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CHILD RIGHTS

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I INTRODUCTION

ANY DISCUSSION relating to child rights revolves round the three core inquires that can be summed up in the following three propositions, namely:

(a) Children or 'childhood' is a special social category.

(b) Children suffer from multiple vulnerabilities.

(c) Search for appropriate child rights formulations is constantly on.

II CHILDREN AS A SPECIAL SOCIAL CATEGORY

Children or minor persons of both the sexes have been treated as special social category right from the very early times. The reasons for such categorization may be : (a) Children's underdeveloped physical and mental faculties; (b) Their inadequate cognitive abilities associated with lower maturity and reasoning capacities; (c) Their inability, both mental and physical to comprehend the adult world interactions and to turn them to their advantage; (d) Their lack of social and economic independence and consequent low positioning in the social hierarchy and (e) All these cumulatively leading to a child vulnerability syndrome.

Since the labeling a person as 'child' or locating him in the 'childhood' category is a social construct, the structuring and re-structuring of 'childhood' is constantly done through the social institutions such as the law, culture, religion, economy, media, education *etc*. This impart, a unique and dynamic character to the social construction exercise that is evidenced by the debates and controversies relating to gender differential, minimum age, age of innocence and age variation in matters of marriage, child labour, capacity to contract, capacity to testify, capability and criminal accountability *etc*. However, with the advent of the United Nations Convention on the Rights of the Child, 1989 (ratified by the Indian Government in 1992) the basic issue as to who is a 'child' is more or less settled in terms of article 1 that provides "Child means every human being below the age of 18 years". But still there is a need to rethink on the rationale of providing different age limits for the diverse activities in which children may legitimately be involved

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such as right to primary education, child labour, co-education and consensual sex etc.. The law protects the labouring children only till the age of 14 years, which also happens to be the age till their right to primary education is guaranteed? What about the protection of children between 14 and 18 who are forced to indulge is diverse forms of child labour? Similarly in the name of protection of children against sexual aggression the raising of the age of consent to 18 years, both under the POCSO Act and section 375 of IPC that totally bars sexual freedom for children, including consensual sex between legitimate partners, not amount to over paternalize childhood? Also the trend of viewing childhood not so much from the stand point of his biological age as from the nature of his behaviour and the attributable culpability, not an attempt to go in, for less scientific and more gross and obvious solutions?

Multiple vulnerabilities of children

The increasing incidence of exploitation and abuse of children in the open society, closed child protection institutions and even children's own homes is an indicator of children's multiple vulnerabilities. The more known forms of such vulnerabilities are sale of children, bondage of children, subjecting children to organ trade, child prostitution and many other forms of child slavery. In late 2014 a joint report of the World Health Organisation (WHO), United Nations Office on Drugs and Crime (UNODC) and United Nations Development Programme (UNDP) titled as, 'Global Status Report on Violence Prevention', has some revealing findings about the special vulnerabilities of children and women all over the world. The report highlights data from 133 countries covering 6.1 billion people representing 88% of the world's population. The first finding that violence affects the lives of millions; with long lasting consequences including homicides has some startling statistics : that in the year 2012, of the estimated 4,75,000 deaths, 60% were of males aged between 15-44years, that made homicide the third leading cause of death of this age group. That women, children and elderly bear the brunt of non-fatal physical, sexual and psychological abuse:

i. A quarter of adults report having been physically abused as children.

ii. One in five women reports having been sexually abused as a child etc.

Earlier in a similar study conducted by Anti – Slavery International 2009: Begging for Change, the problem of forced child begging in Albama, Greece, India and Senegal has been critically surveyed.[1] The study explores that nature of forced child begging, both by the 'Third Parties' as well as by the parents or guardians. The study has come out with seven recommendations that aim at better enforcement of norms, more effective identification, rescue and rehabilitation of forced beggar children, conducting prevention activities among vulnerable communities, training of police and other officials and raising awareness among general public *etc*. Down home a recent survey conducted by CRY reports that

1 Anti- Salvery International, Report on Begging for Change, 2009, *available at*: http://www.antislavery.org/includes/documents/cm_docs/2009/b/beggingforchange09.pdf (last visited on July 10, 2015).

there has been a 53 per cent increase in urban child labour in India in the last 10 years. The number of working children in the age group between 5 to 9 years in urban India has risen from 18,49, 680 in 2001 to 25,33,638 in 2011. That works out to a percentage change of 36.98%.[2] This increase in urban child labour could be attributed to increased migration, including seasonal migration for employment as well as trafficking of unaccompanied minors. However, the society is largely to blame for the increase in working children is urban areas as most of these children work as domestic help.

