990

The United Nations Standard Minimum Rules for Administration of Juvenile Justice, 1985, adopted by United Nations General Assembly Resolution 40/33 (November 29, 1985). Though General Assembly resolutions is not binding as this is only a directive in nature. The UN Standard Minimum Rules for the Administration of Juvenile Justice states that:

- a. ‘Emphasize the well-being’ of young people and ensure that any reactions should always be in proportion to the circumstances of both the offenders and the offence;
- b. Encourage the use of diversion programs which remove young people from the criminal justice process and implement supportive or community services;
- c. Ensure the right to privacy and procedural safeguards including presumption of innocence;
- d. Ensure that proceedings are conducive to the best interests of the child and that young people have the opportunity to participate and express themselves freely;

⁵ Bearing in mind also the Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders this was laid before 68th plenary meeting organized on 14th December 1990.

- e. Use inquiry reports on social, family, and educational background to identify and provide appropriate social services;
- f. Avoid institutionalization as much as possible by using other measures such as counseling, probation or community service;
- g. Use institutionalization only as a last resort; and
- h. Focus the goal of institutionalization on assisting young people in becoming productive members of society.

2.2.1 Beijing Rules

Beijing Rules has a comprehensive manner for the child justice. The rules are following:

- a. It has definition of juvenile as a child or young person who, under the respective legal system, may be dealt with for an offence in a manner which is different from the one meted out to an adult.
- b. It appeals state not to charged juvenile with criminal responsibility as it affect the mind of juvenile emotionally, mentally they have no sufficient intellectual maturity.
- c. The Beijing rules provide fundamental procedural safeguard for the juvenile it ensure few presumptions in favor of juvenile such as lack of mensrea, right to be heard, right to not to speak, right to chose advocate on his own choice, right to presence of parent or guardian, right to confront and cross examine witnesses.⁶
- d. It holds that, detention pending the trial should be used only as a measure of last resort and for the shortest possible period of time.⁷
- e. It directs that, capital punishment should not be imposed for any crime committed by the juveniles.⁸

⁶Rule 7.1 emphasizes some important points that represent essential elements for a fair and just trial and that are internationally recognized in existing human rights instruments.

⁷Rule 13.1 of Beijing has encouraged the devising of new and innovative measures to avoid such detention in the interest of the well-being of the juvenile.

⁸Rule 17.2 of Beijing Rules made special provisions keeping in mind the age of the child.

These Rules are divided into *six* parts-

- a. fundamental principles;
- b. investigation and prosecution;
- c. adjudication and disposition;
- d. institutional treatment;
- e. non-institutional treatment; and
- f. Research, planning, policy formulation and evaluation.

The 'Beijing Rules' address the following fundamental areas of importance:

- a. Transparent procedure for children who come into conflict with the law;
- b. Save the best interest of the child and ensure full participation;
- c. Application of the principle of proportionality to the offender qua the offence;
- d. Recreation programmes for diversion from court procedures;
- e. Arrest of child should as last resort and it should be within minimum time;
- f. Only for serious offenses the liberty should be withdraw;
- g. The capital and corporal punishment should be abolish;
- h. Special training programme should be conducted for law enforcement officer working with children;
- i. Provision of educational and other social re-integrative services for those children who are institutionalized.

2.3 THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, 1989[\]

The Preamble of the UNCRC says that, the States parties to the present Convention, Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom.⁹

⁹ Preamble of CRC, 1889

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance, convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding, considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.

Keeping in mind to give special care the child the extend particular care the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November, 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights.¹⁰

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration.

¹⁰Articles 23 and 24 of ICCPR and the International Covenant on Economic, Social and Cultural Rights particularly Article 10.

The UNCRC, 1989 enumerates the following rights:

- a. **Survival & Development:** Every child has the right to life. Governments must do all they can to ensure that children survive and grow-up healthy.¹¹
- b. **Registration, Name, Nationality & Care:** Every child has the right to a legally registered name and nationality, as well as, the right to know and as far as possible, to be cared for by their parents.¹²
- c. **Views:** Every child has the right to say what they think in all matters affecting them, and to have their views taken seriously.¹³
- d. **Freedom of Expression:** Every child must be free to say what they think and to seek and receive information of any kind as long as it is within the law.¹⁴
- e. **Freedom of Thought, Belief and Religion:** Every child has the right to think and believe what they want and also to practice their religion, as long as they are not stopping other people from enjoying their rights. Governments must respect the rights of parents to give their children guidance about this right.¹⁵
- f. **Freedom of Association:** Every child has the right to meet other children and young people and to join groups and organizations, as long as this does not stop other people from enjoying their rights.¹⁶
- g. **Right to Privacy:** Every child has the right to privacy. The law should protect the child's private, family and home life.¹⁷
- h. **Access to Information from Mass Media:** Every child has the right to reliable information from the mass media. Television, radio, newspapers and other media channels should provide information that children can understand. Governments must help protect children from materials that could harm them.¹⁸
- i. **Adoption:** If a child is adopted, the first concern must be what is best for the child. The same protection and standards should apply whether the child is adopted in the country where they were born or in another country.¹⁹

¹¹ Article 6, of UNCRC 1989.

¹² Article 7 of UNCRC 1989.

¹³ Article 12 of UNCRC 1989

¹⁴ Article 13 of UNCRC 1989.

¹⁵ Article 14 of UNCRC 1989.

¹⁶ Article 15 of UNCRC 1989.

¹⁷ Article 16 of UNCRC 1989.

¹⁸ Article 17 of UNCRC 1989.

¹⁹ Article 21 of UNCRC 1989.

- j. **Children with Disability:** A child with a disability has the right to live a full and decent life in conditions that promote dignity, independence and an active role in the community. Governments must do all they can to provide free care and assistance to children with disability.²⁰
- k. **Health and Health Services:** Every child has the right to the best possible health. Governments must provide good quality health care, clean water, nutritious food and a clean environment so that children can stay healthy. Richer countries must help poorer countries to achieve this.²¹
- l. **Adequate Standard of Living:** Every child has the right to a standard of living that is good enough to meet their physical, social and mental needs. Governments must help families who cannot afford to provide in this regard.²²
- m. **Right to Education:** Every child has the right to education. Primary education must be free. Secondary education must be available to every child. Schools must respect children's human dignity. Wealthy countries must help poor countries to achieve this.²³
- n. **Children of Minorities:** Every child has the right to learn and use the language, customs and religion of their family whether or not these are shared by the majority of the people in the country where they live.²⁴
- o. **Child Labour:** Governments must protect children from work that is dangerous or might harm their health or education.²⁵
- p. **Drug Abuse:** Governments must protect children from the use of illegal drugs.²⁶
- q. **Sexual Exploitation:** Governments must protect children from sexual abuse and exploitation.²⁷
- r. **Other Forms of Exploitation:** Governments must protect children from all other forms of exploitation that might harm them.²⁸

²⁰ Article 23 of UNCRC 1989.

²¹ Article 24 of UNCRC 1989.

²² Article 27 of UNCRC 1989.

²³ Article 28 of UNCRC 1989.

²⁴ Article 30 of UNCRC 1989.

²⁵ Article 32 of UNCRC 1989.

²⁶ Article 33 of UNCRC 1989.

²⁷ Article 34 of UNCRC 1989.

²⁸ Article 36 of UNCRC 1989.

- s. **Detention:** No child shall be tortured or suffer other cruel treatment or punishment. A child shall only, if ever be arrested, or put in prison it should be as a matter of last resort and for the shortest possible time. Children must not be put in prison with adults and they must be able to keep in contact with their family.²⁹
- t. **Juvenile Justice:** A child accused or guilty of breaking the law must be treated with dignity and respect. They have the right to seek help of a lawyer and, fair trial that takes account of their age or situation. The privacy of a child must be respected at all times.³⁰

The Convention on the Rights of the Child (CRC) is the most important and comprehensive document on the rights of children.³¹ Based purely on the number of substantive rights it sets forth, as distinct from implementation measures, it is the longest the U.N. treaty or convention on human rights is not only addressing the children living in peace time but also those the grievance of children engaged in arm conflict. The U.N treaty is trying to save the rights of children who are the victims of arm conflicts or war. The CRC is also significant because it included, “for the first time in binding international law, the principles upon which adoption is based, viewed from the child’s perspective.” The CRC has focus to develop the children’s right in four ways: in decisions affecting them; against discrimination and all forms of neglect and exploitation; against the harm to them and assistance to children for their basic needs.³² For the purposes of the CRC, a child is defined as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.³³

CRC gives new types of rights which were not in existence earlier. They are:

²⁹ Article 37 of UNCRC 1989.

³⁰ Article 40 of UNCRC 1989.

³¹The Convention on the Rights of the Child, with a Preamble and 54 articles, was adopted by the U.N. General Assembly on November 20, 1989, and entered into force on September 2, 1990. G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989); 28 I.L.M. 1448 (1989). <http://www.ohchr.org/english/law/crc.htm> (last visited March 13th, 2017)

³² Jean Koh Peters, “How Children Are Heard in Child Protective Proceedings in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study” 6 *Nev. L. Jour.* 971 (2006).

³³ Article 1 of UNCRC 1989.

- a. The child's right to preserve his or her identity,³⁴
- b. The rights of vulnerable children like refugees to special protection³⁵, and
- c. Indigenous children's right to practice their culture.³⁶
- d. The right to a fair trial.³⁷

In addition, the CRC includes in a global treaty rights that had only been found in case law under regional human rights treaties (e.g., children's right to be heard in proceedings that affect them).³⁸

The CRC also replaced non-binding recommendations with binding standards (e.g., safeguards in adoption procedures and with regard to the rights of disabled children) (Articles 21 and 23). The state parties have several obligations in regard to protection of children such as ban the customs which are affecting the children's health and cause adverse effect. There is need to adopt rehabilitative schemes for the victims the neglected abuse exploitation.

2.4 OPTIONAL PROTOCOLS TO THE CRC ON SEX TRAFFICKING, ARMED CONFLICT

On May 25, 2000 the U.N. has adopted two protocols for the protection of children. The optional protocol to the CRC on the cell of children, child prostitution and child pornography and the optional protocol to the convention on the rights the child on the involvement of children in armed conflict (Child Soldiers Protocol). The Sex Trafficking Protocol (STP) addresses not only the problem of sex trafficking, but also other purpose for which children are bought and sold, including, in addition, forced labor, adoption, and participation in armed conflicts, marriage, and organ trade. The Preamble of optional protocol to achieve the purpose of refers to achieve "the purposes of the CRC" and obligations on State to implement the specific measures given in the CRC. This Preamble also gives the object to protect the children from economic exploitation working at harmful work. The optional protocol gives special protection to girl's child. In addition, it recognizes "that a number of particularly vulnerable groups, including girl children, are at greater risk of sexual

³⁴ Articles 7 and 8 of UNCRC 1989.

³⁵ Articles 20 and 22 of UNCRC 1989.

³⁶ Articles 8 and 30 of UNCRC 1989.

³⁷ Article 40 of UNCRC 1989.

³⁸ Article 12 of UNCRC 1989.

exploitation” and are disproportionately represented among the sexually exploited, and expresses concern over “the growing availability of child pornography on the Internet and other evolving technologies.” The STP has the definition of various terms used such as sale of children, child prostitution and child pornography. It also prohibits the above action it urges state parties to make certain related with sale of children, Child prostitution as punishable under their criminal law. The STP lays down certain principles in regards to jurisdiction over actionable practices so that the extra edition of offenders can be done in proper way. It will help the strength of the law enforcing bodies to combat with those offenders who are committing offense against juveniles and left the boundaries of their nation. The STP has also provision for the protection of and assistance to the victimized children in the criminal justice process. The STP also said in the judicial treatment of the children the guiding principle should be the best interest of the child. In order to prevent the offenses against the child there is a proper procedure to seek compensation for the damages under the law.³⁹ The STP also has provisions on strengthening international cooperation in regard to sex trafficking involving children and on reporting requirements for States Parties.⁴⁰

The Child Soldiers Protocol⁴¹ says in its Preamble that “the rights of children require special protection,” notes “the harmful and widespread impact of armed conflict on children,” and condemns their being targeted in such situations. It also refers to inclusion as a war crime in the Rome Statute of the International Criminal Court “the conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflicts.” The preamble of STP has define the child on the equal note of article 1 of the CRC and say that the conviction of the offender against juvenile should be effectively implemented in order to save the principle of the best interest of the child. The STP has extended the minimum age of children for the direct participation in the armed conflict and the age has been increased up to 18 years. It forbids rebellion and other nongovernmental armed forces to recruit or to use in hostilities person below the age of 18 years however the STP has not say anything about voluntarily recruitment

³⁹ Article 9(4) of Optional Protocols to the CRC on Sex Trafficking, Armed Conflict.

⁴⁰ Article 12 of Optional Protocols to the CRC on Sex Trafficking, Armed Conflict.

⁴¹ The Child Soldiers Protocol, comprising a Preamble and 13 articles, entered into force on February 12, 2002. G.A. Res. A/RES/54/263 of 25 May 2000.

in armed conflict. But it requires that the age of minimum should enhance from 15 years to 18 years. The STP also urged state parties to have a binding obligation that the minimum age of voluntarily recruitment should be enhanced so that better interest should be served of the children. The child shoulder protocol also requires state parties to take all possible steps to make possible, that the recruitment of the children should be frustrated.

2.5 REGIONAL DOCUMENT

2.5.1 African Charter on the Rights and Welfare of the Child 1990

The African Charter is the treaty on the rights of the child and took place in 1979 much prior to CRC, but this Africa Charter has to be modeled after CRC 1989. The African Charter is different to CRC as CRC has only provision for rights while African Charter has duty also.⁴²

The Preamble states that “the child occupies a unique and privileged position in the African society” and requires legal protection as well as “particular care with regard to health, physical, mental, moral and social development.”

- a. A child is defined as “every human being below the age of 18 years.”⁴³
- b. The ACRWC sets forth the principles of non-discrimination and the best interests of the child and also provides that children have an inherent right to life, protected by law.
- c. The death sentence is not to be applied to crimes committed by children.⁴⁴
- d. Children have a right to a name and nationality as well as to freedom of expression, association and peaceful assembly; thought, religion, and conscience; privacy; education; and rest and leisure.⁴⁵
- e. Special measures of protection are to be taken for handicapped children and children should enjoy physical, mental, and spiritual health⁴⁶.

⁴² The African Charter on the Rights and Welfare of the Child, with a Preamble and 48 Articles, was adopted on July 11, 1990, and entered into force on November 29, 1999. OAU Doc. CAB/LEG/24.9/49 (1990).

⁴³ Article 2 of ACRWC.

⁴⁴ Articles 3-5 of ACRWC.

⁴⁵ Article 11 on education is the longest article in the ACRWC. It also provides, among other measures, that States Parties are to in particular to provide free and compulsory basic education (Art. 11(3)).see also Articles 6-12

⁴⁶ Articles 13-14 of ECECR.

- f. Children should also be protected against all forms of economic exploitation and from performing work likely to be hazardous⁴⁷ and against all forms of torture, maltreatment, and abuse⁴⁸; harmful social and cultural practices⁴⁹; all forms of sexual exploitation or abuse⁵⁰; the use of narcotics and illicit drugs⁵¹; and abduction, sale, trafficking, and use in begging⁵².

2.5.2 European Convention on the Exercise of Children's Rights 1996

The European Convention on the Exercise of Children's Rights (ECECR) through emphasis Preamble the aim of promoting the rights and best interests of children.⁵³ For this purpose it says that, it states that opportunity should be given to the children, so that they can exercise their rights, especially in family proceeding which affect them. The ECECR says the information should be given to them for betterment of the interest of the child. The welfare of the child should be protected with necessary action. The states and the parent have their responsibility to engage them self in the protection and promotion of the rights recognized under this convention. The ECECR has the application to the children which who have not attained the age of 18 years.⁵⁴ The ECECR has given procedural safe guard to the children so that the rights of the children may protect in proceedings. These procedural rights are such as rights to have assistance by an appropriate person of their choice, right to appoint their own representative and other rights given under ECECR.⁵⁵

2.5.3 European Convention on Human Rights 1950

The Convention for the Protection of Human Rights and Fundamental Freedoms is popularly as European convention on human rights. This is the first international human rights treaty which established to supervise and develop

⁴⁷ Article 15 of ECECR

⁴⁸ Article 16 of ECECR.

⁴⁹ Article 21 of ECECR.

⁵⁰ Article 27 of ECECR.

⁵¹ Article 28 of ECECR.

⁵² Article 29 of ECECR.

⁵³ The European Convention on the Exercise of Children's Rights, C. E.T.S. No. 160, has a Preamble and twenty-six Articles. It was opened for signature on January 25, 1996, and entered into force on July 1, 2000 (March, 2017)

⁵⁴ Article 1(1) of ECECR.

⁵⁵ Articles 3-5 of ECECR.

machinery for the enforcement of human rights. According to Article 1 state parties are under obligation to secure the right of freedom within their jurisdiction to everyone .the term “everyone” used in ECHR⁵⁶ is very wide and includes everyone irrespective of their age .the term “everyone” is applicable to the parents of the children also. According to Article 5(1)(d), is gives a provision for depriving the minor from his or her liberty. It permits the lawful detention of the minor for the educational supervision and for bringing them before the competent legal bodies. According to Article 6 every person including children have the right to fair and public hearing and the judgment should be published and pronounce publicly in special circumstances to save the interest of the juveniles private hearing may be done.

According to Protocol No. 7 of the ECHR the state parties are not being prevented to take special measures for the interest of the children. Irrespective of this fact those spouses are enjoying the equality of rights and them responsibilities towards their children.⁵⁷

2.5.4 African Charter on Human and People’s Rights 1981 (Banjul Charter) and Protocol

The African charter gives not civil and political rights but also economic social and cultural rights. In reference to child it also lays down the duties of family members. In this manner ACHPR gives harmonious environment for the development of the family and respect to the parents.⁵⁸ The ACHPR does not give any specific rights to children as the UDHR and ICCPR.ACHPR is for individual whether he or she is child or adult. The protocol to the African charter on human and people’s rights on the rights of women in Africa has numerous specific provisions regarding children and girls in particular. The Preamble of ACHPR said that the condemnation and elimination of “any practice that hinders or endangers the normal growth and affects the physical, emotional and psychological development of women and girls”.

⁵⁶The Convention for the Protection of Human Rights and Fundamental Freedoms, C.E.T.S. No. 005, with a Preamble and fifty-nine articles, was adopted on November 4, 1950, and entered into force on September 3, 1953. There have been eleven Protocols to the Convention, but as from November 1, 1998, Protocol 9 was repealed and Protocol 10 lost its purpose. For an online text as amended by Protocol 11 (E.T.S. No. 155, in force November 1, 1998),

⁵⁷Article 5 of ECHR.

⁵⁸The Banjul Charter, in a Preamble and 68 Articles, was adopted June 27, 1981, and entered into force October 21, 1986. OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

According to Article 2(1)(b) says the States Parties are under an obligation to enact implement legislative matters to stop all kind of harmful custom, protect women and girls against rape and all kinds of violence, including trafficking; and “ensure that in times of conflict or war, such acts are considered war crimes and are punished as such”.⁵⁹ The ACHPR also gives direction to States Parties to condemn the practice of medicalization of female genital mutilation and scarification which violates the human rights women and girls.⁶⁰ States Parties should afford effective protection to women and children in emergency and conflict situations as well.⁶¹ In addition to the right to education and training, “all appropriate measures” so that discrimination against women and girls, may be eliminated with specific positive action to be taken to promote girls education and training at all levels and all disciplines as well as they can be retained in their schools and training institutions.⁶²

2.5.5 American Convention on Human Rights (Pact of San José)

The American Convention on Human Rights (ACHR) put obligations on the states party to respect to rights and freedom given under this conventions to all persons whether he is child or adult there will be no discretion on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.⁶³ The article 1 of the ACHR defines persons as every human being. Thus, it talks about all whether he or she of any age. Article 12 (4) gives rights to parents and guardian to provide religious and moral education of their children or wards that is in accord with their own convictions. Article 13(4) “public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence,” notwithstanding the right to freedom of thought and expression. The ACHR stipulates that provision must be made for the protection of children “solely on the basis of their own best interests” when a marriage is dissolved and that equal rights must be recognized by law for children born in and out of

⁵⁹ Article 4(c) and (d) of ACHPR.

⁶⁰ Article 6(b-d) of ACHPR.

⁶¹ Article 11(4) of ACHPR.

⁶² Article 12 of ACHPR.

⁶³ The American Convention on Human Rights, with a Preamble and 82 Articles, was adopted on November 22, 1969, in San José, Costa Rica, and entered into force on July 18, 1978. OAS, Treaty Series, No. 36; U.N. Registration 08/27/79 No. 17955.

wedlock⁶⁴. Everyone also has the right to a given name and to the surnames of one or both parents.⁶⁵ The ACHR has a separate provision on the rights of the child: “every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.⁶⁶” According to Article 27(2) the rights given under this convention may not be suspended in the time of war public danger and other emergency.

2.6 UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948

The Universal Declaration of Human Rights contains two articles that specifically deal with the care of child. Article 25(2) states: “motherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock shall enjoy the same social protection. Article 26 of UDHR gives right to all children. It means education should be free at least in the early stage. The elementary education should be compulsory and the state should done maximum effort to realize this human rights.⁶⁷

2.7 INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 1966

The Preamble to the International Covenant on Economic, Social and Cultural Rights (ICESCR), insofar as it recognizes the indivisibility of human rights, is applicable to children’s rights as well. This covenant is based upon recognizing that foundation of freedom, justice and peace in the world is derived from the equal and dignity of all members of the human families.⁶⁸ The ICESCR has Specific provisions from art. 10 to 12. Under Article 10, “the widest possible protection and assistance should be accorded to the family, particularly for its establishment and while it is responsible for the care and education of dependent children”. In addition to this it says that special measures of protection assistance should be taken for the benefit of

⁶⁴ Article 17(4) & (5) of ACHR.

⁶⁵ Article 18 of ACHR.

⁶⁶ Article 19 of ACHR.

⁶⁷ The Universal Declaration of Human Rights, with a Preamble and 30 Articles, was adopted by the U.N. General Assembly on December 10, 1948. G.A. Res. 217 A (III), U.N. Doc. A/810 at 71 (Dec. 10, 1948).

⁶⁸ The International Covenant on Economic, Social and Cultural Rights, with a Preamble and 31 Articles, was adopted by the U.N. General Assembly on December 16, 1966, and entered into force on January 3, 1976. G.A. Res. 2200A (XXI), 21 U.N.GAOR, 21st Sess., Supp. (No. 16) at 49, U.N. Doc. A/6316 (Dec. 16, 1966),993U.N.T.S. 3

young people without any discrimination; the young people should be protected from economic and social exploitation; engaging any child in any activities which has nature of morally harmful or dangerous work or in work likely hamper their normal development should be punished. There is need to recognized minimum age or age limit so that the paid employments of the child labour make a punishable offence. Article 12 addresses the right of all to “enjoyment of the highest attainable standard of physical and mental health,” to be fully realized by, among other measures, States Parties’ providing “for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child”. The ICESCR also provides for the right of everyone to education as UDHR under Article 13(1)) and stipulates “primary education shall be compulsory and available free to all”.⁶⁹

2.8 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966

The International Covenant on Civil and Political Rights (ICCPR) has common provisions threw which all children’s are entitle to get the benefits which is available to all persons irrespective of their age.⁷⁰ Some specific provisions also available of administration of justice for the family and children. In this reference Article 2 urges state parties to respect and to ensure to all individual within its territory and subject to its jurisdiction to have laws implement the rights given under ICCPR and also provide effective remedies where the violation occurs. Article 14(1) has specific reference to rights of the young: “any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.” Art 14 (4) also said, criminal proceedings “should take account of juveniles age and the desirability of promoting their rehabilitation”⁷¹ and the penal system should segregate juvenile offenders from adults and accord them treatment “appropriate to their age and legal status.”⁷² According to Article 23(1) the family is entitled to protection by state and society, in addition to this state parties are

⁶⁹ Art 13 (2a) of ICESCR

⁷⁰ The International Covenant on Civil and Political Rights, with a Preamble and 53 Articles, was adopted by the U.N. General Assembly on December 16, 1966, and entered into force on March 23, 1976. G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess. Supp. (No. 16) at 52, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171

⁷¹ Article 14(4) of ICCPR.

⁷² Article 10(3) of ICCPR.

require to ensure liberty of the parents should be given importance to ensure the children's religious and moral education in conformity with their own convictions. According to Article 23(4) if the marriage has been dissolved between the parents the children should be protected by state so that they will not become juvenile delinquent. Article 24 says 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." In addition to this every child must be register in birth register to certain that the right to have name and nationality may not be denied.

2.9 CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, 1979

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is an international bill of rights for women. The convention defines what things will be fall in to head out discrimination.⁷³ The Preamble, of CEDAW has tried to invoke the principles of universal declaration of human rights which affirms the principle of individuality of discrimination and its proclamation. This kind of statement forms the backdrop for certain rights set forth in CEDAW, even though girls specifically are mentioned only once.

According to Article 10, States Parties are under an obligation to ensure the reduction of female student dro-pout organized special programmes for girls and women to encourage them who have left school prematurely. It is an obligation on state parties to take appropriate steps "to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".⁷⁴ CEDAW lays obligation for the interest of the children not only upon women but on men also. It as expectation from state parties to ensure that right and responsibility among men and women should be shared equally in the performance of the function of the parents during the guardianship, wardship, trusteeship, and adoption of

⁷³ Convention on the Elimination of all Forms of Discrimination Against Women [http:// www. un.org/ women watch/ daw/cedaw/cedaw.htm](http://www.un.org/women/watch/daw/cedaw/cedaw.htm) (visited 27th March, 2017).

⁷⁴ Article 5(a) of CEDAW

children.⁷⁵ CEDAW also lays down minimum age for marriage compulsory registration of marriage should be done by the state parties.⁷⁶

2.10 THE UNITED NATIONS RULES FOR THE PROTECTION OF JUVENILES DEPRIVED OF THEIR LIBERTY, 1990

In the 68th plenary meeting on 14th December 1990, 45/113, the General Assembly held the United Nations Rules for the Protection of Juveniles deprived of their liberty.⁷⁷

Keeping in mind the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child, as well as other international instruments relating to the protection of the rights and well-being of young persons, the Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders. The UN declaration has the following principles:

- a. Affirms that the placement of a juvenile in an institution should always be a disposition of last resort and for the minimum necessary period;⁷⁸
- b. Recognizes that, because of their high vulnerability, juveniles deprived of their liberty require special attention and protection and that their rights and well-being should be guaranteed during and after the period when they are deprived of their liberty;⁷⁹
- c. Notes with appreciation the valuable work of the Secretariat and the collaboration which has been established between the Secretariat and experts, practitioners, intergovernmental organizations, the non-governmental community, particularly Amnesty International, Defense for Children International and Radda Barnen International (Swedish Save the Children Federation), and scientific institutions concerned with the rights of children

⁷⁵ Article 16 (1)(d) and (f) of CEDAW

⁷⁶ Article 16(2) of CEDAW

⁷⁷ The United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990; Adopted by General Assembly Resolution 45/113 of 14 December 1990; [http://www.ohchr.org/Documents/Professional Interest /res45 113.pdf](http://www.ohchr.org/Documents/ProfessionalInterest/res45_113.pdf), Visited on: 31-03-2016

⁷⁸ Rule 1

⁷⁹ Rule 2

and juvenile justice in the development of the United Nations draft Rules for the Protection of Juveniles Deprived of their Liberty;⁸⁰

- d. Adopts the United Nations Rules for the Protection of Juveniles Deprived of their Liberty contained in the annex to the present resolution;⁸¹
- e. Calls upon the Committee on Crime Prevention and Control to formulate measures for the effective implementation of the Rules, with the assistance of the United Nations institutes on the prevention of crime and the treatment of offenders;⁸²
- f. Invites Member States to adapt, wherever necessary, their national legislation, policies and practices, particularly in the training of all categories of juvenile justice personnel, to the spirit of the Rules, and to bring them to the attention of relevant authorities and the public in general;⁸³
- g. Also invites Member States to inform the Secretary-General of their efforts to apply the Rules in law, policy and practice and to report regularly to the Committee on Crime Prevention and Control on the results achieved in their implementation;⁸⁴
- h. Requests the Secretary-General and invites Member States to ensure the widest possible dissemination of the text of the Rules in all of the official languages of the United Nations;⁸⁵
- i. Requests the Secretary-General to conduct comparative research, pursue the requisite collaboration and devise strategies to deal with the different categories of serious and persistent young offenders, and to prepare a policy-oriented report thereon for submission to the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders;⁸⁶
- j. Also requests the Secretary-General and urges Member States to allocate the necessary resources to ensure the successful application and implementation of the Rules, in particular in the areas of recruitment, training and exchange of all categories of juvenile justice personnel;⁸⁷

⁸⁰ Rule 3

⁸¹ Rule 4

⁸² Rule 5

⁸³ Rule 6

⁸⁴ Rule 7

⁸⁵ Rule 8

⁸⁶ Rule 9

⁸⁷ Rule 10

- k. Urges all relevant bodies of the United Nations system, in particular the United Nations Children's Fund, the regional commissions and specialized agencies, the United Nations institutes for the prevention of crime and the treatment of offenders and all concerned intergovernmental and non-governmental organizations, to collaborate with the Secretary-General and to take the necessary measures to ensure a concerted and sustained effort within their respective fields of technical competence to promote the application of the Rules;⁸⁸
- l. Invites the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights to consider this new international instrument, with a view to promoting the application of its provisions;⁸⁹
- m. Requests the Ninth Congress to review the progress made on the promotion and application of the Rules and on the recommendations contained in the present resolution, under a separate agenda item on juvenile justice.⁹⁰

2.11 HAVANA RULES, 1990

The Havana rules 1990⁹¹ is based upon the following principles:

- a. Juvenile Justice System should uphold the rights and safety, as well as, physical and mental well-being of juveniles. Imprisonment should be used as a last resort.⁹²
- b. Deprivation of liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of sanction should be determined by judicial authority, without precluding the possibility of an early release.⁹³
- c. Deprivation of liberty should be effected in conditions (and circumstances) which will ensure respect qua the human rights of the juveniles. Juveniles detained in facilities should be guaranteed the benefit of meaningful activities

⁸⁸ Rule 11

⁸⁹ Rule 12

⁹⁰ Rule 13

⁹¹ Annex United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Fundamental perspective

⁹² Rule 1 of Havana rules.

⁹³ Rule 2 of Havana rules.

and programmes which would serve to promote and sustain their health and self-respect, to foster in them 'sense of responsibility' and encourage them towards those attitudes, skills and pursuits, which will assist them in developing potential to become responsible members of the society.⁹⁴

- d. Juveniles detained (under arrest) or awaiting trial (untried juveniles), are to be presumed innocent and should be treated as such. Detention before trial should be avoided to the maximum extent possible, and the same should be limited to only exceptional circumstances. When preventive detention is used, Juvenile Courts and other investigative bodies should give highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention. Untried detainees should be separated from convicted juveniles.⁹⁵
- e. All reports (legal records, medical records and records of disciplinary proceedings) qua a juvenile being tried for an offence must be kept in a confidential individual file by the juvenile justice detention facilities. The records must be kept up-to-date and accessible only to the authorized persons.⁹⁶
- f. Open detention facilities for juveniles should be established. Open detention facilities are those with no or minimal security measures.⁹⁷
- g. Detention of juveniles should take place under conditions that take full account of their particular needs (status and special requirements) according to their age, personality, sex and type of offence, as well as, their mental and physical health, which ensure their protection from harmful influences and risk situations. The principal criterion for the separation of different categories of juveniles deprived of their liberty is individualized treatment and care, best suited to the particular needs of the juvenile individuals.⁹⁸
- h. Possession of personal effects is a basic element of the right to privacy and is essential to the psychological well-being of the juvenile. The right of every juvenile to possess personal effects and to have adequate storage facilities for them should be fully recognized and respected. Personal effects that the

⁹⁴ Rule 3 of Havana rules.

⁹⁵ Rule 4 of Havana rules.

⁹⁶ Rule 5 of Havana rules.

⁹⁷ Rule 6 of Havana rules.

⁹⁸ Rule 7 of Havana rules.

juvenile does not choose to retain or that are confiscated should be placed in safe custody.⁹⁹

- i. Upon the death of a juvenile during the period of detention, the nearest relative qua the juvenile should have the right to inspect the death certificate, see the body and determine the method of disposal of the body. Upon the death of a juvenile in detention, there should be an independent inquiry into the causes of death, the report of which should be made accessible to the nearest relative. This inquiry should also be made when the death of a juvenile occurs within six months from the date of his or her release from the detention facility and there is reason to believe that the death is related to the period of detention.¹⁰⁰

2.12 THE UNITED NATIONS GUIDELINES FOR THE PREVENTION OF JUVENILE DELINQUENCY, 1990

These Guidelines were adopted in 1990 (one year after the Convention on the Rights of the Child). These Guidelines stress on a need for a multi-disciplinary approach and proper recruitment and training of personnel who work with children.¹⁰¹

It is indicated in the 1990 text, that the Riyadh Guidelines should be interpreted and implemented within the broad framework of the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Declaration of the Rights of the Child; and the Convention on the Rights of the Child; and in the context of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), as well as other instruments and norms relating to the rights, interests and well-being of all children and young persons.

Following are the guideline aims of Riyadh guidelines:

- a. Spreading awareness qua the fact that predominant opinion of experts-labeling a young individual as ‘deviant’, ‘pre-delinquent’ or ‘delinquent’,

⁹⁹ Rule 8 of Havana rules.

¹⁰⁰ Rule 9 of Havana rules.

¹⁰¹ The United Nations Guidelines for the Prevention of Juvenile Delinquency, 1990, <https://www.crin.org/docs/resources/publications/hrbap/IHCRC/UnitedNationsGuidelinesforthePreventionofJuvenileDelinquency.pdf>, Visited on: 31-03-2016.

often contributes to the development of a consistent pattern of undesirable behaviour in them.

- b. Creation of opportunities - in particular educational opportunities to meet the varying needs of young individuals and to serve as a supportive framework for safeguarding the personal development of all young individuals, particularly those who are demonstrably endangered (or are at social risk) and are in need of special care and protection.
- c. Spreading social awareness qua the fact that youthful behaviour or conduct in non-conformity with, overall social values and norms is often part of the maturation and growth process, and most likely the same tends to disappear spontaneously with transition to adulthood.
- d. Spreading awareness qua the fact that successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents, with respect to and in promotion of their personality from early childhood.
- e. Member States must ensure that there are necessary legislative safeguards to protect children and other young individuals from drug abuse, sexual exploitation, other abuses and exploitation.
- f. Dissemination of scientific information to professional community and to the public at large about the sort of behaviour or situation which is indicative of physical or psychological victimization, harm and abuse, as well as exploitation of young individuals.
- g. Governments qua the Member States must monitor the mass media generally, and television and film media in particular. Television and film media should be encouraged to minimize the level of pornography, drugs and violence portrayed and to display violence and exploitation unfavorably as well as to avoid demeaning and degrading presentations, especially of children, women and interpersonal relations and to promote egalitarian principles and roles.
- h. Governments qua the Member States must ensure that- no child or young individual be subjected to harsh or degrading correction or punishment measures at home, in schools or in any other institutions.

2.13 INTERNATIONAL JUVENILE JUSTICE OBSERVATORY (IJJO)

The IJJO is a body which gives information, communication, debates, analysis and proposal concerning with juvenile justice. This body is not only stick only to juvenile justice but also helps children and young people who are facing social difficulties, behavior problems are in conflict with the law. The IJJO has a focus to contribute at international so that the juvenile justice can be served in proper manner. The IJJO has on to develop international strategies to create necessary policies, legislation with regard to global juvenile justice that is universally applicable in the world. The IJJO also works to promote the major international convention and laws related to juvenile justice for example UNCRC and UN rules for the protection of juvenile. The IJJO has very focused objective to develop an international platform for debate invention and laws in order to address the problem of juvenile delinquency.

The IJJO gives a platform for research, discussion and make legislation to address the problem of juvenile delinquency. The IJJO has following works in respect of objective stated above:

- a. Develop international relations with regard to juvenile and also deal with problem through law, criminology, education etc.
- b. Analysis the globally, nationally and locally, of issues related with young people.
- c. Make new and alternative solutions to the problem of juvenile justice.
- d. Amend the law, education system, police system health care etc.
- e. Create knowledge space which is universally applicable and hence reach other to professionals, institutes and organizations by means of databases, conferences, workshops and seminars.
- f. Give a supportive and information based system so that a healthy juvenile justice system may develop.
- g. Promote the formation of a worldwide network of juvenile justice observers.
- h. Do awareness for solving the problem related with young offenders.
- i. Promote gathering of international organizations to give solutions for juvenile justice.

2.14 IMPACT OF U.N. INSTRUMENTS: DEVELOPMENTS IN INDIA

Earlier each states of India have different law on same subject matter which caused in consistent between states laws .it also create lack of infrastructure so that the laws related to the children never got implemented fully either in sprit or in intent.

The 1985 United Nations guidelines on Standard Minimum Rules for the Administration of Juvenile Justice, worked as foundation for the major changes in the attitude of Indian law. It has changed the law in wide manner. This inspire the State to make a uniform legislation for all States. The uniform legislation aim to that ensure that no child, under any circumstances, is lodged in jail or police lock-up. Provision was to be made for a specialized approach towards prevention and treatment of juvenile delinquency. Appropriate machinery and infrastructure would be required for the care, protection, treatment, development and rehabilitation of various categories of children coming within the purview of the juvenile justice system.

The Juvenile Justice Act passed in 1986 initiated uniform legal provisions for children all over the country for the first time. The Act replaced other State legislations. Ironically, even the Juvenile Justice Act, 1986, considered a landmark step towards uniform juvenile justice measures, the execution of the act could not be done in proper manner .the juvenile cannot be tried in adult court.¹⁰²

In 1992 India has ratified the CRC and now it is mandatory on the part of the India to make special provision for children and enact new laws after review of the lacuna in old act of Juvenile Justice Act 1986. The governments replace this act by JJ Act 2000. It was also amended in 2006. But after the Nirbhaya incident India replace the JJ Act 2000 by the JJ Act 2015. This act has tried to incorporate the UN guidelines, CRC principles, and welfare and social provisions pertaining to children, from the Indian Constitution.

¹⁰² Juvenile Justice Rules have to be developed by each State which specifies the operational mechanisms for implementation of the Act. In the absence of State Rules, the Central Rules would be adopted by that State.

2.15 UNITED NATIONS GUIDELINES FOR THE PREVENTION OF JUVENILE DELINQUENCY AND ITS IMPACT ON INDIA¹⁰³

2.15.1 Fundamental Principles

- a. The prevention of juvenile delinquency is an essential part of crime prevention in society. By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non – criminogenic attitudes.
- b. The successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents, with respect for and promotion of their personality from early childhood.
- c. For the purposes of the interpretation of the present Guidelines, a child – centered orientation should be pursued. Young person’s should have an active role and partnership within society and should not be considered as mere objects of socialization or control.
- d. In the implementation of the present Guidelines, in accordance with national legal systems, the well – being of young persons from their early childhood should be the focus of any preventive programmes.
- e. The present guidelines should also be implemented in the context of the economic, social and cultural conditions prevailing in each Member State.

2.15.2 General Prevention

The Comprehensive prevention plans should be instituted at every level of Government and includes the following:

- a. In – depth analysis of the problem and inventories of programmes, services, facilities and resources available.
- b. Well – defined responsibilities for the qualified agencies, institutions and personnel involved in preventive efforts.
- c. Mechanisms for the appropriate co – ordination of prevention efforts between governmental and non – governmental.

¹⁰³ Adopted and proclaimed by General Assembly resolution 45/112 of 14 December 1990.

2.15.3 Socialization Process

- a. Every society should place a high priority on the needs and well – being of the families and of all its members.
- b. Since the families is the central unit responsible for the primary socialization of children, governmental and social efforts to preserve the integrity of the family, including the extended family, should be pursued. The society has a responsibility to assist the family in providing care and protection and in ensuring the physical and mental well – being of children. Adequate arrangements including day – care should be provided.
- c. Governments should establish policies that are conducive to the bringing up of children in stable and settled family environments. Families in need of assistance in the resolution of conditions of instability or conflict should be provided with requisite services.
- d. Government should take measures to promote families cohesion and harmony and to discourage the separation of children from their parents, unless circumstances affecting the welfare and future of the child leaves no viable alternative.
- e. It is important to emphasize the socialization function of the family and extended family; it is also equally important to recognize the future role; responsibilities; participation and partnership of young persons in society.

2.15.4 Education

- a. Governments are under an obligation to make public, education accessible to all young persons.
- b. Education systems should seek to work together with parents, community organizations and agencies concerned with the activities of young persons.
- c. Young persons and their families should be informed about the law and their rights and responsibilities under the law, as well as the universal value system, including United Nations instruments.
- d. Education system should extend particular care and attention to young persons who are at social risk. Specialized prevention programmes and educational materials, curricula, approaches and tools should be developed and fully utilized.

- e. Schools should serve as resources and referral centers for the provision of medical, counseling and other services to young persons, particularly those with special needs and suffering from abuse, neglect, victimization and exploitation.
- f. School systems should plan, develop and implement extracurricular activities of interest to young persons, in co – operation with community group.
- g. Special assistance should be given to children and young persons who find it difficult to comply with attendance codes, and to ‘drop – outs’.
- h. Schools should promote policies and rules that are fair and just; students should be represented in bodies formulating school policy; including policy on discipline, and decision – making.

2.15.5 Mass Media

- a. The mass media should be encouraged to ensure that young persons have access to information and material from a diversity of national and international sources.
- b. The mass media should be encouraged to portray the positive contribution of young person’s to society.
- c. The mass media should be encouraged to disseminate information on the existence of services, facilities and opportunities for young persons in society.
- d. The mass media should be aware of its extensive social role and responsibility as well as its influence, in communications relating to youthful drug and alcohol abuse. It should use its power for drug abuse prevention by relaying consistent messages through a balanced approach. Effective drug awareness campaigns at all levels should be promoted.

2.15.6 Legislation and Juvenile Justice Administration

- a. Governments should enact and enforce specific laws and procedures to promote and protect the rights and well – being of all young persons.
- b. Legislation preventing the victimization, abuse, exploitation and the use for criminal activities of children and young person’s should be enacted and enforced.

- c. No child or young person should be subjected to harsh or degrading correction or punishment measures at, in schools or in any other institutions.
- d. Legislation and enforcement aimed at restricting and controlling accessibility of weapons of any sort to children and young people should be pursued.
- e. Legislation should be enacted and strictly enforced to protect children and young persons from drug abuse and drug traffickers.

