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CHILD RIGHTS LAW

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I INTRODUCTION

FROM THE point of view of child rights the years 2012-13 has been very eventful, both in terms of the legislative law and the judicial law. The concerned period has been responsible for three vital developments, namely: *first*, expansions of the horizons of child rights in terms of its ideological underpinnings, range of interests brought under its sweep and techniques of enforcement at the ground level, *second*, increased focus on child protection through "Juvenile Justice" particularly for the delinquent juveniles or 'juvenile in conflict with law' and *third*, on coming conflict between gender justice and "tender justice" or justice to children. Before undertaking a critical analysis of the judicial decisions it may be useful to discuss briefly the three developments under which the child rights cases would be discussed.

II THE EXPANDING HORIZONS OF CHILD RIGHTS

Though the term child rights can be traced back to the post First World War era and League of Nations Resolution in 1924. Allthough this rudimentary idea got its international recognition and expansion much later in the United Nations (UN), Declaration on Child Rights 1959, and thereafter the UN concern for children led to the passing of the two normative formulations, namely the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) 1985 and United Nations Convention on the Rights of the Child, 1989 (CRC). The CRC, which is most widely ratified convention, has provided the most comprehensive understanding of child rights that include within its fold right to survival, right to protection, right to participation and right to development. The UN initiative for the rights of children has continued even in the twenty first century as reflected in the United Nations Millennium Development Goals (2000) that has devoted four out of eight goals to children. In the same spirit the General Assembly conducted a special session in 2002 to adopt a vital child right document: A World Fit for Children.[1]

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1 *Available at*: http://www.unicef.org/specialsession/docs_new/documents/A-RES-S27-2E.pdf.(last visited on July 19, 2014.)

In India too the concept of child rights has remained at the focus of brisk legislative and juridical activity leading to the passage of laws such as the Commissions for Protection of Child Rights Act, 2005, the Right of Children to Free and Compulsory Education Act, 2009, the Protection of Children from Sexual Offences Act, 2012. All this has culminated in the considerable broadening of the horizons of child rights that are visible in the following three developments, namely:

Firstly, child rights had remained traditionally anchored on the *Patria Potestas*[2] concept that conferred a monopoly of raring and caring of the children on the parents, who enjoyed absolute freedom to decide what they thought, was best for their children, including forcing the children to enter into labour bondage and even sale. With the increasing community concern for the children, in the nineteenth and the twentieth century, the King/ State began exercising *Parens Patria* jurisdiction over all the children in need of care. *Parens Patria* [3] was based on the principle that the King/ State is also the ultimate guardian of every child. The *Parens Patria* was mainly concerned with the enactment of the various child protection laws and entertaining petitions on behalf of children in distress arising on account of denial of basic needs or warding off oppressive practices or traditions.

Secondly, child rights notion proliferating to bring within its fold many new kinds of concerns relating to care and wellbeing of children such as children's right to adoption and foster care, *etc.*

Thirdly, Taking child right beyond the normative level to the actual enforcement or implementation level by appropriate judicial directions.

Focusing on juvenile justice and the challenges to it

The concept of juvenile justice is a sub-set of child rights, yet it is different from it. The CRC guarantees to every child right to protection against harsh and adult- centric justice system. Since the needs, interests and above all the mental capacities and abilities of children are different from that of the adults, subjecting them to the adult justice delivery system is both unfair and unjust. Like many other western countries, in India too child offenders were subject to different kind of punishment/sanctions for their wrongdoings. Child offenders were processed and tried like any other offender under the colonial criminal justice administration. The Indian Penal Code,1860 (IPC) accorded complete exemption from criminal liability for children below the age of 7 years[4] and extended partial exemption to

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2 In Roman family law, the power that the male head of a family exercised over his descendants in the male line and over adopted children.

3 A doctrine that grants the inherent power and authority to the state to protect persons who are legally unable to act on their own behalf.