Finally, child malnutrition continues to remain the mother of all the vulnerabilities still. The recent data on malnutrition released by the Government of India based on the figures from the rapid survey on children that was collected in 2013-14 reveals that 29.4 per cent children (aged less than three years) to be underweight (low in weight for their age), while 15 per cent were wasted (low weight for their height) and 38.7 percent were stunted (low in height for age). This data is fairly close to the National Family Health Survey-3 data, in which the corresponding figures were 40.4 percent (under weight), 22.9 percent (wasted) and 44.9 percent (stunted). It is sad that we have only succeeded in declaring malnutrition as a medical emergency that can be treated by the administration of drugs and therapeutic foods. In the words of Rajib Das gupta there is still lack of realization that "Chronic malnutrition requires a far wider spectrum of programmatic interventions beyond clinical management. Multi-sectoral actions are needed to combat multi-dimensional deprivations."

Search for appropriate child rights formulations

Children's social and legal entitlements have been changing along with the scientific understanding of childhood and political recognition their interest. Historically the child's diminished legal capacities are traced back to the writings of the thinkers of the enlightened era like Locke, who described minors as those who lacked certain amount of reason and understanding. They can neither free as adults or as their equals, because granting them freedom as adults would be to harm them. The same ideas were considerably refined by John Rawls in his Treatise on Justice (1971), where children's diminished capabilities and autonomy had to be matched up by parental and state protection. Though Rawls concedes to parental intervention in the lives of the children, but only till such time when their autonomous capabilities remain impaired. According to Rawls children from birth to the age of majority gradually develop their decision making ability, therefore, as children become more competent, parental interference ought to diminish. Rawls argument is that since the child is not in a position to make a autonomous decision "we try to get for him the things he (the child) presumably wants whatever, else he wants, one helps children to obtain primary goods such as wealth, opportunity, self respect and other things that would make them capable of exercising autonomous choice. Children, therefore, have not the same liberty rights as adults, but have higher protection rights based on needs".

The League of Nations (1924) and the United Nations Declarations (1959)(hereinafter UN Decleration) about the rights of the children did make

2 The Hindu, Alld. edn., June 23, 2015.

significant statement of principles, but none of them constituted a binding authority for the member states. However, with the advent of the United Nations Convention of the Rights of the Child 1989, the child rights formulations had started assuming definite shape. The Child Rights Committee (CRC) provides an elaborate catalogue of children's rights that may be grouped into four main categories, namely: (i) Right to Survival, (ii) Right to Protection, (iii) Right to Participation and (iv) Right to Development. The rights expounded in the convection go much beyond the need based protection right recognized by the UN Declaration. These rights create obligations not for the State only, but also the parents of the children and even the community. This also marks a change in approach from kindness and charity to children to moral and legal obligation to children. This new approach underlies the key provisions of the convention such as article 2: that all the children have equal value as human beings, article 3: that best interest of the child should be a primary consideration, article 4: that State ought to accord priority to obligations flowing from the convention, article 6: that every child's inherent right to life ought to be recognized and article 13: that every child shall have a comprehensive right to freedom of expression *etc*.

Thus the CRC has inaugurated a new line of thinking in the rights jurisprudence by doing away with the traditional distinction between the civil and political rights, on the one hand, and economic and social rights of the children, on the other. This way it has disregarded any kind of ranking order amongst the child rights by treating all the rights of equal value and non-derogable. However, the convention has kept in mind the point of view of the economically and socially vulnerable children by expressly creating a wide range of special survival and protection rights under articles 19, 32, 33, 34 and 28.

The convention as such may not be binding on individuals, but by ensuring that the norms laid down in the convention are adhered to by the state parties their indirect compliance is ensured. For ensuring a better compliance the convention has a built in mechanism that obligates the ratifying state parties (the Government of India ratified the convention in December 1992) to furnish the implementation report within specified time for periodic review and recommendations of the UN CRC.