2.16 MEASURES TO BE TAKEN BY INDIA AT THE INTERNATIONAL LEVEL

India should give due attention internationally, regionally and nationally, including within the framework of the United Nations system wide action. There is an urgent need for close co-operation between all bodies in this field, in specially, in the field of the Crime Prevention and Criminal Justice Division of the Secretariat, the Office of the United Nation High Commissioner for Human Rights or Centre for Human Rights, the Office of the United Nations High Commissioner for Refugees, the United Nations Children’s Fund, the United Nations Development Programme, the Committee on the Rights of the Child, the International Labour Organization, the united Nations Educational, Scientific and Cultural Organization and the world Health Organization. In addition, the World Bank and other international and regional financial institutions and organizations as well as non – governmental organizations and academic institutions, are invited to support the provision of advisory services and technical assistance in the field of juvenile justice. Co- operation should therefore be strengthened, in particular with regard to research, dissemination of information, training, implementation and monitoring of the Convention on the rights of Child and the use and application of existing standards, as well as with regards to the provision of technical advice and assistance programmes, for example by making use of existing international network on juvenile justice. India should insure the truthful implementation of CRC with the help of technical co-operation and advisory service.

Following are required for the co-operation:

- a. Assistance in legal reform;
- b. Strengthening national capacities and infrastructures;

- c. Training programmes for police and other law enforcement officials, judges and magistrates, prosecutors, lawyers, administrators, prison officers and other professionals working in institutions where children are deprived of their liberty, health personnel, social workers, peacekeepers and other professionals concerned with juvenile justice.
- d. Preparation of training manuals
- e. Preparation of information and education material to inform children about their rights in juvenile justice.
 - i. The current situation with regards to juvenile crime and delinquency can be characterized by the following basic facts and trends;
 - ii. There has been an observed increase in violent and aggravated crimes among youth.
 - iii. The number of drug – related crimes is growing.
 - iv. The process of globalization and the greater mobility of large population groups have led to an increase in criminal activity associated with intolerance towards members of other cultures.
 - v. The difficulties encountered by immigrants and their descendents in certain countries are sometimes related to the high levels of group crime deriving from the activities of ethnically based delinquent groups.
 - vi. In many cases juvenile crimes are linked to less obvious sources of motivation; various actions may reflect, for example, the standards of particular subordinates, teachings or traditions deriving from religious radicalism, or the compulsion to use of violence as a means of contracting gender identity. Quite often, aggressive and criminal behavior is positively portrayed in the media, creating a confused picture of acceptable societal norms within some youth subcultures.
 - vii. Quite often, aggressive and criminal behavior is positively portrayed in the media, creating a confused picture of acceptable societal norms within some youth subcultures.
 - viii. Children and adolescents in difficult circumstances constitute ready reserves for organized crime, participation in armed conflicts, human and drug trafficking and sexual exploitation.

Among recent developments regarding children's rights are an international call for action to end violence against children and a resolution adopted by the U.N. General Assembly on the establishment of a Human Rights Council.¹⁰⁴

¹⁰⁴NGO Advisory Council for the UN Study on Violence Against Children, International Call for Action to End Violence Against Children: Establish a Special Representative to the UN Secretary General on Violence Against Children (May18, 2007), Child Rights Information Network, *available at* <http://www.crin.org/resources/infodetail.asp?id=13401>; Resolution Adopted by the General Assembly [*without Reference to a Main Committee (A/60/L.48)*] 60/251, Human Rights Council, the OHCHR, http://www.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf (PDF) (visited 27th March, 2017).

CHAPTER-3

CONSTITUTIONAL AND STATUTORY PROTECTIONS TO JUVENILE IN INDIA

“There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they grow up in peace.”

-Kofi Annan

The age determination of child in India is a debatable issue however most of the government counts the age of child below the age of 14 years for government programs. According to biology the childhood of the any person considered between infancy and adulthood. UNCRC says a about the definition of child as any human being who has not completed the age of eighteen years or not obtained the adulthood. There is controversy about the age limits for children in Indian law, no uniformity in age of child.

3.1 THE EVOLUTION OF THE JUVENILE LAW IN INDIA (1773- 2000)

The legal history of juvenile justice can be traced back to the early 18th century. The reference related to children and laws can be found in ancient text of the Hindu books. The important laws related to juvenile were passed between 1850 and 1919.

3.1.1 The Apprentices Act, 1850

The Apprentices Act, 1850 is considered as the first legislation in India to deal with children. Section 3 of the Act has given powers to magistrate to act as guardian on behalf of the orphan or poor child abandoned by the parents. It not only discuss with abandoned child but any child convicted for petty offences.

3.1.2 The Indian Penal Code, 1860

The Indian Penal Code, 1860 is the chief statute to deal with the criminal substantial principles, which decide the offences and its essentials. The main provisions relating to an offence which provides the exemptions on account of the age of the offender are as follows:

- a. Section 82 exempts child from all criminal liability (DOLI- INCAPX) who is under Seven years of age.¹
- b. Section 83 has the provision for conditional criminal liability. It exempts a child above seven years of age and under twelve years, from all criminal liability, who has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct on that occasion.²
- c. Section 361 IPC provides about Kidnapping from lawful guardianship.

Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship. Explanation: The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception: This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

Holding the accused liable for kidnapping under section 363³, the Supreme Court said in case of *Thakorilal D Vadgama v. State of Gujarat*,⁴ that the mere circumstances that his act was not the immediate cause of her leaving her parental

¹ Section 82 in The Indian Penal Code 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.*

² Section 83 in The Indian Penal Code: Act of a child above seven and under twelve of immature understanding: *Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.*

³ Section 363 in The Indian Penal Code: Punishment for Kidnapping: *Whoever kidnaps any person from [India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

⁴ AIR 1973 SC 2314: (1973) 2 SCC 413

home or guardian's custody would constitute no valid defense and would not absolve him from the offence of kidnapping. The question truly falls for determination on the facts and circumstances of each case. Lawful guardian where facts indicate that a girl left her father's protection, knowing and having capacity to know the full import of what she was doing and voluntarily joined the accused, the offence of kidnapping cannot be said to have been made out.⁵ Meaning of the use of the word "keeping" in the context connotes the idea of charge, protection, maintenance and control; further the guardian's charge and control appears to be compatible with the independence of action and movement in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. On plain reading of this section the consent of the minor who is taken or enticed is wholly immaterial: it is only the guardian's consent which takes the case out of its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section.⁶ In the year 1959, the Indian Penal Code, 1860 was amended with and inserted Section 363-A which make punishable the act of Kidnapping or maiming a minor for purpose of begging.⁷

⁵ *S. Varadraján v. State of Madras*, AIR 1965 SC 942

⁶ *Prakash v. State of Haryana*, AIR 2004 SC 227

⁷ Section 363-A of IPC: Kidnapping or maiming a minor for purpose of begging: (1) Whoever kidnaps any minor or, not being the lawful guardian of a minor, obtains the custody of the minor, in order that such minor may be employed or used for the purpose of begging shall be punishable with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

(2) Whoever maims any minor in order that such minor may be employed or used for the purposes of begging shall be punishable with imprisonment for life, and shall also be liable to fine.

(3) Where any person, not being the lawful guardian of a minor, employs or uses such minor for the purposes of begging, it shall be presumed, unless the contrary is proved, that he kidnapped or otherwise obtained the custody of that minor in order that the minor might be employed or used for the purposes of begging.

(4) In this section,—

(a) 'begging' means—

(i) soliciting or receiving alms in a public place, whether under the pretence of singing, dancing, fortune-telling, performing tricks or selling articles or otherwise;

(ii) entering on any private premises for the purpose of soliciting or receiving alms;

(iii) exposing or exhibiting, with the object of obtaining or extorting alms, any sore, wound, injury, deformity or disease, whether of himself or of any other person or of an animal;

(iv) using a minor as an exhibit for the purpose of soliciting or receiving alms;

(b) 'minor' means—

(i) in the case of a male, a person under sixteen years of age; and

(ii) in the case of a female, a person under eighteen years of age.]

- **Selling minor for purposes of prostitution, etc. under Section 372:**

Whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine.

Explanation I: When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

Explanation II: For the purposes of this section “illicit inter-course” means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognized by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi-marital relation.

- **Buying minor for purposes of prostitution, etc. under Section- 373 :**

Whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, of knowing it to be likely that such person will at any age be employed or used for any purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.⁸

⁸ Section 373 in The Indian Penal Code: Buying minor for purposes of prostitution, etc.—Whoever buys, hires or otherwise obtains possession of any 1[person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, of knowing it to be likely that such person will at any age be] employed or used for any purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. 2[Explanation I.—Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used

Explanation I: Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

Explanation II: “Illicit intercourse” has the same meaning as in section 372.⁹

- A man is said to commit “rape” under Section 375¹⁰ IPC who has sexual intercourse with a woman with or without her consent, when she is under sixteen years of age.

Exception: Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

for the purpose of prostitution. Explanation II.—“Illicit intercourse” has the same meaning as in section 372.]

⁹ Section 372 in The Indian Penal Code: Selling minor for purposes of prostitution, etc.—Whoever sells, lets to hire, or otherwise disposes of any 1[person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be] employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine. 2[Explanation I.—When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution. Explanation II.—For the purposes of this section “illicit inter-course” means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi-marital relation.]

¹⁰ Section 375 in The Indian Penal Code: Rape.—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following de-scriptions:—

(First) — Against her will.

(Secondly) — Without her consent.

(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly) — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be law-fully married.

(Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupe-fying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly) — With or without her consent, when she is under eighteen years of age. Explanation.— Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Exception) — Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.]

3.2 RIGHTS OF JUVENILES UNDER CONSTITUTION

The Constitution has secured special status for children in the Indian polity since its adoption in 1950. Children figure in the chapters containing fundamental rights and the directive principles of state policy, both of which are fundamental to the governance of the country.

3.3 NEHRU REPORT

The Nehru Report had certain principles for the protection and welfare of the children, which were later recognized under Indian constitution the NEHRU report states:

- All citizens of India have the right to free elementary education without any distinction of caste or creed; and
- Parliament shall make suitable laws for the maintenance of health and fitness for work of all citizens, and welfare of children.

The above principles were accepted by the All Parties Conference held at Lucknow at the end of August 1928, which have been recognized in the Constitution in Articles 15(3), 24, 39(e) and (f), and 45. The draft provisions recognized inter alia the principles of (i) free elementary education without any distinction of caste or creed, and (ii) Articles 15(3) and 24 were introduced at later stages during the Constituent Assembly Debates (CAD) but evoked no discussion. While there is no explanation available for introduction of 'children' in the draft provision preceding Article 15(3), the draft provision preceding Article 24 was introduced pursuant to the Congress Declaration of 1933. Though these provisions were not discussed during the CAD, they can still be said to be indicative of a consensus as the principles behind these provisions did figure and were adopted at the All Parties Conference in 1928.¹¹

3.4 THE CONSTITUTIONAL PROVISIONS RELATED TO PROTECTION FOR CHILDREN

The Constitution of India guarantees all children certain rights, which have been specially included for them.

¹¹ Ved Kumari, *The Juvenile Justice System in India from welfare to Right 45*(Oxford University Press, New Delhi 2004)

- a. Article 14 states that the State shall “not deny to any person equality before the law or the equal protection of the laws within the territory of India” “Nothing in this article shall prevent the State for making any special provision for women and children.”¹²
- b. Article 15 (3) says that, “Nothing in this article shall prevent the State from making any special provision for women and children”¹³
- c. Article 19(1) (a) said that all citizens shall have the right (a) to freedom of speech and expression;¹⁴
- d. Article 21 tells that no person shall be deprived of his life or personal liberty except according to procedure established by law.¹⁵
- e. Amendment 86 of the Constitution recognizes the Right to education. Article 21-A provides that 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. According to Article 21-A of the Indian Constitution all children between the ages of six to fourteen should be provided with free and compulsory education.¹⁶
- f. Article 45 states that the State shall Endeavour to provide early childhood care and education for all children until they complete the age of six years. Article 45 of the Constitution obligates the state to endeavor to provide for free and compulsory education to all children until they complete the age of 14 years The constitutional concept of the children in India is of a healthy childhood with opportunities for all-round growth and development, protected from exploitation and abuse, and unburdened by child labour forced on them by economic necessity.
- g. Article 51(k) states the parents or guardians of the children between the ages of six and fourteen should provide them with opportunities for education.
- h. Article 24 prohibits employment of children below the age of fourteen years in factories, mines or any other hazardous occupation.¹⁷

¹² Article 14 of The Constitution of India

¹³ Article 15(3) of The Constitution of India

¹⁴ Article 19(1) of The Constitution of India

¹⁵ Article 21 of The Constitution of India

¹⁶ Article 21 A The Constitution of India

¹⁷ Article 24 of The Constitution Of India

- i. Article 39(e) and (f) provides that the State shall, in particular, direct its policy towards securing to “ensure that the health and strength of workers, men and women and the tender age of children are not abused” and that “the children are given opportunities and facilities to develop in a healthy manner and in conditions of free demand dignity” and that the childhood and youth are protected against exploitation and against moral and material abandonment.
- j. Article 46 mention about the right of weaker sections of the people to be protected from social injustice and all forms of exploitation.¹⁸
- k. Article 47 mention about that State shall raise the level of nutrition and standard of living of its people and the improvement of public health.¹⁹

3.5 THE PROBATION OF OFFENDERS ACT IN 1958

- The Probation of offenders Act, 1958, prohibits court in awarding imprisonment to offenders under twenty one years of age and to direct removal of all disqualifications attaching to conviction.
- Section 361 of the Code of Criminal Procedure, 1973 says that any case where the court could have dealt with the accused person under the provisions of the Probation of Offenders Act or under section 360 of the CrPC. and yet the court decides not to do so, it shall record in its judgment, special reasons for not having done so.

3.6 THE CHILD LABOUR (PROHIBITION AND REGULATION) ACT, 1986

The Child Labour (Prohibition and Regulation) Act, 1986 defines a child as a person who has not completed fourteen years of age. *The Factories Act, 1948* and *Plantation Labour Act 1951* states that a child is one that has not completed fifteen years of age and an adolescent is one who has completed fifteen years of age but has

¹⁸ Article 46 in The Constitution of India: Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections: *The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation*

¹⁹ Article 47 in The Constitution of India 1950: Duty of the State to raise the level of nutrition and the standard of living and to improve public health: *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 endeavor to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.*

not completed eighteen years of age. The Factories Act gives permission to adolescents to work in factories if they are medically fit they may not work more than four and half hours per day. *The Motor Transport Workers Act 1961*, and *The Beedi and Cigar Workers (Conditions of Employment) Act 1966*, both give definition of child as a person has not completed fourteen years of age i.e. to attain adulthood fourteen years age is required. *The Merchant Shipping Act 1958* and *Apprentices Act 1961* have no definition of child but it prohibits the work of a child below fourteen years, indirectly it says a person who is not above fourteen years is not permitted to work. *The Mines Act, 1952* is the only statute related to labour which gives definition of adult. It says that any person who has completed the age of eighteen years therefore, child is below eighteen years.

3.7 THE AGE OF CHILD UNDER OTHER LEGISLATION

The Prohibition of Child Marriage Act, 2006 states that a male has not reached majority until he is twenty-one years of age and a female has not reached majority until she is eighteen years of age. *The Indian Majority Act, 1875* was enacted to create a blanket definition of a minor for such acts as *the Guardians and Wards Act of 1890*. Under *The Indian Majority Act, 1875* a person has not attained majority until he or she is of eighteen years of age. This definition of a minor also stands for both *The Hindu Minority and Guardianship Act, 1956* and *The Hindu Adoption and Maintenance Act, 1956*. Muslim, Christian and Zoroastrian personal law also upholds eighteen as the age of majority. *The Juvenile Justice Act, 1986* defined a boy child as below sixteen years of age and a girl child as below eighteen years of age. *The Juvenile Justice (Care and Protection of Children) Act, 2000* and now of *Juvenile Justice (Care and Protection of Children) Act, 2015* Act, has changed the definition of child to any person who has not completed eighteen years of age. Because of its umbrella clauses and because it is the latest law to be enacted regarding child rights and protection, many are of the opinion that the definition of child found in *the Juvenile Justice Act, 2000* should be considered the legal definition for a child in all matters. Now it becomes most important to know the population of

child in India. As per the census of 2011, the child²⁰ in India can be represented as follows:

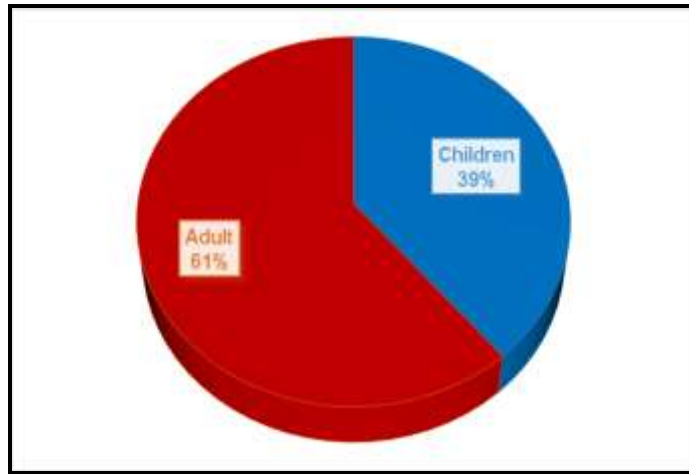


Figure 1.

India with 121 Crores people constitutes as the second most populous country in the world, while children represents 39% of total population of the country.

Children's Age group in India:

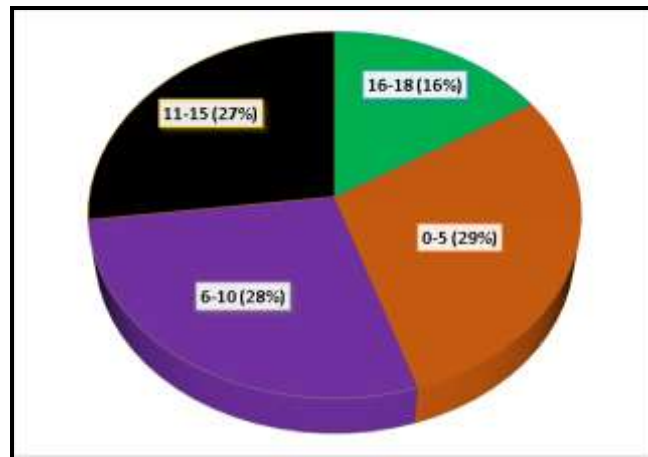


Figure 2.

The figures show that the larger number of about 29 percent constitutes Children in the age between 0-5 years. The share of Children (0-6 years) in the total population has showed a decline of 2.8 points in 2011, compared to Census 2001. The children's population (0-18) is 472 million.

²⁰ Data Source: Census of India 2010-11, Assessed from www.childlineindia.org.in/child-in-india.htm, dated 22.06.2017, time 12:30 P.M.

Age group of Gender of India's Children

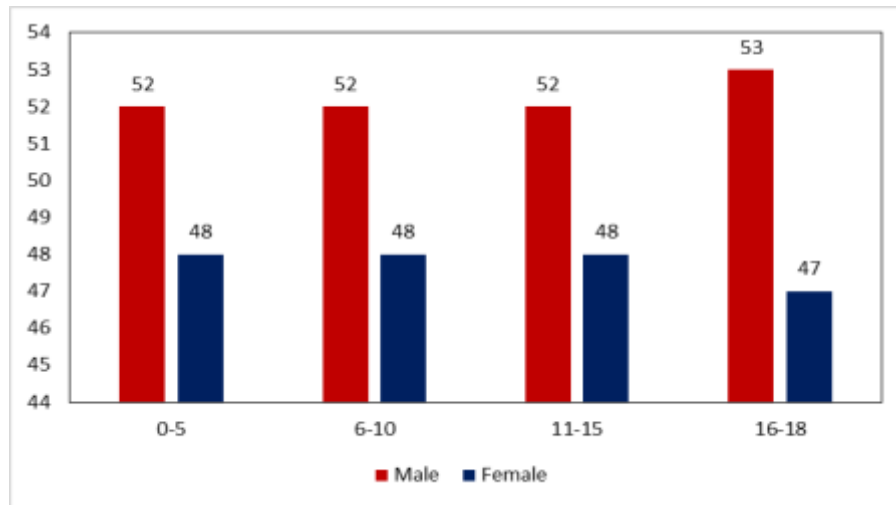


Figure 3.

While an absolute increase of 181 million in the country's population has been recorded during the decade 2001-2011, there is a reduction of 5.05 million in the population of children aged 0-6 years during 2010-11. The decline in male children is 2.06 million and in female children is 2.99 million. The share of Children (0-6 years) in the total population has showed a decline of 2.8 points in 2011, compared to Census 2001 and the decline was sharper for female children than male children in the age group 0-6 years.

Rural - Urban Distribution of Children Population:

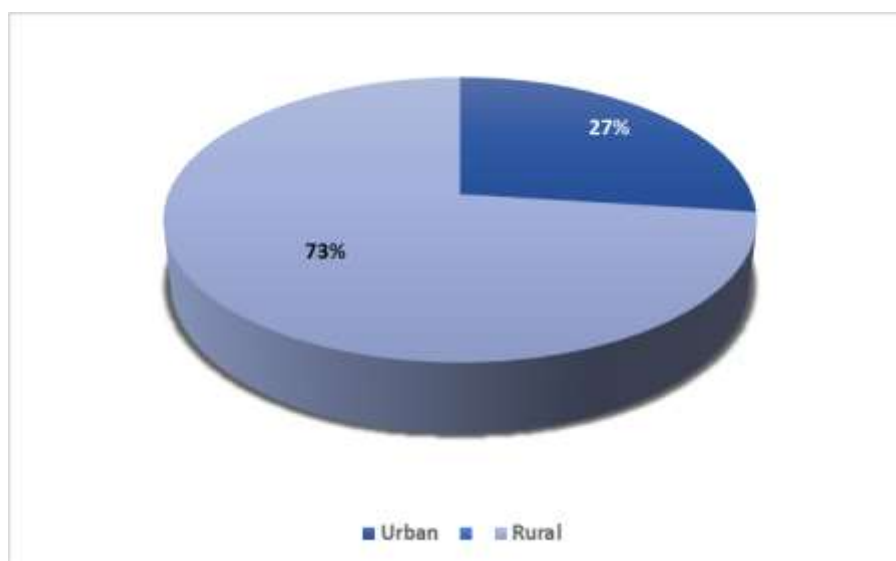


Figure 4.

State wise distribution of Children’s population:



Figure 5.

- Uttar Pradesh (19.27%) is the state with highest children’s population in the country followed by Bihar (10.55 %), Maharashtra (8.15 %), West Bengal (6.81%) and Madhya Pradesh (6.46%) constitutes 52% of Children’s population in the country.

State wise and Gender wise distribution of Children's population:

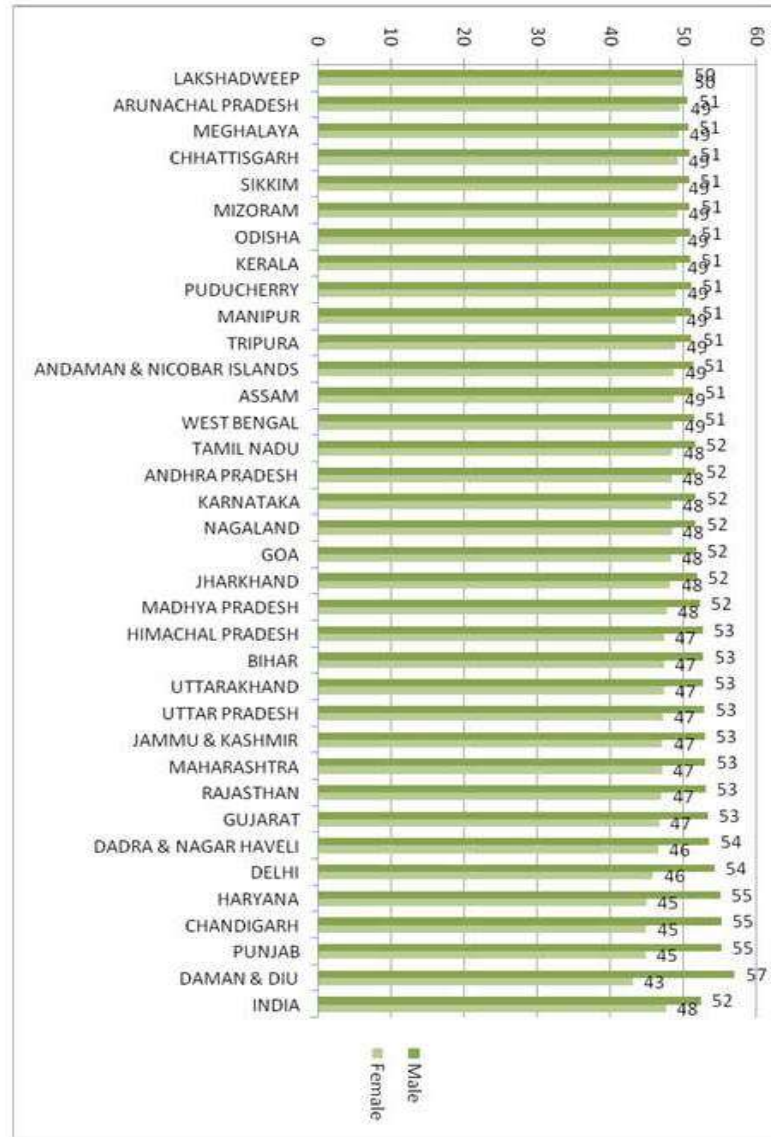


Figure 6.

Male – Female Children’s Ratio:

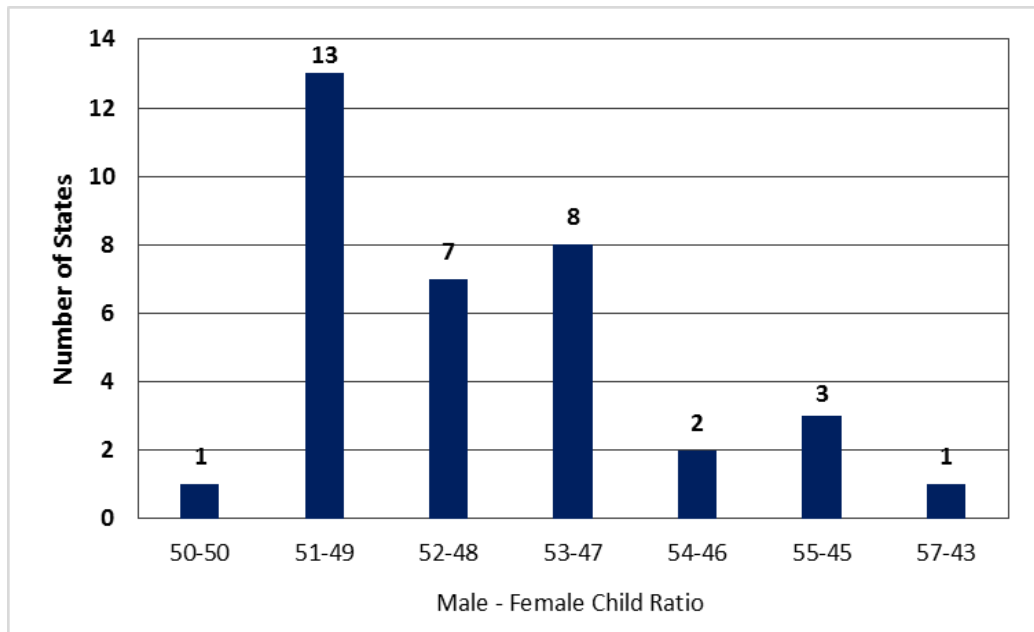


Figure 7.

The Child gender Ratio in the country has declined.

Gender wise Adult vs. Children:

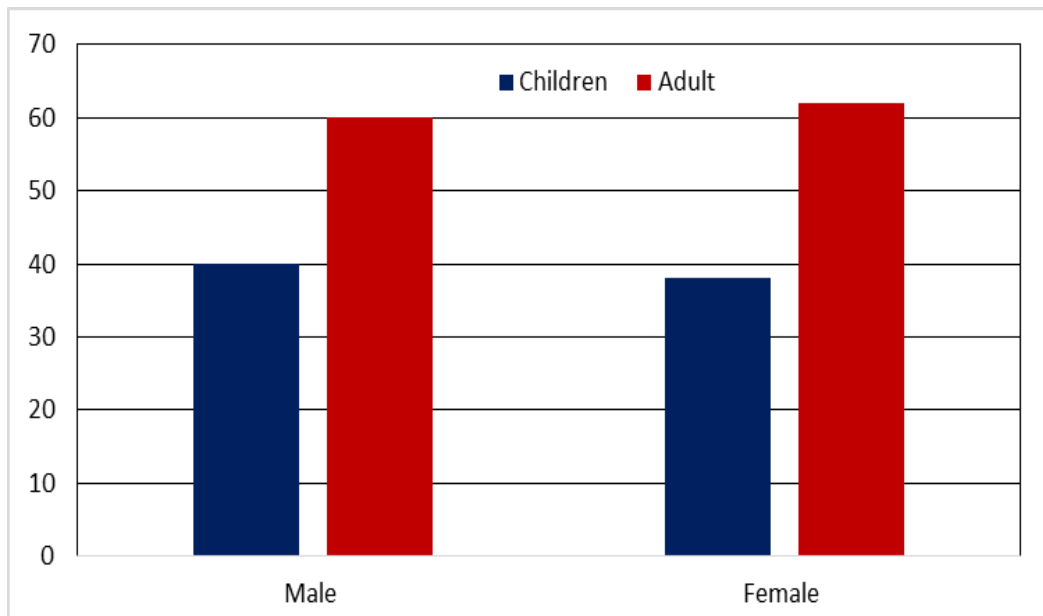


Figure 8.

Gender wise distribution of Rural - Urban Children Population:

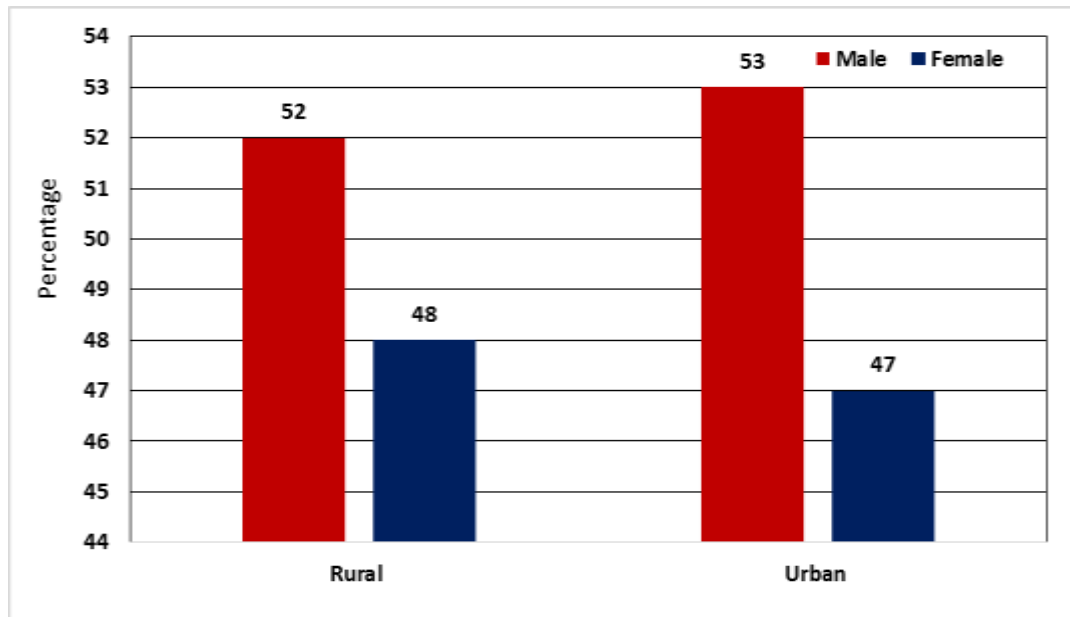


Figure 9.

Age distribution of Rural and Urban population:

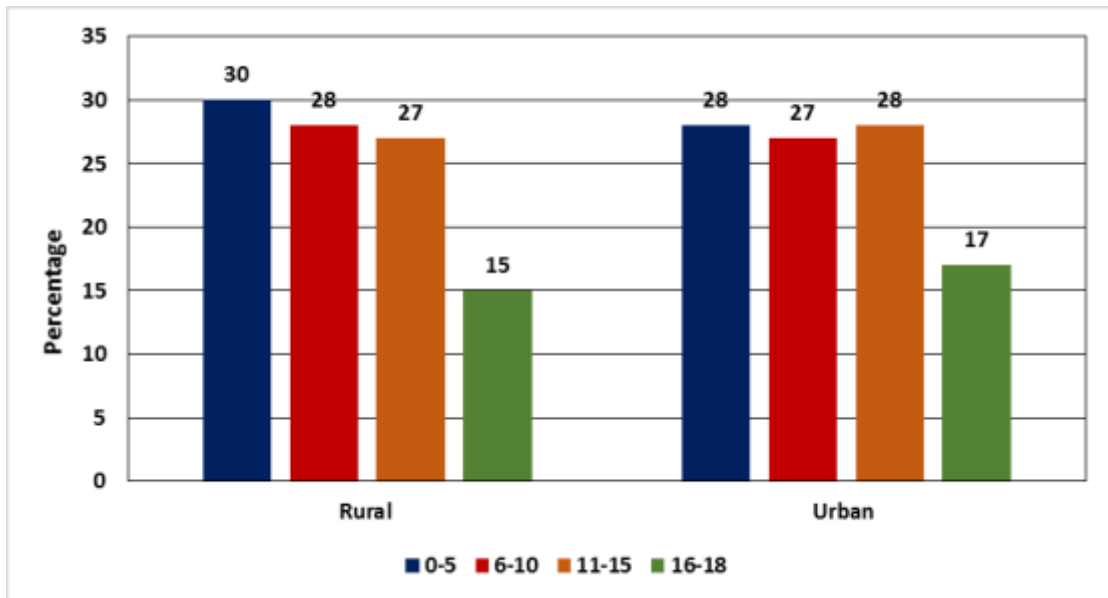


Figure 10.

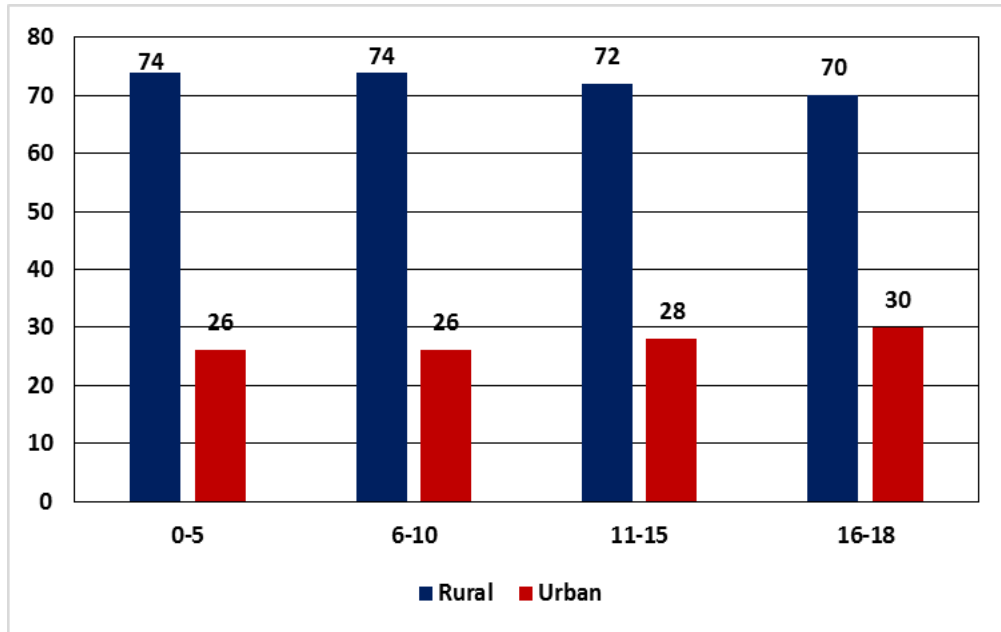


Figure 11.

Comparison of Adult and Children population in Rural and Urban India:

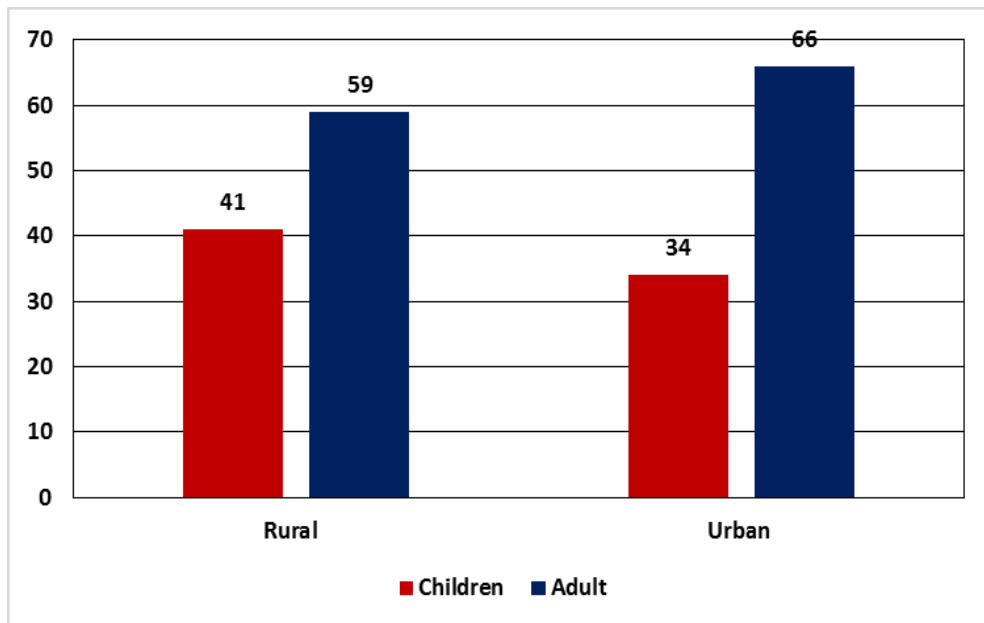


Figure 12.

Age of Child in Different Statutes in India:

S. No.	Legislation/ Law	Age (Specified in Years)
1.	Arms Act, 1959	16
2.	Apprentices Act, 1850 (Rep)	10 – 15
3.	Constitution of India Article 23 and 24	14
4.	Plantation Labour Act	12
5.	Employment of children Act 1938	15
6.	Factories Act 1948	14
7.	Child Marriage Restrain Act 1929	18 for Girls, 21 for Boys
8.	Option of puberty under Muslim law	15 – 18
9.	Children Act 1960	16 for Boys, 18 for Girls
10.	Guardians and Wards Act 1890	18/21 years
11.	Hindu Minority and Guardianship Act, 1956	18
12.	Sec.125,Cr.p.c 1973	18
13.	Hindu Adoption and Maintenance Act, 1956	15
14.	Indian Contract Act, 1872	18
15.	Indian Majority Act, 1875	18
16.	Indian Penal Code 1860:-	
	Sec. 82	Below 7
	Sec.83	7 – 12
	Sec.361	16 for Boys , 18 for Girls
	Sec.363-A,372,373	18
	Sec.375-consent	18
17.	Immoral Traffic Prevention Act 1956	16 for Girls
18.	Juvenile justice Act 1986	16 for Boys , 18 for Girls

19.	Juvenile justice Act 2000	18
20.	Primary Education Act	6 – 11
21.	Reformatory school Act 1897	Below 15
22.	Various state Children act	14 – 18

3.8 JUVENILE JUSTICE ACT, 2000

The Juvenile Justice (Care and Protection of Children) Act, 2000, has been passed to reform the old legislation 1986 Act, which was framed to alleviate the children from the impact of crime, poverty and crime. This act states the responsibilities of the government to deal with these delinquent children. The Act has been formulated in pursuance of the international obligations and standards regarding juvenile offenders.

Even with the passing of the enactment, child protection in India remains a low priority of the center with an annual allocation of 0.027 per cent of the union budget in 2007-08. The recent Nithari killings, the increasing child trafficking, malnutrition, child labour, girl child neglect all seem to vindicate the hypothesis that the plight of children in India has remained largely neglected.

3.8.1 Deficiencies in the Act

The preamble of the Act of 2000 reads that the Act seeks to amend the law relating to juveniles by providing proper care, protection and treatment by catering to their development needs and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interest of children. Unfortunately none of these aims have been fulfilled because of glaring insufficiencies in the Act itself which are not very difficult to point out. Both, in procedural as well as substantive portions, there is a lot that needs to be added to the Act in order that it may actually be useful for the purpose for which it has been established. Some of the deficiencies are as following:

3.8.1.1 Use of the word ‘may’

In the act the word ‘may’ has been used in number of sections of the Act. According to the Rule of Interpretation the word ‘may’ left power of discretion to the authority ‘to do’ or ‘not do’. Therefore, most of the provisions of this Act depend upon the sweet will. Such word that is ‘may’ is a sign of deficiency for e.g. Sec.8 (3) of the Act; the State may formulate rules and standards for the observation homes that are to be established. Leaving something as important as maintenance of standards to the discretion of the State is a major problem and should be made mandatory for the State to regulate such basic areas. Even the appointment of inspection committees for the children’s homes has been left to the discretion of the States and they ‘may’ constitute such committees according to Sec. 29.

3.8.1.2 Extension of period regarding inquiry

Sec. 14 of the Act discuss about the period regarding enquiry to be completed. It states 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. This provision has no exhaustive list of ‘some special circumstances in special cases’. It left use of arbitrariness into the matters of the enquiry. This section also does not deal with the maximum period for enquiry in ‘some special circumstances in special cases’.

3.8.1.3. Punishment for cruelty to a juvenile

Juvenile justice act, 1986 was made for the protection to juvenile. However sec.23 of the act has the provision of imprisonment for a period of six months or with fine or with both. In case a cruelty has been committed against a juvenile. It is very surprising that amount of the punishment is only of six months under the act. It has deterrent effect to accused.

3.8.1.4. Adequate training for the officials dealing with juveniles

There is no provision under the act for the special training of the officials who are supposed to deal with juvenile offenders. Even though Sec. 63 provides for properly trained police unit, it pays mere lip service to the requirement of special training because no proper guidelines have been provided as to how the special

training will be given. Lack of properly trained officials defeats the entire purpose of the Act. Officially the police are charged with enforcing the law. Unofficially, the police can be very corrupt, quite arbitrary and sometimes brutal. Because of these practices, it should be no²¹ revelation that their treatment of juvenile offenders is frequently informal, arbitrary and extralegal.²² When juvenile delinquents are sent to locked custody, there is a great deal of disparity in official and unofficial standards of treatment. In fact, corruption and unequal treatment are the rule rather than the exception.