4 S. 82: 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.

child offenders between 7 and 12 years.[5] Thus, any child offender above 7 years could be proceeded against like other adult criminal. However, even during that early period child offenders received differential treatment in matters of punishment, in as much as after the award of sentence he could be sent to the reformatory school in terms of the Reformatory Schools Act, 1886 or 1897 or the Borstal Schools Acts operating in different provinces. The decisive movement in the direction of a distinct and exclusive justice delivery system for child offenders can be attributed to the Indian Jails Committee Report 1919- 20 that for the first time categorically recommended for child offenders below 15 years separate apprehension, trial, sentencing and custodial care system. The jails committee recommendation produced two effects namely (a) many provinces enacted Children Acts like the Madras Children Act 1920, the West Bengal Children Act, 1922 and the Bombay Children Act 1924, and (b) The Code of Criminal Procedure, 1898 (Cr PC) section 29 was amended in 1923 to include enabling provision under section 29-B that conferred powers on special magistrates to try child offenders below 15 years by special magistrates constituted in terms of the children Acts. As a sequel several provinces and later the states, passed various children Acts from time to time and also in more and more cases child offenders began to assert their legal entitlement to distinct and different justice delivery system. In 1985 the Government of India became a signatory to the Beijing Rules and that marked a distinct shift to a term "Juvenile Justice" in place of justice to children in terms of children's Acts. In India, the fact of being party to an international obligation emboldened the Union Government to come up with a uniform, standardized and comprehensive legislation namely the Juvenile Justice Act 1986. The Juvenile Justice Act 1986 defined 'delinquent Juvenile', 'neglected juvenile' and the 'victimized juvenile' comprehensively and provided for two track system for the apprehension, adjudication, sentencing and custody of juveniles. However, soon after the enactment of the CRC and its ratification by the Government of India in 1992, the Juvenile Justice Act, 1986 appeared to be outdated. The child rights approach and the changed perception of 'childhood' propounded by the CRC impelled the government to enact the Juvenile Justice (Care and Protection of Children) Act, 2000 as amended by the 2006 Act. The Juvenile Justice Act, 2000 and 2006 added many new measures such as (i) raising the age of childhood uniformly to 18 years, both for boys and girls (ii) age determination has been recognized as a distinct proceeding under section 7, 7A and 49, (iii) cases involving 'juvenile in conflict with law' are to be processed and adjudicated upon by the Juvenile Justice Boards (instead of a juvenile court), that is comprised by one magistrate (judicial member, who is designated as principal magistrate) and two non judicial members (of which at least one to be a woman member) (iv) The board is empowered to sentence the juvenile to wide range of dispositional alternatives (v) custodial sentence can be awarded not beyond a period of three

5 S. 83: Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

years, (vi) the juvenile justice board shall conduct its proceedings informally and within a period of four months.

The liberal juvenile justice system envisaged by the Juvenile Justice Act, 2000 already came in for ideological criticism, but the involvement of one juvenile member in the Delhi Gang Rape incident of December, 2012 provided a rallying point for opposing the liberal juvenile justice system. As a consequence several petitions were filed before the Supreme Court challenging the legality and constitutionality of the Juvenile Justice Act, 2000.

Gender justice and 'tender justice' in conflict course

Just as gender justice relates to multiple measures aimed at rendering justice to women deemed as weak on account of her gender, the term 'tender justice' may relate to all the measures that aim to render justice to children who are treated as weak because of their tender age. It may be of interest that traditionally women and children have been clubbed together in matters of rendering justice or being subjected to protective measures. Even during the British Colonial period no clear demarcation between women and child protection measures was maintained. For example the Child Marriage Restraint Act, 1929 that prohibited child marriage, was also meant to protect the girl child who were worst suffers of the child marriage practice. The traditional philosophy of treating women and children in a harmonious relationship was re-iterated and recognized by the

Constitution of India that bracketed woman and children in matters of special measures under article 15(3). However, with the rise of gender consciousness and the increasing possibilities of women coming in conflicts with the children, particularly in the impersonal urban environment, the traditional 'gender' and 'tender' partnership seems to be heading for a breakdown. Such a breakdown appears to have been accentuated by the undue haste shown in matters of enactment of child- centric laws over the women- centric laws. As a consequence questions are being raised at the policy and the highest court levels: Whether we have gone too far in our quest for rendering justice for children? Whether liberal tender justice ought to be achieved at the cost of justice to the female victim?