In a society like ours in which several competing claims are advocated by the different interest groups the possibilities of child right claims can also grow manifold. The usual situations of rights claims in respect to economic and social rights such as right to basic necessities right to education, right to health care etc are more or less normal, but occasionally there do arise cases in which child right claims arise under most bizarre situations. The case of rape and pregnancy of a 14 year old class X student from Ahmedabad, who was raped by a homeopathic medical practitioner in the course of her treatment for typhoid, is one such unusual rights claim case. The minor girl claim for right arose an account of detection of her pregnancy after 20 weeks when the legally permissible period for termination of pregnancy under the Medical Termination of Pregnancy Act, 1971 had already passed. On refusal to accord permission to terminate pregnancy by the session court and high court the petitioner approached the Supreme Court. The two judges of Supreme Court Bench seem to have difference of opinion in the matter, with

one judge favouring the 14 year old victim of the sex crime outright, while the other pointed to the agony of the unborn child whose limbs might have developed by now. Finally, both the judges agreed to set up a panel of three medical experts, including a psychologist to suggest whether medical termination of pregnancy was necessary to save the life of the mother. Also that the panels opinion for the termination of pregnancy would be with the consent of the victim and her parents. Appreciating the judicial innovativeness, the city edition of *The Hindu* in their editorial observed: "The decision of the expert committee appointed by the Supreme Court to allow a minor who was raped, to undergo an abortion after 24 weeks of gestation, is a welcome one and doctors thus initiated the procedure on the young person on Friday. In referring the case to the panel, the court looked beyond the rule book, while treating the right to life as a revered constitutional principle".[3]

While the Ahmedabed child rape pregnancy resolution can be cited as excellent example for the creation of a new right there are large numbers of other situations where the formal response is merely negative. A recent study conducted by an NGO Butterflies, based on the empirical observation of children's homes in Delhi, Kerala, Tamil Nadu and Orissa, has revealed an increase of 100 per cent in juvenile crime between 2003 and 2013.[4] The data shows that in 2003 the incidence of juvenile crime was 17, 819 (1.7 per cent of the total crime in India), but in 2013 the incidence rose to 31, 725 (2.7 Per cent of the total crime). A study on similar lines titled, Why Children Commit Offences,[5] based on a study on children in conflict with law in Delhi, has analyzed in greater detail the nature and extent of juvenile criminality. Though based on a small sample, the statistics is very reveling, that over 50 per cent of juveniles apprehended were for property offences such as theft, bodily crimes constituted barely 32 percent: Murder (17.2%), attempt to murder (3.2%) and rape (11.2%). The unfortunate part is that the general public and the dominant class perception of juvenile criminality is influenced by the statistics that reports 100 per cent rise in juvenile criminality. That is the reason that the government has already initiated steps to do away with the existing favourable treatment to the 16 to 18 year old heinous offending juveniles, thereby leading to the shrinking of the basket of child rights.

III RIGHT TO EDUCATION

Children's right to compulsory primary education

Though right to education as a basic need has been held to be implicit under article 21 of the Constitution in the *Mohini Jain* v. *State of Karnataka*[6] and *Unnikrishnan* v. *State of A.P.*,[7] but the 86th Amendment to the Constitution passed

3 *The Hindu*, Alld, edn., August 1, 2015.

4 *The Hindu* Alld, edn., July 9, 2015.

5 A study conducted by the Delhi Commission for Protection of Child Rights, (DCPCR) June,2015.

6 (1992) 3 SCC 666.

7 (1993) 1 SCC 645.

in 2002, whereby article 21-A was inserted in the Constitution for the first time that guaranteed all the children the right to free and compulsory primary education. The Constitutional command flowing down article 21-A led the Parliament to enact the Right of Children to Free and Compulsory Education Act, 2009. The Act carved out a special right to primary education in favour of children belonging to the disadvantaged groups by providing reservation to the extent of 25% seats in the government and also in the aided and unaided private schools in terms of the provisions of section 2(ii) (iv) of the Act. Thus, by the year 2009 all children between 6 to 14 years got a guaranteed right to free and compulsory education up to VIII standard and the 6 to 14 age group children of the disadvantaged sections got up to 25% reservation in seats in all government institutions and in the aided and unaided private educational institutions too.