3.9. BASIC CORE ISSUES

3.9.1 Age

The need to pay attention to empirical research findings on children's cognitive capacities has been largely ignored by policy makers, with an inevitable arbitrariness in legislation. During early adolescence, young people's thinking tends to become more abstract, multidimensional, self-reflective and self-aware, with a better understanding of relative concepts. Not only do young people become increasingly able to consider the long term consequences of their actions, they also tend to think about such consequences more in terms of their own sense of responsibility and with increased awareness of the effects of their action on other people.²³ Overall crime rates, including crime by juveniles, have greatly risen in the past century.

3.9.2 Offenders being children

A nine year old boy earned the dubious tag of being the country's youngest rapist after raping a six year old girl, in Indora, Kangra. Three ten year olds in a Haryana school were booked for molesting a ten year old girl from the same school.²⁴ Horrifying incidents like these should force the government to do a rethink on the policies regarding the juvenile offenders. It is very evident that there is something drastically wrong in the society where such incidents take place. The basic

²¹ www.law.harvard.edu/students/orgs/hrj/iss21/155-166.pdf, (last visited on 9 April, 2016).

²² Gus Martin, *Juvenile Justice Process and System*, 361 (Sage Publication, New Delhi, 1st ed. 2005).

²³ Michael Rutter, et al., "Antisocial Behavior by Young People" 40 *Brit. Jour, Crimn.* 537-538 (1998)

²⁴ <http://jjindia.net/1/Default.aspx?pg=c0bddfa2-2f20-4583-abc9-9405e84a479c&detail> (visited on 9 Apr, 2016).

cause of juvenile delinquency and neglect were poverty coupled with lack of parental or societal care, industrialization and slums, bad cinema, substandard education and soon.²⁵

1. There are explanations based on individual risk factors as genetic influences, low IQ and poor educational attainment.
2. It could be because of changes in living conditions and socioeconomic factors.
3. It could be based on family and socialization factors, including the influence of mass media.

3.9.3 Offenders being teenagers

The 2007 case of the gruesome murder of a 16 year old boy, Adnan Patrawala, by his teenage friends, who later pleaded delinquency is a very important case as far as the importance of age is concerned. In a very recent case of a similar kind, a 17 year old boy was kidnapped and killed by his close friends for money.²⁶ Section 2 (k) of the Act has defined a juvenile as anyone below 18 years of age. This section will protect the offenders in the abovementioned cases because they were below the age of 18 years. The logic behind the existence of the Act was to protect the juveniles because they were not supposed to have the necessary mental element required to commit crimes. This is the reason behind having milder laws and punishments to deal with juvenile offenders. However, in the abovementioned cases, it is very evident that the offenders had the necessary knowledge and mental element regarding the commission of the crime.

3.9.4 Need for the Policy of Waiver

In Reepak Ravindran²⁷ case, the 15 year old boy was convicted for rape of a 7 year old girl. The fact that the boy was working in a lodge where he was exposed to act of adults and blue films while serving guests were considered as mitigating circumstances leading to the commission of offence. Even if the crime is shocking to

²⁵Ved Kumari, *The Juvenile Justice System in India from welfare to Right* 110 (Oxford University Press, New Delhi 2004)

²⁶<http://timesofindia.indiatimes.com/NEWS/City/Mumbai/Close-friends-abduct-murder-17-yr-old-formoney/articleshow/4141279.cms>, (last visited on 10 April, 2016).

²⁷1991 Cri LJ 595 (AP).

the conscience and the conduct abhorring, still Section 22, being aware of it, provides for keeping them in safe custody.

In *Gulzar Singh v. State of Punjab*²⁸, the offence was serious or the child is of depraved nature, the courts suggested that the appropriate course for the juvenile courts was to send the matter to the government for deciding the term of detention.²⁹ In U.S.A. the policy of waiver has been extensively used those juveniles who are engaged heinous offences should be conceder as adult, because the harm to society committed by adults.

There are three kinds of waiver - legislative waiver, judicial waiver and prosecutorial waiver. In case of legislative waiver, the legislature excludes certain crimes from the jurisdiction of the juvenile court. Some crimes such as murder, rape, etc. are so severe that no leniency should be shown to the offenders. In judicial waiver, the juvenile court judge has the discretion to waive of the jurisdiction of the juvenile court keeping in mind the nature of offence, age of offender and the past record of the juvenile. The same powers are given to the prosecutor in case of prosecutorial waiver.³⁰ In most states judges decide whether a youth is a criminal or a delinquent in a waiver hearing and base their discretionary assessments on a juvenile's 'amenability to treatment' or 'dangerousness'.³¹ Legislatures increasingly use age and offence criteria to redefine the boundaries of adulthood, coordinate juvenile transfer and adult sentencing practices, and reduce the 'punishment gap'. There are some juveniles who are extremely dangerous to others and who do not appear to be amenable to rehabilitation. Most of the states have established mechanisms for transferring or waiving jurisdiction to adult courts in such cases.³² India needs to include something on the lines of waiver in the Act in order to take care of juveniles committing serious offences and also in cases where the juvenile is a teenager and well aware to understand the implications of his act.

²⁸(1979) 91 Punj 477.

²⁹*Peter Gill v. State of Punjab*, 1983 Cri LJ 231 (Punj) NOC.

³⁰<http://www.altlawforum.org/grassroots-democracy/juvenile-justice/a-critique-of-the-juvenile-justice-act-2002/>, (visited on 30 April, 2016).

³¹Joseph G. Weis, et al., *Juvenile Delinquency Readings* 598 (Boston Pine Forge Press, London 2nd ed; 2001)

³²Steven M. Cox, et al., *Juvenile Justice- A Guide to Theory, Policy and Practice*, 254 (Sage Publication, New Delhi 6th ed. 2008).

3.10 FACILITIES BEING PROVIDED TO THE JUVENILE DELINQUENTS

The facilities available to delinquent juvenile are very inadequate. The planning for rehabilitation of these juvenile is not proper, only few procedural safeguard has been conferred on them in respect to adults. So long the myth prevails that juvenile court intervention constitutes only benign coercion and that in any case children should not expect more, youths will continue to receive the ‘worst of both the worlds’. The increased suicide rates among the delinquents and the mass break out of the delinquents from the Madivala observation home (Bangalore) are very discouraging. Most of the observation homes in our country have bad living conditions, poor diet, weak security lacking in entertainment and education.³³ Such incidents show very clearly that there are many deficiencies in the institutions and this problem needs to be tackled.

3.11 CLOSED NATURE OF JUVENILE HOMES AND OBSERVATION CENTERS

The institutions designated as observation homes, children’s homes and special homes share one feature in common – they are all closed institutions, which completely deprive the child of his or her liberty.³⁴ Should prisonization occur during institutionalization, there exists a distinct possibility that a child will be ‘lost’ and grow up to become an adult criminal. Indeed the consequences are readily apparent, as research has shown that recidivism rates are very high among juvenile participants in aftercare (parole) programs. The closed, informal and confidential nature of delinquency proceedings reduces the visibility and accountability of the justice process and precludes external checks on coercive interventions.

3.12 CONDITIONS IN THE JUVENILE HOMES AND OBSERVATION CENTERS

3.12.1 Facilities provided:

Research in the US indicates that there are systemic problems of inadequate security, crowded residential space and improper health care. Institutional crowding

³³Whose crime is it anyway?, Times of India, Bangalore, 23 October 2007 at 2.

³⁴Aastha Suman, “*Critique of the Juvenile Justice Act, 2000*”, <http://humanrights.indlaw.com/search/articles/?914b8ae2-f17a-4e0f...>, (visited on 26 April, 2016).

is, in fact conducive to violence because of the administration's inability to closely monitor youths and because sub cultural pressures are intensified. In the United States, relying on the parent's patria principle for support, 'child savers' argued that indulgent, improper parents should lose all legal rights over their children and the children be brought under state's protection. The knowledge of the court about the internal operations and 'benevolent effect' of reformatories was derived from the information received from the manager of these institutions but various investigations internal affairs brought out some brutal facts. It had been suggested in the Parliamentary debates that the homes should be small and should provide adequate space, medical facilities, vocational training, education and a home like atmosphere. They should be unlike prisons or brothels and should be made attractive to children. There was a need for laying down standards as homes functioning below standards were more harmful. An advisory committee ought to be constituted to report on the condition in these homes. In the Pilla Jail of Vijaywada's Observation Home, in June 2004, it was found that children between ages of 3 to 18 years were kept in very small size of room, the size does not exceed 700 sq. feet.

3.12.2 Treatment of the juvenile

The life of children who have the misfortune of ending up there is frequently more horrifying than the family environment they escaped and often more wretched than the life on the streets from which the government supposedly rescued them.³⁵ The children in the Vijayawada Observation Home were made to sit in a single room for the entire day so that the guards can easily control them. There is absolutely no recreation for them except for a few hours of television. Hygiene is a major problem. The food supplies are not enough and most of the times the children stay hungry because they cannot risk asking for more food on account of the beatings they receive. Medical facilities provided are not enough for the children. Systematic physical abuse also takes place in the Vijayawada home. Children are frequently beaten up, made to massage the guards, forced to eat their excreta as a form of punishment and also subjected to sexual abuse.

³⁵Federico Ferrara and Valentina Ferrara, "The Children's Prison: Street Children and India's Juvenile Justice System", www.careshareindia.org/OHome/OHEnglish.pdf, (visited on 30 April, 2016).

3.12.3 Improvement of the Juvenile and Observation Homes

For the welfare of the juvenile offenders, it is imperative that the government draft rules for the administration and upkeep of the juvenile and observation homes. Rather than leaving such important areas to the States, it is necessary that the government lay down specific guidelines for such places. Rather than leaving such duties as the constitution of inspection committees and the laying down of minimum standards for the juvenile and observation homes to the discretion of the States, these rules should be made and strictly followed by the Union Government itself. Also, violations of such laws should be heavily punished in order to prevent more law breaking in this aspect. Also there should be provisions for the surprise inspections for such places, the minimum requirements for such places.

3.13 PROCEDURAL ISSUES

More than the substantive issues, it is the procedural issues that have played spoilsport for the Act. Lack of properly trained officials and allocation of proper funds have been the responsible for the widespread violations of the Act.

3.13.1 Lack of proper allocation of funds

A major drawback in the implementation procedure is a constant lack of resources both financially and in terms of personnel. The JJA has required a substantial amount of funds and so it was not always possible to find members with the desired background in child welfare, resulting in posts remaining vacant. This delays an already delay-prone system. Lack of proper funds also hampers the training process which should be made mandatory for all people associated with the implementation of the Act. The Government needs to lay down proper guidelines regarding the allocation and distribution of funds for the welfare of the juveniles.

3.13.2 Lack of guidelines regarding the minimum requirements of officials to be associated with the system

The officers meant to be associated with the implementation of the act remain apathetic and insensitive to the conditions of juveniles.³⁶ Special training modules

³⁶Heed their cries for help, Times of India, Kolkata, 18 December 2007 at 5.

need to be developed for magistrates and social workers appointed or to be appointed as members of the board or the committee. All members of such boards and committees must be given special training in the philosophy of juvenile justice and policy and scheme of the Act. It is imperative that children are moulded in such a manner that they grew up as responsible adults and it is not possible within the traditional framework of law.³⁷

Judicial officers are not used to being overshadowed by social workers while dealing with persons committing offences, nor are the social workers familiar with the idea that their opinion counts as much as that of the magistrate's. In addition, the magistrates usually do not have occasion to acquire special knowledge of child psychology and welfare, which is an essential qualification under the Act, before being appointed to the Board. Social workers need to know the laws applicable to children lest the magistrates subdue them. The members of the committee, too, need to know the scheme and provisions of the Act under which they operate. Complete knowledge regarding the various laws applicable to the juveniles is required. Special training of police officers in each police station is essential for the special juvenile/child welfare officers and special juvenile police units in each district to discharge their duties effectively.

Furthermore, it is observed that the members tend to be not well informed in child psychology and dynamics of juvenile behavior which results in apathy towards following an urgent path to finding a solution for a child presented before the Child Welfare Committee. Moreover the magistrates so provided are mostly unpaid for their work which only creates inefficiency.

Also, though the chairperson of the Child Welfare Committee is given the powers of a magistrate, lack of awareness among the police officials and other administrative staff leads to a delay in the implementation of their decisions.

Rules need to be made to prevent such incidents. Lack of supervision, and limited staff, combined with a lack of training, strain relations between Home staff and children at the Observation homes and this worsens the situation. It needs to be

³⁷<http://www.indopia.in/India-usa-uk-news/latest-news/1165/National/1/20/1>, (visited on 28 April, 2016).

ensured that all people to be associated with the implementation of the Act are adequately trained to deal with the juveniles and in cases of any violations or incidents of Cruelty, strict punishment needs to be given.

3.14 JURISPRUDENTIAL ANALYSIS

There are two reasons which compel the re-examination of juvenile justice jurisprudence:

- a. There do exist systems where either juvenile justice has not fully evolved, or a common Understanding of the concept is lacking
- b. Even in advanced countries serious doubts and rethinking is under way in the field that is Manifest in the process of ‘Re-criminalizing Delinquency’ and measures like juvenile justice jurisdiction, waiver provisions and statutes.³⁸

The Convention on the Rights of the Child has four categories of rights:

- a. Right to Survival
- b. Right to Protection
- c. Right to Participation
- d. Right to Development

The rights given under C.R.C. has not only obligation upon the state but also parents and community: from kindness and charity to children to moral and legal obligations to them. However this system has come in for criticism because like the needs of the children, their rights are also a creation of the adult institutions, in which children have no say even though they have a positive contribution in the construction of their own lives and in the lives of others.

Therefore, all children should be provided with resource and opportunities that will allow them to develop their freedom since not being able to participate effectively in taking choices that governs one’s life would be a capability deprivation

³⁸B.B. Pande, *The Indian Juvenile Justice Jurisprudence and The Convention on The Rights of The Child*, available at <http://www.workingchild.org/htm//jj.htm>, (visited on 9th April, 2017).

since both material and political control over one's environment is a central human capability.³⁹ Essentially, there are three components to the juvenile justice system:

- a. Identify the patterns of thinking that have led the child to perform acts of crime and violence in the past and that pose a risk of such behaviors in the future;
- b. Learn specific skills for intervening in and controlling these patterns of thinking; and
- c. Summarize these patterns and interventions in the form of a plan for controlling their high-risk thinking in the community.⁴⁰

3.14.1 Therapeutic Jurisprudence

Therapeutic jurisprudence is the study of the role of the law as a therapeutic agent and the law can be seen to function as a kind of therapist or therapeutic agent producing therapeutic and ant therapeutic consequences.⁴¹

It can be defined as “the use of social science to study the extent to which a legal rule or practice promotes the psychological or physical well-being of the people it affects.⁴² The field of psychology and law has the potential to fill a fundamental gap in modern jurisprudence that is necessary to complete the realist vision of a legal system that is committed to doing good.⁴³

In the juvenile system it would require:

- a. Enabling juvenile respondents to make good use of legal representation and
- b. Ensuring that they believe that their point of view is being taken seriously because people value procedures in which they are treated with respect and given a say in matters pertaining to them. This results in greater compliance with the decision. Individuals feel that the legal system has treated them with fairness, respect, and dignity and it has a therapeutic effect. Some states

³⁹Martha Nussbaum, *Frontiers of Justice*, 77 (The Belknap Press, Harvard 1st ed 2006).

⁴⁰Amy D. Ronner, “Songs of Validation, Voice, And Voluntary Participation: Therapeutic Jurisprudence, Miranda And Juveniles” 71 U. Cin. L. Rev. 89 (1997).

⁴¹Thomas J. Mescall, Legally Induced Participation And Waiver Of Juvenile Courts: A Therapeutic Jurisprudence Analysis, 68 Rev. Jur. U.P.R. (1999).

⁴²Gene Griffin, Michael J. Jenuwine, Using Therapeutic Jurisprudence To Bridge The Juvenile Justice And Mental Health Systems, 71 U. Cin. L. Rev. 65 (1998).

⁴³Gary B. Melton, The Law Is a Good Thing (Psychology Is, Too): Human Rights in Psychological Jurisprudence, available at <http://www.jstor.org/stable/1394270>, (visited on 10th April, 2017).

reacted to the perceived increase in juvenile violence by enacting no individualized juvenile waiver mechanism such as:

I. **Legislative waiver:** State legislatures determine when juvenile waiver is appropriate, generally establishing criteria based on offense categories and age. There does not appear to be a deterrent effect of legislative waiver on rates of juvenile crimes.

II. **Prosecutorial waiver:** extraneous factors such as sympathy for victim, public outcry etc. might be given a lot of importance in this case. Non-judicial waivers may be ant therapeutic since the-basic tenets justifying the passage of the waiver statute are empirically questionable and disregard any assessment of the individual juvenile. In *Kent v. United States*⁴⁴, the Supreme Court enumerated eight factors that judges should evaluate when determining whether a juvenile is amenable to treatment in the juvenile justice system. These are:

- i. The nature, circumstances, and seriousness of the alleged offense;
- ii. The child's court and delinquency record;
- iii. The child's age and maturity;
- iv. The child's family, school and social history;
- v. The success or lack of success of any past treatment efforts of the child;
- vi. The nature of services available through the juvenile justice system;
- vii. The adequate protection of the public; and
- viii. The likelihood of rehabilitation of the child

However, currently importance is being given to impose a rebuttable presumption upon all juveniles to prove they are amenable to treatment and rehabilitation because such a presumptive judicial waiver encourages juvenile participation throughout the entire transfer process.

⁴⁴383 U.S. 541, 566-67 (1966).

3.14.2 Approaches to be utilized

Two main approaches regarding the juvenile justice:⁴⁵

- i. **Diversionary approach:** to avoid criminal courts. This has been considered to be the most important approach.
- ii. **Interventionist approach:** emphasized the positive good that new programs administered by child welfare experts could achieve. A child centered court was an opportunity to design positive programs that would simultaneously protect the community and cure the child. Such an approach needs to be designed using the abovementioned theory about therapeutic jurisprudence. It is submitted that rather than taking one of the abovementioned approaches for the structuring of the juvenile justice system, it is necessary to combine both to ensure that the child is kept away from the criminal court system and at the same time is brought into the mainstream society by way of the programs as part of the interventionist approach. The procedural and the substantive issues highlighted above need to be taken care of to ensure that it has therapeutic effects on the delinquents. Providing the juveniles with proper facilities, adequate care and protection and improvement in the procedures being followed will ensure that the children get the best possible chance to improve their position in life. Concept of judicial waiver need to be brought into the system so that the child gets the chance to directly interact with the judge and gets a chance to present his side of the story. This participation will have a therapeutic effect as mentioned above and would lead to increased effectiveness of the system, tailor made to suit the needs of the particular children.

The story of the Juvenile Justice Act is one of broken promises and dashed hopes. Passing of the proposed bills without the necessary resources is merely eyewash as implementation is the crux of the matter. The general quality of juvenile justice remains coarse and arbitrary with little regard for fairness and justness to the juvenile concerned. Though the concept of juvenile justice

⁴⁵Franklin E. Zimring, *The Common Thread: Diversion in the Jurisprudence of a Century of Juvenile Justice*, available at http://papers.ssrn.com/paper.taf?abstract_id=256244, (last visited on 9th April, 2017).

comprises two important ideas, viz., fairness or justness to children and alternative standards of administering justice, there is preoccupation with the second idea due to the utilitarian grounds of serving the public.

The Ministry of Women and Child Development is creating Model Rules as an addendum to the Juvenile Justice Act, with the intention that all states will adopt and comply with them. These rules will hopefully take care of all the inadequacies of the Act, and will provide for set guidelines regarding the implementation of the Act.

The Ministry is also overhauling the Department of Women and Child's organizational structure and policy, creating an Integrated Child Protection Scheme ("ICPS"). The Rules advocate for a stronger relationship between NGOs and government agencies, an acknowledgement of the positive impact NGOs can have within the Observation Homes and throughout the system. The Integrated Child Protection Scheme will hopefully address implementation concerns, through an entirely new bureaucratic structure and increased expenditures for child protection.

Three different justifications have been advanced for a separate juvenile system:⁴⁶

- a. Compared to adults, children are more treatable;
- b. Compared to adults, children are less culpable; and
- c. Compared to adults, children are less deterrable.

All these criteria need to be utilized to ensure that the objective of the separate juvenile justice system is fulfilled. It has been discovered that deterrence-based interventions do not have the requisite effects on children and it is therefore better to go in for reformatory justice. In order to have effective functioning of the juvenile justice system, there must be close coordination between police, magistracy and social services. The involvement of NGO's in the juvenile justice system is a boon as they seem to be more aware of ground realities and problems facing the children. Mental

⁴⁶Jennifer L. Woolard, Mark R. Fondacaro, Christopher Slobogin, *Informing Juvenile Justice Policy: Directions for Behavioral Science Research*, available at <http://www.jstor.org/stable/1394469>, (visited on 10th April, 2017).

health and juvenile justice systems must work together to address the psychological components of rehabilitating delinquent youth. Therapeutic jurisprudence, which lies in the use of community based programs for the mentally ill juvenile offenders, needs to be applied in the juvenile justice system.

CHAPTER-4

CRITICAL ANALYSIS OF JUVENILE JUSTICE (CARE AND PROTECTION) ACT, 2015

The Juvenile Justice Act, 2015 got the assent of the President on 31st December, 2015. There after it become law and published in the Gazette of India.¹ As per the section 1(2) the JJA 2015 is extended by the parliament for the State of Jammu and Kashmir, it means juvenile of Jammu and Kashmir will be continue to governed by the Jammu and Kashmir Juvenile Justice (Care and Protection of Children) Act, 2013, till then legislature of the State of Jammu and Kashmir not makes its own new law.²

4.1 DEFINITIONS

Juvenile Justice Act, 2015 defines all the important terms in a very rational manner some of the definitions brought in new angles within their meaning. The JJ Act, 2000 contained only twenty five definitions under Section.2 but in Juvenile Justice Act, 2015 have been given sixty definitions. One of the most vibrant Definitions is “*child*” and “*juvenile*”. Definition of child was a matter of litigation but JJ Act, 2015 tries to define the term child in a very rational way.

4.1.1 Child and Juvenile

As per the provision under section.2 (12) of the JJA 2015 the word ‘child’ means, “a person who has not completed eighteen years of age”³. It also includes the definition of ‘juvenile’ as “a child below the age of eighteen years”⁴. There is no

¹ Gazette of India, Extraordinary, Part II, Section (3) sub-section (ii) dated 13th January 2016.

² It reads, “(2) It extends to the whole of India except the State of Jammu and Kashmir”

³ S.2(12) “child” means a person who has not completed eighteen years of age;

⁴ S.2(35) “juvenile” means a child below the age of eighteen years;

reason for inclusion of this definition or rationale for the differential formulation and must be ignored as it has no bearing on any matter relating to the JJA 2015. As we know different Acts have different criteria for determination of the age of children.

4.1.2 Child in conflict with Law

In juvenile justice Act, 2015 enough stress has been given to define the term “child in conflict with law” means “a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence.”⁵ In this context The Juvenile Justice Act, 2015 is different to Juvenile Justice Act, 2000 in reference to definition following two differences are between two these acts. There are two differences in this definition compared to the corresponding definition in the JJA 2000.

In the juvenile justice act 2000 the word child was mention but Juvenile justice act 2015 replace the word ‘juvenile’ with ‘child’ In the juvenile justice act 2000 only children alleged to have committed an offence’ was mention but the juvenile justice act 2015 not only include the children alleged to have committed an offence but also children found to have committed an offence. So we can say that ambit of juvenile justice act 2015 is broader than the ambit of juvenile justice act 2000.

4.1.3 Child in need of care and protection

The definition of “child in need of care and protection”⁶ has retained many of the clauses from the JJA 2000 but with some deletions, additions and modifications in the clauses. It contains twelve clauses.

⁵S.2(13) “child in conflict with law” means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of Commission of such offence.

⁶S.2(14)“child in need of care and protection” means a child—(i) who is found without any home or settled place of abode and without any ostensible means of subsistence; or

(ii) who is found working in contravention of labour laws for the time being in force or is found begging, or living on the street; or

(iii) who resides with a person (whether a guardian of the child or not) and such person—

(a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child; or

(b) has threatened to kill, injure, exploit or abuse the child and there is a reasonable likelihood of the threat being carried out; or

(c) has killed, abused, neglected or exploited some other child or children and there is a reasonable likelihood of the child in question being killed, abused, exploited or neglected by that person; or

- i. Clause (i) includes a child “who is found without any home or settled place of abode and without any ostensible means of subsistence”. This definition is the same as in the JJA 2000 and includes children found without any home or settled place of abode and without any ostensible means of subsistence.
- ii. Clause (ii) includes a child “who is found working in contravention of labour laws for the time being in force or is found begging or living on the street.” However, it includes only those children who are working in violation of the labour laws and does not cover all working children.
- iii. Clause (iii) includes a child who resides with a person (whether a guardian of the child or not) and such person—
 - a. has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of the child; or
 - b. has threatened to kill, injure, exploit or abuse the child and there is a reasonable likelihood of the threat being carried out; or
 - c. has killed, abused, neglected or exploited some other child or children and there is a reasonable likelihood of the child in question being killed, abused, exploited or neglected by that person.
- iv. Clause (iv) covers a child “who is mentally ill or mentally or physically challenged or suffering from terminal or incurable disease, having no one to support or look after or having parents or guardians unfit to take care, if found so by the Board or the Committee”. Surely the State has the obligation to

(iv) who is mentally ill or mentally or physically challenged or suffering from terminal or incurable disease, having no one to support or look after or having parents or guardians unfit to take care, if found so by the Board or the Committee; or

(v) who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child; or

(vi) who does not have parents and no one is willing to take care of, or whose parents have abandoned or surrendered him; or

(vii) who is missing or run away child, or whose parents cannot be found after making reasonable inquiry in such manner as may be prescribed; or

(viii) who has been or is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts; or

(ix) who is found vulnerable and is likely to be inducted into drug abuse or trafficking; or

(x) who is being or is likely to be abused for unconscionable gains; or

(xi) who is victim of or affected by any armed conflict, civil unrest or natural calamity; or

(xii) who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnization of such marriage;

provide care and protection to all children who have no one to support or look after them. This is more so when such a child is also mentally ill or mentally or physically challenged or suffering from terminal or incurable disease.

- v. Clause (v) covers a child “who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child”. Read in the light of Section 76(2), the word ‘unfit’ in this clause refers to a parent or guardian who knowingly abuses and exploits the child for illegal purposes. Incapacitated, however, is not necessarily a blameworthy condition and this incapacity may arise due to physical or mental illness or incapacity of the parent, or incarceration of the parent.
- vi. Clause (vi) refers to a child “who does not have parents and no one is willing to take care of, or whose parents have abandoned or surrendered him”. This definition needs to be read in conjunction with the analyses of the definitions of abandoned child and orphan child.
- vii. Clause (vii) includes a child “who is missing or run away child, or whose parents cannot be found after making reasonable inquiry in such manner as may be prescribed”. This clause includes a new category of children within the definition of children in need of care and protection. The ‘missing’ child in this clause presents the peculiar problem of not being present or traceable. A child can be said to be ‘missing’ only till he or she is found. Once they are found, they are no more missing. For the purposes of this Act, no action can be taken by anybody under this Act till the child is found. Perhaps the intention was to refer to children who are lost as distinguished from children who run away from home. A missing child as understood in the sense of a lost child, will need to be treated as a child in need of care and protection if their parents cannot be found after reasonable inquiry.
- viii. Clause (xi) includes a child “who is victim of or affected by any armed conflict, civil unrest or natural calamity”. This clause is also similar to the earlier clause in the JJA 2000 except that it has substituted ‘civil unrest’ in the place of ‘civil commotion’.

- ix. Clause (xii) of Section 2(14) includes a child “who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnization of such marriage”. This is a completely new category included within the definition of children in need of care and protection and reflects the recognition the malaise of child marriage.⁷

4.1.4 Best interest of the child and child friendly

The word best interest of the child has been defined under section 2(9) in the juvenile justice act 2015. The word means and includes “decisions taken regarding the child in order to ensure the basic rights and needs, identity, social well-being and physical, emotional and intellectual development.”⁸

The term child friendly contained in section 2(15) deals with humane behavior, attitude, treatment, practice and environment.⁹ These factors are very important because it determines the character of human being. In this context we can say that Juvenile justice Act, 2015 is wider and rational as compare to Juvenile justice Act, 2000 undoubtedly, we are in a position to say that the juvenile justice act 2015 is more children friendly. These things have been reflected in rule 2 (d) of the juvenile justice model rules 2007.

4.2 CLASSIFICATION OF OFFENCES

The JJ Act, 2015, has classified the offence in to three categories namely, petty, serious and heinous. Section 2 of the JJ Act, 2015 contains the definitions of petty, serious, and heinous offences. Section -2 of the JJ Act, 2015 define the term petty, serious and heinous offences as follows:

- a. ‘Petty offences’ includes the offences for which the maximum punishment under the Indian Penal Code or any other law for the time being in force is

⁷Ved Kumari, *The juvenile justice (care and protection of children) Act, 2015-critical analysis*, 7 (Universal Law Publication, New Delhi, 1stedn. 2017).

⁸ S.2 (9) “best interest of child” means the basis for any decision taken regarding the child, to ensure fulfillment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development.

⁹ Section 2(15) means “any behavior, conduct, practice, process, attitude, environment or treatment that is humane, considerate and in the best interest of the child”. This definition has widened the scope of operations that should be child friendly.

imprisonment up to three years.¹⁰

- b. 'Serious offences' includes the offences for which the punishment under the Indian Penal Code or any other law for the time being in force is imprisonment between three to seven years.¹¹
- c. 'Heinous offences' includes the offences for which the minimum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment for seven years or more.¹²

The definition of petty offences is quite clear as it includes only those offences that are punishable with maximum imprisonment of three years, but under the Indian Penal Code Sec. 95 discuss about that matters which matters settle outside the court between themselves called petty matters. Sec. 95 I.P.C. is intend to prevent penalization of negligible wrongs, or offences of trivial nature. The section provides an exception from criminal liability in respect of those acts which, though they fall within the latter of the law, are yet not within its spirit, and is considered as innocent. The definition of petty offence given under I.P.C can be also taken in respect to juvenile justice for presumption of innocence. The JJ Act, 2015 also discuss about petty offences where the juvenile will be presumed innocent in such cases the juvenile should be treated as having no mensrea. The qualifying words in this definition are maximum imprisonment of three years'. Hence, despite inclusion of offences punishable with three years of imprisonment in the category of serious offences, this definition will need to be read as referring to offences punishable with imprisonment of more than three years.

The second problem posed by the definition of serious offences is that it includes offences punishable with imprisonment up to seven years. Due to this limitation included in the definition of serious offence, all offences punishable with more than seven years of imprisonment are not serious offences. For any offence to be classified as a heinous offence, it must be punishable with minimum imprisonment of seven years or more. The consequence of classification of an offence as heinous under the JJA 2015 is that if it is alleged to have been committed by a child between

¹⁰ S.2(45) of JJ Act, 2015

¹¹ S.2(54) of JJ Act, 2015

¹² S.2(33)of JJ Act, 2015

the age of 16-18 years, it exposes the child to the possibility of being tried as an adult and thereby expanding their criminal liability. Hence, it is impermissible to include offences punishable with more than seven years of imprisonment but not providing for imposition of mandatory minimum imprisonment of seven years within the category of heinous offences.

4.3 CHILD CARE INSTITUTION

The term “child care institution”¹³ refers to a range of places where children may be kept and it means “Children Home, open shelter, observation home, special home, place of safety, Specialized Adoption Agency and a fit facility recognized under this Act for providing care and protection to children, who are in need of such services”.

In relation to Observation Home, Special Home and Observation Home, the JJ Act, 2015 follows the same pattern as prescribed in the JJ Act, 2000. Children in conflict with the law may be kept in an observation home¹⁴ during adjudication of their case by the Board when not released on bail. An observation home means a home established and maintained by the government or a home run by a NGO registered as an observation home under the JJA.

4.4 FOSTER CARE

The word ‘Foster care’ has been defined under the JJ Act, 2015 “means placement of a child, by the Committee for the purpose of alternate care in the domestic environment of a family, other than the child’s biological family, that has been selected, qualified, approved and supervised for providing such care”.¹⁵ The main aim of Foster care is to provide family like care to the child grow up as a member of the family.

¹³ S.2(21).

¹⁴ Under S.2(40) “observation home” means an observation home established and maintained in every district or group of districts by a State Government, either by itself, or through a voluntary or non-governmental organisation, and is registered as such, for the purposes specified in sub-section (I) of section 47.

¹⁵ Section 2(29).

4.5 ADOPTION

The term ‘adoption’ has been defined in the JJ Act, 2015, that is quite different from the definition given by the JJ Act, 2000. The JJ Act, 2000 define the term adopted child legitimate child of the person those who adopted the child. But the definition in the JJ Act, 2015 is different; it describes such child as the lawful child. The replacement of the word legitimate means lawful child, and make a difference with ‘illegitimate child’.¹⁶

Further the word orphan child has been defined under section 2(42) of the JJA, 2015 ‘orphan’ means a child:

As children without biological or adoptive parents or legal guardian; or the legal guardian of children when refuse to take care, or not capable of taking care of the child.¹⁷

From the above mentioned definition of the term orphan it is clear that a child who has neither the natural or legal nor the adoptive parents. The same proposition is applicable in the case of a child who has parents but them incapable of taking care of the child and due to in capacity the parents force to surrender the child.

This part of the JJ Act, 2015 is very important for Central government, State government, and the JJ board and other agencies, while implementing the provisions of this Act. The provisions laid down under adoption are similar to the directive principle of the state policy in the constitution of India.

4.6 CHILDREN’S HOME

The term ‘Children’s Home’ means a Children’s Home, established or maintained, in every district or group of districts, by the State Government, either by itself, or through a voluntary or non-governmental organization, and is registered as such for the purposes specified in section 50.¹⁸

¹⁶ S.2 (2) “adoption” means the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child;

¹⁷S. (42) “orphan” means a child— (i) who is without biological or adoptive parents or legal guardian; or (ii) whose legal guardian is not willing to take, or capable of taking care of the child;

¹⁸ Section 2(19)

4.7 SPECIAL JUVENILE POLICE UNIT

The term ‘special juvenile police unit’ means a unit of the police force of a district or city or, as the case may be, any other police unit like railway police, dealing with children and designated as such for handling children under section 107.¹⁹

4.8 SPECIAL HOME

The term ‘special home’ means an institution established by a State Government or by a voluntary or non-governmental organization, registered under section 48, for housing and providing rehabilitative services to children in conflict with law, who are found, through inquiry, to have committed an offence and are sent to such institution by an order of the Board.²⁰

4.9 PROVISIONS FOR EFFECTIVE IMPLEMENTATION OF THE JUVENILE JUSTICE ACT

In order to implement the provisions of JJ Act, 2015 in effective manner, the JJ Act, 2015 recommended for establishment of State Child Protection Society, District Child Protection Unit, Special Juvenile Police Unit, and the Commissions for Protection of Child Rights. In order to protect the interest of children additional responsibilities have been given to the commission for protection of child right.

The Act also provides for evaluation of functioning of various structures under the Act. State Child Protection Society and District Child Protection Unit important bodies and have the most significant role in the implementation of the JJ Act, 2015. As per Section 106,²¹ the SCPS and DCPU will consist of all such officers and other employees as are appointed by the government to take up all matters relating to children in the implementation of the Act. These matters include establishment and maintenance of institutions under the Act, notification of competent authorities

¹⁹ Section 2(55)

²⁰ Section 2(56)

²¹ S. 106. State Child Protection Society and District Child Protection Unit- Every State Government shall constitute a Child Protection Society for the State and Child Protection Unit for every District, consisting of such officers and other employees as may be appointed by that Government, to take up matters relating to children with a view to ensure the implementation of this Act, including the establishment and maintenance of institutions under this Act, notification of competent authorities in relation to the children and their rehabilitation and co-ordination with various official and non-official agencies concerned and to discharge such other functions as may be prescribed.

relating to children, rehabilitation of children and co-ordination among various stakeholders.²²

Under this act, responsibility has been given to the National Commission for protection of child rights and the state commission for protection of child rights for monitoring the implementation of the Act. These Commissions are specifically responsible for monitoring the implementation of the Act under Section 109 of the JJ Act, 2015.²³

4.10 SPECIAL JUVENILE POLICE UNIT AND CHILD WELFARE POLICE OFFICER

Section-107²⁴ of JJ Act 2015, discussed about the special juvenile police unit and welfare police officer. It laid down the following provision:

- a. A Special Juvenile Police Unit is established in each district which will consist of the Child Welfare Police Officers from each police station in the district, and
- b. Two social workers, one of whom must be a woman.

²²Ved Kumari, *The Juvenile Justice (care and protection of children) Act, 2015-Critical Analysis*, 215 (Universal Law Publication, New Delhi, 1stedn. 2017).

²³ S.109. (1) The National Commission for Protection of Child Rights constituted under section 3, or as the case may be, the State Commission for Protection of Child Rights constituted under section 17 (herein referred to as the National Commission or the State Commission, as the case may be), of the Commissions for Protection of Child rights Act, 2005, shall, in addition to the functions assigned to them under the said Act, also monitor the implementation of the provisions of this Act, in such manner, as may be prescribed.

(2) The National Commission or, as the case may be, the State Commission, shall, while inquiring into any matter relating to any offence under this Act, have the same powers as are vested in the National Commission or the State Commission under the Commissions for Protection of Child Rights Act, 2005.

(3) The National Commission or, as the case may be, the State Commission, shall also include its activities under this section, in the annual report referred to in section 16 of the Commissions for Protection of Child Rights Act, 2005.

²⁴ S.107 Child Welfare Police Officer and Special Juvenile Police Unit-(1) In every police station, at least one officer, not below the rank of assistant sub-inspector, with aptitude, appropriate training and orientation may be designated as the child welfare police officer to exclusively deal with children either as victims or perpetrators, in co-ordination with the police, voluntary and non-governmental organisations.

(2) To co-ordinate all functions of police related to children, the State Government shall constitute Special Juvenile Police Units in each district and city, headed by a police officer not below the rank of a Deputy Superintendent of Police or above and consisting of all police officers designated under sub-section (1) and two social workers having experience of working in the field of child welfare, of whom one shall be a woman.

(3) All police officers of the Special Juvenile Police Units shall be provided special training, especially at induction as child welfare police officer, to enable them to perform their functions more effectively.

(4) Special Juvenile Police Unit also includes Railway police dealing with children.

Its function is to co-ordinate all functions of the police relating to children. These police unit has a cardinal role in the JJ Act, 2015 All police officers of the Special Juvenile Police Units shall be provided special training, especially at induction as child welfare police officer to enable them to perform their functions more effectively. In the special juvenile police unit at least one officer, not below the rank of assistant sub-inspector, with appropriate training, aptitude and orientation may be designated as the child welfare police officer to exclusively deal with children either as victims or perpetrators, in co-ordination with the police, voluntary and non-governmental organizations.

4.11 EVALUATION OF FUNCTIONING OF STRUCTURES

The JJ Act, 2015 empowers the Central and State Government to freely assess the functioning of various institutions which include the Board, the Committee, special juvenile police units, registered institutions; the evaluation process which has been left on the discretion of the government. In such case independent evaluation is conducted by both the government and it lies down that in such cases the evaluation made by the Central Government will prevail.²⁵

4.12 CONSTITUTION OF THE JUVENILE JUSTICE BOARD

The JJ Act, 2000 brought a land mark change in the constitution the juvenile court, which renamed as the juvenile justice board consisting of three members viz.,

- a. One magistrate, designated as the Principle Magistrate, and
- b. Two social workers as members of the Board vested with the powers of the magistrate. Similar provisions have been made in the JJA, 2015 also.

The same provision also adopted in JJ Act, 2015. Chapters 3rd and 4th of JJ Act, 2015, specifically deals with constitution, procedure, powers and function of the board when the board dealing with a child conflict with law. Section 4²⁶ specially

²⁵ S.55 Evaluation of functioning of structures: (1) The Central Government or State Government may independently evaluate the functioning of the Board, Committee, special juvenile police units, registered institutions, or recognized fit facilities and persons, at such period and through such persons or institutions as may be prescribed by that Government.

(2) In case such independent evaluation is conducted by both the Governments, the evaluation made by the Central Government shall prevail.

²⁶ S. 4. Juvenile Justice Board- (1) Notwithstanding anything contained in the Code of Criminal

deals with the constitution of the board and it instructs that at least one Juvenile Justice Board shall be constituted for every district for exercising the powers and discharging its functions relating to children in conflict with law.

- a. Section.4 (2) laid down the following conditions to be fulfilled for appointment as the member of the Board:
 - i. One Metropolitan Magistrate or a Judicial Magistrate of First Class not being Chief Metropolitan Magistrate or Chief Judicial Magistrate having experience of at least three years. He is to be referred as the Principal Magistrate.
 - ii. Two social workers selected in the manner to be prescribed under the rules. At least one of the social worker must be a woman.
- b. Sub-section (3) of Section 4 lays down the qualification for appointment of social workers as a member of the Board. It provides for appointment of social workers from two categories of persons:
 - i. Those who are actively involved in health, education, or welfare activities pertaining to children for at least seven years; or

Procedure, 1973, the State Government shall, constitute for every district, one or more Juvenile Justice Boards for exercising the powers and discharging its functions relating to children in conflict with law under this Act.

(2) A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of First Class not being Chief Metropolitan Magistrate or Chief Judicial Magistrate (hereinafter referred to as Principal Magistrate) with at least three years' experience and two social workers selected in such manner as may be prescribed, of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973 on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class.

(3) 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 atleast seven years or a practicing professional with a degree in child psychology, psychiatry, sociology or law.

(4) No person shall be eligible for selection as a member of the Board, if he —

- (i) has any past record of violation of human rights or child rights;
- (ii) has been convicted of an offence involving moral turpitude, and such conviction has not been reversed or has not been granted full pardon in respect of such offence;
- (iii) has been removed or dismissed from service of the Central Government or a State Government or an undertaking or corporation owned or controlled by the Central Government or a State Government;
- (iv) has ever indulged in child abuse or employment of child labour or any other violation of human rights or immoral act.

(5) The State Government shall ensure that induction training and sensitisation of all members including Principal Magistrate of the Board on care, protection, rehabilitation, legal provisions and justice for children, as may be prescribed, is provided within a period of sixty days from the date of appointment. Juvenile Justice Board.