Recognizing childrens right to basic necessities of life

In *Arushi Dhasmana* v. *Union of India* [7] the Supreme Court was required to hear a bizarre PIL, filed by a child right activist on behalf of conjoint twin girls aged 15 years coming from a poor Muslim family in Bihar. The parents of the conjoint twins were not only poor but foolish too, because they were neither interested in detailed medical investigation nor surgical intervention but were only interested in financial help. Thus, the case forced the court to discharge its obligation towards minor children especially when they are conjoint twins, fighting for their lives. In the words of K.P.S. Radhakrishnan J (writing for himself and

7 (2013) 9 SCC 475.

Dipak Mishra J):[8]

> We spent sleepless nights to find out a solution. Seldom the society cares and knows the mental and psychological trauma, in such situations, judges undergo, especially, when they are called upon to decide an issue touching human life, either to save or take away

The Supreme Court issued several directions after the hearing the petitioner. As per one of the orders a team of two doctors of the AIIMS, Delhi visited the conjoint twins and submitted a report that indicated that before undertaking any kind of surgical intervention more detailed investigations are called for. Since the family members were opposed to taking any kind of risk in investigation or surgery in respect to the plight of the minor twins, the court was left with little option other than to opine about the children's right to life. The court did recognize that each child was enjoined with a right to bodily integrity. Since in the present case for want of detailed investigation report one could not say whether separation by surgical operation was in the interest of which of the two twins, the court only made observations hypothetically. But still the following observation is of great value:[9]

> If there is a authentic medical report before us that the life of one could be saved, due to surgical operation, otherwise both could die, we would have applied "least detrimental test" and saved the life of one, even if parents are not agreeable to that course. Every life has an equal and inherent value which is recognized by Article 21 of the constitution and court is bound to save that life.

On the face of the parental resistance to doing what is in the best interest of the children the Court had to assert its *parens patria* jurisdiction thus:[10]

> Saba and Farha are now wards of this Court and we are exercising warship jurisdiction as well. The law of this land has always recognized the rights of parents with their wards/ minors and first and foremost consideration of the Court is "welfare of the children", which overrides the views or opinions of the parents.

Though, the Supreme Court finally disposed of the petition after a direction to the state of Bihar to meet the complete medical expenses, payment of consolidated amount of Rs.5000/- every month to the parents of the twins and the states obligation to report every six months to the court about the condition and treatment given to the twins. But one expected that the court after assuming *parens paptria* jurisdiction, would override the parental objection to detailed investigation

8 *Id.* at 478.

9 *Id.* at 472.

10 *Id.* at 473.

go ahead with the "least detrimental" process in the best interest of the children.

In *Voluntary Health Association of Punjab* v. *Union of India*[11] the Supreme Court passed an order and made vital observations relating to the growing social menace of female foeticide and lack of implementation of the PCPNDT Act, 1994. The court speaking through Dipak Mishra J (Radhakrishnan J concurring though writing a separate judgment) observed as follows: [12]

> This court has laid special emphasis on the term "child" as a child feels that the entire world waits for his/her coming. A female child, as stated earlier, becomes a woman. Its life-spark cannot be extinguished in the womb, for such an act would certainly bring disaster to the society. On such an act the collective can neither laugh today nor tomorrow. There shall be tears and tears all the way because eventually the spirit of humanity is comatose.

Child's right to privacy and freedom from social stigma was recognized and legally articulated in *ABC* v. *Commissioner of Police*, Delhi.[13] In this case the Delhi High Court was required to address the issues arising out of formal action, in respect to a minor girl who was subjected to rape and sexual aggression by her father within the family. Vipin Sanghi J passed directions in respect to police and media in such gender sensitive matters.

Ensuring children's right to bodily integrity against sexual aggressions

In *Shankar Kishanrao Khade* v. *State* [14] an intellectually disabled minor girl of 11 years had been repeatedly raped and sodomised and ultimately done to death by a 52 year old accused. The lower courts had convicted the accused for various offences such as rape, murder, kidnapping etc and awarded death sentence. The Supreme Court upheld the convictions but differed on the issue of sentence. However, since the victim in this case was a minor girl who had been sexually aggressed the court speaking through K.S.P. Radhakrishnan J (Madan Lokur J concurring) made certain vital observations relating to crimes against children as follows:[15]

> Whenever we deal with an issue of child abuse we must apply the best interest of the child standard, since best interest of the child is paramount and not the interest of the perpetrator of the crime.