The *Paramati Educational and Cultural Trust (Registered)* v. *Union of Indian* [8] was a five judge bench decision of the Supreme Court of India in which the constitutionality of the 86th and the 93rd Constitutional Amendment were challenged. Presently we shall primarily focus on the 86th Constitutional Amendment that mainly relates to whether the insertion of article 21A alters the basic structure of the constitution? Whether article 21-A obligates only the state or even private unaided institutions and private individuals are obligated by it? Whether states right under article 21-A can abrogate private institutions rights under article 19 (1) (g) or minority institutions rights under article 30(i)? whether sections 1 (4), 2 (n) (ii) and (iv), 12 (1) (c) and 18(3) of the Right of Children to Free and Compulsory Education Act, 2009 is Constitutional and in consonance with articles 19(1) (g) and 30(1)?

A. K. Patniak J (R.M. Lodha CJ, S.J. Mukhopadhyaya, Dipak Misra and F.K. Ibrahim Kalifulla JJ concurring), after taking into consideration the elaborate arguments of the petitioner's counsel, arrived at a conclusion that the State is under a Constitutional obligation to provide free and compulsory primary education to all the children of the age of 6 to 14 year and such a basic obligation is further re-enforced by enabling the State to make a law to achieve the objective. Understanding the matters in this perspective, the court observed:[9]

> We do not find anything in Article 21 A which conflicts with either the right of private unaided schools under Article 19(1)(g) or of minority school under Article 30(1) of the Constitution, but the law made under Article 21-A may affect these rights under Article 19(1)(g) and 30(1). The law made by the state to provide free and compulsory education to the children of the age 6 to 14 years should not, therefore, by such as to abrogate the right of unaided private educational schools under Article 19(1)(g) of the Constitution or the right of the minority schools, aided or unaided, under Article 30(1) of the Constitution

8 (2014) 8 SCC 1(hereinafter *Paramati Trust* case).

9 *Id.* at 267.

The court was inclined to give primacy to poor and weaker section children's right to primary education over private educational institutions rights under article 19(1) (g) in these word:[10]

> State in exercise of this power under Article 21-A of the Constitution is for the purpose of providing free and compulsory education to the children of the age of 6 to 14 years and so long as this law forces admission of children of poorer, weaker and backward sections of the society to a small percentage of seats in private educational institutions to achieve the Constitutional goals of equality of opportunity and social justice set out in the preamble of the constitution, such a law would not be destructive of the right of the private unaided educational institutions under Article 19(1)(g) of the Constitution.

Thus, the Supreme Court endorsed a pro-poor and inclusive approach to the right to primary education, which the propounder of "universal" approach may find difficult to accept. A recently published comment on the *Paramati Trust* case, the author has observed, thus. "The term "inclusive" has become politically fashionable but the entitlement to elementary education ought to be guaranteed in "universal" terms and article 21-A does guarantee the same to all. The expression "universal" on the other hand is all embracing and pervasive and this embraces all and, therefore, completely repugnant to any notion of inclusiveness"[11]

However, the court held that, the powers conferred on the state by section 12(1) (b) read with section 2(n) (ii) and section 12(1) (c) read with section 2(n) (iv) of the 2009 Act would not in any way abrogate the rights, of minorities to establish and administer schools of their choice, in these words: [12]

> We, however, hold that the 2009 Act in so far as it applies to minorities schools, aided or unaided, covered under clause (1) of Article 30 of the Constitution is ultra virus the Constitution.

State of U.P. v. *Pavan Kumar Divedi* [13] again related to article 21-A, where again a five judge bench of the Supreme Court re-iterated that children up to the age of 14 years have a fundamental right to free education and it is the states obligation to grant and to recognize educational institutions imparting basic or primary education.

Right to standardized and accountable child care institutions

In *Chhatravas, Arya Kanya Vidya Mandir* v. *Director, Dept. of Women and Child Dev*[14] the petitioner, who ran a free boarding and lodging institution for

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10 *Id*. at 268.

11 Vijay Kumar, "Trumping of Core Individual Right by Socio-economic Right-A Critique RTE Judgment" (2015) 8 SCC 51- 63.

12 *Supra* note 8 at 271.

13 (2014) 9 SCC 692 .