(6) The term of office of the members of the Board and the manner in which such member may resign shall be such, as may be prescribed.

- ii. Those who are practicing professionals with a degree in child psychology, psychiatry, sociology, or law.
- c. Section 4(4) the following four categories of persons cannot be appointed as a member of the Board:
 - i. Who have any past record of violation of human rights or child rights;
 - ii. have been convicted of an offence involving moral turpitude, and such conviction has not been reversed or has not been granted full pardon in respect of such offence;
 - iii. have been removed or dismissed from service of the Central Government or a State Government or an undertaking or corporation owned or controlled by the Central Government or a State Government;
 - iv. Have ever indulged in child abuse or employment of child labour or any other violation of human rights or immoral act.

4.12.1 Functions, Powers and Responsibilities of the Board

- a. Under Section-8 along with Section 1(4) clearly provides that all offences alleged by a child below the age of 18 years on the date of offence are to be dealt with the board. As per the Section 8(2), similar powers may be exercised by the High Courts and the Children's Court, when the proceedings come before them under Section 19 or in appeal, revision or otherwise.
- b. Further Section 8(3) provides the functions and responsibilities of the board but these functions and responsibilities are not exhaustive and any additional function may be added. Its include to ensure:
 - i. Participation of the child's parent or guardian in every step of the process;
 - ii. Right of child's are protected in the process of inquiry, aftercare and rehabilitation;
 - iii. Availability of legal aid by the counsel;

- iv. The Board shall provide interpreter if he could not understand the language used in the proceedings;
- v. Directing the Probation Officer, if not available then Child Welfare Officer or a social worker, to undertake for a social investigation and submit a report within 15 days from first production before the Board to investigate that circumstances in which the alleged offence was committed;
- vi. Adjudicate and dispose of cases of children in conflict with law in according to process of inquiry specified in Section 14;
- vii. Transferring to the Committee, matters concerning the child alleged to be in conflict with law, stated to be in need of care and protection at any stage, thereby recognizing that a child in conflict with law can also be a child in need of care simultaneously and there is a need for the Committee and the Board to be both involved;
- viii. Disposing the matter and passing a final order that includes individual care plan for the child's rehabilitation, including follow up by the Probation Officer or the D.C.P.U. or a member of a non-governmental organization, as may be required;
- ix. Board Conduct an inquiry for declaring a fit persons regarding care;
- x. conducting at least one inspection visit every month of residential facilities for children in conflict with law and recommend action for improvement in quality of services to the District Child Protection Unit and the State Government;
- xi. Order to police for registration of F.I.R. for offences committed against any child in conflict with law,
- xii. Order to police for registration of F.I.R. for offences committed against any child in need of care and protection;
- xiii. Conduct the regular inspection of jails meant for adults to check if any child is lodged in such jails and take immediate measures for transfer

of such a child to the observation home; and

- xiv. Any other function as may be prescribed.

4.12.2 Duties of the Board

As per the Section 8(3) (a) provisions laid down in JJ Act, 2015, the duties of the board is to ensure the participation of the child and their parent or guardian at all levels of the proceeding the board has to protect the child from harm at every stage as during inquiry, aftercare and rehabilitation. As per the Section 8(3) (c) the board also ensures free legal aid to children (children conflict with law) by the advocate or law practitioners.

4.12.3 Powers of the Board

It is the power of the board to direct the probation officer or social worker to prepare and submit the report within 15 days from the first prosecution of the child before it. The report must contain the circumstances in which the child committed offence.

It has the power to direct the probation officer, or a social worker to prepare and submit it within fifteen days from the first production of the child before it. Clause (c) provides that this report should contain the circumstances in which the alleged offence was committed. It must be clearly understood that the phrase “circumstances in which the alleged was committed” has a different meaning in relation to the social investigation report compared to police investigation report. While the latter is aimed to find out if the offence was committed or not, the former is focused on the social circumstances in which the child was living when he was alleged to have committed the offence.

4.13 RESPONSIBILITIES AND FUNCTIONS OF POLICE

Under the JJ Act, 2015 every police station is required to have a police officer specially designated and trained to function as the child welfare police officer to deal with all matters relating to children.²⁷ The police officer those who working as child

²⁷ S.107. Child Welfare Police Officer and Special Juvenile Police Unit- (1) In every police station, at least one officer, not below the rank of assistant sub-inspector, with aptitude, appropriate training and orientation may be designated as the child welfare police officer to exclusively deal with children either

welfare police officer must not be below the rank of assistant sub inspector and he must be chosen due to their attitude of child friendly approach. The child welfare police officer should be given training and orientation to be able to co-ordinate with police and different NGO's. Further, if the obligation of the state to established special juvenile police. Section 10 of the JJ Act, 2015 provides that whenever there is apprehension of an offence committed by the police, Such child, shall be handed over to the special juvenile police specially known as CWPO. Further, Section 13 of the JJ Act, 2015, clearly states about the functions of special juvenile police unit in the case of commission of an offence it is the duty of the SJPU. To inform the parents or guardian of the child, if they can be found, the SJPU must inform to the board when the child is produced before it.²⁸

4.13.1 Placements during Proceedings

Section 5 of the JJ Act, 2015, clearly states that a child who at the time of initiation of proceeding was below the age of 18 years but attained the age of 18 years during the pendency, then he must be treated as a child. Section 6 also runs at same line. It means children who are produced before the Board for the first time after attaining the age of 18 years for an offence committed before attaining the age of 18

as victims or perpetrators, in co-ordination with the police, voluntary and non-governmental organizations.

(2) To co-ordinate all functions of police related to children, the State Government shall constitute Special Juvenile Police Units in each district and city, headed by a police officer not below the rank of a Deputy Superintendent of Police or above and consisting of all police officers designated under subsection (1) and two social workers having experience of working in the field of child welfare, of whom one shall be a woman.

(3) All police officers of the Special Juvenile Police Units shall be provided special training, especially at induction as child welfare police officer, to enable them to perform their functions more effectively.

(4) Special Juvenile Police Unit also includes Railway police dealing with children.

²⁸ S. 13. Information to parents, guardian or probation officer-(1) Where a child alleged to be in conflict with law is apprehended, the officer designated as Child Welfare Police Officer of the police station, or the special juvenile police unit to which such child is brought, shall, as soon as possible after apprehending the child, inform —

(i) the parent or guardian of such child, if they can be found, and direct them to be present at the Board before which the child is produced; and

(ii) the probation officer, or if no probation officer is available, a Child Welfare Officer, for preparation and submission within two weeks to the Board, a social investigation report containing information regarding the antecedents and family background of the child and other material circumstances likely to be of assistance to the Board for making the inquiry.

(2) Where a child is released on bail, the probation officer or the Child Welfare Officer shall be informed by the Board.

years. In such instances too, the person is to be treated as a child for the purposes of inquiry.²⁹

4.13.2 Bail to Children in Conflict with law

All children having Conflict with law when arrested must be released on bail except in the following three circumstances:

- a. When it is in the mind that release will bring the child in contact with criminals.
- b. When there is apprehension of moral, physical or sociological danger.
- c. When there is apprehension that release will defeat the justice.³⁰

4.13.3 Procedure to be followed by board

Juvenile Justice Act, 2015, Section 7 deals with the procedure to be followed by a board and Section 9 deals with the course of action to be followed by a magistrate not empowered to deal with a child in conflict with law.

- a. Section 7 specially deals with the provision under which the board has to meet as often as prescribed and followed the rules as laid down for the transaction

²⁹S.5. Placement of person, who cease to be a child during process of inquiry- Where an inquiry has been initiated in respect of any child under this Act, and during the course of such inquiry, the child completes the age of eighteen years, then, notwithstanding anything contained in this Act or in any other law for the time being in force, the inquiry may be continued by the Board and orders may be passed in respect of such person as if such person had continued to be a child.

³⁰S.12. Bail to a person who is apparently a child alleged to be in conflict with law- (1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person: Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail.

of the business at its meeting.³¹

- b. Section 16 specially provides for submission of reports regarding pendency of cases by the Board to the Chief Judicial Magistrate, or the Chief Metropolitan Magistrate, the District Magistrate in every three months. The CJM & CMM will review these reports. It is obligatory for the board to hold its setting at a venue that is not intimidating and it must not resemble a regular court in the absence of the sitting of the board child may be produced before an individual member of the board. Even a single member of the board may conduct proceeding and pass order.³²
- c. Section 14(4) clearly states that if the inquiry in petty offences is not completed within six month the proceeding shall stand terminated, the proceedings stand terminated even if no such order is passed by the Board.³³As per the provision laid down in JJ Act, 2015, different procedure to

³¹ S. 7. Procedure in relation to Board- (1) The Board shall meet at such times and shall observe such rules in regard to the transaction of business at its meetings, as may be prescribed and shall ensure that all procedures are child friendly and that the venue is not intimidating to the child and does not resemble as regular courts.

(2) A child in conflict with law may be produced before an individual member of the Board, when the Board is not in sitting.

(3) A Board may act notwithstanding the absence of any member of the Board, and no order passed by the Board shall be invalid by the reason only of the absence of any member during any stage of proceedings: Provided that there shall be at least two members including the Principal Magistrate present at the time of final disposal of the case or in making an order under sub-section (3) of section 18.

(4) In the event of any difference of opinion among the members of the Board in the interim or final disposal, the opinion of the majority shall prevail, but where there is no such majority, the opinion of the Principal Magistrate, shall prevail.

³² S.16. Review of pendency of inquiry-(1) The Chief Judicial Magistrate or the Chief Metropolitan Magistrate shall review the pendency of cases of the Board once in every three months, and shall direct the Board to increase the frequency of its sittings or may recommend the constitution of additional Boards.

(2) The number of cases pending before the Board, duration of such pendency, nature of pendency and reasons thereof shall be reviewed in every six months by a high level committee consisting of the Executive Chairperson of the State Legal Services Authority, who shall be the Chairperson, the Home Secretary, the Secretary responsible for the implementation of this Act in the State and a representative from a voluntary or nongovernmental organization to be nominated by the Chairperson.

(3) The information of such pendency shall also be furnished by the Board to the Chief Judicial Magistrate or the Chief Metropolitan Magistrate and the District Magistrate on quarterly basis in such form as may be prescribed by the State Government.

³³ S.14. Inquiry by Board regarding child in conflict with law-(1) Where a child alleged to be in conflict with law is produced before Board, the Board shall hold an inquiry in accordance with the provisions of this Act and may pass such orders in relation to such child as it deems fit under sections 17 and 18 of this Act.

(2) The inquiry under this section shall be completed within a period of four months from the date of first production of the child before the Board, unless the period is extended, for a maximum period of two more months by the Board, having regard to the circumstances of the case and after recording the

be followed in petty, serious and heinous offences under section 14(5),(d),(e) and (f). In the case of petty offences the board follows summary trial³⁴ proceeding as provided by the CrPC. In the case of serious offence by any juvenile or heinous offences by the juvenile below the age of 16 years the board follows summons trial³⁵ procedures, and in the case of above the age of 16 years who is alleged to have committed a heinous offense. Board has to start initial assessment to decide whether to transfer or not. But it is very unfortunate that JJ Act, 2015 is silent about the procedure to be followed by the children's court when it decides to tried the juvenile as an adult.

4.14 SPECIAL PROCEDURES

The JJ Act, 2015, like the earlier legislations, prohibits joint trial of children in conflict with law with any other person who is not a juvenile.³⁶ This principle is not only applicable against board but also extends to proceeding before the children's court. It is mentioned in Section 23(2) but provisions laid down under Section 23(2) is

reasons in writing for such extension.

(3) A preliminary assessment in case of heinous offences under section 15 shall be disposed of by the Board within a period of three months from the date of first production of the child before the Board.

(4) If inquiry by the Board under sub-section (2) for petty offences remains inconclusive even after the extended period, the proceedings shall stand terminated: Provided that for serious or heinous offences, in case the Board requires further extension of time for completion of inquiry, the same shall be granted by the Chief Judicial Magistrate or, as the case may be, the Chief Metropolitan Magistrate, for reasons to be recorded in writing.

(5) The Board shall take the following steps to ensure fair and speedy inquiry, namely:—

(a) at the time of initiating the inquiry, the Board shall satisfy itself that the child in conflict with law has not been subjected to any ill-treatment by the police or by any other person, including a lawyer or probation officer and take corrective steps in case of such ill-treatment;

(b) in all cases under the Act, the proceedings shall be conducted in simple manner as possible and care shall be taken to ensure that the child, against whom the proceedings have been instituted, is given child-friendly atmosphere during the proceedings;

(c) every child brought before the Board shall be given the opportunity of being heard and participate in the inquiry;

(d) cases of petty offences, shall be disposed of by the Board through summary proceedings, as per the procedure prescribed under the Code of Criminal Procedure, 1973;

(e) inquiry of serious offences shall be disposed of by the Board, by following the procedure, for trial in summons cases under the Code of Criminal Procedure, 1973; (f) inquiry of heinous offences,—

(i) for child below the age of sixteen years as on the date of commission of an offence shall be disposed of by the Board under clause (e);

(ii) for child above the age of sixteen years as on the date of commission of an offence shall be dealt with in the manner prescribed under section 15.

³⁴ Section 260-265, CrPC

³⁵ Section 251-255, CrPC

³⁶ S.22. Proceeding under Chapter VIII of the Code of Criminal Procedure not to apply against child- Notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1973, or any preventive detention law for the time being in force, no proceeding shall be instituted and no order shall be passed against any child under Chapter VIII of the said Code

not crystal clear, Under this section the board is required to determine the age of the persons brought before it at the very initial stage and the age once determined is presumed to be the true age of the person for the purposes of the Act.

4.15 INQUIRIES BY THE BOARD IN RELATION TO CHILDREN IN CONFLICT WITH LAW

It is the duty of the Board to start initial two inquiries in relation to children in conflict with law. The first issue before the court is to determine whether the child alleged to be in conflict with law before it is below the age of 18 years on the date of offence. In this context, if the answer is positive then the Board is required to conduct the second inquiry to find out if the child has committed the offence as alleged and to pass the appropriate order in relation to that child.

4.15.1 Age determination

As per the provision laid down under Section 94³⁷ of the JJ Act, 2015 provisions relating to age determination in all cases by the Board and the Committee has been discussed. It has been laid down in detail in chapter - 5 containing provisions which apply both to the Board and the Committee.

4.15.2 Provisions which apply both to the Board and the Committee

The moot question is to determine the offence alleged to have been committed by a child is heinous or not, if the answer is positive, then to determine whether the child is on the borderline of 16 years or not. It is not worthy that that the time frame

³⁷S.94. Presumption and determination of age -(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining —

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof; (ii) the birth certificate given by a corporation or a municipal authority or a panchayat; (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board: Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.

for determination of age of a child is fifteen days from the date of first production under the JJ Act, 2015 compared to one month given under the JJ Act, 2000 in context of age determination of a child, school certificate or the birth certificate from another state has been given preference.

4.15.3 Final disposal

After the completion of inquiry under Section 17³⁸ and 37³⁹ provides that if the Board satisfies that the child has not committed the offence, the Board has to record that finding while disposing the case finally. It is the duty of the board to record to all the findings “notwithstanding anything contrary contained in any other law for the time being in force” as no law can provide anything contrary to what has been provided in this Section. The order passed by the board in context of acquittal, is not appealable when the child acquitted was alleged to have committed a heinous offence and was between the ages of 16-18 years of age on the date of commission of offence. When the child acquitted was alleged to have committed a heinous offence and was between the ages of 16-18 years of age on the date of commission of offence. If the Board comes to a conclusion the child has committed the alleged offence, then it may pass any of the orders mentioned under Section 18.

³⁸S.17. Orders regarding a child not found to be in conflict with law- (1) Where a Board is satisfied on inquiry that the child brought before it has not committed any offence, then notwithstanding anything contrary contained in any other law for the time being in force, the Board shall pass order to that effect. (2) In case it appears to the Board that the child referred to in sub-section (1) is in need of care and protection, it may refer the child to the Committee with appropriate directions.

³⁹S. 37.(1) The Committee on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the child’s wishes in case the child is sufficiently mature to take a view, pass one or more of the following orders, namely:—(a) declaration that a child is in need of care and protection;(b) restoration of the child to parents or guardian or family with or without supervision of Child Welfare Officer or designated social worker;(c) placement of the child in Children’s Home or fit facility or Specialized Adoption Agency for the purpose of adoption for long term or temporary care, keeping in mind the capacity of the institution for housing such children, either after reaching the conclusion that the family of the child cannot be traced or even if traced, restoration of the child to the family is not in the best interest of the child;(d) placement of the child with fit person for long term or temporary care;(e) foster care orders under section 44;(f) sponsorship orders under section 45;(g) directions to persons or institutions or facilities in whose care the child is placed, regarding care, protection and rehabilitation of the child, including directions relating to immediate shelter and services such as medical attention, psychiatric and psychological support including need-based counseling, occupational therapy or behaviour modification therapy, skill training, legal aid, educational services, and other developmental activities, as required, as well as follow-up and coordination with the District Child Protection Unit or State Government and other agencies; (h) declaration that the child is legally free for adoption under section 38. (2) The Committee may also pass orders for — (i) declaration of fit persons for foster care; (ii) getting after care support under section 46 of the Act; or (iii) any other order related to any other function as may be prescribed.

As per the legislative intent of the act, is based on reformative actions. It is clear from the object of the act, which is to give the child another chance in life by providing opportunities for development, reformation, and rehabilitation and not to punish; the order of the board is to be made by reference to the following factors:

- a. Nature of offence,
- b. Specific need for supervision or intervention,
- c. Circumstances as brought out in the social investigation report, and
- d. Past conduct of the child.

The above mention factors are to be coupled together and all of them have to be considered together while picking the most suitable order in each case. As per the provision, the first order mentioned under section 18 is of allowing the child to go home after advice or admonition after counseling to the child and their parent or guardian.

The second order empowers the board to instruct group counseling and similar activities. But the group that needs to be counseled under this section has not been identified and the boards have little understanding of when and how to implement this order.

The third order of the board deals with community service under guiding of an organization or institution or a person specified, although this is an important order that has been on the statute book but used only exceptionally and without much knowledge about its scope or purpose.

These sections specially empower the boards to send the children to parks, hospitals, temples, or mosques to help keep these places clean such engagement had no link with the offences committed by them. The terms and conditions of such orders do not allow the child to pursue any other activity during the period of community service.⁴⁰

⁴⁰Ved Kumari, *The Juvenile Justice (care and protection of children) Act, 2015-Critical Analysis*, 225 (Universal Law Publication, New Delhi, 1stedn. 2017).

The fourth order mentioned under Section 18 specially deals with fine payable either by the child or their parent or guardian. It is necessary to stressed that under the Indian penal code the fine is listed among the punishment but it is not applicable in the case of Section 18 of JJ Act, 2015.⁴¹

The board is further empowered to release a child on probation of good conduct and placed under the care of parent, guardian, or fit person which mention under clause (e) of section 18 of the JJ Act, 2015: after the release of children on probation, the parent, guardian, or fit person is under compulsion to furnish a bond for the good behavior and well-being of the child. The period of probation cannot be exceeds more than three years.

⁴¹ S.18. Orders regarding a child not found to be in conflict with law- (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, then, notwithstanding anything contrary contained in any other law for the time being in force, and based on the nature of offence, specific need for supervision or intervention, circumstances as brought out in the social investigation report and past conduct of the child, the Board may, if it so thinks fit,— (a) allow the child to go home after advice or admonition by following appropriate inquiry and counselling to such child and to his parents or the guardian;

(b) direct the child to participate in group counselling and similar activities;

(c) order the child to perform community service under the supervision of an organisation or institution, or a specified person, persons or group of persons identified by the Board;

(d) order the child or parents or the guardian of the child to pay fine: Provided that, in case the child is working, it may be ensured that the provisions of any labour law for the time being in force are not violated;

(e) direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or fit person, on such parent, guardian or fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and child's well-being for any period not exceeding three years;

(f) direct the child to be released on probation of good conduct and placed under the care and supervision of any fit facility for ensuring the good behaviour and child's well-being for any period not exceeding three years;

(g) direct the child to be sent to a special home, for such period, not exceeding three years, as it thinks fit, for providing reformative services including education, skill development, counseling, behaviour modification therapy, and psychiatric support during the period of stay in the special home: Provided that if the conduct and behaviour of the child has been such that, it would not be in the child's interest, or in the interest of other children housed in a special home, the Board may send such child to the place of safety.

(2) If an order is passed under clauses (a) to (g) of sub-section (1), the Board may, in addition pass orders to—

(i) attend school; or

(ii) attend a vocational training centre; or

(iii) attend a therapeutic centre; or

(iv) prohibit the child from visiting, frequenting or appearing at a specified place; or

(v) undergo a de-addiction programme.

(3) Where the Board after preliminary assessment under section 15 passes an order that there is a need for 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.

The last order mentioned under 18 specially deals with special homes. The special home means a home obliged to provide reformative services including education, skill development, counseling, behavior modification therapy, and psychiatric support during the stay in the special home.

Some of the additional list has been mentioned under section 18(2) that may be passed in addition to those passed under section 18(1) (a) to (g), the additional orders must be based on the following subjects:

- a. Attend school; or
- b. Attend a vocational training center; or
- c. Attend a therapeutic center; or
- d. Prohibit the child from visiting, frequenting or appearing at a specified place;
or
- e. Undergo a de-addiction programme.

4.16 PROCEDURE IN RELATION TO 16-18 YEARS OLD CHILDREN IN CONFLICT WITH LAW

Section 15 of the JJ Act, 2015 specifically deals with the procedure to be followed in case of a 16-18 years old child alleged to have committed a heinous offence. It instructs the Board to initiate an initial assessment in case of a 16-18 years old child alleged to have committed a heinous offence to determine if the child should be transferred to the Children's Court to be tried as an adult. In order to take that decision, the Board has to follow some preliminary steps. First of all, the Board must conclusively determine that the child in conflict with law before it was above the age of 16 years but below the age of 18 years on the date of offence.

In such case if the board satisfies that the child before it was 16 years or above but below the age of 18 years on the date of offence, then the Board moves further to determine whether the offence alleged to have been committed by the child is a heinous offence or not.

If the board found that the offence is of a heinous nature, then the board follows three simple following steps:

- a. At first the Board shall examine that whether in which section child has been alleged to have committed the offence and prescribes any mandatory minimum period of imprisonment for the offence?
- b. If results found yes, then examine whether the offence is punishable with minimum imprisonment of seven years or more? and;
- c. If the offence is punishable with minimum imprisonment of seven years of more, proceed to conduct the preliminary assessment. If not, follow the procedure prescribed for dealing with serious offences by children.

The JJ Act, 2015 obligates that the initial assessment to determine suitability of transfer of the 16-18 year old child should be completed within three months by the JJBs. This timeline poses serious questions about not only the legality of the procedure but also practicality of the time frame. This time frame does not require that the assessment should be done after the police files its final report in the case confirming that prima facie a case of heinous offence has been made against the child.⁴²

4.17 CHILDREN'S COURT

As per the provision laid down in JJ Act, 2015, Children's Court means a special court established to deal with children committing offences. The logic behind the establishment of Children's Court was the philosophy of care, protection, development, and rehabilitation of children. Section 19 of the JJ Act, 2015 specifically laid down the procedure to be followed by the children's court after receiving the case from the board. Further, it is important to note that the main purpose of children's court is to look after the needs of the children and maintaining

⁴²S.15. Preliminary assessment into heinous offences by Board- (1) In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment 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 allegedly committed the offence, and may pass an order in accordance with the provisions of subsection (3) of section 18: Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts. Explanation.—For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence. (2) Where the Board is satisfied on preliminary assessment 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 order of the Board to dispose of the matter shall be appealable under sub-section (2) of section 101: Provided further that the assessment under this section shall be completed within the period specified in section 14.

child friendly environment. That is why Section 19 does not direct the children's court to impose the punishment as prescribed for the offence.

In the conclusion it can be said that children's court is a special criminal court chaired by a session judge dealing with adult offenders committing offences against children. But the provisions as mentioned, or misleading and mischievous because there is no directions in the provisions about the basis on which the children's court should take decision, so there is always possibility for the children's court to decide the cases in an arbitrary manner.⁴³

4.17.1 Disposal by the Children's Court

In context of disposal by the children's court, it is important to note the intention laid down under Section 19(1) (i) of the JJ Act, 2015, as per the provision if the children's court decides that there is need to try the child as an adult, it is obligatory for children's court to pass appropriate orders after trial subject to the provisions of Section 19(1)(i). Further the court has to assess the special needs of the child, the fabric of fair trial and child friendly atmosphere.

As Section 19 does not instruct the children's court to impose the punishment as prescribe for the offence in the IPC or any other laws enforce. These provisions have been inserted to fulfill the provisions of the convention on the rights of the child. For this purpose Section 19 of the JJ Act, 2015, includes four instructions for the children's court in context of the passing the final order.

It shall deport the child to the place of safety however, Section 19 failed to specify the period. Further, instruction has been given to the court to ensure that the reformative services in educational services, skill development, and alternative therapy such as counseling, behaviour modification therapy, and psychiatric support are provided to the child during the period of his stay in the place of safety. The duty has been assigned to the children's court to direct the Probation Officer or the District Child Protection Unit or a social worker, as necessary "to assess the progress of the child in the place of safety and to ensure that there is no ill-treatment to the child in

⁴³ S.19 Powers of Children's Court-(4) The Children's Court shall ensure that there is a periodic follow up report every year by the probation officer or the District Child Protection Unit or a social worker, as required, to evaluate the progress of the child in the place of safety and to ensure that there is no ill-treatment to the child in any form.

any form” Section 19 of the JJA 2015, provides that children’s court shall send the children to the jail after attaining of the 21 years.⁴⁴

4.18 CONSTITUTION OF THE CHILD WELFARE COMMITTEE

Section 27 of the Juvenile Justice Act, 2015 puts an obligation on the establishment of child welfare committee in each district for the purpose children in need of care and protection. This committee will consist of five members including one chairperson and four other members. There is provision for inducing training for all members of committee from the date of notification of the committee. There will be at least one woman and one expert on children affairs.⁴⁵

⁴⁴Ved Kumari, *The juvenile justice (care and protection of children) Act, 2015-critical analysis*, 240 (Universal Law Publication, New Delhi, 1stedn. 2017).

⁴⁵S. 27 Child Welfare Committee. - (1) The State Government shall by notification in the Official Gazette constitute for every district, one or more Child Welfare Committees for exercising the powers and to discharge the duties conferred on such Committees in relation to children in need of care and protection under this Act and ensure that induction training and sensitisation of all members of the committee is provided within two months from the date of notification.

(2) The Committee shall consist of a Chairperson, and four other members as the State Government may think fit to appoint, of whom at least one shall be a woman and another, an expert on the matters concerning children.

(3) The District Child Protection Unit shall provide a Secretary and other staff that may be required for secretarial support to the Committee for its effective functioning.

(4) No person shall be appointed as a member of the Committee unless such person has been actively involved in health, education or welfare activities pertaining to children for at least seven years or is a practicing professional with a degree in child psychology or psychiatry or law or social work or sociology or human development.

(5) No person shall be appointed as a member unless he possesses such other qualifications as may be prescribed.

(6) No person shall be appointed for a period of more than three years as a member of the Committee.

(7) The appointment of any member of the Committee shall be terminated by the State Government after making an inquiry, if—

(i) he has been found guilty of misuse of power vested on him under this Act;

(ii) he has been convicted of an offence involving moral turpitude and such conviction has not been reversed or he has not been granted full pardon in respect of such offence;

(iii) he fails to attend the proceedings of the Committee consecutively for three months without any valid reason or he fails to attend less than three-fourths of the sittings in a year.

(8) The District Magistrate shall conduct a quarterly review of the functioning of the Committee.

(9) The Committee shall function as a Bench and shall have the powers conferred by the Code of Criminal Procedure, 1973 on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class.

(10) The District Magistrate shall be the grievances redressal authority for the Child Welfare Committee and anyone connected with the child, may file a petition before the District Magistrate, who shall consider and pass appropriate orders.

4.18.1 Power, Functions and Responsibilities of the Committee

Section 29 of the Act has the provision for the powers of committee. The committee has exclusive power to deal with children in need of care and protection. Such power should be used keeping in mind the protection, treatment, development, rehabilitation of children in need of care and protection.⁴⁶

4.18.2 Procedure of the committee relating to children in need of care and protection

Section 28 says the provisions for at least one meeting in twenty one days to check the function of institution and wellbeing of children. A child can be produced before a single member of the Committee even though the committee is not sitting. The committee is entitled pass order and function in the absence of any member. The decision of committee will be taken by majority but in absence of majority, the chairperson shall be binding.⁴⁷

4.18.3 Inquiry

The committee has two responsibility in respect of inquiry; one inquiry is about for age determination of child and second is to ascertain whether the child is

⁴⁶ S.29. Powers of Committee -(1) The Committee shall have the authority to dispose of cases for the care, protection, treatment, development and rehabilitation of children in need of care and protection, as well as to provide for their basic needs and protection.

(2) Where a Committee has been constituted for any area, such Committee shall, notwithstanding anything contained in any other law for the time being in force, but save as otherwise expressly provided in this Act, have the power to deal exclusively with all proceedings under this Act relating to children in need of care and protection.

⁴⁷S .28. Procedure in relation to Committee (1) The Committee shall meet at least twenty days in a month and shall observe such rules and procedures with regard to the transaction of business at its meetings, as may be prescribed.

(2) A visit to an existing child care institution by the Committee, to check its functioning and well-being of children shall be considered as a sitting of the Committee.

(3) A child in need of care and protection may be produced before an individual member of the Committee for being placed in a Children's Home or fit person when the Committee is not in session.

(4) In the event of any difference of opinion among the members of the Committee at the time of taking any decision, the opinion of the majority shall prevail but where there is no such majority, the opinion of the Chairperson shall prevail.

(5) Subject to the provisions of sub-section (1), the Committee may act, notwithstanding the absence of any member of the Committee, and no order made by the Committee shall be invalid by reason only of the absence of any member during any stage of the proceeding: Provided that there shall be at least three members present at the time of final disposal of the case.

need and inquiry. The age determination of juvenile will be in accordance of section 94 of the Act.⁴⁸

4.18.4 Orders

The committee has obligation to pass interim and final orders for production of children during the pendency of inquiry, if the committee is satisfied that the child is in need of care and protection it may pass interim orders if the child is below six years it may send the child to Specialized Adoption Agency and in other cases, it may direct the child to be kept in the children's home or a fit facility or a fit person or a foster family till suitable means for permanent rehabilitation of the child are found or till the child attains the age of eighteen years.

4.19 ADOPTION

“Adoption” under the act means “the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child.” Section 63 specifies the effect of adoption in the following words:

After the adoption the adoptive father will be the parents of child. The child will be treated as the child had been born to the adoptive parents for all purposes including intestacy with effect from the date on which the adoption order takes effect and from the date of adoption all the ties of the child in the family of his or her birth

⁴⁸ S.94. Presumption and determination of age- (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining —

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board: Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.

shall stand severed and replaced by those created by adoption. that any property which has vested in the adopted child immediately before the date on which the adoption order takes effect shall continue to vest in the adopted child subject to the obligations, if any, attached to the ownership of such property including the obligations, if any, to maintain the relatives in the biological family.

4.19.1 Inapplicability of the Hindu adoptions and maintenance act

Section 56 of the Act says the provisions of Hindu Adoptions and Maintenance Act 1956 will not apply to Juvenile Justice Act, 2015. This means that Hindu may choose either under Hindu Adoption and Maintenance Act or Juvenile Justice Act. It does not mean that Hindus are barred to adopt child under this Act. HAMA prohibits the adoption of a child of same sex if the adoptive parents has already a natural born child but the JJA has no such limitation, under this Act the adoptive parents are free to adopt the child of same sex if they have already a natural born child of same sex. Under the JJA if the interest of child is best protected by the adoption.

4.19.2 Declaring orphan, surrendered and abandoned children free for adoption

The Act has three categorizing of children who are legally fit to be declared as for adoption. These are:

- a. Orphan: orphan includes not only those children who do not have the parents abut also those parents who are not capable to take care of their children.
- b. Surrendered: A child whose parents are unwilling to take care of the child suggests that the parents are traceable. No child may be taken away from their parents without getting the parents declared as unfit but no such procedure has been provided under the Act.
- c. Abandoned: if the parents of the children are traceable but they do not want to take care of them, they will be treated as abandoned.

Section 38 and 35 of the Act has the provision for the abandoned children and surrendered children.

4.19.3 Eligibility of prospective adoptive parents

Section 57 of the JJA has the provisions for eligible to become future adoptive parents. These are as:

- a. The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.
- b. In case of a couple, the consent of both the spouses for the adoption shall be required.
- c. A single or divorced person can also adopt, subject to fulfillment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority.
- d. A single male is not eligible to adopt a girl child.
- e. Any other criteria that may be specified in the adoption regulations framed by the Authority.

4.19.4 Procedure for adoption

The adoption of children under the JJA is of three kinds:

- a. In country adoption: the adoption took place between Indians.
- b. Inter-Country adoption by NRI: the adoption is taking place between Indian and Non-resident Indian.
- c. Inter-Country adoption by Foreigner: The adoption is taken place between Indian and foreigner.

There is no bar to religion in regard to religion.

4.20 RESIDENTIAL CARE

The JJA has included a various categories of residential care under the JJA. These residential options may broadly be divided in two broad categories. The first category includes all the 'Homes', namely, observation homes, special homes, place of safety, and children's homes established and run to provide institutional care either

during pendency of proceedings before the Board or the Committee or pursuant to the order of the Board or the Committee for keeping them there.

The second category includes open shelters, fit facility, and fit person who are to provide community based residential care to them.

4.20.1 Compulsory registration of child care institutions

All the child care institutions are required to be compulsorily registered under the JJA 2015 within six months of the JJA 2015 having been enforced.⁴⁹ All institutions which are housing children in need of care and protection or children in

⁴⁹ 41. Registration of child care institutions- (1) Notwithstanding anything contained in any other law for the time being in force, all institutions, whether run by a State Government or by voluntary or non-governmental organisations, which are meant, either wholly or partially, for housing children in need of care and protection or children in conflict with law, shall, be registered under this Act in such manner as may be prescribed, within a period of six months from the date of commencement of this Act, regardless of whether they are receiving grants from the Central Government or, as the case may be, the State Government or not:

Provided that the institutions having valid registration under the Juvenile Justice (Care and Protection of Children) Act, 2000 on the date of commencement of this Act shall be deemed to have been registered under this Act.

(2) At the time of registration under this section, the State Government shall determine and record the capacity and purpose of the institution and shall register the institution as a Children's Home or open shelter or Specialised Adoption Agency or observation home or special home or place of safety, as the case may be.

(3) On receipt of application for registration under sub-section (1), from an existing or new institution housing children in need of care and protection of children in conflict with law, the State Government may grant provisional registration, within one month from the date of receipt of application, for a maximum period of six months, in order to bring such institution under the purview of this Act, and shall determine the capacity of the Home which shall be mentioned in the registration certificate:

Provided that if the said institution does not fulfill the prescribed criteria for registration, within the period specified in sub-section (1), the provisional registration shall stand cancelled and the provisions of sub-section (5) shall apply.

(4) If the State Government does not issue a provisional registration certificate within one month from the date of application, the proof of receipt of application for registration shall be treated as provisional registration to run an institution for a maximum period of six months.

(5) If the application for registration is not disposed of within six months by any officer or officers of any State Government, it shall be regarded as dereliction of duty on their part by their higher controlling authority and appropriate departmental proceedings shall be initiated.

(6) The period of registration of an institution shall be five years, and it shall be subject to renewal in every five years.

(7) The State Government may, after following the procedure as may be prescribed, cancel or withhold registration, as the case may be, of such institutions which fail to provide rehabilitation and reintegration services as specified in section 53 and till such time that the registration of an institution is renewed or granted, the State Government shall manage the institution.

(8) Any child care institution registered under this section shall be duty bound to admit children, subject to the capacity of the institution, as directed by the Committee, whether they are receiving grants from the Central Government or, as the case may be, the State Government or not.

(9) Notwithstanding anything contained in any other law for the time being in force, the inspection committee appointed under section 54, shall have the powers to inspect any institution housing children, even if not registered under this Act to determine whether such institution is housing children in need of care and protection.

conflict with law are required to be registered irrespective of the fact that they are run by the government or by a voluntary organisation or by a non-government organization.

4.21 OFFENCES AGAINST CHILDREN

The problem of offences against children has been recognised for long but offences against children have been increasing at an alarming rate. Reporting of offences under the JJA 2000 has been miniscule⁵⁰ even after all offences included in the JJA 2000 were made cognizable recognising the problem of initiating action as child victims rarely had the familial support to file complaints before the Courts.

Section 89 clearly states that if any offence against children included in Chapter IX of the JJA 2015 is committed by another child, that child is considered as child in conflict with law.⁵¹ It would have been better if a clarifying clause was added to this section specifically stating that all such children in conflict with law will be dealt with by the Board as per the scheme of the Act.⁵²

4.21.1 Punishment for cruelty to child

Section 75 of the Act has the provisions for the punishment for cruelty against child. Cruelty includes Cruelty within the meaning of this section includes assault, abandonment of child, abuse, exposure or neglect of a child in a manner that is likely to cause unnecessary mental or physical suffering to the child. Any person who has the actual charge or control over the child is punishable for this offence. However, biological parents who abandon their child are exempt from any criminal action and the liability prescribed under this section.

⁵⁰ As per Crime in India 2014, the total number of incidences of crimes against children under the JJA 2000 was 1315 while the total number of offences against children 89423 (from 14423 in 2004, reported in Crime in India 2004). These constituted 3.1% of total crimes in India. On an average 20.1 out of every one lakh of children were subjected to some reported crime against them. Charge sheet was filed in 87.6% cases. Out of these, only 33-1% resulted in conviction of the accused persons.

⁵¹ S.89. Any child who commits any offence under this Chapter shall be considered as a child in conflict with law under this Act.

⁵² Ved Kumari, *The Juvenile Justice (care and protection of children) Act, 2015-Critical Analysis*, 252 (Universal Law Publication, New Delhi, 1stedn. 2017).

4.21.2 Employment of child for begging

The employment of child for begging is made a punishable offence by virtue of section 76 of the Act. This act is punishable with five years imprisonment and fine which may extend up to one lac rupees.

4.21.3 Giving intoxicating liquor or narcotic drug or psychotropic substance to a child

Giving intoxicating, liquor or narcotic drugs are punishable offence. It is cognizable and non-bailable offence punished with seven years imprisonment and fine up to one lac rupees.

4.21.4 Use of children for vending, peddling etc., of liquor, narcotic drug or psychotropic substance

Section 78 makes a new offence as cognizable and non-bailable offence. It prohibits use of children for vending, peddling of liquor, narcotic drugs etc. This act is punishable with seven years imprisonment and one lac fine.

4.21.5 Exploitation of child employee

Section 79 makes a cognizable and non-bailable offence for exploitation of child employee. This provision is in accordance with Article 23 and 24 of the Indian Constitution.

4.21.6 Corporal punishment

Physical torture is a very common practice against children living in child care institutions. Section 82 of the JJA makes it punishable.

CHAPTER-5

JUVENILE JUSTICE AND INDIAN JUDICIARY

The judiciary in India plays very important role and has passed many significant judgments in favor of child rights. The Children Acts, the Juvenile Justice Act, and the Juvenile Justice (Care and Protection) Act, 2000 contain the seeds of the Juvenile Justice System in India. Delinquent and neglected children, however, have enjoyed special protection under certain other enactments also.¹ For example, Section 82 of the IPC absolved children below seven years of age from any criminal responsibility and Section 83 extended that exemption to children between 7 and 12 years of age if proved to be *doliincapax*. The questions under the IPC, therefore, were limited to *mensrea* and the age of the child. In *Emperor v. Wali Mahommad and another*,² the court held that “*throwing of stones at a train by children of five and eight years would ordinarily be protected under Sections 82 and 83 of the IPC and would not be punishable as offences.*” In *Emperor v. Dharam Prakash*³, The court have held that “*very young children should not be sent to prisons.*” In *Parbati Dasi v. Emperor*⁴, the court held that as far as possible, such young children should be released under the supervision and care of their parent or guardian. The court must have clear evidence of the age of a person before sending him or her to a reformatory school. In *Nawab Dheru Gul v. Emperor*,⁵ It was clarified that a child could not be sent to a reformatory school unless an order of institutionalization, that is, of imprisonment, was made and that the duration of stay could not be less than that

¹For example, the Apprentices Act 1850, the Indian Penal Code 1860 (IPC), the Reformatory Schools Act 1897, the Code of Criminal Procedure 1898 (CrPC. 1898), the Code of Criminal Procedure 1973 (CrPC.), and the Borstal Act, 1928.

² AIR 1936 (Sind) 185

³ AIR 1926 (Lah.) 611

⁴ AIR 1921 (Call.) 190

⁵ AIR 1934 (Pesh.) 29

prescribed by the rules.

In *Emperor v. Dharam Prakash*⁶ the protective philosophy underlying the special legal provisions relating to children has been reiterated by the judiciary on various occasions under the Reformatory Schools Act. The courts have held that very young children should not be sent to prisons. They should be released under the supervision and care of their parent or guardian. The court must consider the age of child before sending him to a reformatory school. It was very much clear that children could not be sent to their reformatory school unless the order has been passed by court. The order must contain that the duration of the reformatory school should not exceed the maximum period for reformatory school. In *State v. Jhlu*⁷ the Himachal Pradesh High Court ruled that a child could not be sent to a reformatory school unless an order of institutionalization, that is, of imprisonment, was made and that the duration of stay could not be less than that prescribed by the rules.

In *Ramgopal v. State*⁸ the Madhya Pradesh High Court has ruled that those children who were guilty of offences punishable with death or life imprisonment were the focus of attention under the Borstal Acts, the Reformatory Schools Act, as well as the CrPC. The question arose before the High Courts. The opinions of the High Courts are very much different with each other on this issue. Few High Courts were of the opinion that juvenile should be punished with death penalty or life imprisonment irrespective of the Reformatory Schools Act, the Borstal Act. While few of them were of the view applicable to death penalty and life imprisonment. However, the major question under the Borstal Acts related to the custody of adolescent offenders sentenced to life imprisonment on their attaining the age, after which they could not be kept in a borstal school. The problem was whether to send them to an ordinary prison for completing the remaining period of their sentence as per Section 433-A of the CrPC.⁹ or to release them forthwith. The Supreme Court held that Section 433-A was not applicable to a person sent to a borstal school under the AP Borstal Schools Act 1926.¹⁰ A similar approach taken in *Hava Singh v. State of Haryana*¹¹ was

⁶ AIR 1926 (Lah.) 611

⁷ AIR 1953 (HP) 40

⁸ 1968 Cri LJ 1178 (MP)

⁹ Section 433-A provides for detention for a minimum of fourteen years in certain cases of life imprisonment

¹⁰ *State of AP v. Vallabhpuram Ravi*, AIR 1985 (SC) 870

reversed in *Subash Chand v. State of Haryana and others*¹² because the definition of ‘offence’ under the Punjab Borstal Act excluded the application of that Act to offences punishable with death. Under the CrPC, the question was whether the juvenile court or the session’s court had jurisdiction to deal with such cases and the controversy was settled in favour of the exclusive jurisdiction of the juvenile court.¹³

These statutes being limited to only certain aspects of juvenile justice, do not form the prime focus of this chapter though they have been cited occasionally when they were used in courts while dealing with young offenders. This chapter analyses in detail the cases under the Children Acts and the JJA that have hitherto been the mainstay in the judicial approach to juvenile justice. It has been a year and a half since the enforcement of the JJ (C&P) Act and it has been referred to or invoked only in two cases reported so far.