Since in this case the police had not registered as case under section 377 nor taken into cognizance the fact of non-reporting of the rape after witnessing the incident, the court is the exercise of its *parens patria* obligation, especially with

11 (2013) 4 SCC 1.

12 *Id.* at 9.

13 MANU/DE/0334/2013

14 (2013) 5 SCC 546.

15 *Id.* at 581.

regard to children with intellectual disability, issued as many as nine directions in respect to the recently enact POCSO Act, 2012 as follows:[16]

(i) incharge of schools, special homes, shelter homes, hostels, remand homes *etc*., are under a special obligation to report SJPU or local police all the incidents of sexual abuse or assault of children that comes to their knowledge;

(ii) media persons, incharge of hotels, hospitals and clubs in compliance with section 20 are under an obligation to furnish information about sexual abuse/ assault of children that comes to their knowledge;

(iii) special obligation of institutions handling children with disability;

(iv) where the perpetrator of the crime is a family member reporting the matter relating to such children should be in consultation with the mother of the abused/ assaulted child in the best interest of the child;

(v) special obligation of the hospitals and medical institution where children come for treatment to report sexual abuse of children to appropriate authorities;

(vi) non- reporting of such crimes is in itself a serious offence and persons should be subject to legal action for such in action;

(vii) complaints made to NPPCR/ SC PC/ Child Helpline *etc*., would be disposed of in consultation with the JJB , SJPU, and local police;

(viii) The Central and state governments are directed to constitute SJPU in all the districts;

(ix) Central and state governments are directed to take all steps to give widest publicity to the provisions of the 2012 Act.

Child's right to adoption

Adoption as a measure is meant to serve the religious and sentimental purposed of the adopter as well as the rehabilitative care and protection of the adopted child. The Hindu Adoption and Maintenance Act, 1956 provides provisions relating to competence to adopt and be adopted and the procedure in regard to adoption. The courts have been ruling in favour of free and unfettered adoption in cases coming before them.

In *Laxmibai (Dead) Though Lrs*. v. *Bhagwantbuva (Dead) Through Lrs*,[17] appellant, a widow had adopted a male child aged 8 years from outside that family. The respondent side contended that adoption of a male child from outside

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16 *Id.* at 582-83.
17 (2013) 4 SCC 97.

the family was barred by a special custom. The appellate court and the high court held that the adoption deed was invalid, therefore, dismissed her suit. The Supreme Court decreed the suit by allowing the appeal of the adoptive mother. Dr. B.S. Chauhan J (speaking for himself and V. Gopala Gowda J) observed:[18]

> Custom has the effect of modifying general personal law, but it does not override statutory law, unless the custom is expressly saved by it. He who relies upon custom varying general laid, must plead and prove it. Custom must be established by clear and unambiguous evidence.

Furthermore, though the court has endorsed the wisdom and ability of legislature in comprehending the mental preparedness of the entire citizenry that has enacted the adoption' measure in the Juvenile Justice Act, 2000, but it has exercised restraint in matter of declaring adoption a fundamental right in these terms. All these impel us to take a view that the present is not an appropriate time and stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right and/or to understand such a right to be encompassed by article 21 of the Constitution.

Child right to adoption has come before the high courts only in two decisions of the Mumbai High Court. In *Snehalaya's Snehankur Adoption Center* v. *Child Welfare Committee, Ahmedanagar*[19] issue of adoption of a child whose mother had suffered pregnancy because of a forced rape was in question. The high court viewed adoption as a measure for care and rehabilitation of the child, provided it is as per the procedure fixed by the law. The second adoption case *Varsha Sanjay Shinde* v. *Society of Friends of Sasson Hospital* [20] arose out of the petition of an Indian couple who wanted to be given preference in matter of a particular child over that of an Indian born NRI couple who had chosen the child earlier. The bench comprising of V.M Khande and S.C. Gupta JJ traced the history of adoption laws, including that laid down by the apex court that had equated foreign adoptions as duly recognized means of rehabilitation of children. In this light the high court had little difficulty in dismissing the petition.