14 2015 (1) RCR (Cri) 775.

orphan girls and children who could not be maintained by their parents, had been seeking renewal of license under the Licensing Act, 1956. The Director, Department of Women and Child Development had been insisting on registration under section 34(3) of the Juvenile Justice Act, 2000 (hereinafter JJ Act). The division bench of the High Court of Delhi appreciated the problem in a developmental matrix in the light of the legislative developments since the 1956 when the Licensing Act, 1956 was enacted. Expressing opinion in the contemporary law context, Pradeep Nandra Jog J (Jayant Nath concurring) ruled, thus: [15]

> Whereas the Licensing Act, 1956 was a general law relating to children and women, the JJ Act, 1986 and the JJ Act 2000 are special legislations pertaining to two categories of children and thus even if it be assumed that the Licensing Act, 1956 continues to hold the field pertaining to the two categories of children…. The legislative intent could not be made more clear other than the use of the words Without prejudice to anything contained in any other law for the time being in force in the opening sentence of sub-section 3 of Section 34 of the JJ Act, 2000.

The high court rightly treated the child inmates as 'Child in need of Care and Protection' in terms of section 2(iv) para (d) and section 2(v) para (d) of the JJ Act 2000 that require registration under section 34(3). Thus the court passed the following order: [16]

> We dispose the Writ Petition directing the State Government to treat application by the petitioner for extension of its license... to be an application seeking recognition. We would advice the petitioner to thereafter seek registration under sub section 3 of section 34.

In *Shoan Pal* v. *State*[17] is a writ under article 226 for handing over his minor daughter from the illegal custody, declaration of the detention of his wife illegally in Nirmal Chhaya as illegal and seeking compensation by way of damages for the illegal detention of his wife and minor daughter. It is the case of respondent that as per the missing person complaint of a minor girl by the father the police came into action against the petitioner who surrendered along with the daughter before the concerned magistrate. After the surrender the girl was sent to 'Nirmal Chhaya' for safe custody. The petitioner's case is that even after medical examination and proof of majority, his wife was illegally and arbitrarily detained in custody for over eight months and in the course of the delivery of the daughter she died on account of inappropriate treatment. Therefore, they must be directed to give the custody of his minor daughter and pay compensation for the loss, care and love of his wife. The division bench of the High Court of Delhi was quick in appreciating the predicament of the petitioner and her minor daughter detained in illegal custody

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15 *Id.*, para 46.

16 *Id*., para 50.

17 111(2014) ACC 602 (Del).

and Veena Birbal J (Badar Durrez Ahmed J concurring) ruled a compensatory remedy in these words:[18]

> We award a compensation of Rs. 300000/- to the petitioner and his said minor daughter. The respondent No. 1 is directed to pay the sum of Rs. 3,00,000/- to the petitioner on his behalf and on behalf of his minor daughter... within a period of 4 weeks from the date of this judgment. The petitioner shall deposit the said amount in a fixed deposit in a nationalized bank in favour of his child under his guardianship till the child reaches the age of 18 years. The petitioner may withdraw the interest on the said deposit as a father and natural guardian once in 3 months and utilize the same for the benefit of the minor.

Children's right to adoption under the JJ Act, 2000

Adoption as a social measure that involves the transfer of the parental right over a child from the natural parents to the adopting parents, may be perceived from the point of view of the parents, who may adopt for religions or sentimental reasons, or from the point of view of the adopted child, who may be better rehabilitated or cared for after adoption. The parental perception of adoption is provided for under the personal laws of the respective communities that might differ on who can adopt? Who can give in adoption? What conditions need to be fulfilled for adoption? *etc*. However, adoption perceived form the point of view of the child is much more amenable to standardization and modernization. That is the reason for the JJ Act, 2000 recognizing 'adoption' as a measure of 'Rehabilitation' and social integration under chapter IV and section 41 providing elaborate measures for adoption.

In *Shabnam Hashmi* v. *Union of India*[19] a Public Interest Litigation (PIL) was filed under article 32 requesting the Supreme Court to lay down guidelines to enable and facilitate adoption of children irrespective of religion, caste, creed *etc*. under the JJ Act, 2000. The PIL by a Muslim civil rights activist was opposed by the All India Muslim Personal Law Board (AIMPLB) that argued that Islamic law does not recognize adoption and instead professes "Kafala" system under which the child is placed under a "Kafil" who looks after the child care needs. Rejecting the objections of the AIMPLB the Supreme Court held in respect of the applicability of JJ Act, 2000 to adoptions by Muslims, in the words of Ranjam Gogoi J (P. Sathashivam C J and Shiv Kirti Singh J concurring) thus: [20]

> The JJ Act, 2000 as amended is an enabling legislation that gives to a prospective parent the option of adopting an eligible child by following the procedure prescribed by the Act, the Rules and the CARA Guidelines, as notified under the Act. The Act does not

18 *Id.*, para 33.