5.1 EXPEDITIOUS DISPOSAL OF CASES

Expeditious disposal of cases relating to children is of utmost importance for their reformation and rehabilitation. In *Umesh Chandra v. State of Rajasthan*,¹⁴ a full bench of the Supreme Court, too, held that the relevant date for applicability of the Rajasthan Children Act, 1970 so far as the age of the accused, who claims to be a child, is concerned, is the date of the occurrence and not the date of the trial as is clear from the provisions of ss. 3 and 26 of the Act. Justice S M Fazalali further said for himself and Justice Sayed Murtaza that “regards the general applicability of the Act, we are clearly of the view that the relevant date for the applicability of the Act is the date on which the offence takes place. Children Act was enacted to protect young children from the consequences of their criminal acts on the footing that their mind at that age could not be said to be mature for imputing mensrea as in the case of an adult. This being the intendment of the Act, a clear finding has to be recorded that the relevant date for applicability of the Act is the date on which the offence takes place. It is quite possible that by the time the case comes up for trial, growing in age being an involuntary factor, the child may have ceased to be a child. Therefore, ss. 3 and 26 became necessary. Both the sections clearly point in the direction of the

¹¹ AIR 1987 (SC) 2001

¹² AIR 1988 (SC) 584

¹³ *Raghibir v. State of Haryana*, 1981 Cri LJ 1497(SC)

¹⁴ 1982 Cri LJ 994

relevant date for the applicability of the Act as the date of occurrence. We are clearly of the view that the relevant date for applicability of the Act so far as age of the accused, who claims to be a child, is concerned, is the date of the occurrence and not the date of the trial.”

In *Arnit Das v. State of Bihar*¹⁵ R.C. Lahoti, J. said that the date of first appearance was the relevant date for applying the JJA. The division bench reasoned that the usage of the word ‘is’ at two places read in conjunction with ‘a person brought before it’ in Section 32¹⁶ of the JJA clearly indicated for determination of age when the accused was presented before the court. Disagreeing with Dilip Saha, it said that the right under Article 20 of the Constitution would not be violated if the applicability of the Act was determined by reference to the date of the commencement of the inquiry or trial. The decision was *per incurium* and was subjected to severe criticism.¹⁷ This issue had not even survived for decision as the accused in the case was held not to be a juvenile on the date of commission of the offence. A review was filed, limited only to the question of relevant date for applicability of the JJA. The matter was referred to a constitution bench acknowledging that the two judge bench had overlooked the earlier decision by a three judge bench. The constitution bench, however, refused to answer a purely academic question as in the case at hand the accused was found not to be a child even on the date of commission of the offence. It said that it was of no consequence, insofar as this petition was concerned, as to whether the crucial date for purposes of the 1986 Act was the date of commission of the offence or the date when the accused first appeared in court in the inquiry proceedings.

¹⁵AIR 2000 (SC) 2264. The division bench was consist of K.T. Thomas, R.C. Lahoti

¹⁶Section 32. Presumption and determination of age. (1) Where it appears to a competent authority that a person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile, the competent authority shall make due enquiry as to the age of that person and for that purpose shall take such evidence as may be necessary and shall record a finding whether the person is a juvenile or not, stating his age as nearly as may be.

(2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a juvenile, and the age recorded by the competent authority to be the age of the person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.

¹⁷*Arnit Das v. State of Bihar: A Rejoinder*, (2002) 2 SCC (Jour) 15

5.2 STATUS OF THE CHILD

The Act do not lay down clearly the consequences if the child fails to raise the plea of being a child at the earliest opportunity. Will the child be dealt with under the Act only if she/he specifically pleads so? Does the philosophy of *parens patriae* underlying the JJA impose any special obligations on the juvenile court/juvenile welfare board? These and other related questions have arisen under the JJA as well as under the earlier Children Acts and have been answered differently by different courts. The provisions of the JJ (C&P) Act, too, do not contain an answer to such issues.

The Supreme Court has permitted the plea of child status to be raised for the first time before it on earlier¹⁸ as well as later occasions.¹⁹ However, this approach of the Supreme Court has neither been incorporated in the statute nor followed consistently by the Supreme Court itself and the courts continue to doubt the veracity of the plea when it is raised later instead of discharging the burden so squarely put on their shoulders.

In *Sushil Kumar v. State of Uttar Pradesh*²⁰ A Sen, A Varadarajan JJ said that “*in the case where special leave petition was raised as the plea of child status was not raised before the trial court or the High Court or even in the original grounds of special leave petition but was added long afterwards, the court believed the plea to be an afterthought and dismissed the petition.*” Yet again, the Supreme Court in *Hari Om v. State of UP*,²¹ P Sawant, S Mohan JJ. summarily dismissed the plea of being a child as no evidence was placed either during the trial or earlier before the High Court. It said that it was too late to produce a certificate before this court. No mention was made of its own earlier cases on the subject. Nor was the plea to be dealt with by the juvenile court as in *Abdul Mannan and others v. State of West Bengal*²² due to their own act of protracting the trial. R. P. Sethi, J. in *Ramdeo Chauhan v. State of Assam*,²³ reiterated the view of the session judge that the plea of child status was an afterthought having not been raised at the first instance.

¹⁸*Dharam Pal and others v. State of UP*, AIR 1975 (SC) 1917

¹⁹*Umesh Singh v. State of Bihar*, 2000 (4) SCALE 511

²⁰ AIR 1984 (SC) 1232

²¹ 1993 Cri LJ 1383 (SC)

²² (1996) 1 SCC 665

²³ (2001) 5 SCC 714

In *Krishna Bhagwan v. State of Bihar*,²⁴ N. Singh J. said that “Section 32 of the Children Act contained a similar provision. Section 32 vests power in the juvenile court to make due enquiry in respect of the age of the accused on the date of the commission of the offence and for that purpose such Court has to take evidence as may be necessary and to record a finding whether the accused in question was a juvenile. It need not be pointed out that it is not possible for this Court to determine the age of an accused on the date of the commission of the offence because that has to be determined on the basis of the evidence to be adduced and other materials in support thereof being produced. This determination should not be based merely on written opinion of the doctors produced before this court. Prosecution has right to cross-examine such medical or forensic experts who have given their opinions about the age of the accused in order to demonstrate that the accused was not a juvenile on the date of the commission of the offence.”

In view of such widespread unawareness, it is only reasonable that the children should not be denied the protection of the progressive and beneficial legislation simply for failing to raise the plea of child status at the appropriate time. The majority of children falling within the scope of the JJS are poor, illiterate, and unaware of their rights or obligations of others towards them. They cannot be expected to know that such a law exists for their benefit and that they should ask for its application at the earliest. Flexibility in the procedure is essential to ensure the protection of the legislation to children in whose cases the plea of child status is not raised.

5.3 AGE DETERMINATION

The Supreme Court in *Mukarrab v. State of U.P.*²⁵ said that “age determination is essential to find out whether or not the person claiming to be a child is below the cut-off age prescribed for application of the Juvenile Justice Act. The issue of age determination is of utmost importance as very few children subjected to the provisions of the Juvenile Justice Act have a birth certificate.”

²⁴ 1991 Cri LJ 1283 (Pat) (FB)

²⁵ AIR 2014(SC)117

As juvenile in conflict with law usually do not have any documentary evidence, age determination, cannot be easily ascertained, specially in borderline cases. Medical examination leaves a margin of about two years on either side even if ossification test of multiple joints is conducted.

Determination of the age of the child under the JJA is essential for two reasons. First, such age determination is essential to get whether or not the person claiming the benefit is below the required age of JJA. Second, recording of the age as nearly and accurately as possible is essential for deciding the duration of institutionalization. The question of age determination arose in a number of cases under the Children Acts and the higher courts examined the adequacy of evidence on various occasions. Age determination, however, is not an easy issue to be decided, specially in borderline cases. In *Anita v. Atal Bihari and another*²⁶ the Registrar who acts or purports to act in pursuance of the provisions of the Act of 1969 or any rule or order made thereunder, is deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code, as laid down in Section 26. Therefore, the document, i.e., the certificate was admissible under Section 35 of the Evidence Act, as it fully satisfies the three conditions, namely,

- a. the entry of the date of birth was made in a public record;
- b. it is an entry stating a fact in issue; and
- c. it was made by a public servant in discharge of his official duty.

In *Shyam Narayan Singh v. State of Bihar*,²⁷ the Patna High Court determined the accused to be a juvenile on the basis of the age mentioned in his own evidence before the magistrate as that was not challenged by anybody. In another case, it clarified that if the High Court or Court of Sessions immediately records its opinion without holding an inquiry on evidence on the basis of visual perception, its opinion will not be binding. The Delhi High Court held that rejection of the accused's application claiming to be a child on the basis of mere visual examination was improper.²⁸ The reason for the judges to determine age by visual examination perhaps

²⁶ 1993 Cri LJ 549 (MP)

²⁷ 1993 Cri LJ 772 (Pat)

²⁸ *Manoj & Munna v. State*, 1993 Cri LJ NOC 454 (Del). However, this is not the only occasion when the age was determined by mere facial examination. The crime branch of Delhi Police conducted a raid on the brothels on G. B. Road on 15 March 1990. The police took charge of 111 persons considered by

stems from the usage of the word ‘appears’ in the Acts. The word ‘appears’, in the opinion of the Punjab High Court, presupposed something apparent and telltale in the outward physical appearance of the person.²⁹

In *Milap Singh v. State of UP*,³⁰ the Allahabad High Court said to come to the conclusion that the age recorded in the school leaving certificate should have been given preference to the report of the Medical Officer unless there is evidence to the contrary to the effect that such a certificate is either fabricated or forged or the date of birth is provenly understated. In *Raja Singh vs. State of Bihar*³¹ the earlier medical board found the accused to be above eighteen years of age while the one constituted later found him to be 16-18 years of age. The Patna High Court rejected his plea of being a child by reference to the opinion of the earlier medical board coupled with the assessment of the sessions judge that he was twenty years of age.

In *Kumar Satyanand v. State of Bihar*,³² The Patna High Court said that:

Where the documents like matriculation certificate, school leaving certificate or the entry made in the different records of the school are available, they should be accepted as reliable and genuine. It is because the entries definitely having been made several years before cannot be challenged or attacked on the ground that subsequent to the occurrence any record has been created for the advantage of any accused.

In *Umesh Chandra v. State of Rajashtan*,³³ in the instant case there are two documents of two different schools showing the date of birth of the appellant as June 22, 1957 and both these documents have been signed by his father and were in existence *ante litem motam*. Hence, there could be no ground to doubt the genuineness of these documents. At the time when the age of the appellant was first

them to be children, in that raid. All these persons were produced before the Juvenile Welfare Board under the JJA. The chairman of the Board was of the opinion that they were above the age of eighteen years and released a majority of them. His opinion was based on ‘facial examination’ of the children. No medical examination was ordered, as that would have taken at least a week. The police too had formed its opinion that they were children by facial examination only in the circumstances of a raid. Hence, one has been left wondering as to how facial examination alone by the Board constituted ‘adequate and proper evidence’ for determining their age. Ved Kumari, ‘Age Determination Hurdle’ *Times of India*, 30 March 1990.

²⁹ *Borstal Inmate Narjit Singh v. State of Punjab*, ILR (1975) 2 Punj 251 (DB).

³⁰ 2000 Cri LJ 3059 (All)

³¹ 2000 Cri L J 3388 (Pat)

³² 1983 Cri LJ 1532

³³ 1982 Cri LJ 994

mentioned in the admission form, there was absolutely no dispute about the date of birth and there could not have been any motive on the part of the parents to give a false date of birth because it was his first admission to a school at a very early age. The school to which the appellant was admitted enjoyed good reputation of authenticity.

In *Bhoop Ram v. State of UP*,³⁴ the Supreme Court disagreed with the sessions judge who refused to rely on the school-leaving certificate stating that it was not unusual that in school age was understated by one or two years for future benefit, and declared the person to be above the specified age on the basis of medical opinion. Giving precedence to the authentic documentary evidence over the medical opinion, the Supreme Court said that medical evidence was an estimate based on radiological examination and physical features and the possibility of an error of estimate creeping into the opinion cannot be ruled out. It further reiterated that school certificates should be accepted as reliable and genuine if there was no material on record to throw doubt about the authenticity of the entry.

However, the Supreme Court sounds a completely discordant note while determining the age of the accused in *Ramdeo Chauhan v. State of Assam*.³⁵ The session court had referred the accused for medical examination for age determination. The accused produced an entry in the school register made many years prior to the occurrence as evidence of being a child on the date of offence and his father and the school principal were examined to prove it. The medical opinion as well as the school register showed him to be a child on the date of occurrence. Still, the session court relied on the discrepant oral evidence of the father of the accused in examination-in-chief and cross-examination to hold that he was not a juvenile. The entry in the school register was rejected as it was based on the transfer certificate issued by the other school and the basis of entry in that school was not known. The medical certificate was rejected by a curious way of calculating the margin of error of two years. In para 56 of his judgment, the sessions judge noted, "If we apply the variation of margin of two years on lower side, the accused must be eighteen years at present. If he is eighteen years at present, at the time of alleged occurrence he must be twelve years of

³⁴ 1989 (1) SCALE 799

³⁵ 2001 (5) SCC 714

age which is absolutely impossible because according to evidence adduced by the defence his age was above fifteen years at the time of alleged occurrence. If we apply the variation of margin of two years on the other side, accused may be twenty-three years at present. Then the accused cannot be below sixteen year of age at the time of alleged occurrence to attract the provisions of Juvenile Justice Act 1986 as the alleged occurrence took place before six years.” In this calculation, he chose to ignore the one-year margin in calculating the current age on the lower side but added it on the higher side. It increased the range of age of the accused from twelve to seventeen, a gap of five years, while the Supreme Court judgment permitted a range of four years. He also presented his calculation as if the Supreme Court judgment directed that the courts must determine it either two years lower or two years higher. The Supreme Court had only mentioned the margin of error. Sethi, J. in his judgment not only did not find this approach to be contrary to the earlier decisions of the Supreme Court, but also relied on the statement recorded by the I.O.³⁶

It is for the court to hold an inquiry and determine the age by medical and other evidence. In *Dilip Saha v. State of WB*³⁷, the Calcutta High Court said that there is an obligation upon the person who is producing the accused before the Court to inform the Court about the necessity of due enquiry as to his age and thereafter it becomes the duty of the Court to determine the age of the person produced before it and record a finding relating to his age. The age so recorded shall be deemed to be the true age of the accused for purposes of trial and punishment. The Supreme Court, in *Gopinath Ghosh*, has clearly imposed the duty on the magistrate to secure the evidence of age when it observed that ‘whenever a case is brought before the Magistrate and the accused appears to be aged 21 years as below, before proceeding with the trial or undertaking an inquiry, an inquiry must be made about the age of the accused on the date of the occurrence. This ought to be more so where special acts dealing with juvenile delinquent are in force. If necessary, the Magistrate may refer the accused to the Medical Board or the Civil Surgeon, as the case may be, for obtaining credit worthy evidence about age. The Magistrate may as well call upon

³⁶ Even though barred from admission under Section 162 of the Code of Criminal Procedure except for the purpose of contradiction

³⁷ 1979 Cri LJ 88(FB)

accused also to lead evidence about his age. Thereafter, the learned Magistrate may proceed in accordance with law.’

In *Bhola Bhagat v. State of Bihar*³⁸ the Supreme Court again held:

Keeping in view the beneficial nature of the socially oriented legislation, it is an obligation of the court where such a plea is raised to examine that plea with care and it cannot fold its hands and without returning a positive finding regarding that plea, deny the benefit of the provisions of an accused. The court must hold an enquiry and return a finding regarding the age, one way or the other. We expect the High Courts and subordinate courts to deal with such cases with more sensitivity, as otherwise the object of the Acts would be frustrated and the effort of the Legislature to reform the delinquent child and reclaim him as a useful member of the society would be frustrated.

The Supreme Court, in *Arnit Das v. State of Bihar*,³⁹ clarified that the a hyper technical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile and if two views may be possible on the same evidence, the Court should lean in favour of holding the accused to be a juvenile in border line cases. The Rajasthan High Court in *Balbir Singh v. State of Rajasthan*,⁴⁰ laid down that the age determination inquiry must be made by a competent authority by giving an opportunity to the parties to adduce oral and documentary evidence. It must also give right to cross-examine the opposite party following the procedure of summons case. Inquiry may be made by the magistrate, if empowered to do so. Otherwise he must forward the case to a competent authority. The High Court or the court of sessions may exercise the power of inquiry when proceedings come before them in appeal, revision, or otherwise after commitment of the case.⁴¹

The following guidelines emerge from these cases in relation to determination of age:

³⁸ 1998, Cri LJ 390

³⁹ AIR 2000 (SC) 2264

⁴⁰ 1994 Cri LJ 2750 (Raj)

⁴¹ *Aquil Alvi v. State of UP*, 1996 Cri LJ 103 (All)

- a. The finding of age should be recorded on the basis of adequate and proper evidence.
- b. Oral evidence could be utilized to explain existing contradictory evidence.
- c. Authentic documentary evidence is preferred over radiological examination and physical features.
- d. School certificates should be treated as reliable and genuine if there was no material on record to throw doubt about the authenticity of the entry.
- e. All possible efforts must be made to ascertain the age most accurately.
- f. Whenever the accused present before a magistrate appears to be around 21 years of age or below, the magistrate should make due inquiry to determine the age of the accused by referring her/him for medical opinion or by calling upon her/him to lead evidence of age.
- g. The standard of proof required for age determination is that of degree of probability and not proof beyond reasonable doubt.
- h. The courts should lean in favour of declaring the accused to be a child in case of doubt in determining age in borderline cases.

These guidelines do reflect the protective posture of the higher judiciary as well as the fact that the lower judiciary lack adequate understanding of the issues. Awareness of these guidelines, or action according to such guidelines by the lower judiciary, is most essential for extending the protection to the mass of poor, illiterate children coming before them.

5.4 DEALING WITH CHILDREN COMMITTING SERIOUS OFFENCES

The question of the jurisdiction of a juvenile court to deal with offences punishable with death or life imprisonment arose for the first time in 1932 before the Calcutta High Court in *Lakhi Sahu v. Emperor*⁴² and became the focal point in numerous other cases right up to 1990s. The controversy was due to a provision in the Code of Criminal Procedure 1898 as well as that of the 1973. CrPC.⁴³ laying down that any offence committed by a child, not punishable with death or life imprisonment, may be tried by the court of a chief judicial magistrate or a juvenile

⁴² AIR 1932 (Cal) 437. One Lakhi Sahu alias Kahu, a boy of 13 or 14, was produced before Mr. Mukherji on a charge of culpable homicide under Section 304, I.P.C., (an offence which is exclusively triable by a Court of Session) alleged to have been committed in Howrah.

⁴³ Section 29B of the CrPC 1898 and Section 27 of Cr P C 1973

court or any other court specially empowered under the Children Act, or any other law in force providing for the treatment, training, and rehabilitation of youth offenders.

The matter reached the Supreme Court in *Rohtas v. State of Haryana*.⁴⁴ The Supreme Court held that the High Court was in error in holding that the Code of 1973 over-ruled the Haryana Act and that the appellant should have been tried under the Code 1973. The view taken by the Sessions Judge on this point was correct and the case of the appellant should have been referred to the Magistrate concerned for trial in accordance with the provisions of the Haryana Act.

The question, however, was raised again in *Raghubir v. State of Haryana*⁴⁵ on the plea that the judgment in *Rohtas* was delivered without considering the impact of the language of Section 27 of the CrPC. The Supreme Court reiterated its decision in *Rohtas*. It said that as Section 27 did not contain any expression like ‘notwithstanding anything contained in any Children Act passed by any State Legislature’, it is not ‘a specific provision to the contrary’ within the meaning of Section 5 which alone could have excluded the operation of the special law relating to children. Counsel for the appellant had based his argument on Article 254 of the Constitution, which provided for supremacy of central legislation over a state legislation to the extent of repugnancy. The Supreme Court rejected the contention and quoted with approval the dissenting opinion of Verma J. in *Devi Singh v. State of Madhya Pradesh*.⁴⁶ It said that the question of applying Article 254 arose only when the provisions of the two legislations were incapable of coexistence. In the present instance, the operation of the special state legislation was saved by the central legislation itself. Therefore, Article 254 was not attracted, and the provisions of the Children Act conferring exclusive jurisdiction on the juvenile courts to try all offences, including those punishable with life imprisonment or death, would operate. The Supreme Court said, ‘Such a conclusion is supported also by the fact that the Bal Adhiniyam is a special local Act while the new Code is a general enactment applicable throughout the country on account of which the special local Act would apply within this State in preference to the general law on the subject.’ All offences by children are they petty or heinous

⁴⁴ AIR 1979 (SC) 1839

⁴⁵ 1981 Cri LJ 1497

⁴⁶ 109 1978 Cri LJ 585

have been declared to be triable by juvenile courts. The approach taken by the Supreme Court was in the right direction and undoubtedly made the Children Act 1960 the most progressive measure as was intended by its framers.

In the case of *Sheela Barse and Anr. v. Union of India and Ors*⁴⁷, the Supreme Court had suggested that instead of each State having its own Children's Act different in procedure and content, it would be desirable if the Central Government initiates a Parliamentary Legislation on the subject to bring in uniformity in regard to the various provisions relating to juveniles in the entire country. In accordance with this observation of the Supreme Court, the Central Government enacted the Juvenile Justice Act, 1986, to deal with the problem of juvenile delinquency in India.

In re Sessions Judge Kalpetta,⁴⁸ the question arose in a case of rape and other offences by a juvenile against a girl belonging to a Schedule Tribe. Should the juvenile be tried in accordance with the provisions of the Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act.

The approach of the Madras High Court in *Ramchandran v. Inspector of Police*,⁴⁹ shows yet another way not to exclude children from the purview of the JJA. The question in this case did not relate to the commission of a serious offence by the child accused, but the declaration of the accused as a goonda due to the commission of offences antecedent to the current offence. The court found it unnecessary to examine the overriding effect of the power of detention under the Act in question⁵⁰ for the simple reason that this Act was attracted only in case of goondas, bootleggers, drug offenders, and the like, and a child, in its opinion, could not satisfy the definition of a goonda. The child will never become a goonda if the police discharged its function promptly and properly. When a child commits a serious offence, the police must take prompt steps to take him into custody and place him under proper care so that there is no opportunity for him to indulge in further criminal activities which may affect law and order.

⁴⁷ AIR 1986 SC 1773

⁴⁸ 1995 Cri LJ 330 (Ker)

⁴⁹ 1993 Cri LJ 3722 (Mad)

⁵⁰ Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders and Slum Grabbers Act 1982

The JJ (C&P) Act may be interpreted as setting at rest this controversy by being a later, special enactment that has not excluded any category of offences by children despite being aware of the special Acts. However, it is silent on the subject and the issue is still likely to be determined by the understanding and empathy of lawyers and the courts.

5.5 PROCEDURAL ISSUES

The JJA had adopted various procedural changes contained in the Children Act 1960 relating to the proceedings concerning children. These included designated courts to deal with children, differential principle of bail, summons procedure, exclusion of public in the proceedings, prohibition against joint trial, procedure of the competent authority, role of a lawyer, limited right of appeal, and so on. The constitution of a separate juvenile court culminated in the process of segregation of children from the ordinary criminal justice system.

In *Mata v. State of Rajasthan*,⁵¹ the court held the order, refusing bail on the basis of the nature and seriousness of the offence, to be improper. The Court said that it clearly transpires that a delinquent juvenile ordinarily has to be released on bail irrespective of the nature of the offence alleged to have been committed unless there appear reasonable grounds as mentioned in Section 18.⁵² The session judge in *Amit v. State of UP*⁵³ had brushed aside the application of bail on the ground that merely being a child was not enough ground for granting bail to the accused. Granting short-term bail, the High Court clarified that questions of age and bail have to be determined. The session's court has to either consider the question of bail itself in accordance with Section 18 or refer the matter to the juvenile court under Section 8 of the JJA.

⁵¹ 1996 Cri LJ 743 (Raj)

⁵² A contrary approach is reflected in the observation of the court in *Antaryami Patra* when it said, 'I have no hesitation to come to the conclusion that release of an accused involved in commission of an offence under the NDPS Act would defeat the ends of justice and the drug traffickers would pursue their objective of drug trafficking through such juvenile delinquents.' 1993 Cri LJ 1908 (Ori) at 1914

⁵³ 1999 Cri LJ 1878 (All). Bail prayer on behalf of the applicant is pressed on the ground that he is assigned the role of exhortation and conspiring with actual assailants and that the applicant's age is below 16 years and thus he is juvenile.

In *Shokat Ali v. State of Rajasthan*,⁵⁴ the short question before the High Court was whether the session's court could grant bail to the juvenile when he was presented before it instead of the juvenile court. The court answered in the affirmative as the sessions court was among the courts that could exercise the powers of the juvenile court in proceedings before it in appeal, revision, or otherwise. Though there was mention of Section 33 of the NDPS Act permitting release of an offender under 18 years of age on probation, the provisions of Section 37 of the NDPS Act was not mentioned. Desirability of a lawyer as well as the provision barring their presence in a juvenile court was also points of concern. In *Mohomed Alan v. The Crown*,⁵⁵ the only point urged in appeal was that the trial was bad because the advocate who appeared before the juvenile court was not allowed to cross-examine the complainant. The advocate of the appellant could not prove that any prejudice was caused to the appellant in this case and he, in fact, agreed that the order made was in the best interest of the child. The observations of Tyabji J., the-then Chief Justice, in the case are worthy of note in this respect:

“The intention of the Juvenile Courts appears to be that juvenile offenders should be dealt with under conditions clear of the atmosphere of the criminal court. The presence of members of the Bar on behalf of the accused in such petty matters as are brought before the court, whose functions are corrective rather than penal, would, with the resultant long, often times tedious cross examination, tend to frustrate the intention, more specially as the aid of lady members of the public has been listed in this corrective work.”

The provision prohibiting a lawyer in the children's court was challenged for being in violation of Article 22 (1) of the Constitution in *Kario alias Man Singh Main and others v. State of Gujarat*⁵⁶ on a reference made by the session's judge, Rajkot. It is interesting to note that advocates who had filed an appearance on behalf of the accused did not appear before the High Court, nor did the Advocate General, despite a notice from the High Court. Only the Assistant Government Pleader appeared and argued that:

⁵⁴ 1992 Cri LJ 1335 (Raj)

⁵⁵ 136 AIR 1950 (Sind) 16.

⁵⁶ 1969 Guj LR 66

- a. the ban on the presence of an advocate before a juvenile court was not absolute and could be lifted in public interest;
- b. the provisions of the CrPC. relating to the right to be defended by a pleader were controlled by the Children Act made in the larger interest of the child offender;
- c. the ban was not invalid as no child delinquent could be sentenced to death or transportation or imprisonment;
- d. no prejudice was caused to the accused by the denial of an advocate; and
- e. the objective of the Children Act was to improve the child offender and not to punish him.

The division bench relied heavily on the majority decision of the Supreme Court in *State of Madhya Pradesh v. Shobharam*,⁵⁷ for rejecting all these arguments. It held that the provision of the Saurashtra Children Act, restricting the appearance of a lawyer before a juvenile court, violated the fundamental right to be defended by a lawyer as guaranteed by Article 22(1) of the Constitution. No statutory provision could restrict the scope of the guarantee of the Constitution and the right enshrined under Article 22(1) was unfettered and absolute. The object of the Act was immaterial as Article 22(1) of the Constitution contained no restrictions unlike the fundamental rights guaranteed under Article 19. The right accrued as soon as a person was arrested and continued till he was answerable to the cause of his arrest, irrespective of whether he was not released on bail. An order of institutionalization could be made against the accused and that would deprive them of their personal liberty. Imposition of fine is also a penal consequence that might follow in this case. The children were, therefore, entitled to a right to defend themselves with the aid of a counsel and any law that took away that right was violative of the Constitution. The decision given by the division bench consisting of A.D. Desai and J. M. Sheth, JJ., in this case, had the historic consequence of amendment of the CA60 in 1978, permitting the presence of an advocate before the juvenile courts.

⁵⁷ AIR 1966 (SC) 1910 The respondents were arrested by the police for the offence of trespass and were released on bail. They were tried and sentenced to pay a fine by the Nyaya Panchayat, a court established under the Madhya Bharat Panchayat Act, 1949, with powers to impose only a sentence of fine. The conviction was set aside by the High Court on the ground that s. 63 of the Act, which provides that no legal practitioner shall appear on behalf of any party in a proceeding before the Nyaya Panchayat, violated Art. 22(1) of the Constitution and was therefore void.

Unlike the CrPC, the Acts have provided for summons procedure to be followed by the competent authority in all proceedings before it, including those for determination of age.⁵⁸ The higher courts, while upholding the constitutionality of the differential procedure, have not permitted violation of the procedure prescribed for summons cases. In *re Anthony*,⁵⁹ the differential procedure was held to be permissible under Article 14 of the Constitution. The Madras High Court said that the distinction had been made for the benefit of the child and was eminently reasonable, as the distinction enabled a more informal procedure, and far more humane method of dealing with crimes committed by child offenders.

The summons procedure, however, does not mean informality in the procedure. An order made solely on the report of the probation officer was set aside as it was made in total disregard of the procedure prescribed

In *Sultan Singh v. State of MP*,⁶⁰ determination of age by the chief judicial magistrate alone was held to be improper since he alone did not constitute the juvenile court. Relying on *Sunil Kumar*, it was re-emphasized that when a juvenile court has been constituted, the orders and inquiries must be made by all the magistrates constituting the juvenile court, and orders by only one of them were bad.

The summons procedure did not permit a preliminary inquiry. Therefore, the Madras High Court quashed the committal order by the magistrate in relation to the child as illegal.⁶¹ However, once a trial was completed and sentence passed, the courts have almost consistently set aside the sentence but not quashed the trial itself.⁶² In *Shyam Narayan Singh and others v. State of Bihar*,⁶³ the court while recognizing that the accused was a child on the date of the offence, maintained his conviction but directed him to be released on probation and pay a fine to compensate the victim's relative.

⁵⁸*Balbir Singh v. State of Rajasthan*, 1994 Cri LJ 2750 (Raj)

⁵⁹AIR 1960 (Mad) 308

⁶⁰1997 Cri LJ 657 (MP-Gwalior). Curiously the accused seems to be less than six years of age on the date of offence. His date of birth was mentioned as 1 July 1987 and that of the offence was 8 April 1993 in the case.

⁶¹*In re Keralan*, (1972) Mad LW (Cri) 195

⁶²*Chandrika Kumar and others v. State of Bihar*, 2002 Cri LJ NOC 38 (Pat).

⁶³1993 Cri LJ 772 (Pat) There is no information available in the case whether the court had satisfied itself about the existence of the two preconditions for imposition of fine, namely, whether the accused was above fourteen years of age and earning.

A major procedural departure under the JJA/JJ (C&P) Act, as also the Children Acts, relates to the bar against joint trial of a child with another who is not a child and who may otherwise be tried together in accordance with the provision contained in the CrPC. The validity of the joint trial of a child with another who was not a child was questioned in appeals as well as in references made by a number of judicial officers. It was apprehended that the provision would result in long delays, as a decision in one case would not be given unless the trial was completed in the other case also. The Madras High Court gave precisely such a direction in *Sessions Judge, Tirunelveli v. Perumal*.⁶⁴ It held that a session's judge trying an adult and a child separately for the same offence should not pronounce his judgment in either case till the trials in both the cases were over. Quite a few courts were unanimous in declaring the joint trial of a child with another person who was not a child, as being illegal, and contrary to the provisions of the Children Acts. However, in *Vinod v. State of UP*,⁶⁵ the court held the trial of the child accused along with his father and guardian was not vitiated, as the joint trial was not shown to have prejudiced the child. In *Mukhtiar Singh v. State of Punjab*,⁶⁶ the joint trial of the child with a non-child was held not vitiated in view of the provisions of the East Punjab Children Act.

The procedure in relation to cases pending at the time when the new legislation came into force was also subject of some scrutiny. In *Lallan Singh v. State of UP*,⁶⁷ the court clarified that Section 20 of the JJ (C&P) Act was clear that the pending cases had to continue as if this statute had not come into force. The case was to be transferred to the juvenile justice board for disposal in accordance with its provisions only if the accused was found to be guilty. Section 64 of the JJ (C&P) Act had no application to pending cases and was limited in relation to children undergoing imprisonment.

The cases before the higher courts bring to focus only one issue of not separating the case of the child from that of the non-child. Various other apprehensions about duplication of court work, contradictory decisions by two forums

⁶⁴ 1974 Cri LJ 261 (Mad) (FB)

⁶⁵ 1999 Cri LJ 3729 (All)

⁶⁶ 152 1992 Cri LJ 2968 (P&H)

⁶⁷ 156 2002 Cri LJ 1242

dealing with the same matter, or prejudice caused by findings of one on the other in the absence of a joint trial, have not been focused on in any of these cases.

Several procedural questions have been raised in relation to neglected children. The first two cases before the higher courts relating to neglected children, dealt with the *locus standi* of the person making the appeal. In the first case, the putative father was held to have none,⁶⁸ but in the latter case, the appeal by the child through her aunt was held to be maintainable.⁶⁹ In *Om Prakash vs. Child Welfare Board*,⁷⁰ an application under the Guardians and Wards Act 1890 against the child welfare board was declared to be misconceived, as the correct remedy was to file an appeal to the court of sessions under the Children Act. In *Shila Bhalla v. Bhagwan Dass*,⁷¹ the validity of the summon issued by the President of the Child Welfare Board to the parent to show cause as to why the child should not be dealt with as a neglected child under the Children Act, was upheld. The presence of all members of the Board was not required for passing an interim order under the Act. The order of the juvenile court sending a girl to a school outside the state was held to be illegal and without jurisdiction.

5.6 PROPRIETY OF ORDERS RELATING TO CHILDREN

The primary approach of the JJS is protective and not penal. Challenges to the appropriateness of the orders of the juvenile court, or any other court dealing with children, provide the opportunity for highlighting this basic difference between the JJS and the ordinary criminal courts and increase the understanding, acceptance, and practice of the laudable objects of the JJS. The propriety of penal orders relating to children passed by the lower courts was challenged in many cases before the higher courts under the Children Acts and was upheld only in minority of cases. For example, in *Rajendra v. State of UP*,⁷² the court upheld the order of sending the juvenile delinquent to an approved school for two years for an offence of murder. In other cases the orders were found to be inappropriate for various reasons. In one case,

⁶⁸ *In re Anandi Mahar*, AIR 1937 (Bom.) 388

⁶⁹ *Public Prosecutor, Mad. v. Geetha* (1964) MLJ (Cri.) 313

⁷⁰ AIR 1980 (Cal) 137

⁷¹ 1997 Cri LJ 2700 (All).

⁷² 1997 Cri LJ 2700 (All).

a sentence of imprisonment made without inquiry into age was found to be illegal.⁷³ The Supreme Court, too, held that the sentence of life imprisonment without proper determination of age could not be sustained in view of the provisions of the Children Act and ordered the accused to be released on probation.⁷⁴

In others order of probation or of sending to juvenile institutions or keeping them with parents, were found to be more appropriate even in serious offences like murder and rape. The orders of institutionalization to run consequently were modified so as to run simultaneously. In some cases, the courts had to deal with an order wrongly sending the child to an institution outside the state or to a wrong institution.

In *Public Prosecutor v. Rajam Ammal*,⁷⁵ the public prosecutor filed a revision against an order directing a girl to be kept in a borstal school as there were no borstal schools for keeping girls. In *Rajesh Khaitan v. State of West Bengal*,⁷⁶ the Calcutta High Court found normal abandoned children kept with abnormal children and declared such confinement improper. It also declared a sentence of imprisonment passed against a child as being without jurisdiction. The higher courts were called upon to decide on the validity of orders of custody of children in borstal schools after they attained the age of 21-23, beyond which they could not be kept in the juvenile institution.⁷⁷ In *Karuppayee and another*,⁷⁸ the court held that the order directing the juvenile to be sent to jail, on completion of their stay in an approved school, to serve the remaining period of life sentence imposed upon them was illegal and contrary to the decision of the Supreme Court. It approved the approach taken in *Rajan & Thiruvengada Karthigean v. State*,⁷⁹ in this judgment where the JJ Act followed a liberal approach.

The Children Acts provided for continuation of inquiry when the child ceased to be so during the pendency of proceedings and for passing orders as if the child continues to be so. However, the provision relating to institutionalization specified an upper age limit beyond which no child could be kept in a home under the Act. The

⁷³ *Hiromal s/o Chuharmal v. Emperor*, AIR 1948 (Sind) 63 (DB)

⁷⁴ *Sri Krishan v. State of UP*, AIR 1991 (SC) 43

⁷⁵ AIR 1942 (Mad) 674.

⁷⁶ 1983 Cri LJ 877

⁷⁷ *Peter Gill v. State of Punjab*, 1983 Cri LJ 231 (Punj)

⁷⁸ 1997 Cri LJ 1627 (Mad)

⁷⁹ 1993 MLJ (Cri) 257

higher courts chose different courses of actions for dealing with children who had crossed the prescribed upper age limit by the time final orders were made in the case. In *Superintendent, Central Jail, Hyderabad v. C. Narsimhulu*,⁸⁰ the Andhra Pradesh High Court held that persons between 16 and 21 years of age on the date of conviction may be sent to borstal school. In *State of MP vs. Ashok Kumar*,⁸¹ the MP High Court held the trial of a juvenile by a session's court to be without jurisdiction but did not remit the case for retrial as fifteen years had elapsed. The accused was acquitted for not being guilty on evidence. In *Jayendra v. State of Uttar Pradesh*,⁸² the Supreme Court directed the proceedings to be dropped as the child had become twenty-five years of age during the pendency of the proceedings. In *Umesh Chandra v. State of Rajasthan*,⁸³ however, it referred a child of comparable age, back to the juvenile court for appropriate orders. While the Allahabad High Court considered such a case fit to be sent to the state government for appropriate orders,⁸⁴ In *Budha Singh v. State of Punjab*, the High Court of Punjab ordered that such child be released on probation for good conduct.⁸⁵ In *Sunita v. State*,⁸⁶ the accused was a child when she committed murder by sprinkling kerosene and setting the deceased on fire. The plea of child status was taken before the High Court. She had become 25 years of age by the time her appeal was decided. Following the earlier precedents, the court, without disturbing her conviction, set aside her sentence of life imprisonment and ordered her release. In *Lalit Mohan Ghose v. State of Tripura*,⁸⁷ the court directing other orders like one for release on probation that may be passed by the juvenile Court, it has to be born in mind that more than a decade has elapsed since he was convicted.

In *Bhudha Singh v. State of Punjab*,⁸⁸ the session's judge sent a child to judicial custody as the list of certified schools to which he could be sent was not available.

Operations under the Acts are replete with instances of injustice caused to children due to the apathy and ignorance of various agencies involved there under.

⁸⁰ 1999 Cri LJ 1425 (AP)

⁸¹ 1995 Cri LJ 3955 (MP)

⁸² 1982 Cri LJ 1000

⁸³ 1982 Cri LJ 994

⁸⁴ *Ghanshyam v. State*, 1982 Cri LJ 138(A11.). Overruled in *Ghanshyam v. State*, 1983 Cri LJ 439(SC).

⁸⁵ 1979 Chand LR (Cri) 114 (Punj)

⁸⁶ 1998 Cri LJ 4249 (P&H)

⁸⁷ 1999 Cri LJ 609 (Gau)

⁸⁸ 1979 Chand LR (Cri) 114

The UP Children Act permitted imprisonment of children till they attained the age of 18 years in case they were found to be of such a depraved character that it was not advisable to deal with them under its provisions. *In Lakshmi v Sub-Inspector, N. P. Police Station*,⁸⁹ the juvenile delinquent was arrested on suspicion of involvement in a theft and was kept for some time in the police station and then remanded to judicial custody. The court found both to be illegal and invalid in view of Sections 18 and 21 of the JJA. The state government was ordered to invest Rs 25,000 in an approved scheme for five years in the name of the child. The amount was to be made available to him in a vocation in which he would be rehabilitated by the state.

These few cases referred to here of grave bad form, caused to kids because of the numbness of legal officers, is just the tip of the chunk of ice. A hint of something better over the horizon can be found in the cases making the police responsible for infringement of the law. In any case, if there should be an occurrence of infringement of the legitimate commitments by the individuals from legal, neither any strictures were passed against them nor were the kids given any remuneration, either by the High Court or the Supreme Court.

5.7 NEGLECTED CHILDREN BEFORE THE HIGHER COURTS

The number of neglected children is much more than that of delinquent children dealt with under the JJS. Despite this, the number of cases relating to neglected children before the higher courts is only marginal. It may be so because the neglected children are friendless, penniless, homeless, and exploited, in addition to being uneducated and unaware. The prohibition of a lawyer in neglect proceedings may also be responsible for it. Does institutionalization of a neglected child amount to curtailment of liberty? Does the differential procedure provided for conduct of neglect proceedings violate the constitutional or legal rights of children? In the few cases of neglected children before the higher courts, these questions were not raised. But the issues that were raised were no less significant. These cases did highlight the illegalities and misconceptions while dealing with neglected children as well as the problem of flesh trade vis-a-vis neglected girls.

⁸⁹ 1991 Cri LJ 2269 (Mad)

In *Rajesh Khaitan v. State of West Bengal*⁹⁰ P. C. Borooah, J. of the Calcutta High Court Under no circumstances a child of tender age who is normal but has been abandoned should be confined in a prison with abnormal juveniles. This will certainly retard their mental growth and affect them both mentally and psychologically. The State Government should take immediate steps for their dispersal to some welfare home or even, if possible, to a home run by the Missionaries such as Mother Teresa so that there may be chances of their being adopted by some outside agencies.