Juvenile justice law in operation

The Juvenile Justice Act, 2000, amendment, 2006 and Juvenile Justice Model Rules 2007 envisage to usher in a child friendly justice delivery system that provides for dealing with 'juveniles in conflict with law" and "Children in Need of Care and Protection" in terms of distinct and exclusive rules for apprehension, bail release, pre-adjudication custody, adjudication, disposition and post disposition custodial care. The Juvenile Justice Act, 2000 has been in operation for the past thirteen years, but still we need to go a long way before the Act is fully operational.

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18 *Id.* at 105.

19 2013(6)ABR 350.

20 2014 (5) ALLMR 297.

Distinction between 'juvenile' and 'adolescent' offender

In *Nagoor Pichai Alias Badusha* v. *State through Sub- Inspector of Police* [21] the petitioner had been sentenced to life imprisonment for having committed a murder, when he was 19 years and 8 months. At the time of pronouncement of the sentence by the trial court the petitioner was 22 years 9 months. The sole point agitated before the Supreme Court was that the trial court did not take into account the Tamil Nadu Borstal Schools Act, 1925. The Supreme Court held that there was no impropriety in sending the prisoner to ordinary prison, because the accused was in the verge of crossing the age of adolescence. The court clearly underscored the distinction between 'adolescent' and minor or 'juvenile', because the Borstal Schools Act, 1925 merely concerns the place of detention of a convict, where as the Juvenile Justice Act, 2002 deals with detention as also the punishment or sentence that can be imposed. Therefore, the accused plea could have been considered if at the time of the commission of the crime or conviction his age was between 16 and 21 years, but not when he was beyond that age.

Claim of juvenility/ age determination proceedings

The beneficial nature of Juvenile justice proceedings has made age determination or claim of juvenility a matter of dispute in several cases. The thrust of age determination provisions, namely sections 7, 7-A, 3, 5, 6, 49 and 54 of the Juvenile Justice Act, 2000 is that the juvenility benefit ought to be extended to largest number of persons under the age of eighteen years. The three judge bench decision of *Abuzar Hossain Alias Golam Hosssain* v. *State of West Bengal* [22] has already laid down the law as per the intent of the Juvenile Justice Act, 2000.

The age issue was again resolved by the Supreme Court in *Subodh Nath* v. *State of Tripura*[23] where two accused one above the age of juvenility and the other in the borderline of 16 years were involved in the murder of fellow worker. Plea of juvenility was raised by appellant no.2 at the high court stage, but the high court upheld the conviction and sentence of both under section 302. At the Supreme Court the benefit of the liberal age determination provisions under sections 7-A, 2(k) and section 20 (as amended in 2006) were extended to appellant no. 2 and his case was remitted to the juvenile justice board to be disposed in accordance with the Juvenile Justice Act, 2000.

In *Ranjeet Goswami* v. *State of Jharkhand* [24] the court was again required to resolve an issue relating to claim of juvenility. The juvenile justice boards had declined to rely on school records and on the basis of medical report rejected the claim. On the matter being referred to the sessions court the juvenile was given benefit of doubt in matter of age. High court in revision restored the juvenile

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21 (2013) 10 SCC 668.
22 (2012) 4 SCC 122.
23 (2013) 4 SCC 122.
24 2013 (II) SCALE 577.

justice board's rejection of juvenility without giving cogent reasons. The Supreme Court held since no cogent reasons have been adduced by the high court for discarding the school leaving certificate, which was amply proved by the unchallenged testimony of the headmistress. Therefore, there is no reason for subjecting the accused to medical examination and the appeal is allowed.

Out of the nearly 70 cases on juvenile justice in the year 2013 coming from the various high courts more than 20 cases relate to plea of juvenility/ age determination proceedings instituted *suo- moto* or at the instance of the juvenile. This is because plea of juvenility is the very basis for ordering juvenile justice board adjudication, preferential right to bail, expeditious inquiry and reformative dispositional alternatives and all other beneficial measures that entails the declaration of juvenile status. In the light of such a critically of the plea of juvenility the Allahabad High Court in *Sudhir Singh* v. *State of U.P* [25] had categorically declined to consider the bail application, because this benefit was subject to the person being found to be a juvenile first.

The Patna High Court held that though the plea of juvenility can be raised at any stage, but the revision application had to be dismissed because the juvenile was serving a sentence and appropriately an application should have been made under section 64 and Juvenile Justice Model Rule 98. Similarly in *Ruby* v. *State of Delhi* [26] 14.01.13 the Delhi High Court refused to accept the plea of juvenility in the absence of documentary evidence mentioned in rule 12 and dismissed the revision.