19 (2014) 4 SCC 1.

20 *Id.* at 7-8.

> mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the permissions of the Act, if he so desires... To us, the Act is a small step in reading the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the permissions of a enabling statute.

In response to the petitioner's prayer that the right of the child to be adopted and that of the prospective parent to adopt be declared as a fundamental right under article 21 of the Constitution, the court held as follow:[21]

> Elevation of the right to adopt or to be adopted to the status of a fundamental right in our considered view, will have to await a dissipation of the conflicting thought processes in this sphere of practices and belief prevailing in this country... All these impel us to take the 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.

This way the Supreme Court has accorded a strong endorsement to a secular and modern approach to adoption as a measure of rehabilitation and reintegration particularly for the orphan, abandoned and surrendered children.

Children's right to different and distinct system of justicing

The problem of 'Juvenile delinquency' or children coming in conflict with the criminal laws is a part of larger problem of rise in the criminality generally. However, under the law, child criminality has been viewed differently from the adult criminality, all over the world, right from very early days. In India too the 'child offenders' were subjected to different set of rules of liability and punishments, particularly after the Indian Jails Committee 1919-20 Recommendations that led to the era of the enactment of the Children Acts in the Provinces and later followed by the States. However, the distinct and favourable system of 'Justicing' for the child offenders has came under sharp attack in the post Delhi Gang Rape case (2012).

Subraminian Swamy v. *Raju through Member Juvenile Justice Board*[22] is the second major challenge to the prevailing juvenile justice regime, after the *Salil Bali* v. *Union of India*[23] Since the petitioner had made the juvenile involved in *Delhi Gang Rape* case as the first party, the nature of challenge in this case assumed a comprehensive and broad based character. The petitioners claimed that the juvenile was not entitled to a beneficial treatment under the Act and should have been tried under the penal law of the land. On not receiving an authoritative answer from the Juvenile Justice Board (JJB) the petitioner filed a writ before the

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21 *Id.* at 8-9.

22 (2014) 8 SCC 390; Hereinafter the *Raju* Case.

23 (2013) 9 SCC 705.

Delhi High Court, which was dismissed. Finally, the petitioner approached to the Supreme Court by way of a SLP.

The two unique arguments challenging the Constitutionality of the JJ Act, 2000 were: that the JJ Act suffers from under classification as all juveniles under the age of 18 years, irrespective of the level of mental maturity and gravity of crime are grouped in one class and that its replacement of the criminal justice system in respect to juveniles amounts to derogation from the basic feature of the Constitution. The core argument of the principal petitioner is that having regard to the object behind the enactment, the Act has to be read down to understand that the true test of "juvenility" is not the age but the level of mental maturity of the offender. The Act is not intended to apply to serious or heinous crimes committed by a juvenile. The provisions sections 82 and 83 of the IPC provide that while a child below 7 years cannot be held to be criminally liable, the criminality of those between 7 and 12 years has to be judged by the level of their mental maturity. The same principle will apply to all children beyond 12 and up to 18 years also.

The three judge bench of the Supreme Court comprising of the P. Sathasivam CJI and Ranjam Gogoi, Shiva Kirti Singh JJ, heard all the petitions and interventions in great detail and the unanimous decision was delivered by Ranjan Gogoi J. The decision not only rejected all the grounds of challenge, but also emphatically re-iterated the distinct character of juvenile justice system in the following formulation:

i. FIR and charge-sheet in respect of juvenile offenders is filed only in "serious cases" where the adult punishment exceeds 7 years.

ii. A juvenile in conflict with law is not "arrested" but "apprehended" and only in case of allegations of a serious crime.

iii. Once apprehended, the Police must immediately place such juvenile under the care of a welfare officer, whose duty is to produce the juvenile before the Board. Thus, the police do not retain pre-trial custody over the juvenile.

iv. Under no circumstances is the juvenile to be detained in a jail or police lock-up, whether before, during or after the Board inquiry.

v. Grant of bail to juveniles in conflict with the law is the rule.