In *Gaurav Jain v. Union of India*,⁹¹ and *Vishaljeet v. Union of India*,⁹² the issue was rehabilitation of child prostitutes and children of prostitutes. While no reference was made to the Children Act or the JJA in *Gaurav Jain*, *Vishaljeet* did point out that the JJA, which provided for care, protection, rehabilitation of neglected children, made specific provisions for taking charge of and making appropriate orders relating to child prostitutes. The court did not agree with the proposal for separate hostels and schools for children of the prostitutes as that would have hindered their integration in the mainstream of society. It appointed a committee to study the question in depth and submit a report. No directions for rehabilitation were made in *Vishaljeet* in view of the order in *Gaurav Jain*. The report has recommended further study into:

- a. efforts of government or non-government organizations;
- b. the way certain schemes are being implemented by voluntary organizations and the possibility of their extension to other areas;
- c. the possibility of making more of the existing schemes;
- d. the working of the JJA in some states other than Delhi;
- e. the role and perspective of the police; and
- f. the need for legislation on the basis of the UP Naik Girls Act 1929 which aimed at preventing the induction of Naik girls into prostitution.

In *Amrita Ahluwalia v. Union of India*,⁹³ B.N. Kirpal, J. was called upon to determine if the young bride Ameena, married to a sixty year old Arab, was a neglected child within the meaning of the JJA and whether her case should be dealt with by the juvenile court rather than the ACMM. Answering the question in the

⁹⁰ 1983 Cri LJ 877 (Cal)

⁹¹ AIR 1990 (SC) 292

⁹² (1990) 3 SCC 318; 1990 (1) SCALE 874.

⁹³ 1992 Cr LJ 1906

affirmative the court said that she was a child whose parents were unfit to exercise control over her. She was also a child without any home or settled place of abode and certainly without ostensible means of livelihood. The court raised important questions about the possibility of trafficking in women under the garb of marriage and asked the Union of India to file an affidavit if any such trafficking was taking place and if so, what steps were being taken by it for its prevention. Ameena was finally placed under the care of her parents under supervision of a local NGO in Hyderabad, which was directed to visit her every week. The order of supervision was made for five years while Section 16 (2) of the JJA prescribed the maximum of three years in the first instance. In this case, even though the child was in the observation home for about seven months and was studying in school before her alleged marriage, no inquiry was held or evidence called for to determine her age as mandated by Section 32 of the JJA.

The judicial process at the higher courts level is marked with three main characteristics. First, the higher courts have used the protective philosophy behind the JJS in the cases before them, sometimes for the purpose of educating the unaware implementers of the law, the judicial officers, and institutional personnel. Secondly, they made various departures from the rules and principles of the criminal justice system and established judicial practices to extend the protection of the JJS to children in need. Thirdly, the states, as well as members of judiciary, have played a proactive role to promote and protect the interests of children by initiating cases and by their active involvement in public interest litigation. However, Krishna Iyer, J. in *Satto v. State of Uttar Pradesh*⁹⁴ lamented at the existing state of juvenile justice. He said: Regrettably our juvenile system still thinks in terms of terror, not cure, of wounding, not healing, and a sort of blind man's bluff is the result. This negative approach converts even the culture of juvenile homes into junior jails. From the reformatory angle, the detainees are left to drift, there being no constructive

⁹⁴AIR 1979 (SC) 1519. the appellants should be released on probation of good conduct and committed to the care of their respective parents and if no surviving parents, then their guardian, executing a bond each without sureties to be responsible for the good behaviour of the youthful offender for a period of two years from the date of release and for the observance of a condition namely that the child shall be put to school or continue its studies if it is already at school and attend any recreational or meditational centre, if any, of the parents' choice regularly. The Reformation Officer enjoying jurisdiction in the locality will have supervision over each of the appellants and shall make a report once every three months to the Trial Court. The Reformation Officer will explain to the appellants and their parents the import of this order.

programme for the detainees nor correctional orientation and training for the institutional staff. I highlight these drawbacks largely because the state's response to punitive issues relating to children has been stricken with illiteracy and must awaken to a new 'enlightenment'. The learned judge recapitulated at length the principles to be followed by courts in dealing with children. Welfare of the child was the paramount consideration. The courts should, in proper cases, take steps to remove children from undesirable surroundings and for securing that proper provision was made for their education and training. If the past history did not show that they were naturally of a criminal type and that they were capable of reformation, they should be released on probation. 'Sentencing in large part is concerned with avoiding future crimes by helping the defendant learn to live productively in the community which he has offended against.

Iyer J. further said that Juvenile detention needs a new focus and a new rationale. The detention period ought to be used to begin to draw together resources necessary for constructive change, whether or not the juvenile is adjudicated. There is abundant evidence that detention has failed as an isolated interlude between those more dramatic parts of the juvenile justice system-arrest and trial or disposition.

In *Sunil Kumar v. State*,⁹⁵ the Kerala High Court outlined the scheme of the Children Act to emphasize the protective nature of various homes for children and the constitution and procedure of the juvenile court. The Calcutta High Court in *Rajesh Khaitan v. State of West Bengal*,⁹⁶ clarified that under no circumstance should a child of tender age, who was normal but had been abandoned, is confined in a prison with abnormal children. This would certainly retard their mental growth and affect them both mentally and psychologically.

The courts relied heavily on the object of punishment in case of children, namely, to reform and reclaim them to society, for reducing the rigors or duration of incarceration. In *Munna v. State*⁹⁷ the Supreme Court pointed out that the inhibition against sending a child to jail did not depend upon any proof that the person was a child 'but as soon as it appears that a person arrested is apparently under the age of 16

⁹⁵*Sunil Kumar v. State*, 1983 Cri LJ 99 (Ker).

⁹⁶1 983 Cri LJ 877.

⁹⁷1 982 Cri LJ 620.

this inhibition is attracted. The law throws a cloak of protection around children and seeks to isolate them from criminal offenders because the emphasis placed by the law is not on incarceration but on reformation' In their effort to ensure protection to children, the higher courts have imposed various duties on the magistrates, such as, to hold due inquiry and determine the correct age of the child;⁹⁸ to secure the attendance of the parent, guardian, or legal adviser of the child during all stages of proceedings or in their absence, to explain to the boy the charge and the consequences of pleading guilty to the charge;⁹⁹ to introduce rehabilitative training in institutions housing children.¹⁰⁰

The higher courts in many cases lamented the absence of Children Acts in certain states and exhorted the state governments to enact or enforce it but the High Courts of Assam and Rajasthan went further and considered the inaction to enforce the Children Act as violative of the Directive Principle contained in Article 39(f) of the Constitution.¹⁰¹ In *Sheela Barse*, too, the Supreme Court suggested enactment of a uniform law to prevent imprisonment of children.¹⁰²

Although High Courts have inherent power of *suomotu* revision, it is not common for the courts to actually exercise that power. The Kerala High Court initiated revision proceedings *suomotu*, after seeing first hand the deplorable conditions under which children were sent to and maintained at the Children's Home at Trivendrum.¹⁰³ The Calcutta High Court also took judicial notice of young normal children kept along with spastics and lunatics and deplored the practice.¹⁰⁴

Some members of the lower judiciary, too, initiated appellate proceedings in the High Courts for according protection to children. In a few cases, the learned session's judges requested the High Courts for quashing of orders of the magistrates committing children to them who instead should have been dealt with under the provisions of the Children Acts. *In re Chinnathambi*,¹⁰⁵ the magistrate requested

⁹⁸*Pritam Singh and others v. State of Punjab*, 1977 Cri LJ 51 (DB).

⁹⁹*Ashvini Kumar Bose v. Emperor*, AIR 1931 (Cal) 522.

¹⁰⁰*Vishwanathan Nair v. State of Kerala*, 1952 Cri LJ 1701.

¹⁰¹*Nuruddin v. State of Assam*, 1984 Cri LJ 1724 (Gau).

¹⁰²*Sheela Barse v. Union of India and others*, AIR 1986 (SC) 1773

¹⁰³ *Sunil Kumar v. State*, 1983 Cri LJ 99 (Ker)

¹⁰⁴ *Rajesh Khaitan v. State of West Bengal*, 1983 Cri LJ 877 (Cal)

¹⁰⁵ (1961) MLJ (Cri) 671

transfer of some children inadvertently sent to the senior certified school, to junior certified school.

The historic case of *Kario alias Mansingh Main*¹⁰⁶ also resulted as a consequence of reference by the session's judge. He recommended that the order of the children court rejecting the application filed by the accused to allow them to be defended by an advocate, be set aside. Judicial officers referred questions to the High Courts for their opinion on important matters like the forum for trial of the child accused, and the crucial time for determining applicability of the Children Act.

The Government counsels who ordinarily are expected to file appeals for enhancement of sentence, filed revision petitions for setting aside sentence of imprisonment as being illegal because the accused was a child.¹⁰⁷ Another public prosecutor filed a petition to set aside the order of the juvenile court ordering detention of minor girl in a government home for children outside the state.¹⁰⁸ The revision petition filed by the state against the consecutive sentences ordered by the sub-magistrate in case of a child found to have committed two offences shows their protective approach towards children.¹⁰⁹

The judicial process relating to juvenile justice is dotted with public interest litigation (PIL) in recent times, beginning with focusing on the exploitation of children in jails. Disposing of the PIL six years later,¹¹⁰ the court re-emphasized its earlier order that magistrates must be extremely careful to see that no person, apparently a juvenile, was sent to jail and that such children should be detained in children homes or other places of safety.

The Supreme Court orders in the 1980s show its increasing involvement with the cause of children, and that it no more felt constrained by the technicality of law, the absence of it, or by the infrastructure under it in giving relief. *In Dharam Pal and others v. State of UP*,¹¹¹ the plea of child status was raised for the first time in the proceedings before the Supreme Court. The bench consisting of M. H. Baig, P. N.

¹⁰⁶ (1969) 10 Guj LR 66

¹⁰⁷ *Public Prosecutor v. Shaik Valli and others*, 1971 Cri LJ 1229 (AP) (DB)

¹⁰⁸ *State of Kerala v. Subbalakshmi*, 1959 Ker LR 1446

¹⁰⁹ *State v. Natrajan*, 1971 Cri LJ 1479

¹¹⁰ Order dated 15 March 1989 in Writ Petition (Cri No. 6) of 1982.

¹¹¹ AIR 1975 (SC) 1917

Bhagwati, and R. S. Sarkaria, JJ., said that appropriate action under the Children Act 'could have been taken in this case if the question had been raised in time.' A decade later, when a similar occasion arose before D. A. Desai and A. N. Sen, JJ, they went ahead and applied the Children Act. They said that Children Act was a social protective legislation and the children must not be denied its protection by taking shield behind the technicality of the law that the contention has been raised for the first time before it.¹¹²

The learned judges of the Supreme Court echoing in the more humanistic tone on several point of time, lamentated at the absence of Children Act in the states and at their inability to deal with accused as a child '*for the simple reason that absence of legislation cannot be made up for by judicial legislation.*' In *Sheela Barse v. Union of India*, P. N. Bhagwati, C J with R. N. Misra, J., undertook judicial legislation and directed closure of proceedings if they prolonged beyond the time limit prescribed by the court for completing investigation and disposal thereof.¹¹³ However, the Madras High Court has held that these directions are not rigid formulae but only guidelines. The decision should be made on the basis of whether the accused was on bail or not, what was the reason for the delay, whether reasonable proceedings have taken place or not, and so on.¹¹⁴

In *Sheela Barse*, the Supreme Court extended its brief of granting relief to children in jails and launched an elaborate exercise of gathering information about the conditions of children in jails as well as in correctional institutions. The Supreme Court was not daunted by the expenses involved and directed the Union of India and other states to deposit money for the purpose. There had been instances in the past when the courts directed the constitution of certain bodies under the Children Act or exhorted the states to enact or implement Children Acts. The Supreme Court, in view of the lackadaisical implementation of the JJA, undertook the responsibility to oversee its implementation. However, the Supreme Court of the 1990s is not so consistently protective towards child offenders. On many occasions the courts have refused the protection provided by the Children Act or the JJA to children committing offences.

¹¹²*Gopinath Ghosh v. State of WB*, 1984 Cri LJ 168 (SC)

¹¹³*Sheela Barse v. Union of India* AIR 1986 (SC) 1773

¹¹⁴*Bharatnatyam v. State*, 1994 Cri LJ 3546 (Mad)

In *Sheela Barse v. Union of India*¹¹⁵, The Supreme Court issued directions to the state government to set up necessary observation homes where children accused of an offence could lodged, pending investigation and trial will be expedited by juvenile courts.

In *Sheela Barse v. Secretary, children Aid Society*,¹¹⁶ The Supreme Court commented upon setting up dedicated juvenile courts and special juvenile court officials and the proper provision of care and protection of children in observation Homes.

In *Vishal Jeet v. Union of India*,¹¹⁷ The Supreme Court issued appropriate directions on a PIL to the state Governments and all Union Territories for eradicating the evil of child prostitution and for evolving programmes for the care, protection, treatment, development and rehabilitation of the young fallen victims.

In *M.C. Mehta v. State of Tamil Nadu*,¹¹⁸ Supreme Court pronounced upon the constitutional perspective of abolition of Child labor and issued appropriate guide lines to the Government of India with respect to compulsory education, health, nutrition, etc of the child laborers.

In *Sakshi v. Union of India*,¹¹⁹ Supreme Court directed the government or Law commission to conduct a study and submit a report on the means of curbing child abuse.

Juvenile offender- Incidence of 16th December, 2012- Fire person brutally assaulted young lady, sexually and physically- One of five persons identified was below 18 years of age on date of commission of crime- His case referred for inquiry to Juvenile Justice Board- Other accused tried in regular sessions court- Question for determination Whether offence(s) allegedly committed by juvenile is to be inquired into by Juvenile Justice Board or juvenile is required to be tried in regular criminal court? J.J. Act treated all under 18 as separate category for purpose of differential treatment so far as commission of offences are concerned- Contentions advanced by

¹¹⁵ AIR1986 SC1733

¹¹⁶ AIR1987 SC656

¹¹⁷ AIR 1997 SC 699

¹¹⁸ (1999) 6 SCC 591

¹¹⁹ AIR 199 SC 1412

petitioners to the contrary on strength of thinking and practices in other jurisdiction- Without any relevance- Held, in instant case no question of sending juvenile to face regular trial. It was urged by the appellant that the relevant provisions of the Juvenile Justice (Care and Protection of Children) Act, i.e. Sections 1(4), 2(k), 2(1) and 7 must be read to mean that juveniles (children below the age of 18) who are intellectually, emotionally and mentally mature enough to understand the implications of their acts and who have committed serious crimes do not come under the purview of the Act. Such juveniles are liable to be dealt with under the penal law of the country and by the regular hierarchy of courts under the criminal justice system administered in India. This is what was intended by the Legislature; a plain reading, though, shows an unintended omission which must be made up or furnished by the court. It is further urged that if the Act is not read in the above manner the fall out would render the same in breach of Article 14 as inasmuch as in that event there would be a blanket/flat categorisation of all juveniles, regardless of their mental and intellectual maturity, committing any offence, regardless of its seriousness, in one homogenous block in spite of their striking dissimilarities. This, the petitioner contends, is a classification beyond what would be permissible under Article 14 inasmuch as the result of such classification does not further the targeted object, i.e., to confer the benefits of the Act to persons below 18 who are not criminally responsible in view of the low level of mental maturity reached or achieved. This, in substance, is also the argument of the learned counsel of the petitioner, who in addition, has contended that the Act replaces the criminal justice system of the country by a scheme which is not even a poor substitute. The substituted scheme does not even remotely fit with constitutional tapestry woven by certain basic features namely the existence of a criminal justice system. Reading down the provisions of a statute cannot be resorted to when the meaning thereof is plain and unambiguous and the legislative intent is clear. The fundamental principle of the "reading down" doctrine can be summarized as follows. Courts must read the legislation literally in the first instance. If on such reading and understanding the vice of unconstitutionality is attracted, the courts must explore whether there has been an unintended legislative omission. If such an intendment can be reasonably implied without undertaking what, unmistakably, would be a legislative exercise, the Act may be read down to save it from unconstitutionality. The above is a fairly well established and well accepted principle of interpretation which having been

reiterated by the Supreme Court time and again would obviate the necessity of any recall of the huge number of precedents available except, perhaps, the view of Sawant, J. (majority view) in *Delhi Transport Corporation vs. D.T.C. Mazdoor Congress and others*, 1991 Supp. (1) SCC 600. In the present case, there is no difficulty in understanding the clear and unambiguous meaning of the different provisions of the Act. There is no ambiguity, muchless any uncertainty, in the language used to convey what the Legislature had intended. All persons below the age of 18 are put in one class/group by the Act to provide a separate scheme of investigation, trial and punishment for offences committed by them. A class of persons is sought to be created who are treated differently. This is being done to further/effectuate the views of the international community which India has shared by being a signatory to the several conventions and treaties already referred to. Classification or categorization need not be the outcome of a mathematical or arithmetical precision in the similarities of the persons included in a class and there may be differences amongst the members included within a particular class. So long as the broad features of the categorization are identifiable and distinguishable and the categorization made is reasonably connected with the object targeted, Article 14 will not forbid such a course of action. If the inclusion of all under 18 into a class called 'juveniles' is understood in the above manner, differences inter se and within the under 18 category may exist. Article 14 will, however, tolerate the said position. Precision and arithmetical accuracy will not exist in any categorization. But such precision and accuracy is not what Article 14 contemplates. If the provisions of the Act clearly indicate the legislative intent in the light of the country's international commitments and the same is in conformity with the constitutional requirements, it is not necessary for the court to understand the legislation in any other manner. In fact, if the Act is plainly read and understood, the resultant effect thereof is wholly consistent with Article 14. The Act, therefore, need not be read down, as suggested, to save it from the vice of unconstitutionality for such unconstitutionality does not exist. That in certain foreign jurisdictions, details of which have been mentioned earlier to bring about clarity and completeness to the issues arising, the position is otherwise would hardly be of any consequence so far as our country is concerned. Contrary international opinion, thinking or practice, even if assumed, does not dictate the legislation of a sovereign nation. If the Legislature has adopted the age of 18 as the

dividing line between juveniles and adults and such a decision is constitutionally permissible the enquiry by the courts must come to an end. Even otherwise there is a considerable body of world opinion that all under 18 persons ought to be treated as juveniles and separate treatment ought to be meted out to them so far as offences committed by such persons are concerned. The avowed object is to ensure their rehabilitation in society and to enable the young offenders to become useful members of the society in later years. India has accepted the above position and legislative wisdom has led to the enactment of the J.J. Act in its present form. If the Act has treated all under 18 as a separate category for the purposes of differential treatment so far as the commission of offences are concerned, the Supreme Court do not see how the contentions advanced by the petitioners to the contrary on the strength of the thinking and practices in other jurisdictions can have any relevance.

In *Chanderjeet Kumar & Kishan v. State*¹²⁰ the Judgment delivered by Gita Mittal and J P S Teji JJ. took note of the callousness of the courts in dealing with the matter which had led to violation of Art. 21 guaranteed to the appellant (juvenile convict) *Chanderjeet Kumar & Kishan* and he was also denied benefits available to juveniles under the JJ Act. The court said: “We are informed that the appellant was arrested on 13th January, 2007, and has been incarcerated ever since. As on date, he has undergone over nine years of imprisonment. The appellant has undergone more than the maximum sentence permissible under the provisions of the JJ Act. In any case, the appellant could not have been kept in the jail meant for adult prisoners but was required to be kept in the observation home, that too only for the maximum period of three years.

The Supreme Court in *Re: Exploitation of Children in Orphanages in the State of Tamil Nadu* has issued some significant directives to the Central and state governments. A bench comprising Madan B Lokur and Deepak Gupta JJ. asked the governments to ensure that the process of registration of all child care institutions is completed before the end of this year. The court observed that the Juvenile Justice Act mandates that all institutions, whether run by a state government or by voluntary organisations or NGOs, for housing children in need of care and protection shall be registered within six months of the commencement of the Act.

¹²⁰ CrI.M.A. No. 14463/2016 in CRL.A. 371/2015

The JJ Act came into force on 15th January, 2016, but we were informed that the process of registration is underway and not yet complete, the court said.

Referring to a report by Anjali Sinha about sexual abuse faced by children in child care institutions, the bench observed: “If activities of the nature mentioned by Ms. Anjali Sinha in her article are carried out in government-run institutions, one can only imagine what possibly can go wrong in unregistered institutions, which are managed beyond the law.

The court also observed that even in registered childcare institutions, many of the statutory facilities and requirements are missing. If that be so, we can only imagine the living conditions of children in unregistered institutions, the bench remarked.

The court said that if the officers of the state do not ensure that minimum standards of care are followed in the child care institutions, they could well be guilty of negligence, also perhaps of a violation of the human rights of children.

If the registration of child care institutions is not complete, their management obviously cannot be supervised. Therefore, a misstep in the very first stage could have a chain reaction and perhaps disastrous consequences in some cases as is evident from the incidents of child abuse in institutions as brought out by Ms. Anjali Sinha,” the court added.

The following directives were issued to Union and state governments:

Ensure that the process of registration of all childcare institutions is completed positively by December 31, 2017, with the entire data being confirmed and validated.

The information (pertaining to institutions) should be available with all the concerned officials. The registration process should also include a data base of all children in need of care and protection which should be updated every month. While maintaining the database, issues of confidentiality and privacy must be kept in mind by the concerned authorities.

Enforce the minimum standards of care as required by and in terms of the JJ Act and the Model Rules positively on or before 31st December, 2017.

Set up inspection committees as required by the JJ Act and the Model Rules to conduct regular inspections of child care institutions and to prepare reports of such inspections so that the living conditions of children in these institutions undergo positive changes. These inspection committees should be constituted on or before 31st July, 2017.

These inspection committees should conduct the first inspection of the child care institutions in their jurisdiction and submit a report to the concerned government of the states and union territories on or before 31st December, 2017.

The vacation bench of the Supreme Court today dismissed the plea filed by Delhi Commission for Women challenging the release of the juvenile convicted in the Nirbhaya case saying that “though it shared the society’s concern”, it could not extend his stay in the observation home beyond three years under the present Juvenile Justice Act.

“Everything has to be done in accordance with the law. We have to follow the law. Without legislative sanction our hands are tied. We cannot go beyond any statute. Can we ? then what is the interim order you expect from us ?”, a bench of Lalit JJ. told lawyer Guru Krishna kumar who represented DCW Chairpeson. The juvenile who was released from the observation home in Majnu Ka Tila on Thursday, that is three days in advance due to security reasons, was shifted to “When Additional Solicitor General Pinky Anand rose to support DCW and said “we support their stand”, justice Goel asked her “how can you ? you have not made any law. There has to be some legislative sanction”.

DCW told the court that it was not pressing for sending back the juvenile to the observation home and said he only may be subjected to an independent assessment of his mental state to ascertain if the criminal has reformed and was safe to be released into the society. “There is no reformation programme in place even on the lines of what the High Court had directed. In that view his stay in the place where he is presently lodged, with an NGO should be extended”, Krishna Kumar argued.

The Juvenile Justice Board (JJB), on Wednesday, ruled that the 16-year old teenager accused of killing seven-year-old Pradyuman Thakur at Ryan International School will be tried as an adult.

Delivering the verdict, Principal Magistrate Davender Singh reportedly opined that the offence was “heinous” and that circumstances showed that the teenager was “mature enough” to understand the consequences of his alleged act.

The JJB relied on the reports submitted by clinical psychologist, Dr. Jogender Singh Kairo and legal-cum-probation officer from the district child protection unit, Gurgaon, Ms. Nisha Saini. As per Advocate Sushil Tekriwal, who is representing Pradyuman’s father, the report suggested that the accused was “hyper- aggressive” and that he should be treated as an adult.

The JJB, however, clarified that if convicted, he will stay in a correctional home till he is 21 years old and will then be transferred to a jail for the remainder of his sentence. The accused will be lodged at the observation home in Faridabad during the trial, unless he gets bail. The teenager is expected to be produced before Gurgaon’s Sessions Court at its next hearing on December 22. The class 11 student is accused of slitting Pradyuman Thakur’s throat in the school toilet on September 8. While the Gurgaon Police had claimed that the crime had been committed by a bus conductor, the Central Bureau of Investigation (CBI) had refuted the assertion and had nabbed the juvenile. The CBI had claimed that the teenager had killed Pradyuman in a bid to get the school closed so that a scheduled parent- teachers meeting and an examination could be deferred.¹²¹

The Supreme Court, *Sampurna Behura v. Union of India*¹²², requested Chief Justices of all High Courts to “seriously consider” establishing child friendly courts and vulnerable witness courts in each district.

The Bench comprising M.B. Lokur and Deepak Gupta JJ. observed, “*Inquiries under the JJ Act and trials under other statutes such as the Protection of Children from Sexual Offences Act, 2012, the Prohibition of Child Marriage Act, 2006, trials for sexual offences under the Indian Penal Code and other similar laws require to be conducted with a high degree of sensitivity, care and empathy for the victim. It is often said that the experience in our courts of a juvenile accused of an offence or the victim of a sexual offence is traumatic.*”

¹²¹ Read more at: <http://www.livelaw.in/ryan-international-school-case-juvenile-justice-board-directs-16yr-old-accused-to-be-tried-as-an-adult/>

¹²² writ petition (civil) no. 473 OF 2005, February 9 2018

“We need to have some compassion towards them even juveniles in conflict with law, since they are entitled to the presumption of innocence – and establishing child friendly courts and vulnerable witness courts is perhaps one manner in which the justice delivery system can respond to ease their pain and suffering. Another advantage of such child friendly courts and vulnerable witness courts is that they can be used for trials in which adult women are victims of sexual offences since they too are often traumatized by the not so friendly setting and environment in our courts.”

The Court was hearing a Petition filed by activist and human rights defender Dr. Sampurna Behura, who had highlighted the “virtual non-implementation or tardy implementation” of Juvenile Justice (Care and Protection of Children) Act, 2000 and the Juvenile Justice (Care and Protection of Children) Act, 2015. Acknowledging the veracity of the accusations, the Court further opined that it would be appropriate for High Courts to initiate *suomotu* proceedings for better implementation of the Acts.

The judgment begins by tracing the resolutions passed during Chief Justices’ conference since 2006. It then acknowledged that while it may be criticized for judicial activism and overstepping its boundaries, it nevertheless rapped the State Governments for not implementing the Act in its true spirit, noting:

“...over the last decade or so, State Governments and Union Territories have not fully complied with the provisions of a law solemnly enacted by Parliament for the benefit of children. In many instances, only cosmetic changes have been introduced at the ground level with the result that voiceless children continue to be subjects of official apathy.”

However, it must be acknowledged that the Union of India through the Ministry of Women and Child Development (for short MWCD) has taken some bold steps in recognizing the rights of the children and giving them some importance. Nevertheless, the overall picture relating to the recognition of the rights of children and their realization is far from satisfactory and remains gloomy as we continue to trudge along the long and winding road.” The Court issued the following directions for functioning of the National and State Commissions for Protection of Child Rights. These are following:

- i. The Ministry of Women and Child Development in the Government of India and the State Governments should ensure that all positions in the NCPCR and the SCPRs are filled up well in time and adequate staff is provided to these statutory bodies so that they can function effectively and meaningfully for the benefit of the children.¹²³
- ii. The NCPCR and the SCPCR should take their duties, functions and responsibilities with great earnestness keeping in mind the faith reposed in them by Parliament. A position in these statutory institutions is not a sinecure. These bodies have a very significant and proactive role to play in improving the lives of children across the country.¹²⁴
- iii. The State level Child Protection Societies and the District level Child Protection Units have an enormous responsibility in ensuring that the JJ Act is effectively implemented and Child Care Institutions are managed and maintained in a manner that is conducive to the well being of children in all respects including nutrition, education, medical benefits, skill development and general living conditions. These two bodies would be well advised to take the assistance of NGOs and civil society to ensure that the JJ Act serves the purpose for which it is enacted by Parliament.¹²⁵
- iv. The State Governments must ensure that all positions in the JJBs and CWCs are filled up expeditiously and in accordance with the Model Rules or the Rules framed by the State Government. Any delay in filling up the positions might adversely impact on children and this should be avoided.¹²⁶
- v. The JJBs and CWCs must appreciate that it is necessary to have sittings on a regular basis so that a minimal number of inquiries are pending at any given point of time and justice is given to all juveniles in conflict with law and social justice to children in need of care and protection. This is a constitutional obligation.¹²⁷

¹²³ Ibid. para no. 95

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Ibid.

- vi. The NCPCR and the SCPCRs must carry out time-bound studies on various issues, as deemed appropriate, under the JJ Act. Based on these studies, the State Governments and the Union Territories must take remedial steps.¹²⁸
- vii. In particular the NCPCR and the SCPCRs must carry out a study for estimating the number of Probation Officers required for the effective implementation of the JJ Act. Based on this study, the State Government must appoint the necessary number of Probation Officers. It must be emphasized that the role of a Probation Officer is critical for the rehabilitation and social reintegration of a juvenile in conflict with law and due importance must be given to their duties as postulated in the Model Rules and Rules, if any, framed by the State Governments and the Union Territories.¹²⁹
- viii. The MWCD must continue to make creative use of information and communication technology not only for the purpose of collecting data and information but also for other issues connected with the JJ Act such as having a database of missing children, trafficked children and for follow up of adoption cases etc. With the utilization of technology to the fullest extent, administrative efficiency will improve considerably, which in turn will have a positive impact on the lives of children.¹³⁰
- ix. It is important for the police to appreciate their role as the first responder on issues pertaining to offences allegedly committed by children as well as offences committed against children. There is therefore a need to set up meaningful Special Juvenile Police Units and appoint Child Welfare Police Officers in terms of the JJ Act at the earliest and not only on paper. In this context, it is necessary to clearly identify the duties and responsibilities of such Units and Officers and wherever necessary, guidance from the available expertise, either the National Police Academy or the Bureau of Police Research and Development or NGOs must be taken for the benefit of children.¹³¹

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid.

- x. The National Police Academy and State Police Academies must consider including child rights as a part of their curriculum on a regular basis and not as an isolated or sporadic event.¹³²
- xi. The management of Child Care Institutions is extremely important and State Governments and Union Territories would be well advised to ensure that all such institutions are registered so that children can live a dignified life in these Institutions and issues of missing children and trafficking are also addressed....¹³³
- xii. State Governments and Union Territories would be well advised to appoint eminent persons from civil society as Visitors to monitor and supervise the Child Care Institutions in all the districts. This will ensure that the management and maintenance of these Institutions are addressed. We have no doubt that the State Legal Service Authorities and the District Legal Service Authorities will extend full assistance and cooperation to the government authorities in this venture as well as to the Visitors.¹³⁴
- xiii. The JJ Fund is a bit of an embarrassment with an absence of an effective response from the State Governments and the Union Territories. If financial resources are not made available for the welfare of the children we shudder to think what could be better utilization of the funds.¹³⁵
- xiv. NALSA has done a remarkable job in collecting data and information relating to the JJ Act, as evidenced by the three part Report prepared by it. We request NALSA to carry forward the exercise and complete a similar Report preferably before 30th April 2018 to assist all the policy making and decision taking authorities to plan out their affairs.¹³⁶
- xv. The importance of training cannot be over-emphasized. It is vital for understanding and appreciating child rights and for the effective implementation of the JJ Act. All authorities such as JJBs and CWCs,

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

Probation Officers, members of the Child Protection Units, Special Juvenile Police Units, Child Welfare Police Officers and managerial staff of Child Care Institutions must be sensitized and given adequate training relating to their position. A very positive step has been taken in this regard by NALSA and we expect the NCPCR with the assistance of the SCPCRs to carry forward this initiative so that there is meaningful implementation of the JJ Act.

- xvi. Since the involvement of the State Governments and the Union Territories is critical to child rights and the effective implementation of the JJ Act, it would be appropriate if each High Court and the Juvenile Justice Committee of each High Court continues its proactive role in the welfare of children in their State. To make the involvement and process more meaningful, we request the Chief Justice of every High Court to register proceedings on its own motion for the effective implementation of the Juvenile Justice (Care and Protection of Children) Act, 2015 so that road-blocks if any, encountered by statutory authorities and the Juvenile Justice Committee of the High Court are meaningfully addressed after hearing the concerned governmental authorities. A copy of this judgment and order should be sent by the Secretary General of this Court to the Registrar General of each High Court for being placed before the Chief Justice of every High Court for initiating *suo motu* proceedings.”¹³⁷

¹³⁷ Ibid.

CHAPTER-6

COMPARATIVE ANALYSIS OF JUVENILE JUSTICE IN UK, USA AND INDIA

The Apprentices Act, 1850 was the first legislation dealing with children in conflict with law, providing for binding over of children under the age of 15 years found to have committed petty offences as apprentices. Subsequently, the Reformatory Schools Act, 1897 provided that children up to the age of 15 years who has been sentenced to imprisonment may be sent to reformatory cell.

The social, economic and cultural conditions plays vital role for the gravity of the juvenile offences in any country. The slum areas are more vulnerable to juvenile crime. It has been also found that juvenile offender is increasing due to the social environment, which they face in their society. The act of violence is also responsible factor for increasing causes of juvenile crime. These people or group of people have very low availability of basic requirement for their life, for example-educational enlighten is not very much in their society, lack of the education is also responsible factor for making them a juvenile offender. The cause and condition for juvenile crime emerged from the social structure to which they belongs, includes society as a hole. Interpersonal relationship juveniles are forced to take delinquent activities for their careers due to lack of basic ammonites.¹

There are number of causes for juvenile delinquency. Among these factors the state is not performing their duty to impart public education and assistance to the family of juveniles, which gives the chances for unemployment. The young people that are juvenile are not very much skilled in their area of activities. It becomes a cause of low income among the young, which can increase the chance of their involvement in criminal activities. The delinquent behavior is normally not acceptable in any society it is a behavior which is against societal norms. The juvenile who are

¹World Youth Report 2003: The Global Situation of Young People By United Nations. Dept. of Economic and Social Affairs at p. 193

not skilled and getting less income or more likely to engage rebellious or even more harsh criminal activity.²

6.1 POSITION OF JUVENILE DELINQUENTS IN UNITED KINGDOM

While handling the problem of juvenile delinquency, the English criminal justice administrators have preferred to deal with it outside the framework of criminal law. Though the problem has attracted nationwide attention, many reformists feel that delinquency among adolescents is a transient phase and will disappear as they grow older; hence they need to be tackled differently. Moved by this consideration, the English penal reformists adopted different procedure and methods for treatment of juvenile offenders in United Kingdom.

6.1.1 History of Juvenile Delinquency in United Kingdom

In, Great Britain enacted the Children and Young Persons Act in year 1969. This Act stated that juvenile offenders should be dealt with outside the courts, and it introduced a new form of civil proceedings known as “care” proceedings. The “care” proceedings are the preferred alternative to criminal proceedings against juveniles between the ages of fourteen and seventeen. The Children and Young Persons Act represents a philosophy “that greater consideration should be given to informal nonjudicial disposals that greater consultation should take place between relevant agencies and that court proceedings should be viewed as a last resort” Marshall 1978:72). The specific intentions of the act are:

- a. Criminal prosecutions other than for homicide longer be brought against those under fourteen;
- b. Criminal offenses committed by youths under could provide grounds for taking care proceedings, would be necessary to provide that the child was of care and control which he or she would be receive unless the court made an order; and
- c. Criminal charges against those over fourteen longer be brought unless the prosecutor considered response inappropriate, had sought statutory welfare agency, and could satisfy a court prosecution was necessary.³

²Dr. Vidya devi Patil, *Social Problems in India*, 4-5 (Laxmi Book Publication, Solapur 1stEdition,2015)

In England, a juvenile court may take action against when they consider that one or more of the following:

- a. His proper development is being avoidably prevented or neglected or his health is being avoidably impaired or neglected or he is being ill-treated; or
- b. It is probable that the condition set out in the preceding paragraph will be satisfied in the case of another child or young person who is or was a member of the household to which he belongs; or
- c. It is probable that the conditions set out in paragraph 1 of this subsection will be satisfied in case, having regard to the fact that a person who has been convicted of an offense mentioned in Schedule 1 of the Act of 1933 is, or may become, a member of the same household as the child; or
- d. He is exposed to moral danger; or
- e. He is beyond the control of his parent or guardian; or
- f. He is of compulsory school age within the meaning of the Education Act 1944 and is not receiving efficient full-time education suitable to his age, ability and aptitude; or
- g. He is guilty of an offense, excluding homicide, and that he is in need of care or control which he is unlikely to receive unless the court makes an order under this section in respect of him".⁴

The following individuals may bring a child (through age 17) to the juvenile court; if they have reason to believe the child is in need of care and control: social workers, police constables, officers of the National Society for Prevention of Cruelty to Children. However, the police are most likely to become aware that a juvenile has committed criminal offense. The police usually conduct a thorough investigation of the juvenile prior to referring the juvenile to court. For example, the Juvenile Bureau for the Metropolitan Police for London screens all cases referred to them by visiting the juveniles and their families, and by checking school progress and previous referrals to social service agencies. Based on these inquiries, a decision is made which reflects the police view of the likelihood of the juvenile's future deviant behavior. If

³ Galan M. Janeksela, "Descriptive analysis of five juvenile justice system : united states , Scotland, England, India, and South Africa" *Int. Re. Mod. Socio.* 10.

⁴ Children and Young Persons' Act, 1969, amended 1975, Chapter 54, Section 1). This content downloaded from 14.139.228.226 on Tue, 30 May 2017 07:26:38 UTC All use subject to <http://about.jstor.org/terms>

the likelihood of future deviant behavior is great, then, referral to court usually results. However, if the child denies the offense the case must go to court. The following options guide the decisions of the juvenile justice system:

- a. If the child is under the age of ten, criminal proceedings cannot be brought, however, the police may initiate care proceedings if other evidence is available to show that the child is in need of care or control;
- b. Between the ages of ten and fourteen, criminal proceedings may be brought if there is evidence to “rebut doliincapax”; and
- c. Between the ages of fourteen and sixteen, there are no specific legal restraints which inhibit criminal proceedings.

A child between the ages of 12 and 17 may be transferred to criminal court. When a juvenile is jointly charged with an adult, the case is heard in the adult court. If the juvenile is found guilty in criminal court and he is not discharged or fined, the juvenile is sent to juvenile court for disposition. If a juvenile defendant denies that he has committed the criminal or delinquent act with which he is charged, then the safeguards of criminal trial as to the admissibility of evidence and the burden of proof are retained. Thus, in a contested case, there are two stages. The first is conducted as if it were a criminal trial. The second is civil in nature with civil rules of evidence and proof. Juvenile court proceedings are conducted before one to three magistrates drawn from a panel. The following dispositions are available for criminal cases in the juvenile court:

- a. Fines up to about \$125;
- b. Compensation to the victim;
- c. Required attendance at an "attendance center;"
- d. Up to 6 months in a detention center;
- e. Commitment to Borstal training;
- f. Conditional discharge; and Unconditional.

In its report on the UK, the UN Committee expressed particular concern at the criminal prosecution of child prostitutes and children without valid immigration documentation. It also noted the application to children of ASBOs which, whilst civil

orders, might convert into criminal offences if breached and could lead children into contact with the criminal justice system. It recommended that the UK:

- a. Raise the age of criminal responsibility;
- b. Always deal with children in conflict with the law within the juvenile justice system;
- c. Review the application of the counter-terrorism act to children;
- d. Adopt appropriate measures to protect the rights and interests of child victims or witnesses of crime at all stages of the criminal justice process; and
- e. Conduct an independent review of ASBOs, with a view to abolishing their application to children.

6.1.2 Criminalization of children

Echoing the concerns of the UN Committee, Children England told us that it remained concerned that too many children and young people were becoming caught up in the criminal justice system, which was often ill-suited to their needs. The Standing Committee for Youth Justice suggested that there had been a fall in the proportion of children diverted from court and a tendency towards increased prosecution. The Children's Commissioner for England stated that since 2002, the number of under-18 year olds involved with the criminal justice system had risen by 27%, even though the juvenile crime rate had remained stable. The Children's Society pointed to “net-widening”, in other words an increasing number of offences which may be committed by children.

However, in contrast to the submissions of a number of witnesses, the Youth Justice Board stated that between 2005 and 2008 there was a 10% reduction in first time entrants into the youth justice system, as recorded by Youth Offending Teams. The Department for Children, Schools and Families told us that in 2007-08, 10,000 fewer young people entered the criminal justice system in England for the first time compared to the previous year and restated its aim to reduce the number of first-time entrants to the criminal system aged 10-17 by one fifth from current levels by 2020.

6.1.3 Issues relating to Age Determination in UK

According to the Section 16 of the Children and Young Person Act, a child below the age of 10 years should not be arrested, if a juvenile who is below the age of 10 years has been arrested should be released immediately according to Section 34(2) of Police and Criminal Evidence Act. The Child should be kept in the custody of police for 72 hours, during this period the concerned constable should make arrangements for the continuation of the investigations. As per the provision of Section 46(1) the juvenile who has been charged and detained in police custody must be present before the magistrate immediately it should make it possible that there should not be a lapse of a day after juvenile has been charged to produce before magistrate. According to Schedule 6, Para 19 (b) of the Police and Criminal Evidence Act. A warrant cannot be issued against juvenile. A juvenile must not be detained in police custody unless there is accommodation is available and the custody. If is not placed in the cell. According to section 50 of the children and person act, 1933 it has been stated a child below the age of 10 years will be a *doli incapax*. But the age of 10-14 years a child would be presumed that he has no knowledge to difference between right and wrong therefore they are incapable to have mensrea. A juvenile who is between the age of 10-14 years a presumption of mensrea will not be in favor of juvenile. This is a rebuttable presumption and the burden of rebutting it is upon the prosecution as was also held in the case of *J.M. v. Runcles*⁵. From the cases of *C v. DDP*⁶, there were five relevant principles laid down which are not contentious:

- a. If there will be clear-cut evidence against the child then only presumption of *doli incapax* can be rebuttable.
- b. Evidence of the omission of the acts amounting to the offence itself is not sufficient to rebut the presumption.
- c. Interviews with the child are capable of proving the necessary insight into the mental functions of the child from which inferences may be drawn to rebut the presumption.
- d. The conduct of the child before or after the act may go to prove his guilt mind.

⁵(1984) 79 Cr App R 255

⁶(1995) Cr App R 136

- e. The older the child is and the more obviously wrong the act, the easier it will generally to prove guilt knowledge.