Preferential right to bail for juveniles

Over fifty percent cases of juveniles coming before the high courts in the year 2013 related to claim for special right to bail under section 12 of the Juvenile Justice Act 2000. In a majority of cases the high courts granted bail to the juvenile irrespective of the seriousness of offending. Thus, juveniles involved in murder, rape, POCSO /offences, Robbery, Kidnapping, either jointly or singly were released on bail sought from the high courts through a revision application under section 54 of the Juvenile Justice Act, 2000. However, the court refused bail in *Raju Singh* v. *State of Punjab*[27] where in a case under the NDPS the juvenile who was caught carrying huge quantities of drugs was refused bail.

Bail to a juvenile gives only a interim relief to the juvenile, but a few high courts, particularly three decisions of the Uttarakhand High Court, have instead of release on bail passed orders for the completion of inquiry by the juvenile justice board within the period of four months as per section 14 of the Juvenile Justice Act, 2000.

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25 2010 (61) ALR574.

26 *Available at:* indiakanoon.org/doc/168286538 (last visted on July 22nd 2014).

27 *Available at:* http://indiakanoon.org/doc/160291766 (last visted on July 22nd 2014).

Prohibition on joint trial of juveniles

Section 18 of the Juvenile Justice Act, 2000 expressly prohibits joint trials of a juvenile along with a non- juvenile. In *Union of India* v. *Ex- GNR Ajeet Singh*[28] the respondent was enrolled in the Army and while on sentry duty he committed theft of ammunition, guns and absented from duty without sanctioned leave. Out of six offences for which he was charged two were committed when he was below 18 years. The Army authorities conducted general court martial (GCM) for all the six offences jointly and awarded seven years imprisonment and ordered his removal from the service. The Delhi High Court held that as per the Juvenile Justice Act, 2000 the GCM could not have tried him jointly for offences that were committed by him when he was a juvenile, therefore, the GCM proceedings stood vitiated in entirety. The Supreme Court declined to agree with the line of thinking of the high court, because according to them separate trial for different offence would have meant more punishment for the respondent. According to them joint trial has not caused any real prejudice to the respondent. The court speaking through Dr. B.S. Chauhan J (for himself and F,M. Ibrahim Kalifulla J.) was not inclined to show any kind of leniency to 'Juvenile –adolescent' thus:[29] considering the nature of service of the respondent, the gravity of offence committed by him after attaining the age of 18 years and the totality of circumstances, we are of the considered opinion on principles of "Justice, equity and good conscience" was not permissible.

Basis for determination of age of child victim of crime

The Juvenile Justice Model Rules 2007 under Rule 12 day down the elaborate procedure for conducting age determination proceeding mainly for 'juveniles in conflict with law' and 'could in Need of Care and Protection' in *Jarnail Singh* v. *State of Haryana*[30] the Supreme Court was trying to ascertain the age of the prosecutrix who had been the victim of a gang rape. As per rule 12(3) the age of the victim was fixed on the basis of date of birth entered in the school records.

Subjecting the juvenile justice law to all-round challenge

The liberal juvenile justice law had already faced criticism of the conservative crime control agencies and the victim- centric community, but the Delhi Gang Rape Incident that had a juvenile as one of the culprits led to strong community sentiment against the juvenile justice law in the form of as many as seven petitions filed before the Supreme Court within two months of the incident. The petitions challenged the raising the age from 16 to 18 years, the distinct and child- friendly process of trial, the milder dispositional alternatives, which were all seen as being anti-victim and in violation of the Constitutional scheme. The all out challenge to the juvenile justice law was clubbed together and heard by the three judge bench of the Supreme Court in *Salil Bali* v. *Union of India*[31] The intensity of the challenge underlying the seven petition can be gauged by the fact that all the petitions were

28 (2013) 4 SCC 186.

29 *Id.* at para 27.