In *IPH v. Chief Constable of South Wales*⁷, a 11 years old boy was said to have enough knowledge that his act was causing a damage to the motor vehicle and also in the case of *J.M. v. Runeckles*⁸ where a 13 year old who attacked under kid with a milk bottle, must have known that it was seriously wrong to engage in such a behavior. In the case of *Director of Public Prosecutions v. K & B*, children below 14 years of age of 14 years of age were convicted for rape and indecent assault as the children were found with guilt mind leading to the *mensrea*. In Powell's where a 16 years old with a previous conviction for indecent assault received six years Section 53(2) detention of rape of a 15 year old girl, illustrates the courts attempt to balance the various considerations posed by the very serious youthful offenders.

6.1.4 Reasons for the growth of Juvenile Committing Crimes

Many Criminologists of U.K. have found number of grounds or reasons for delinquency. These are Family factors, declining social morality, Poverty, media influence, and the environment.

The type and amount of punishment is different from the adult criminal cases. In 1994 the juvenile crime and punishment touched its high level. The 1990s saw a huge rise in public scrutiny over the perceived juvenile crime epidemic. In order to fight with juvenile crime and punishment many state have enacted various legislation to prevent the juvenile crimes. In 2002, 2.3 million juveniles were arrested for committing crimes. The 1908 Children Act created a separate and distinct system of justice board on the juvenile court; the 1993 Children and Young Persons Act formally required the court to take account of welfare consideration in all cases involving child offenders and the 1969 Children and Young Persons Act advocated the phasing out of criminal in favour of civil proceedings. England and Wales' adherence to principles of children's rights clearly does not clearly preclude the pursuit of policies with exacerbate structural inequalities and punitive institutional regimes.

⁷(2009) AC 1310,

⁸ (1984) 79 Cr App R 255

A child under the age of 10 should not be arrested according to the Section 16 of the Children and Young Persons Act, and if a juvenile arrested and later he turns out to be below the age of 10 years he should be released immediately according to Section 34(2) of Police and Criminal Evidence Act. A child may be only kept in police custody for 72 hours and as soon as possible the constable concerned should make arrangements for the investigations to take place. After a juvenile has been charged and if he is detained he must be brought in front of the magistrates' court in accordance with the provisions of Section 46(1), as soon as is practicable and in any event, in all circumstances not later than the day of the following charge. A juvenile who has been arrested under a warrant should not be released according to Schedule 6, para 19(b) of the Police and Criminal Evidence Act. A juvenile must not be detained in a police cell unless no other accommodation is available and the custody officer does not think it is practical to supervise him if he is not placed in a cell.

Section 50 of the Children and Young Persons Act 1933 it has been stated that it shall be conclusively presumed that no child under the age of 10 can be guilty of an offence. Between the ages of 10-14 years a child is presumed not to know the difference between right and wrong and therefore incapable of committing a crime because lack of *mensrea*. Wrong means gravely wrong, seriously wrong evil wrong or morally wrong. This is a reputable presumption and the burden of rebutting it is upon the prosecution as was also held in the case of *J.M. v. Runeckles*⁹. From the cases of *C v. DPP*¹⁰, *CH v. DPP*¹¹ there were five relevant principles laid down which are not contentious:

- a. The presumption of *doliincapax* can only be rebutted by clear positive evidence that a child knew that his act was seriously wrong.
- b. Evidence of the omission of the acts amounting to the offence itself is not sufficient to rebut the presumption.
- c. Interviews with the child are capable of proving the necessary insight into the mental functions of the child from which inferences may be drawn to rebut the presumption.

⁹ (1984) The Times, 5 May 21

¹⁰(1995) 2 All ER 43

¹¹ 1996) 1 AC

- d. The conduct of the child before or after the act may go to prove his guilty mind.
- e. The older the child is and the more obviously wrong the act, the easier it will generally to prove guilty knowledge.

In the case of *L v. DPP*¹² the youth court was correct to find that there was sufficient evidence of the presumption that the appellant was *doli incapax* to be rebutted. In *IPH v. Chief Constable of South Wales*¹³ it was held a 11 year old boy have knowledge about the nature of his action and also in the case of *J.M. v. Runeckles*¹⁴ a 13 year old was having knowledge about the nature of the act, attacked under kid with a milk bottle, must have known that it was seriously wrong to engage in such a behavior. In the case of *Director of Public Prosecutions vs. K & B*¹⁵ children below 14 years of age or of 14 years of age were convicted for rape and indecent assault as the children were found with guilty mind leading to *mensrea*. In Powell's where a 16 year old with a previous conviction for indecent assault received six years Section 53(2) detention of rape of a 15 year old girl, illustrates the courts attempt to balance the various considerations posed by the very serious youthful offenders.

The present system attracts many criticisms. Much of the discussion about reforming the system centers on lowering the age to 14 or even 12 so that younger murderers may be sent to adult court. Attempts by several legislators in the 1993-94 sessions to adjust age provisions resulted in some changes, although not the sweeping across-the-board reforms many had argued for. Taking effect on January 1 is a law that lowers the applicable age of 707a provisions to 14 (from the present 16) and allows the use of the 707b-c process for 14- and 15-year-olds who are accused of committing murder (although not for the other serious crimes listed in 707b).

In UK child between 10 to 18 years becomes criminally responsible for his action and be tried by the Youth Court and could be tried in an adult court as per the gravity of the offence committed. In France no criminal charge can be brought against a child up to the age of ten years; and for child between ten to thirteen years of age, only educational penalties such as placing in a specialized Centre or home are to be

¹²(2002) 166 JP 113

¹³(1987) Cri LR 42

¹⁴Supra note 27

¹⁵(1990) 1 WLR 1067

given, while between thirteen to sixteen years of age, minors will get only half of the adult sentence. Lastly, between sixteen to eighteen years of age, person would be remanded to Criminal Court and plea of juvenility can be set aside.

6.2 JUVENILE DELINQUENCY IN USA

In USA age to determine juvenility varies from state to state, in most of the states it is 18 years but in few it is 17 years and 16 years respectively. Many states permit execution of juvenile of 16 years for murder as an adult and could be tried by criminal courts for prosecution and punishment as adults as per the gravity of the alleged offence. Till now many juvenile offenders have been executed under capital punishment but in 2005 Supreme Court of U.S.A in the case of *Roper v. Simmons*¹⁶, held that it is unconstitutional to impose capital punishment for crimes committed while under the age of 18. In analyzing juvenile justice from a cross-cultural perspective, it evident that types of situations over which the juvenile justice system has jurisdiction are similar in many countries. These include various and needs of juveniles, as follows:

- a. Acts which if committed by adults would be a crime;
- b. Acts which are illegal only if committed by children;
- c. Incurable;
- d. Physically or emotionally neglected children;
- e. Potentially neglected children; and
- f. Deserted, deprived, or abandoned children

The emphasis on these behaviors and needs varies from country to country, and the categorization (i.e., legal classification) of these behaviors and needs varies from country to country. The classification of, and the procedural processes for handling these behaviors and needs serve as the basis for the comparative analysis.

6.2.1 Juvenile Justice in the United States

In the U.S.A. the position of Juvenile Justice is very hard to analyse because there are so many State. Each State has different definitions in different Acts. Each Statute has:

¹⁶543 U.S. 551 (2005)

- a. Legal authority which may affect the nature of the juvenile justice system; and
- b. Resources which may or may not to the juvenile justice system. Although juvenile justice States is characterized by complex political jurisdictions, common elements to juvenile justice in the United States.

6.2.2 Apprehension

The juvenile offender may be apprehended by a community school authorities), but, in most cases, the juvenile will by the police. In other words, police involvement is usually to a specific complaint against a child.

6.2.3 Diversion

Upon arrest, a juvenile may be transferred to a social agency for treatment, unconditionally released, or released on certain conditions (for example, may courts have a diversion program whereby first offenders can be released if the child and his family agree to comply with certain conditions to be fulfilled during a defined period to time (e.g. a six-month) supervision, restitution, family counseling, improvement of school attendance, improved school performance, marriage counseling, periodic visit to the intake service and involvement in ancillary services available to the juvenile court in some supervision.¹⁷

6.2.4 Police Procedures

The apprehended juvenile may be reprimanded and released, or the police officer may serve as a problem resolver between the complaining party and the juvenile and/or his parents. If the problem is resolved, disposition of the complaint is informal, but, the police will usually make a written report of the incident. Informal disposition is usually an alternative when less serious offenses are involved. Many police departments have Police Juvenile Units. If the juvenile is apprehended and brought to the Police Juvenile Unit of the police department, the Police Juvenile Unit may attempt to resolve the conflict between the complaining party and the juvenile and/or his parents. However, non-judicial resolution is more likely to occur in the field. In the Police Juvenile Unit, the juvenile is assigned to a juvenile officer. The juvenile officer disposes of the case by selecting one of the following options: (1)

¹⁷ Ibid.

release to parents with official reprimand; (2) release with official report of the field interrogation; (3) release to some other juvenile agency; (4) refer to juvenile court without detention; or (5) refer to juvenile court with detention.

6.2.5 Detention

Before a juvenile is placed in a detention facility, an intake officer obtains information regarding the incident, the juvenile, and his family. If the intake officer refers the juvenile to a detention facility, a written report of the incident must be submitted to the juvenile court. In most states the juvenile can be held in detention for up to forty-eight hours without a court order. If a juvenile is to be detained beyond forty-eight hours, a detention hearing takes place within this period. When the need for a detention hearing is determined, the court is required to:

- a. Set the time and place for the hearing immediately;
- b. Appoint a guardian ad item if the child is not represented by counsel;
- c. Provide a written notice to a juvenile's parents (or guardian) 24 hours prior to the detention hearing.

At the detention hearing, the presiding judge will decide whether or not the juvenile will be held while awaiting the plea hearing and the adjudicatory hearing. In many courts, the intake counselor makes a recommendation to the judge who determines if there is probable cause to believe that the juvenile committed the alleged act.

6.2.6 The Judicial Process

If the counselor and judges decide legal proceedings and charge sheet is drawn up. The Court also took consideration for trial. The pretrial procedural steps in the juvenile court are as follows:

- a. Complaints go to the clerk of the court
- b. Probation officer is assigned
- c. Probation officer interviews parents
- d. The probation officer inquires into circumstances of the alleged problem
- e. Arraignment
- f. The probation officer presents the complaint; and

- g. Public defender is appointed (Emerson, 1969).

Many states have four separate hearings for juveniles which are as follows:

- a. The detention hearing is the hearing to determine whether or not the juvenile should be held in custody pending the plea hearing;
- b. The plea hearing is that hearing where the juvenile admits or denies involvement in the alleged misbehavior (i.e., arraignment);
- c. The adjudicatory hearing is to determine whether or not the juvenile committed the alleged delinquent act; and
- d. The dispositional hearing is the hearing to determine that disposition which is in the best interests of the child and the community (however, in some states the judge conducts the plea hearing, the adjudicatory hearing, and the disposition hearing at the same time).

The adjudicatory hearing must be scheduled within two detention hearing. This hearing involves a prosecuting defense counsel, and the juvenile court judge. The guardian (the court appointed representative of the juvenile) plays in safeguarding the rights of the juvenile and his or result of the adjudicatory hearing, the juvenile may be warning to both the juvenile and his parents or the judge that the juvenile did not commit the alleged act. If the juvenile did commit the alleged act, the judges will dispositional hearing. If the judge conducts the adjudication disposition in the same hearing, he will have information alleged offense and the social history of the child and hearing. In rare cases, the juvenile may be transferred to adult court. Prior to transfer of jurisdiction, a waiver hearing must be held (the criteria for transfer to adult court are specified in the Kent decision). If he is tried and found guilty in an adult court, he may be sentenced to an adult prison. Prior to the disposition hearing, the juvenile court judge reviews the social history of the juvenile which is prepared by a probation officer, the social history includes information regarding prior offenses, current offenses, family relationships, school records, prior contact with the police, and the probation officer's recommendations. At the dispositional hearing, the judge will make a decision in the "best interests of the child and the community." The traditional alternatives include the following: probation, a state juvenile institution (youth center), foster care, a private agency, or a community based facility. In some states, parents may request that their child be placed in a private institution. However,

this is not financially feasible for most families. When placed on probation, the child is under the supervision of approbation officer, and he continues to function in the community. If the child's home is unsuitable, he may be placed in a foster home or in a private institution. If the juvenile has committed a serious offense or if he is a recidivist, he may be committed to a juvenile institution. When the juvenile is released from the institution, he is usually placed under the supervision of a parole officer for a given period of time. In nearly all cases, the juvenile eventually will return to the community.

6.2.7 Age Determination in USA

United States also focus the problem about inconsistency of the Age of individual. The terms 'infant', 'child', 'adolescent', 'teen', 'youth', 'juvenile' and 'young person' are also used, although some jurisdictions make a legal distinction between these terms. Minor statutes carries with it special restrictions, penalties and protections that do not apply to adults. The United Nation defined 'child' as an 'individual below twenty – one years of age'. Juvenile Delinquency then deals with children, minor or youth below 21 years of age who break laws or fails to do what law requires. The child and Youth Welfare Code, Presidential decree No. 603 defines youthful offender as "one who is over 9 years but less than 21 years of age at the time of the commission of the offence." A child 9 years of age or under at the time of the offence shall be exempt from criminal liability and shall be committed to the care of his/her father or mother, or nearest relative or family friend in the discretion of the court and subject to its supervision. All member states of the United Nations except the United States and Somalia have ratified the United Nations Convention on the Rights of the Child, 1989. According to the Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.

6.2.8 Causes of Juvenile Delinquency

The causes for Juvenile Delinquency in USA are the same as in India. Some of the major causes of juvenile delinquency in USA are listed below:

- a. Peer Influences
- b. Family Influences

- c. Race as a Factor in Delinquent Behavior
- d. Self – Esteem as a factor in Delinquent Behavior
- e. Trauma and Delinquency.

6.2.9 Preventing Juvenile Delinquency

The violence caused by juvenile delinquency endangers the fundamental human rights the children. Which is very much essential for any human being irrespective of the age .it is indispensable for all the individuals and institutions to put their time, money expertise, or other resources available to them, in order to fight with this global menace .the united nations has given so much emphasis on social values rather than judicial system. The Riyadh guidelines say to prevent juvenile delinquency is a first step towards crime prevention in society. This was also acknowledgement by Beijing rules.

The Beijing rules says that there is need to have positive measures to strengthen the juvenile all over development .the state should stop itself interfere more as police .it is widely believed that early phase intervention represent best approach to prevent juvenile delinquency. The preventive laws should focuses on more reformative approach so that different matters of delinquent and criminal behavior may be discouraged. The punitive prevention method intended to frighten potential offenders by making sure that a severe punishment will be given to them .those who are habitual juvenile delinquent should be punish with horse punishment. This approach is not based on humanitarian base. There is need to work out seriously on the reformation of juvenile delinquent. Some of the most promising approaches, programmes and initiatives are described in some detail below. Within the economic sector, professional development programmes are being setup to provide alternatives for income generation.

Proper opportunities for economic benefits professional training and education provide new workplace assisting in organizing business can be very much helpful to prevent involvement in delinquent activities. Specially educational programmes may prove more important to stop delinquent activities. This educational programmes are helping young people to engage themselves in positive appraisal deal with control of aggression. The educational programmes stop the myth that there a glamorous life in

delinquency .the education not only helps to enliten himself but also helpful to spread the knowledge about good things, which inspired other children to do positive action.

In USA special training program has been stated to train the juvenile delinquency local communities in which juvenile delinquency has increased to informally control youth and include young people in constructive activities.

The young people are very helpful to eradicate the problem of juvenile delinquency. They may give new ideas to the problem of Juvenile Delinquency. NGOs may also play important role. In order to stop the gang delinquency a programme should be initiated to include children and youth in to organized group activities. This purpose can be achieved with the help of social services agencies and institution/organizations such as YMCA, YWCA, Girl Guides and Boy Scouts. This purpose may be also served with the independent activities of the juveniles and children. A cooperation between various schemes design and implemented by the entire society will be a more effective method to stop the delinquency. The society for the interest of youth may work on those activities which ultimately strength the youth in the United State of America the NGOs local citizens and law enforcement officers make a partnership to fight with crime in 10 high crime neighborhoods. They have started various programme for the maintenance of right attitudes of children. These societies NGOs law implement officers started athletic league for young people. A forum to facilitate young people to address the problems available in the community. As well as they have also started various other activities which have in reduction of crime committed by juveniles. It was found that by these methods, schemes, activities 29% drop in crime in the targeted neighborhoods and the city has also witness low crime Institutional programs which aimed to provide psychological and social support for individuals and group. After providing these things to them, it was found that the educational quality, physical health and mental health of the individual as well as group has been enhance the programme like counseling of the young people also help for the motivation of good works. The family is a very important unit an institutions for the socialization of children an juvenile. It works as a preventive tool for juvenile delinquency, but those families distorted they motivate the children to become juvenile delinquent. Therefore it is necessary to focus on those families which are broken so that juvenile delinquency may be minimize in the United State there is

parent management training programme which provide special training to the parents. These training programmes make the parents as a skilled to give proper parenting for the children to three to eight years. It was found that these training programmes have achieved a clinically significant change and returned to a normal behavior of the children. The children living in street and adolescence who has lost their families during armed conflict and have thus no appropriate family surveillance may more benefited with the help of these programmes. It have not only to provide mental and physical health but also through these programmes proper clothing, food, may be served there is need to have continue with these schemes training programmes so that the basic needs may be served.

6.3 JUVENILE DELINQUENCY IN INDIA

The country of India includes several States and some of these States have their own 'Children's Acts.' The main goals of these Children's Acts are:

- a. To make more effective existing law machinery.
- b. To provide protection of neglected children.
- c. To make provision for rehabilitation and treatment who are delinquent.

The basic assumptions underlying the Indian juvenile justice system are:

- a. The need to segregate juveniles and adult offenders to aid crime prevention efforts, and treatment and correctional policies;
- b. The belief that juvenile deviance is the result of "lapses" in society, and therefore, deviance should be approached in social defense terms, rather than penal terms; and
- c. The belief that the juvenile justice system can match system services with specific needs of identifiable juvenile sub-groups.

The juvenile justice system can be divided into two categories:

- a. Offenders: Offenders are those who have broken the law.
- b. Non-offenders: non-offenders come to the attention of the system because they are socially handicapped, or uncontrollable, or because they have been victimized

There is inconsistency about the age of juvenile. The juvenile laws of India are characterized by the following:

- a. Separate trial for juveniles and adults.
- b. Strictly confidential court proceedings and hearings pertaining to juvenile cases.
- c. No disqualification to be attached to the juveniles convicted under the Children Act.
- d. Provision for the protection of young girls who are subject to seduction, or being inducted into prostitution, and for children who are without visible means of subsistence or shelter; and
- e. Legal protection for probation officers in that they are defined as public servants.

Juvenile offenders are apprehended either by the police or by a probation officer and are brought before the juvenile court. The juvenile offender will be in safe custody for twenty four hours. He has to appear before juvenile courts. The court registers the case and calls upon a probation officer to submit an assessment report on a specified date for which the hearing is fixed. Until that time, the juvenile is either detained or released on bail. Bail will be granted only when the parental or home condition are found satisfactory in the interest of juvenile.

Oftentimes, the court utilizes a medical officer's report and clinical studies and other information provided by the police, in determining the case disposition. "If there is any delay on the part of any of the personnel involved, whether police, probation officer, medical officer, or mental health specialist, can mean postponement of disposition and unnecessary prolongation of the juvenile's remand stay". The court also takes help of medical officer's report to understand the mental status of juvenile.

After the hearing, the court issues a disposal order which discharges the juvenile offender after fine or admonition or releases him on bond. The court may also order that the juvenile be placed under custody or be committed to an institution. The court can decide to commit non-offenders to institutions or to place them under suitable custody.

In cases assigned to supervision, a written bond is attained from the guardian to ensure that the conditions of supervision are honored by the juvenile (failure to do so could lead to revocation of the court order). Some cases are released on probation officer lose all contact with the juvenile when he walks out of court. The Indian juvenile system tends to place emphasis on immediate discharge, restoration or transfer and release after fine and admonition, rather than commitment to institutions or probation. Juveniles who are committed to institutions are involved in educational and vocational training programming, which is designed for the juvenile's age, educational background, and aptitude. The progress of the juvenile is assessed on an ongoing basis. After two-thirds of the juvenile's sentence is complete, his case is reviewed and he usually is released on 'license.' While on license the juvenile works with his probation officer in the reintegration process. If a juvenile does not have a suitable home to which to return, he may be referred to the Aftercare Home in Madras and the Aftercare Hostel in Bombay. Although the Indian system focuses on individualized handling of juveniles, individualized justice is inhibited by the following factors:

- a. Limited resources necessitate comingling of offenders and non-offenders at various stages of the system;
- b. Dispositions are based on an assessment of the juvenile's personality and correctional needs;
- c. Definition of a juvenile as an offender is determined by the police without the consultation of experts; and
- d. Social workers, child welfare workers, and mental health workers are not involved in the juvenile justice decision making process.¹⁸

The present law which governs the juveniles who are in conflict with law and children who are in need of care and protection is called Juvenile Justice (Care and Protection of Children) Act, 2000 which is now replaced by Juvenile Justice (Care and Protection of Children) Act, 2015. Juvenile Justice (Care and Protection of Children) Act, 2000 has replaced the earlier law governing juveniles and which was known as Juvenile Justice Act, 1986 which was in conformity with the UN Standard

¹⁸Galan M. Janeksela, "Descriptive analysis of five juvenile justice system: United States, Scotland, England, India, and South Africa" 21 *Int. Re. Mod. Socio.* 13.

Minimum Rules for the administration of Juvenile Justice (also known as Beijing Rules, 1985).

6.3.1 Position of Juveniles under the Indian Penal Code, 1860

According to Section 82, up to 7 years of age there is an absolute irrefutable presumption that the child is *doliincapax*.¹⁹ This immunity is granted to the children below seven years on the pragmatic approach of the state that children below seven years are not capable hence they do not have the capacity to have the requisite *mensrea*. According to Section 83, if the child does not attain maturity of mind the burden of proof lies with the child.²⁰ To make them liable they must attain maturity of mind and this is called “mischievous discretion” under English Law. The children of this age will have to prove that there was no maturity of mind when the act committed and therefore no *mensrea*. In the case of *Harilal Mallick v. State of Bihar*²¹ it was held that not only a proof of a child being under 12 but also it has to be proved that the child did not have enough understanding at that point of time and was immature. If no sufficient proof is laid down in front of the court to prove the immaturity of the child then it will be presumed that the child – accused intended to do what he really did. Thus in this case where a child of 12 or so used a sharp sword in killing a person along with his two brothers and no evidence either of age or immaturity or understanding was led on his behalf, thus held liable.

6.3.2 Juvenile Justice under Juvenile Justice Act

“Juvenile” or child means a person who has not completed eighteen years of age. The Act does not make in difference between the age of girls and check the old Act 1968 had different age for boys and girls, but this law has been replaced now. This definition is wider than the definition provided under Section 82 and 83 of the Indian Penal Code. The Act prohibited that any juvenile can be sentenced to death or imprisonment or committed to prison in default of payment or in default of furnishing security. The Act stipulates that the Juvenile should be sent home advice or

¹⁹ Section 82 in the Indian Penal Code- Act of a child under seven years of age— Nothing is an offence which is done by a child under seven years of age.

²⁰ Section 83 in The Indian Penal Code-83. Act of a child above seven and under twelve of immature understanding.—Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

²¹1977 AIR 2236, 1978 SCR (1) 301

admonition, released on probation of good conduct and placed under the care of parent or guardian or sent to a special home.

6.3.3 Controversies relating to Age Determination

It has been seen and found that there are always controversies about the age of juvenile. The court has tried to settle age by judgment. In the IPC a child below the age of 7 years have blanket protection under the child between the 7 years and 12 years have conditional protection. Who is to determine the age bracket they fall in Section 49 (1) of the Juvenile Justice Act, 2000 confers the power on competent authority to determine whether the person brought it is a juvenile, if he or she appears to be so. But the procedure to determine juvenility of a person cannot be relied on.²² The two ways to determine age of the accused are documentary evidence and medical evidence. In *Jaya Mala v. Home Secretary, Government of J&K*²³, the apex court held that the age as ascertained by medical examination is not conclusive proof of age. It is mere opinion of the doctor and a margin of 2 years could be on either side. In another high profile case, *Bhoop Ram v. State of U.P.*²⁴, the court held that in case of conflict between documentary evidence and medical report, the documentary evidence will be considered to be correct. This leads one to the conclusion that all that it needs to establish and convince court that a criminal is a juvenile is documentary proof. Now documentary proof is one of the easiest things to obtain in our country whether it is to get a license one is legally not entitled to or for furnishing age proof in the country. In such a case, even if we were to turn to medical examination, which is held not to be hundred percent conclusive proof by even medicos. By the Allahabad High Court's own admission, a doctor is not always truthful. In *Smt. Kamlesh and anr. v. State of U.P.*²⁵, the court maintained that a professional witness is prone to side with a party that engages his/her services. Thus, a doctor is not always truthful. A part from the conclusive determination of age, the question of the date when age has to be taken

²² Section-49. Presumption and determination of age.—(1) Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be.

²³AIR 1982 SC 1297

²⁴AIR 1989 SC 1329

²⁵2002 (3) AWC 1792

into account has also been a matter of controversy. In *Arnit Das v. State of Bihar*²⁶, overruled held that the date of commission of offence is irrelevant and it is the date of bringing the accused in the court that has to be taken into account. This was again corrected in *Pratap Singh v. State of Jharkhand*²⁷ where the court held that, “the reckoning date for the determination of the age of the juvenile is the date of an offence and not the date when he is produced before the authority or in the court.”

The minors were exempted from the punishments and the fines because there had to be a difference in the level of understanding of 8 year old and an 18 year old. The immunity to children is based on the principles of Juvenile Justice Act. The constitutional basis for juvenile justice can be derived from Articles 15(3), 39(e) and (f) of the Constitution. Article 15(3) provides that ‘Nothing in this article shall prevent the state from making any laws regarding women and children’. Article 39 forms a part of the directive principles of the state policy. Clause (e) of Article 39 provides inter alia, that the tender age of children is not abused. Clause (f) stipulates that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that youth are protected against exploitation and against moral and material abandonment.

Blackstone has explained the reason for exempting infants from criminal liability in the following words:

Infancy is a defect of the understanding, and infants under the age of discretion ought not to be punished by any criminal prosecution whatsoever.

However, there appears to be no absolute rule as regards the age of discretion. It differs from country to country.

Sections 82 and 83 of the Penal Code grant immunity to an infant below a particular age from criminal responsibility. Section 82 totally absolves a child under 7 years of age from criminal responsibility, whereas section 83 grants partial immunity against prosecution and punishment for a child above 7 and under 12 years of age. This rule is based on the general proposition that an infant below a certain age is

²⁶AIR 2001 SC 3575

²⁷AIR 2005 SC 2731

incapable of distinguishing between right and wrong and so no criminal responsibility should be fasten in law for his deeds.

A careful perusal of the provisions under sections 82 and 83, I.P.C. reveal an interesting lacuna in the drafting of the said provisions. For instance, while section 82 confers immunity on a child under seven years and section 83 to one above seven years, no provision has been made in regard to an infant of seven years of age. Perhaps, it would be appropriate to resolve this ambiguity by amending section 82 of the Penal Code by replacing the word 'under' with 'up to' after 'a child' and before 'seven years'. After the proposed amendment section 82 would read as follows:

Nothing is an offence which is done by a child up to seven year of age.

Until such an amendment is effected the benefit of the doubt should be resolved in favour of an infant up to 7 years under section 82 of the Penal Code.

As per the provisions laid down in Section 82 of the Code completely makes an infant below 7 years of age immune from criminal liability, since a child below this age is considered *doliincapax* in law. That is to say, a child under such an age cannot form the necessary intention to constitute a crime since he possesses no adequate discretion or understanding at this age for his deeds. Thus, if a child below 7 years of age is charged for committing a crime, the fact that he was at that time below 7 years of age is *ipso facto* an answer to the prosecution. The scope of the immunity granted under this section is wide enough to exempt a child not only from prosecution for offences under the Penal Code, but also from offences under the special as well as local laws, as explained under section 40 of the Code.

83. Act of a child above seven and under twelve of immature understanding.— Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

Qualified immunity to a child between age of 7 and 12 years. Section 83 provides qualified immunity to a child above seven years and under twelve years of age.

In other words, if it shows that a child within the age group of 7 to 12 years has not attained the requisite degree of understanding and maturity to judge the nature and consequences of his conduct, he is exempted from criminal responsibility. The presumption of innocence of a child is based on the principle that 'the younger the child in age, the lesser the probability of being corrupt'. This is to say, malice makes up for age, i.e., *militia suppletaetatem*. Hence as age advances the maxim loses force. In the absence of such proof a child above seven years and under 12 years of age is as much liable for his deeds as an adult criminal. The maturity of his understanding can be inferred from the nature of the act and his subsequent conduct and other allied factors, such as his behaviour, conduct and appearance in court.²⁸

In the case of *Harilal Mallick v. State of Bihar*²⁹, it was held that not only a proof of a child being under 12 but also it has to be proved that the child did not have enough understanding at that point of time and was immature. If no sufficient proof is laid down in front of the court to prove the immaturity of the child then it will be presumed that the child accused intended to do what he really did. Thus in this case where a child of 12 or so used a sharp sword in killing a person along with his two brothers and no evidence either of age or immaturity or understanding was led on his behalf, thus held liable.

According to the Section 2(h) of the Juvenile Justice Act, 1986, defines the term juvenile as a 'boy who has not attained the age of 16 years and a girl who has not attained the age of 18 years'³⁰. This definition is wider than the definition provided under Section 82 and 83 of the Indian Penal Code. The Act provides that no juvenile can be sentenced to death or imprisonment or committed to prison in default of payment or in default of furnishing security. The Act stipulates that the Juvenile should be sent home after advice or admonition, released on probation of good conduct and placed under the care of parent or guardian or sent to a special home.

The age of the accused at the time of commission of the offence is relevant and the age at that relevant point in time is what has to be determined. In the case of

²⁸ K.D. Gaur, *The Indian Penal Code*, 143-145, (Universal Law Publishing Co. Pvt. Ltd. New Delhi. 4th ed. 2011)

²⁹ 1978 SCR (1) 301

³⁰ Section 2(h) 'Juvenile' means a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years

*Bhoop Ram v. State of UP*³¹ there was a conflict between the age of the accused as according to the medical reports he had attained the age of 16 and as off the school certificate he was still below 16. As a possibility of an error creeping into the estimation of the age cannot be ruled out and as there was no proof of there being a misrepresentation of age in the school certificates the age was considered as below 16. The accused faced a charge of murder had been sentenced to life imprisonment. The Supreme Court in view of the fact that the accused had been wrongly sentenced to imprisonment instead of being treated as a child, quashed the sentence awarded to him and directed his release. In the case of *Gopinath Ghosh v. State of West Bengal*³² the defense of being a minor was raised for the first time.

In the case of *Bhola Bhagat v. State of Bihar*³³ it was stated that when an accused pleads defense under infancy it is compulsory for the court to look into the age factor of the accused as on when the act been committed.

Section 82 exempts a child from any kind of criminal liability. As per Section 18 of the Juvenile Justice Act 1986, any juvenile accused of bailable or non-bailable offence shall be released on bail with or without surety. He cannot be put in a police station or jail. If in the interest of the juvenile, the officers are of the opinion that the juvenile should not be released on bail, he should then be kept in an observation home or a place of safety, and the parents should be informed immediately. The date for observing the age of the child is the date on which the offence is committed as seen in the case of *Mahendra Singh v. State of Rajasthan*.³⁴

All Juveniles committing an offence shall be produced before the juvenile court as per Section 20 of the Juvenile Justice Act. They should not be produced in front of any other court. If a case in front of the sessions judge then he is supposed to look into the age of the accused and if on inquiry if found to be a juvenile he may be forwarded to the Juvenile Court for trial as seen in the case of *Arjun Ram v. State of Rajasthan*. In the case of *Daljit Singh v. State of Punjab*³⁵ a juvenile who was not sent to the Juvenile justice court after ascertaining the accused to be a minor it was said to

³¹1989 (1) SCALE 799

³²1984 SCR (1) 803

³³(1997) 8 SCC 720

³⁴AIR 1971 SC 2593

³⁵Cri LJ 1999 P&H 2723

be an error jurisdiction. In a murder case when accused was aged 14-15 years at time of commission of offence and was not treated as juvenile under the Act and convicted under Section 304 of the Indian Penal Code, his conviction was maintained but the sentence imposed on him quash under Section 20 and 21 (i) (d) of the 1986 Act. His bail bond stood discharged and the order imposing fine was set aside.

In the case of *Bhagan v. State of Pepsu*³⁶ the Supreme Court held that they should not be tried with or charged with any other offender who is not a juvenile. Section 22 provides that no juvenile shall be sentenced to death or imprisonment or committed to a prison in default of payment or fine. If a juvenile arrested and not produced in front of the magistrate within 24 hours then the confession recorded in that period would be presumed to be involuntary and irrelevant as seen.

Section 28 of the Juvenile Justice (Care and Protection of Children) Act, 2000 speaks about alternative punishment and states that if a juvenile commits an act punishable under this act or any other state act the accused shall be punished only under such act which provides for punishment which is greater in degree. This Section is similar to the Section 45 of the replaced act of 1986.

Section 9 of Juvenile Justice Act, 1986 when a Juvenile girl produced before court is not claimed by any person and she is not a delinquent juvenile, court must ensure that she is kept in place of safety until she attains majority as seen in the case of *R. Rathinam v. Kamala Vaiduriam*.³⁷

The Juvenile Justice (Care and Protection of Children) Act, 2000 is miles away from being a perfect legislation to protect and promote the welfare of the children. The lacuna is still present in this enactment. The Act gives discretion to the State government to establish mechanism given under the Act. We can only hope that State government will fill the gaps, available in the Statute and by making more effective comprehensive role in consultation with child rights. The Central government is empowered under Section 70 to remove, within two years of the Act having come into force, any difficulty that hampers its effective implementation. Let us put the Juvenile Justice (Care and Protection of Children) Act to test, and make

³⁶1956 SCR 363

³⁷Cri LJ 1993 Madras HC 2661

most of this provision to streamline its efficiency, keeping children centre-stage. The Juvenile Justice (Care and Protection of Children) Act, 2000 lays down the primary law for not only the care and protection of the children but also for the adjudication and disposition of matters relating to children in conflict with law. The Juvenile Justice System is limited in its application to the children committing offences and others in need of care and protection.

CHAPTER-7

CONCLUSION AND SUGGESTION

It is very hard to draft a suitable and precise definition of juvenile delinquency. Several factors are responsible for not allowing a rational and reasonable formulation. One hurdle is similar to that encountered while defining crime in general, i.e. the choice between the social and legal definitions.

This is a reason why Sociologists insist that legal definitions are of no means in understanding the true nature of delinquency and in knowing who are juvenile offenders, since the arrest or conviction of a child may depend upon various fortuitous circumstances. They also maintain that legal definitions differ from place to place and time to time and hence are not suitable for scientific studies. The reasons as to why legal definitions are to be preferred are the same as in the case of the definition of crime.

The juvenile delinquency has been defined legally but it is ordinary, because from the legal definition, clear-cut picture of juvenile delinquency is not coming out. As per the provision laid down in the Act, an act forbidden by law for children up to the age of eighteen years is juvenile delinquency. Therefore we can say that if a child is found to have committed an act of juvenile delinquency by a court, is juvenile delinquent.

In India, the definition of juvenile delinquency presents no such problems as are faced in the US and some other countries. The concept is confined to the violation of ordinary penal law of the country so far as the jurisdiction of the Juvenile Court is concerned. The present law which governs the juveniles who are in conflict with law and children who needs the care and protection is called the Juvenile Justice (Care and Protection of Children) Act, 2015. This law has replaced the earlier law governing juveniles and which was known as the Juvenile Justice (Care and Protection of Children) Act, 2000, which was in conformity with the UN Standard

Minimum Rules for the Administration of Juvenile Justice (also known as the Beijing Rules, 1985).

The Juvenile Justice (Care and Protection of Children) Act, 2015, which replaces the Juvenile Justice (Care and Protection of Children) Act, 2000 is primarily designed to give effect to the provisions of the UN Convention on the Rights of the Child, 1989 (ratified by India in December 1992). The Convention laid stress on social re-integration of child victims, to the extent possible, without resorting to judicial proceedings.

In recent past there have been a demand that the age of juveniles should not be an impediment in awarding sentences to the offenders of heinous crimes. The challenge was made on the twin grounds, that the Act would result in under classification if all juveniles, irrespective of the level of mental maturity, are to be grouped in one class and on the further ground that the Act replaces the criminal justice system in the country and therefore derogates from a basic feature of the Constitution. It was argued that the juveniles who have the sufficient maturity to understand their acts should be kept out of the Juvenile Justice Act. But the Supreme Court held that the Juvenile Justice Act is wholly consistent with Article 14. The court said that same penal law applies to all juveniles, only difference is that a different scheme for trial and punishment is introduced by the Juvenile Justice Act. The law is in accordance with Articles 14 and 21 of the Constitution of India.

The rights guaranteed to an accused person are nearly the same as in the American Constitution except that the right to trial by jury has not been given in India. Also, there is no provision corresponding to the right of speedy trial as given in the American Constitution though the same is now read into Article 21 of the Indian Constitution. There is the right against self-incrimination, the right to have a lawyer of one's choice and the right not to be deprived of life or liberty except according to procedure laid down by law. The constitutional issues have not been raised in India till now because of the different nature of the Juvenile Courts in India and also due to some difference between the Indian and American Constitutions regarding the procedure to be employed for depriving a person of his life or personal liberty. In India, the Juvenile Courts are criminal courts unlike in the US and England where they are regarded as courts of a civil nature. It was probably due to this reason that

safe-guards have been provided to the juvenile offenders on the lines of adult offenders. A neglected child must be produced before the Welfare Board within 24 hours of his being taken charge of by a police officer. The period of detention of a delinquent child in a reformatory school cannot exceed the maximum period of punishment provided for the offence.

The Indian courts have considered and laid down certain guidelines with regard to the betterment of children especially the girl child. The Supreme Court while discussing the menace of child prostitution strongly emphasised that the law enforcing authorities should take very severe and speedy legal action against all the erring persons such as pimps, brokers, and brothel-keepers. The court in such cases have to always take a serious view of this matter and inflict condign punishment on proof of such offence. The court in *Vishal Jeet v. Union of India*, directed that both the State and Central Governments have an obligation to safeguard the interests and welfare of the children and girls of this country have to evaluate various measures and implement them in the right direction. Under the Indian Constitution, what is required to deprive a person of his life or liberty is the procedure established by law. Any procedure laid down by law which does not violate any fundamental right is a valid procedure.

Reasonable restrictions can be placed on the fundamental rights and the restrictions on the rights of juvenile offenders laid down in Children Acts are likely to be upheld by the Indian courts. Under the due process clause the American courts have a much wider latitude to declare special procedures as “unconstitutional” as compared to their Indian counterparts. Though by making a very liberal use of Article 21 the Indian courts have brought the position almost on a par with the one obtaining in the US.

Children are more vulnerable than adults to the conditions under which they live. Hence, they are more affected than any other age group by the actions and inaction of governments and society. In most societies, including ours, views persist that children are their parents’ property, or are adults in the making, or are not yet ready to contribute to society. Children are not seen as people who have a mind of their own, a view to express, the capacity to make a choice and an ability to decide. Instead of being guided by adults, their life is decided by adults. Children have no

votes or political influence and little economic power. Too often, their voices are not heard. Children are particularly vulnerable to exploitation and abuse.

All people under the age of 18 are entitled to the standards and rights guaranteed by the laws that govern our country and the international legal instruments we have accepted by ratifying them. The Constitution of India guarantees all children certain rights, which have been specially included for them. These include: Right to free and compulsory elementary education for all children in the 6-14 year age group (Article 21 A). Right to be protected from any hazardous employment till the age of 14 years (Article 24). Right to be protected from being abused and forced by economic necessity to enter occupations unsuited to their age or strength (Article 39(e)). 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 (Article 39 (f)).

The peculiarities of the Juvenile Court procedure have given rise to a paradox which has resulted in some problems of constitutional law in the US. The paradox is provided by the interesting situation that the courts work on the assumption that they act on behalf of children and in the process the child offenders are denied certain constitutional and legal rights which are available to adult offenders. Sometimes the consequences of a Juvenile Court action may be more severe as compared to the consequences the child might have suffered at the hands of an adult court.

In an appeal to the Supreme Court that the due process was not followed in depriving Holmes of his liberty, which violated the 14th Amendment of the Constitution, the court held, without hearing the case on merit, that “since Juvenile Courts are not criminal courts, the constitutional rights granted to persons accused of crime are not applicable to the children before them”. This position of the court was based on the proposition that it was not that the Juvenile Court aimed to punish Holmes but it was only to salvage him and safeguard his interests.

It has been popular practice thus to rationalise the abandonment, partial or complete, of even the most basic conceptions of due process of law; right to counsel and appeal; rejection of prejudicial, irrelevant and hearsay testimony; adjudication only upon proof or upon a plea of guilt. The presumption commonly adopted is that

since the State is determined to protect and save its wards, it will do no injury to them through its diverse officials, so that these children need no due process protections against injury. Several exposures to court; a jail remand of day, weeks or even months; and a long period in a correctional school with young thieves, muggers and murderers these can do no conceivable harm if the States' purpose be beneficent and the procedure be "chancery"; children are adjudicated in this way every day without visible manifestations of due process. They are incarcerated. They become adult criminals too, in thankless disregard of the States' good intention as *parens patriae*.'

The rights guaranteed to an accused person are nearly the same as in the American Constitution except that the right to trial by jury has not been given in India. Also, there is no provision corresponding to the right of speedy trial as given in the American Constitution though the same is now read into Article 21 of the Indian Constitution. There is the right against self-incrimination, the right to have a lawyer of one's choice and the right not to be deprived of life or liberty except according to procedure laid down by law. The constitutional issues have not been raised in India till now because of the different nature of the Juvenile Courts in India and also due to some difference between the Indian and American Constitutions regarding the procedure to be employed for depriving a person of his life or personal liberty. In India, the Juvenile Courts are criminal courts unlike in the US and England where they are regarded as courts of a civil nature. It was probably due to this reason that safe-guards have been provided to the juvenile offenders on the lines of adult offenders. A neglected child must be produced before the Welfare Board within 24 hours of his being taken charge of by a police officer. The period of detention of a delinquent child in a reformatory school cannot exceed the maximum period of punishment provided for the offence.

There is a well-founded general perception that a wide gap exists between the theory and practice of juvenile justice in India. The ground realities regarding juvenile justice are much at variance with the idealism projected through the old legislation. A few factors responsible for this state of affairs are:

1. There is a heavy work-load all around, in courts, police and probation services.

2. Lack of proper planning and dearth of resources affected the quality and working of the institutions.
3. There was hardly any public interest and support regarding juvenile delinquency and its control.
4. There was lack of proper and adequate evaluation of the work connected with the juvenile justice and effective follow-up action and remedies were therefore, not possible.

However, the new JJ Act, 2015 may prove to be more effective than earlier legislations for juveniles.

It is not easy to give a precise definition of juvenile delinquency. Several factors are responsible for not allowing a clear-cut formulation. One hurdle is similar to that encountered while defining crime in general, i.e. the choice between the social and legal definitions. Sociologists insist that legal definitions are of no help in understanding the true nature of delinquency and in knowing who are juvenile offenders, since the arrest or conviction of a child may depend upon various fortuitous circumstances. They also maintain that legal definitions differ from place to place and time to time and hence are not suitable for scientific studies. The reasons as to why legal definitions are to be preferred are the same as in the case of the definition of crime. The legal definition of juvenile delinquency is obvious. Any act prohibited by law for children up to a prescribed age limit is juvenile delinquency and it follows, therefore, that a child found to have committed an act of juvenile delinquency by a court is a juvenile delinquent.

The Juvenile Justice Act, 2015 states that a 16-18 year old committing a serious or heinous offence and apprehended after 21 years of age, will be tried as an adult. It can be pointed out that this would violate Article 20(1) of the Constitution, which states that no person can be given a penalty greater than that which would have been applicable to him, under a law not in force at the time of commission of the offence. This means that at a later date the same person may face a penalty that is higher than what would be applicable to him at the time of commission of the serious offence. It noted that this provision goes against the right to equality and recommended deleting it.

In case of heinous offences, the JJA requires Juvenile Justice Boards to conclude preliminary inquiries within one month from the date of first production of the child in front of the Board. It can be said it is too short a period for proper investigation. It said that it may lead to a presumption of guilt and is contrary to the principle of presumption of innocence. It may also violate Article 14 and 21 of the Constitution.

The Statement of Objects and Reasons (SOR) of the JJA states that it is being brought in to further adhere to the standards set by the United Nations Convention on the Rights of the Child. It can said the JJA is in violation of the Convention for differentiating between children below the 18 years, presumption of guilt during preliminary inquiry, etc. It highlighted the need to reconcile such violations with the Act's SOR.

The Act allows parents to surrender a child on the basis of social, emotional and physical factors beyond their control. The 2015 Act provides for a two month period for a parent to reconsider surrendering their child. The Act changes this to one month. It is recommended reverting to the two month period.

The data of NCRB is based on FIRs and did not provide information on the conviction of children in the age-group of 16-18 years or otherwise. It is true that FIR/complaint was merely an information regarding occurrence of an offence. It can be said that increased reporting of crime against children in the specific age-group should not necessarily lead to assumption of increased conviction of juvenile in the crime. It is showed that involvement of juvenile in heinous crime needs to be based on completion of investigation, filing of final report by the police before the court and pronouncement of judgment.

Article 14 of the Constitution obligates the State not to deny to any person equality before law or equal protection of laws within the territory of India. It is pointed out that in India the concept of equality is not the formal equality as was observed in USA but is that of proportional equality which recognized that everyone is not equal and that the State was obligated to enact laws in favor of the weak and disadvantaged section of the society. Proportional equality is based on that of right to equal treatment in similar circumstances and that the persons who were unequally circumstanced could not be treated at par. It is submitted that through Article 14, it is

recognized that weaker and vulnerable sections required special/additional protection. Further, Article 15(3) of the Constitution permitted the State to enact special laws for the protection of children.

It can be concluded that the underlying principle of the juvenile justice system has always been to treat all children who have committed offences within the juvenile justice system and differential treatment or sending the child to the adult criminal justice system has always been excluded by the Supreme Court. It can be constrained to observe that observations/judgments of the Apex Court of the country have simply been ignored.

Inadequate number of CWCs and JJBs, and many JJBs and CWCs exist only on paper, and are not functioning. Further, the more populous districts are likely to produce larger CWC caseloads and need additional CWCs.

Despite the fact that there are several homes being run by the government and other civil society organisations, there is still dearth of homes to 40 accommodate both CNCP and CCL.

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.

Clause 2(35) of the JJ Act, 2015, the word 'juvenile' has been defined to mean a child below the age of eighteen years. The definition of the word 'child' has been included under the definition clause, and the word 'juvenile' is considered not to be appropriate because of the element of negativity involved in its meaning, the definition of the word 'juvenile' may not be included under the definition clause.

SUGGESTION

There is an urgent need to take concrete steps to implement the provisions of the Juvenile Justices Act, 2015 at national as well as at the state levels. However, while discussing the provisions of juvenile legislations dealing with the juvenile delinquents, following issues emerged which is needed to be redressed by applying the following suggestions:-

- i. Lack of the central agency to monitor various legislations including the Juveniles Justice Act, 2015 concerning juvenile. Therefore the government of India may like to set up a National Commission for Children to monitor the implementation of social legislation concerning the children in the country.
- ii. Most of the states are yet to constitute juvenile courts to cover all the districts as required under the Juvenile Justice Act. As a result, the power of such courts is being exercised by other authorities who may not have special knowledge of child psychology and child welfare. Though this provision may be legally tenable, yet it may run contrary to spirit of law. Juvenile court may be constituted by all states to cover each district, as laid down under the Juvenile Justices Act.
- iii. The mandatory requirement of honorary social worker on the panel of juvenile courts may be fulfilled immediately by all the states.
- iv. Effort may be made by the magistrates appointed on juvenile court who must have special knowledge of child psychology and child welfare as laid down under the Juvenile Justice Act.
- v. There may be separate observation homes for neglected and delinquent juvenile keeping in view their age and nature and gravity of offence committed by them, for the temporary reception during the pendency of an inquiry regarding them under the Juvenile Justice Act to avoid contamination with others.
- vi. Police may be allowed to release the juvenile delinquents giving them warning keeping in view the nature and gravity of the offences committed by the juveniles. A suitable amendment may be made in the existing Juvenile Justice Act.
- vii. Special cader of police personnel may be set upto at least in the metropolitan cities in the country, to deal with handling the juvenile effectively.
- viii. Adequate number of professionally qualified staff especially those charged with magisterial, treatment and rehabilitation responsibilities may be appointed.

- ix. The staff engaged in the juvenile justice system particularly probation officers, may be given attractive incentives and more promotion avenues keeping in view the nature of duties assigned to them.
- x. In order to have effective functioning of the juvenile justice system, there may be close co-ordination between police, magistracy and social services.
- xi. The government of India may like to take up the matter with the state Government to constitute State Level Commission for children to monitor the implementation of the juvenile justice Act and submit periodical reports.
- xii. Status of juvenile court may be up-graded by associating them with the panel of Medical Officer, Educationalists, and Case Worker etc.
- xiii. After care and rehabilitation of juvenile may be an integral part of the statutory responsibility of the Government. A suitable amendment in the legislation may be introduced.
- xiv. Schools, education and families are very much interpedently and play a major role in shaping the future of children. In our society, education is recognized as one of the most important paths to success.
- xv. Poverty being an important factor, steps to raise the income level of poverty-stricken families, providing job opportunities, establishment of schools, improvement of job environment, providing recreational facilities etc. should be taken care of.
- xvi. Family needs greater attention and steps towards reorganization of family structure are important.

After discussing various provisions relating to the functioning of different agencies dealing with the juvenile delinquents under the juvenile justice Act 2015, it may be stated that it is indeed a milestone in the progress of juvenile justice in India.

Nothing is an offence which is done by a child, who has not attained sufficient maturity of understanding to judged of the nature and consequence of his conduct in that occasion. It has been said so taking into account the innocence of the child as well as his incapacity to differentiate between right and wrong and his inability to

understand the consequence of the act. Children are to be treated as assets to the future of the nation. Treatment meted out to the juvenile delinquents should be forward looking and progressive. It cannot be viewed and addressed from a uni-dimensional, restrictive perspective.

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ABSTRACT

JUVENILE JUSTICE SYSTEM IN INDIA: A STUDY WITH REFERENCE TO JUVENILE JUSTICE (CARE AND PROTECTION) ACT, 2015

Introduction

The study of delinquency and juvenile justice often relies on definitions of delinquency that do not conform precisely to the legal definitions of delinquent or status offenses. The definition of delinquency often takes on a specific meaning depending on the interests of the group or individual examining juvenile misconduct. In every definition of delinquency there is an implicit assumption of what constitutes a juvenile. Interestingly, the legal definition of a juvenile varies from jurisdiction to jurisdiction. This means that persons subject to the juvenile statutes in one location may not be in another place. The majority of states recognize juveniles as individuals below the age of 18. Roughly one-fifth of the states define juveniles as those less than 17 years old with some states listing the age of majority below age 17. Under these ages the individual is considered a juvenile and is handled in the juvenile justice system.

In brief a juvenile is a person who is under the age of 18. The age limit below which it should not be permitted to deprive a child of his or her liberty should be determined by law. Juvenile can be defined as a child who has not attained a certain age at which he, like an adult person under the law of the land, can be held liable for his criminal acts. The juvenile is a child who is alleged to have committed or violated some law which declares the act or omission on the part of the child as an offence.

Delinquency is a kind of abnormality. When an individual deviates from the course of normal social life his behaviour is called 'Delinquent'. When a juvenile, below an age specified under a statute exhibits behaviour which may prove to be dangerous to society and / or for him, he may be called a Juvenile delinquent. Juvenile delinquents are those offenders including boys and girls who are under 18 years of age. A Juvenile delinquent is a young person incorrigible or habitually disobedient. The first legislation on juvenile justice in India came in 1850 with the Apprentice Act which required that children between the ages of 10-18 convicted in courts to be provided vocational training as part of their rehabilitation process. This act was

transplanted by the Reformatory Schools Act, 1897 and later came The Children Act of 1960.

The Juvenile Justice Act, 1986 was the primary legal framework for juvenile justice in India. The Act provided for a special approach towards the prevention and treatment of juvenile delinquency and also provided a framework for the protection, treatment and rehabilitation of children in the purview of the juvenile justice system. The law replaced the Children Act, 1960. 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.

Juvenile Justice Act, 1986 was applied uniformly throughout India except state of Jammu and Kashmir. Prior to this law each state had its own enactment on juvenile justice with there being differences in the way juveniles were treated by different state legal systems.

The Juvenile Justice Act, 1986 was more humanistic and treatment-oriented. This Act was considered a unique piece of social legislation intended to provide care, protection, treatment, development, and rehabilitation for neglected and delinquent juveniles as well as the adjudication of matters relating to the disposition of delinquent juveniles.

In a landmark step, the Government of India, repealing the juvenile justice Act 1986, introduced juvenile justice (Care and Protection of Children) Act in 2000 and further, amended , it in 2006, so as to make it responsive to the emerging needs in the tiled of juvenile justice, and making it, compatible with UNCRC standards. The Juvenile Justice Act, 2000 aims at consolidating and amending laws relating to juveniles in conflict with law, and children in need of care and protection by providing proper care, protection and treatment by catering to their developmental needs, by adopting child friendly approach in adjudication and disposition of matters in the best interest of children, and for their rehabilitation through various institutional mechanisms established.

With the passage of time there is a shift of strategic focus of the country from welfare to development to a right based approach. In the 9th Plan child development was viewed, not merely as a desirable societal investment for the nation's future but

also as the right of every child to achieve his or her full development potentials. The 11th Plan in its vision has included commitment to survival, protection and all round development of children of all ages, communities and economic groups.

National Commission for Protection of Child Right has also been constituted by the Government of India in March 2007 in order to ensure that all Laws, Policies, Programmes, and Administrative Mechanisms are in consonance with the Child Rights perspective as enshrined in the Constitution of India and also the UN Convention on the Rights of the Children, under The Commission for Protection of Child Rights Act, 2005, passed by Parliament in December 2005.

The Indian judiciary has given numerous decisions on the juvenile justice. Among these few are leading cases on juvenile justice. The Indian Supreme Court in *Pratap Singh vs. State of Jharkhand and Anr.*(2005) 3 SCC 551 where person has not completed age of 18 he will be governed by new act of 2000. In *Vikram Singh V. State of Haryana*, appellant accused claimed to be juvenile on date of incident, appellant was convicted by trial court and latter confirmed by high court the Supreme Court held, according to school certificate of appellant on date of incident his age was sixteen years during trial juvenile justice act of 1986 was applicable after coming into force of act of 2000 'juvenile in conflict with law' means child who had not completed age of eighteen years - considering facts and circumstances of case benefits of act of 2000 be given to appellant period of sentence be adjusted for sentence already gone appellant be released from custody.

When the JJA was enforced, the Supreme Court emphasized that, about 30 crores of young boys and girls come within the purview of the Act. There can be no two opinions that these children of today are the citizens of tomorrow's India and the country's future would necessarily depend upon their proper hygiene-physical and mental. The problem is, therefore, gigantic, at the same time, there is demand for immediate attention-unless the importance of the matter is properly perceived and the response is adequate both in regard to sufficiency of actions and immediacy of attention, the purpose of the Act cannot be fulfilled. It is one of the paramount obligations of those who are in charge of governance of the country today to attend to the children to make them appropriate citizens of tomorrow.

STATEMENT OF PROBLEM

- A considerable number of children are victims of terrorism and natural disasters. 30,000 children were orphaned by terrorism in Punjab. In Jammu and Kashmir, terrorism led to a high dropout rate of 48 per cent among boys and 60 per cent among girls. Poverty, neglect, ill treatment, and family discord are forcing an increasing number of children to run away from home and take shelter on the streets. The Government of India has mentioned the number of children living on the streets as fifty lakh in 1998.
- The nomenclature and the categories of children under the JJ (C&P) Act changed to children in need of care and protection and included many more categories within its purview. This definition excludes child beggars from its purview and includes three new categories: namely, children living with guardians posing a threat to their safety, ill and disabled children, and child victims of armed conflicts, civil commotion, and natural disaster.
- According to the statistics made available to the UN secretary general's report, "We the Children", India has a long way to go in meeting the needs of its children. The figures state that 63 per cent of children born in India today would not be registered at all, 25 per cent will not be immunized against any disease, 26 per cent will not have access to clean water, 47 per cent will suffer from malnutrition in the first three years of their life, 6 per cent will be born with weight less than 2500 grams, 15 per cent will never go to school, and only 52 percent of children who begin at the first class will reach the fifth.
- The profile of children in India reveals that a majority of them are living in conditions of want, deprived of basic survival, subsistence, and developmental opportunities. High rates of child mortality, school dropouts, child labour, handicapped children, and the problem of juvenile delinquency are indicators of the need for intervention by the state.
- The basic data relating to the number of juveniles in need of care and protection and their location continues to be non-existent. Therefore, it is difficult to ascertain the criteria by reference to which the number of juvenile courts or juvenile welfare boards, homes, and other services at various places may be determined.

- Barring a few instances, there has been no organized pressure on the state either from the beneficiaries of the system or any other group to improve the JJS policy or operations. The beneficiaries of the JJS are children. Most of these children come from low economic, social, and educational backgrounds. Neither does their physical and mental growth or their status in the society give them the ability to organize themselves and lobby for the protection of their interests in any articulated fashion.
- In India, various voluntary workers and organizations have been involved in the welfare of children but they have not evolved any mechanism of co-operation among themselves, or dialogue with one another, or joint action for a place of priority for the children by the state. Individual persons or organizations have taken up the issue with the state on individual instances of injustice to children involved, but there has been no consistent pressure from the social workers on the state to brace it seriously to ameliorate the conditions of children.
- The JJ (C&P) Act has been enacted with the apparent objective of bringing the law in accordance with the rights approach of the CRC but its provisions fail to reflect that policy change
- The Act requires change in the policy is from piecemeal implementation to implementation of the JJ (C&P) Act as a whole. Cooperation of various agencies involved in the system and coordination of their activities is necessary for ensuring care, protection, and developmental opportunities to all children as envisaged in the Act.
- There is no dearth of evidence in the field of juvenile justice of the large-scale unawareness of the law itself among the very personnel of the states who are supposed to operate and function under it. The need for orientation, in-service training, and periodical refresher courses for them in these circumstances can never be overemphasized

HYPOTHESIS

- A special provision for juveniles in Juvenile Justice Act is in consonance with Art 15(3) of the Indian constitution.

- The present Juvenile justice Act, 2015 is inadequate for the safeguard of juveniles in present scenario.

RESEARCH METHODOLOGY

The proposed study would be based mainly on the method of doctrinal explanatory, observational in addition to descriptive, historical, analytical research methods shall also be applied in accordance with the need of prospective study. Where the things are of introductory and observatory in nature, the method to be applied will be analytical.

The information shall be gathered using secondary source of data. The research would be descriptive and narrative information using secondary sources of data. It will include governmental and semi –governmental publications, earlier research, personal records, mass media reports and law journals, public and personal documents, internet magazines and other similar good sources of data. Some primary source of data could also be used in accordance with the requirements of study. The proposed study will definitely enrich the existing knowledge about the legal aspects of ‘Juvenile Justice’.

Chapter 1: Introduction

This chapter introduces the topic of the thesis work. In this process, this chapter covered research problem, research methodology, significance of study, hypothesis. Thereafter, this chapter gives the framework and contents of the rest of thesis in very brief. This also mentions the objective of thesis. The introduction has covered the role political parties, civil society in the juvenile justice.

Chapter 2: International perspective of Juvenile Justice: An Overview

Juvenile delinquency is a worldwide problem that has ebbed and flowed in focus and attention just as it has in the United States. The effects of globalization have impacted the juvenile justice arena just as they have numerous other areas of criminal justice operations. Globalization refers to the increased connectivity and interdependence that has evolved among countries. This chapter has discussed the various United Nation’s convention regional conventions and efforts made for

juvenile justice in other countries like USA, UK. This chapter contains provisions of Declaration of the Rights of the Child 1959, United Nations Standard Minimum Rules for Administration of Juvenile Justice, 1985, The United Nations Convention on the Rights of the Child, 1989¹, Optional Protocols to the CRC on Sex Trafficking, Armed Conflict, Universal Declaration of Human Rights 1948², International Covenant on Economic, Social and Cultural Rights 1966³, International Covenant on Civil and Political Rights 1966⁴, Convention on the Elimination of all Forms of Discrimination against Women 1979⁵, The United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990, The United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), 1990⁶, African Charter on the Rights and Welfare of the Child 1990, European Convention on the Exercise of Children's Rights 1996, American Convention on Human Rights (Pact of San José, Costa Rica)⁷, Havana Rules 1990. The impact of U.N. instruments developments in India has been also discussed.

Chapter 3: Constitutional provisions relating to juvenile justice

This chapter has discussed the legislative history of juvenile justice in India. The Evolution of the Juvenile Law in India (1773- 2000)⁸, The Apprentices Act, 1850⁹, The Indian Penal Code, 1860, Constitutional Protection for Children, The

¹The United Nations Convention on the Rights of the Child, <https://www.unicef.org/au/Discover/What-we-do/Convention-on-the-Rights-of-the-Child/childfriendlycrc.aspx>, Visited on: 31-03-2016

²The Universal Declaration of Human Rights, with a Preamble and 30 articles, was adopted by the U.N. General Assembly on December 10, 1948. G.A. Res. 217 A (III), U.N. Doc. A/810 at 71 (Dec. 10, 1948). <http://www.un.org/Overview/rights.html> (last visited on dated 24th March, 2017)

³The International Covenant on Economic, Social and Cultural Rights, with a Preamble and 31 articles, was adopted by the U.N. General Assembly on December 16, 1966, and entered into force on January 3, 1976. G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. (No. 16) at 49, U.N. Doc. A/6316 (Dec. 16, 1966), 993 U.N.T.S. 3 <http://www.ohchr.org/english/law/cescr.htm> (last visited 23rd March, 2017)

⁴The International Covenant on Civil and Political Rights, with a Preamble and 53 articles, was adopted by the U.N. General Assembly on December 16, 1966, and entered into force on March 23, 1976. G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess. Supp. (No. 16) at 52, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171. <http://www.ohchr.org/english/law/ccpr.htm> (last visited 23rd March, 2017).

⁵Convention on the Elimination of all Forms of Discrimination Against Women <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (last visited 27th March, 2017).

⁶The United Nations Guidelines for the Prevention of Juvenile Delinquency, 1990, <https://www.crin.org/docs/resources/publications/hrbap/IHCRC/UnitedNationsGuidelinesforthePreventionofJuvenileDelinquency.pdf>, Visited on: 31-03-2016

⁷The American Convention on Human Rights, with a Preamble and 82 articles, was adopted on November 22, 1969, in San José, Costa Rica, and entered into force on July 18, 1978. OAS, Treaty Series, No. 36; U.N. Registration 08/27/79 No. 17955. <http://www.oas.org/juridico/english/treaties/b-32.html> (last visited 26th March, 2017)

⁸Constitution of India, Paras Diwan, Edn. 2014, 36

⁹ Drug addict juvenile and the Law, P. Panda, The Law Publication, 2016 edition.

Probation of Offenders Act in 1958, The Central Children Act, 1960, The Child Labour (Prohibition and Regulation) Act, 1986, Juvenile Justice Act, 2000, The Child Labour (Prohibition and Regulation) Act, 1986, The Prohibition of Child Marriage Act, 2006. This chapter has also analyzed the statics data.¹⁰

Chapter 4: Critical Analysis of Juvenile Justice (Care and Protection) Act, 2015

The Juvenile Justice (Care and Protection) Act, 2015 received the assent of the President on the 31st December, 2015 and Act published in the Gazette of India. This Act contains 112 sections dividing into 10 chapters. This chapter has analyzed Juvenile Justice (Care and Protection) Act, 2015 comprehensively. The New Juvenile Justice (care and Protection of children), 2015, has introduced some of the remarkable changes in the existing Juvenile Law. One of such major changes is, juvenile of age group of 16 to 18 are to be tried like an adult. Also, the person who has attained the age of twenty one while in sentence will be send to the jail for rest of the time span. However, all these decisions will be taken by the Juvenile Justice Board. The key purpose to legislate the Juvenile Justice Act, 2015 was the increased number of crimes (mainly rapes), by juveniles of 16 to 18 age groups. However, numerous questions were raised on the new Juvenile Justice Act, 2015, as being more retributive than reformative. Retributive because it contains provisions for teenager who commits heinous crime (give punishment seven years or more) shall be tried like an adult but in the children's court. The Children's Court shall make sure that the child who is found guilty of heinous crime shall be sent to a place of safety till the age of twenty-one years and afterward, the person shall be shift to jail. It means once a juvenile is found guilty; he shall not get the benefit of being child and may be sent to jail if he commits a heinous crime.

The new Juvenile Justice Act, 2015 was also criticized by many protestors as being unconstitutional. It violates Article 14, 15(3) and 20 of Indian Constitution¹⁵⁹. Constitution of India enumerated every person is equal before law¹⁶⁰ but if we read this article with 15(3) then it is very much clear to us that Government can make special provision for the benefit of children. It is also enumerated in the United Nations Standard Minimum Rules for the Administration of Juvenile, 1985 that the

¹⁰ Data Source: Census of India 2010-11, Assessed from www.childlineindia.org.in/child-in-india.htm, dated 22.06.2017, time 12:30 P.M.

prime important should be given to the juvenile Justice and while considering a juvenile in conflict with law.

If a sixteen years old juvenile commits a heinous crime and his or her offence is punishable with seven year sentence, then he/she need to be produce before the Juvenile Justice Board comprising a magistrate and two social workers¹⁶⁵ who will decide on the physical and mental capacity of the child; whether that juvenile has committed such offence has the ability to understand the consequence of the offence and in what circumstances the offence has been committed.

The amendment of Juvenile Justice Act, 2015 has created controversy in regard to the Age of Consent, when it read with the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and the Prohibition of Child Marriage Act (PCM Act) . First of all the POCSO Act states the age of Consent is 18 years and if any crime committed by a Juvenile under the POCSO Act then as per the section 23 of the POCSO Act it will be dealt as per the provision of Juvenile Justice Act, 2000 (Now as per the new amended Act). Again, the PCM Act states that the child marriages are voidable but not void. In such a situation, many Juvenile who are in involved in a love relation can marry each other and can enter in ‘consensual’ sexual act. In such situation the consented sexual act may attract the provision of POCSO Act and Juvenile Justice Act, 2015 and they may be tried as adult offender. In a hypothetical situation, when both the guy and girl are involved in a consensual sexual relation, then the male child shall be treated Children in Conflict with Law and the female will be treated as Children in need of care and protection.

Thus, considering all these things in mind, author thinks that it is necessary for the Government to rethink and peruse child-friendly amendments in the new Juvenile Justice Act, 2015 so that injustice in Juvenile Justice Act can be curved.

Chapter-5 Juvenile Justice and Indian Judiciary

This chapter has explored the judicial approach towards juvenile justice. In this context this chapter has discussed the leading cases on juvenile justice and latest case laws.

In *Emperor v. Dharam Prakash*¹¹ the protective philosophy underlying the special legal provisions relating to children has been reiterated by the judiciary on various occasions under the Reformatory Schools Act. The courts have held that very young children should not be sent to prisons.¹² As far as possible, such young children should be released under the supervision and care of their parent or guardian.¹³ The court must have clear evidence of the age of a person before sending her/him to a reformatory school. It was clarified that a child could not be sent to a reformatory school unless an order of institutionalization, that is, of imprisonment, was made¹⁴ and that the duration of stay could not be less than that prescribed by the rules.¹⁵

In *Bhoop Ram v. State of UP*,¹⁶ the Supreme Court disagreed with the sessions judge who refused to rely on the school-leaving certificate stating that it was not unusual that in school age was understated by one or two years for future benefit, and declared the person to be above the specified age on the basis of medical opinion. Giving precedence to the authentic documentary evidence over the medical opinion, the Supreme Court said that medical evidence was an estimate based on radiological examination and physical features and the possibility of an error of estimate creeping into the opinion cannot be ruled out. It further reiterated that school certificates should be accepted as reliable and genuine if there was no material on record to throw doubt about the authenticity of the entry.

In *Gaurav Jain v. Union of India*,¹⁷ and *Vishaljeet v. Union of India*,¹⁸ the issue was rehabilitation of child prostitutes and children of prostitutes. While no reference was made to the Children Act or the JJA in *Gaurav Jain*, *Vishaljeet* did point out that the JJA, which provided for care, protection, rehabilitation of neglected children, made specific provisions for taking charge of and making appropriate orders relating to child prostitutes. The court did not agree with the proposal for separate hostels and schools for children of the prostitutes as that would have hindered their integration in the mainstream of society. It appointed a committee to study the

¹¹AIR 1926 (Lah.) 611

¹²*Parbati v Emperor*, AIR 1921 (Cdh) 190

¹³*Mst. Parbati v Emperor*, AIR 1921 (Cdh) 190

¹⁴*Nawab Dheru Gul v. Emperor*, AIR 1934 (Pesh.) 29

¹⁵ *State v. Jahlu*, AIR 1953 (HP) 40

¹⁶ 1989 (1) SCALE 799

¹⁷AIR 1990 (SC) 292

¹⁸ (1990) 3 SCC 318

question in depth and submit a report. No directions for rehabilitation were made in Vishal Jeet in view of the order in Gaurav Jain.

In *State (Government of NCT of Delhi) v. Ram Singh & Ors*, S.C. No. 114/2013 the Delhi High Court convicted 4 accused of death sentence for very infamous case Delhi Gang rape. But one juvenile was convicted for three years because he was juvenile at the time of committing crime. This has raised the eyebrows of all sections of society and it was demand to amend the law.

Chapter 6 Comparative analysis of juvenile in USA, UK and India

The intensity and severity of juvenile offences are generally determined by the social, economic and cultural conditions prevailing in a country. There is evidence of a universal increase in juvenile crime taking place concurrently with economic decline, especially in the poor districts of large cities. The problem of juvenile justice is a universal problem irrespective of the nation. This chapter has discussed the position of United States of America, UK and India. The researcher has discussed the Children and Young Persons Act, 1969 of UK, and laws of USA with case laws.

In USA age to determine juvenility varies from state to state, in most of the states it is 18 years but in few it is 17 years and 16 years respectively. Many states permit execution of juvenile of 16 years for murder as an adult and could be tried by criminal courts for prosecution and punishment as adults as per the gravity of the alleged offence. Till now many juvenile offenders have been executed under capital punishment but in 2005 Supreme Court of U.S.A in the case of *Roper v. Simmons*¹⁹, held that it is unconstitutional to impose capital punishment for crimes committed while under the age of 18.

In UK child between 10 to 18 years becomes criminally responsible for his action and be tried by the Youth Court and could be tried in an adult court as per the gravity of the offence committed. In France no criminal charge can be brought against a child up to the age of ten years; and for child between ten to thirteen years of age, only educational penalties such as placing in a specialized Centre or home are to be given, while between thirteen to sixteen years of age, minors will get only half of the

¹⁹543 U.S. 551 (2005)

adult sentence. Lastly, between sixteen to eighteen years of age, person would be remanded to Criminal Court and plea of juvenility can be set aside.

In the case of *L v. DPP*²⁰ the youth court was correct to find that there was sufficient evidence of the presumption that the appellant was *doli incapax* to be rebutted. In *IPH v. Chief Constable of South Wales*²¹ a 11 year old boy was said to have enough knowledge that his act was causing a damage to the motor vehicle and also in the case of *J.M. v. Runeckles*²² where a 13 year old who attacked under kid with a milk bottle, must have known that it was seriously wrong to engage in such a behaviour. In the case of *Director of Public Prosecutions v. K & B*²³ children below 14 years of age or of 14 years of age were convicted for rape and indecent assault as the children were found with guilty mind leading to *mensrea*. In *Powell's* where a 16 year old with a previous conviction for indecent assault received six years Section 53(2) detention of rape of a 15 year old girl, illustrates the courts attempt to balance the various considerations posed by the very serious youthful offenders.

In the case of *Harilal Mallick v. State of Bihar*²⁴, it was held that not only a proof of a child being under 12 but also it has to be proved that the child did not have enough understanding at that point of time and was immature. If no sufficient proof is laid down in front of the court to prove the immaturity of the child then it will be presumed that the child- accused intended to do what he really did. Thus in this case where a child of 12 or so used a sharp sword in killing a person along with his two brothers and no evidence either of age or immaturity or understanding was led on his behalf, thus held liable.

Chapter 7: Conclusion and Suggestion

It is very hard to draft a suitable and precise definition of juvenile delinquency. Several factors are responsible for not allowing a rational and reasonable formulation. One hurdle is similar to that encountered while defining crime in general, i.e. the choice between the social and legal definitions.

²⁰(2002) 166 JP 113

²¹ (1987) Crim LR 42

²² Supra note 27

²³[1990] 1 WLR 1067

²⁴1978 SCR (1) 301

This is a reason why Sociologists insist that legal definitions are of no means in understanding the true nature of delinquency and in knowing who are juvenile offenders, since the arrest or conviction of a child may depend upon various fortuitous circumstances. They also maintain that legal definitions differ from place to place and time to time and hence are not suitable for scientific studies. The reasons as to why legal definitions are to be preferred are the same as in the case of the definition of crime.

The juvenile delinquency has been defined legally but it is ordinary, because from the legal definition, clear-cut picture of juvenile delinquency is not coming out. As per the provision laid down in the Act, an act forbidden by law for children up to the age of eighteen years is juvenile delinquency. Therefore we can say that if a child is found to have committed an act of juvenile delinquency by a court, is juvenile delinquent.

In India, the definition of juvenile delinquency presents no such problems as are faced in the US and some other countries. The concept is confined to the violation of ordinary penal law of the country so far as the jurisdiction of the Juvenile Court is concerned. The present law which governs the juveniles who are in conflict with law and children who needs the care and protection is called the Juvenile Justice (Care and Protection of Children) Act, 2015. This law has replaced the earlier law governing juveniles and which was known as the Juvenile Justice (Care and Protection of Children) Act, 1000, which was in conformity with the UN Standard Minimum Rules for the Administration of Juvenile Justice (also known as the Beijing Rules, 1985).

The Juvenile Justice (Care and Protection of Children) Act, 2015, which replaces the Juvenile justice (Care and Protection of Children) Act, 2000 is primarily designed to give effect to the provisions of the UN Convention on the Rights of the Child, 1989 (ratified by India in December 1992). The Convention laid stress on social re-integration of child victims, to the extent possible, without resorting to judicial proceedings.

In recent past there have been a demand that the age of juveniles should not be an impediment in awarding sentences to the offenders of heinous crimes. The challenge was made on the twin grounds, that the Act would result in under

classification if all juveniles, irrespective of the level of mental maturity, are to be grouped in one class and on the further ground that the Act replaces the criminal justice system in the country and therefore derogates from a basic feature of the Constitution. It was argued that the juveniles who have the sufficient maturity to understand their acts should be kept out of the Juvenile Justice Act. But the Supreme Court held that the Juvenile Justice Act is wholly consistent with Article 14. The court said that same penal law applies to all juveniles, only difference is that a different scheme for trial and punishment is introduced by the Juvenile Justice Act. The law is in accordance with Articles 14 and 21 of the Constitution of India.

The rights guaranteed to an accused person are nearly the same as in the American Constitution except that the right to trial by jury has not been given in India. Also, there is no provision corresponding to the right of speedy trial as given in the American Constitution though the same is now read into Article 21 of the Indian Constitution. There is the right against self-incrimination, the right to have a lawyer of one's choice and the right not to be deprived of life or liberty except according to procedure laid down by law. The constitutional issues have not been raised in India till now because of the different nature of the Juvenile Courts in India and also due to some difference between the Indian and American Constitutions regarding the procedure to be employed for depriving a person of his life or personal liberty. In India, the Juvenile Courts are criminal courts unlike in the US and England where they are regarded as courts of a civil nature. It was probably due to this reason that safe-guards have been provided to the juvenile offenders on the lines of adult offenders. A neglected child must be produced before the Welfare Board within 24 hours of his being taken charge of by a police officer. The period of detention of a delinquent child in a reformatory school cannot exceed the maximum period of punishment provided for the offence.

The Indian courts have considered and laid down certain guidelines with regard to the betterment of children especially the girl child. The Supreme Court while discussing the menace of child prostitution strongly emphasised that the law enforcing authorities should take very severe and speedy legal action against all the erring persons such as pimps, brokers, and brothel-keepers. The court in such cases have to always take a serious view of this matter and inflict condign punishment on proof of such offence. The court in *Vishal Jeet v. Union of India*, directed that both

the State and Central Governments have an obligation to safeguard the interests and welfare of the children and girls of this country have to evaluate various measures and implement them in the right direction. Under the Indian Constitution, what is required to deprive a person of his life or liberty is the procedure established by law. Any procedure laid down by law which does not violate any fundamental right is a valid procedure.

Reasonable restrictions can be placed on the fundamental rights and the restrictions on the rights of juvenile offenders laid down in Children Acts are likely to be upheld by the Indian courts. Under the due process clause the American courts have a much wider latitude to declare special procedures as “unconstitutional” as compared to their Indian counterparts. Though by making a very liberal use of Article 21 the Indian courts have brought the position almost on a par with the one obtaining in the US.

Children are more vulnerable than adults to the conditions under which they live. Hence, they are more affected than any other age group by the actions and inaction of governments and society. In most societies, including ours, views persist that children are their parents’ property, or are adults in the making, or are not yet ready to contribute to society. Children are not seen as people who have a mind of their own, a view to express, the capacity to make a choice and an ability to decide. Instead of being guided by adults, their life is decided by adults. Children have no votes or political influence and little economic power. Too often, their voices are not heard. Children are particularly vulnerable to exploitation and abuse.

All people under the age of 18 are entitled to the standards and rights guaranteed by the laws that govern our country and the international legal instruments we have accepted by ratifying them. The Constitution of India guarantees all children certain rights, which have been specially included for them. These include: Right to free and compulsory elementary education for all children in the 6-14 year age group (Article 21 A). Right to be protected from any hazardous employment till the age of 14 years (Article 24). Right to be protected from being abused and forced by economic necessity to enter occupations unsuited to their age or strength (Article 39(e)). 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 (Article 39 (f)).

There is a well-founded general perception that a wide gap exists between the theory and practice of juvenile justice in India. The ground realities regarding juvenile justice are much at variance with the idealism projected through the old legislation. A few factors responsible for this state of affairs are:

1. There is a heavy work-load all around, in courts, police and probation services.
2. Lack of proper planning and dearth of resources affected the quality and working of the institutions.
3. There was hardly any public interest and support regarding juvenile delinquency and its control.
4. There was lack of proper and adequate evaluation of the work connected with the juvenile justice and effective follow-up action and remedies were therefore, not possible.

However, the new JJ Act, 2015 may prove to be more effective than earlier legislations for juveniles.

It is not easy to give a precise definition of juvenile delinquency. Several factors are responsible for not allowing a clear-cut formulation. One hurdle is similar to that encountered while defining crime in general, i.e. the choice between the social and legal definitions. Sociologists insist that legal definitions are of no help in understanding the true nature of delinquency and in knowing who are juvenile offenders, since the arrest or conviction of a child may depend upon various fortuitous circumstances. They also maintain that legal definitions differ from place to place and time to time and hence are not suitable for scientific studies. The reasons as to why legal definitions are to be preferred are the same as in the case of the definition of crime. The legal definition of juvenile delinquency is obvious. Any act prohibited by law for children up to a prescribed age limit is juvenile delinquency and it follows, therefore, that a child found to have committed an act of juvenile delinquency by a

court is a juvenile delinquent.

The Juvenile Justice Act, 2015 states that a 16-18 year old committing a serious or heinous offence and apprehended after 21 years of age, will be tried as an adult. It can be pointed out that this would violate Article 20(1) of the Constitution, which states that no person can be given a penalty greater than that which would have been applicable to him, under a law not in force at the time of commission of the offence. This means that at a later date the same person may face a penalty that is higher than what would be applicable to him at the time of commission of the serious offence. It noted that this provision goes against the right to equality and recommended deleting it.

Article 14 of the Constitution obligates the State not to deny to any person equality before law or equal protection of laws within the territory of India. It is pointed out that in India the concept of equality is not the formal equality as was observed in USA but is that of proportional equality which recognized that everyone is not equal and that the State was obligated to enact laws in favor of the weak and disadvantaged section of the society. Proportional equality is based on that of right to equal treatment in similar circumstances and that the persons who were unequally circumstanced could not be treated at par. It is submitted that through Article 14, it is recognized that weaker and vulnerable sections required special/additional protection. Further, Article 15(3) of the Constitution permitted the State to enact special laws for the protection of children.

It can be concluded that the underlying principle of the juvenile justice system has always been to treat all children who have committed offences within the juvenile justice system and differential treatment or sending the child to the adult criminal justice system has always been excluded by the Supreme Court. It can be constrained to observe that observations/judgments of the Apex Court of the country have simply been ignored.

Inadequate number of CWCs and JJBs, and many JJBs and CWCs exist only on paper, and are not functioning. Further, the more populous districts are likely to produce larger CWC caseloads and need additional CWCs.

Despite the fact that there are several homes being run by the government and

other civil society organisations, there is still dearth of homes to 40 accommodate both CNCP and CCL.

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.

Clause 2(35) of the JJ Act, 2015, the word 'juvenile' has been defined to mean a child below the age of eighteen years. The definition of the word 'child' has been included under the definition clause, and the word 'juvenile' is considered not to be appropriate because of the element of negativity involved in its meaning, the definition of the word 'juvenile' may not be included under the definition clause.

SUGGESTION

There is an urgent need to take concrete steps to implement the provisions of the Juvenile Justices Act, 2015 at national as well as at the state levels. However, while discussing the provisions of juvenile legislations dealing with the juvenile delinquents, following issues emerged which is needed to be redressed by applying the following suggestions:-

- i. Lack of the central agency to monitor various legislations including the Juvenile Justice Act, 2015 concerning juvenile. Therefore the government of India may like to set up a National Commission for Children to monitor the implementation of social legislation concerning the children in the country.
- ii. Most of the states are yet to constitute juvenile courts to cover all the districts as required under the Juvenile Justice Act. As a result, the power of such courts is being exercised by other authorities who may not have special knowledge of child psychology and child welfare. Though this provision may be legally tenable, yet it may run contrary to spirit of law. Juvenile court may be constituted by all states to cover each district, as laid down under the Juvenile Justices Act.
- iii. The mandatory requirement of honorary social worker on the panel of juvenile courts may be fulfilled immediately by all the states.

- iv. Effort may be made by the magistrates appointed on juvenile court who must have special knowledge of child psychology and child welfare as laid down under the juvenile justice act.
- v. There may be separate observation homes for neglected and delinquent juvenile keeping in view their age and nature and gravity of offence committed by them, for the temporary reception during the pendency of an inquiry regarding them under the Juvenile Justice Act to avoid contamination with others.
- vi. Police may be allowed to release the juvenile delinquents giving them warning keeping in view the nature and gravity of the offences committed by the juveniles. A suitable amendment may be made in the existing juvenile justice Act.
- vii. Special cadre of police personnel may be set upto at least in the metropolitan cities in the country, to deal with handling the juvenile effectively.
- viii. Adequate number of professionally qualified staff especially those charged with magisterial, treatment and rehabilitation responsibilities may be appointed.
- ix. The staff engaged in the juvenile justice system particularly probation officers, may be given attractive incentives and more promotion avenues keeping in view the nature of duties assigned to them.
- x. In order to have effective functioning of the juvenile justice system, there may be close co-ordination between police, magistracy and social services.
- xi. The government of India may like to take up the matter with the state Government to constitute State Level Commission for children to monitor the implementation of The Juvenile Justice Act and submit periodical reports.
- xii. Status of juvenile court may be up-graded by associating them with the panel of Medical Officer, Educationalists, and Case Worker etc.

- xiii. After care and rehabilitation of juvenile may be an integral part of the statutory responsibility of the Government. A suitable amendment in the legislation may be introduced.
- xiv. Schools, education and families are very much interpedently and play a major role in shaping the future of children. In our society, education is recognized as one of the most important paths to success.
- xv. Poverty being an important factor, steps to raise the income level of poverty-stricken families, providing job opportunities, establishment of schools, improvement of job environment, providing recreational facilities etc. should be taken care of.
- xvi. Family needs greater attention and steps towards reorganization of family structure are important.

After discussing various provisions relating to the functioning of different agencies dealing with the juvenile delinquents under the Juvenile Justice Act 2015, it may be stated that it is indeed a milestone in the progress of juvenile justice in India.

Nothing is an offence which is done by a child, who has not attained sufficient maturity of understanding to judged of the nature and consequence of his conduct in that occasion. It has been said so taking into account the innocence of the child as well as his incapacity to differentiate between right and wrong and his inability to understand the consequence of the act. Children are to be treated as assets to the future of the nation. Treatment meted out to the juvenile delinquents should be forward looking and progressive. It cannot be viewed and addressed from a uni-dimensional, restrictive perspective.