30 AIR 2013 SC 3467.

31 AIR 2013 SC 3743.

argued in person by the petitioners. The bench decision was handed down by the Chief Justice Altmas Kabir (Surinder Singh Nijjar and J. Chelameswar JJ concurring), whose deep understanding and concern for juvenile justice had been well known. The decision dismissed all the petitions by extending a broad approval to the parliamentary wisdom that had acted as per the internationally agreed polices and norms. The challenge to juvenile justice law did not sub-side after the *Salil Bali* ruling, because even before the juvenile culprit was handed down a lenient sentence, separate petitions had been filed by a political activist, followed one each by the parents of the rape victim. Post *Salil Bali* petitions were clubbed together and heard by a three judge bench along with the pending petition titled as *Subraminiam Swamy* v. *Raju.*[32] The passionately argued and eagerly awaited Supreme Court decision has been handed down on March 28, 2014 by Ranjan Gogoi J (Chief Justice P. Sathasivam and Shiva Kirti Singh concurring J), which takes the juvenile justice debate much beyond *Salil Bali* in two respects. *First*, the Supreme Court has perhaps for the first time, referred to the brain science studies and researches to appreciate that the brains of persons below 18 years differs markedly from the adult brain and *second*, there are clearly marked stage-wise difference between juvenile justice system and adult criminal justice system. These two appreciations appear to have influenced the courts finding of upholding the constitutionality and the legality of the juvenile justice law.

Taking childhood prank too seriously

The American trend of re-criminalization of juvenile delinquency of mid-nineteen nineties was born out of a situation of large-scale involvement of juveniles in violent crimes, such as school shootouts, but that should not be a role model for countries like India where, by and large, child delinquency is still at the 'bun stealing' stage and not at 'gun- stealing/ using' stage. In the wake of such transitional times the Supreme Court decision in *Ajhar Ali* v. *State of West Bengal*[33] appears to have ushered in a new line of thinking in juvenile justice and child rights jurisprudence. The facts in this case are just bizarre. The accused aged 16 had got hold in the broad day light in a public road, the 16 year girl victim and planted a kiss on her lips, some 18 years ago. On the complaint of the victim the accused was prosecuted for offences under section 354/323. The magistrate convicted the accused and sentenced him to 6 months SI. The Sessions Court dismissed the appeal and the criminal revision was dismissed by the High Court. In the Supreme Court the counsel of the appellant argued mainly on two issues, namely: (a) the court should give the benefit of the provisions of the Probation of Offenders Act 1958 to the accused and (b) being a juvenile on the day of the occurrence, he is entitled to the benefit of the Juvenile Justice Act, 1986. The court speaking through Dr. B.S. Chauhan J (S.A. Bobde J concurring) made the following observation in respect to the plea of probation release:[34]

32 (2013) 10 SCC 465.

33 (2013) 10 SCC 31.

34 *Id*. at 34.

> Relief under the 1958 Act should be granted in the offences which were not of a very grave nature or where mens rea is absent. In the instant case, as the appellant has committed a heinous crime and with the social conditions prevailing in the society, the modesty of a woman has to be strongly guarded and as the appellant behaved like a road-side Romeo, we do not think it is a fit case where the benefit of the 1958 Act should be given to the appellant.

The courts view regarding the plea of juvenility appears to be more interesting as follows:[35]

> The plea of juvenility can be raised at any stage irrespective of delay in raising the same. But the question that would arise is if the matter came before the Juvenile Justice Board, the maximum sentence that can be awarded in such a case is of 3 years. In this instant case, the punishment awarded is only six months so the cause of the appellant is not prejudiced.

The court again tries to balance the plea of juvenility with the modesty of women, thus:[36]

> Offence relating to modesty of a woman cannot be treated as trivial and a lenient view by giving six months imprisonment on the ground of juvenility does not require consideration.

Finally, the court goes back on its own earlier view in matter of pleading juvenility, this:[37]

We are of considered opinion that as the appellant has been awarded only six months imprisonment, considering the matter under Juvenile Justice Act, 2000 would not serve any purpose at such a belated stage.

The *Ajhar Ali* decision has put a serious question mark on the Indian juvenile justice law that claims to have a history of over nine decades. At the end one is compelled to think as to how can a statutorily recognized and constitutionally upheld protection that has already received the validation from the two, three judge benches of the Supreme Court in 2013 and 2014, be brushed aside so lightly by a two judge bench of the same court?

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35 *Id*. at 35.
36 *Id*. at 36.
37 *Id*. at 37.