vi. The JJ Board conducts a child friendly "inquiry" and not an adversarial trial. This is not to say that the nature of the inquiry is non-adversarial, since both prosecution and defence submit their cases. Instead, the natures of proceedings acquire a child friendly colour.

vii. The emphasis of criminal trials is to record a finding on the guilt or innocence of the accused. In case of established guilt, the prime object of sentencing is to punish a guilty offender. The emphasis of juvenile "inquiry" is to find the guilt/innocence of the juvenile and to investigate the underlying social or familial

causes of the alleged crime. Thus, the aim of juvenile sentencing is to reform and rehabilitate the errant juvenile.

viii. The adult criminal system does not regulate the activities of the offender once she/he has served the sentence. Since the JJ system seeks to reform and rehabilitate the juvenile, it establishes post-trial avenues for the juvenile to make an honest living.[24]

The court provides a plausible rationalization for the juvenile justice system in the following words: [25]

> The Act does not do away or obliterate the enforcement of the law in so far as juvenile offenders are concerned. The same penal law i.e. the Penal Code applies to all juveniles. The only difference is that a different scheme for trial and punishment is introduced by the Act in place of the regular provisions under the Code of Criminal Procedure for trial of offenders and the punishments under the Penal Code.

Despite the emphatic re-iteration of the philosophy of a distinct and favourable justicing system for child offenders by the apex court in the *Raju* case, the present government appears to be determined to totally re-cast and replace the existing JJ Act, 2000 by a new version of juvenile justice law that would be tougher and less child friendly.

Plea of juvenility – Essential elements

The plea for a distinct and different justicing system is founded on the ability of the juvenile to successfully plead that at the relevant point of time the concerned person was below the age of juvenility *i.e.*, below 18 years of age. The successful plea of juvenility not only determines the issue of forum of adjudication, but also the rules of adjudication as well as the nature and objective of sentencing. The significance of plea of juvenility can be gauged from the fact that in 2014 the largest number of Supreme Court (6 cases) and high court (6 cases) decisions relate to some aspect or the other relating to this plea. In the first part of the discussion of plea of juvenility we discuss the decisions which are the devoted to the essential elements of the plea.

In *Ranjit Goswami* v. *State of Jharkhand* [26] the concerned child was charged for offences under sections 376, 302 and 201 of the Penal Code. It was argued by the accused that on the relevant date he was a juvenile, but the JJ Board after going through the adduced school leaving certificate, decided to seek the opinion of a medical board on the issue of age. The medical board opined that on the relevant day the accused was around 20 years of age. The sessions court did not agree with the JJB for refusing to accept the school leaving certificate. On appeal by the respondent the high court restored the order of the JJB. The Supreme Court

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24 *Id*. at 418.

25 *Id*. at 422.

26 (2014) 1 SCC 588.

opined that as the high court has not assigned any cogent reason for discarding the school leaving certificate that reveals a date of birth that shows that on the date of occurrence the accused was a juvenile, and, therefore, his plea of juvenility would succeed.

In *Sikandar Mahto* v. *Tunnu alias Tunnu Main*,[27] the respondent was involved in the commission of offences under sections 302/201 of IPC, filed an application claiming to be a juvenile and in support had enclosed a school leaving certificate wherein his date of birth was shown to be one that made him 17 years on the day of occurrence. The trial court declined to accept the claim of juvenility. On an appeal before the high court the court allowed the application by declaring him a juvenile. The finding of the high court was challenged by the complainant, the father of the victim, before the Supreme Court. The Supreme Court not only allowed the victim party to challenge the finding of juvenility, but also permitted the appellant to bring certain documents which had a significant bearing on the issue of plea of juvenility. In view of the cruciality of the documents adduced the court directed the document issuing authorities to appear before the court with records. Since the school records could not show any where the respondent's name, the court had no difficulty in concluding that: "The claim of the first respondent to be a juvenile remains unsubstantiated and in fact, the records of school where he was enrolled indicate that the first respondent was aged about 21 years on the relevant date and therefore he was not a juvenile"[28]

In *Kulai Ibrahim* v. State[29] the appellant who claims to be a juvenile along with two others had been convicted by the trial court under sections 302 and 148 and sentenced to life imprisonment. The appeal before the high court was dismissed and the claim of juvenility was raised for first time before the high court had been negatived. In the appeal before the Supreme Court the court focused only on the question whether the appellant is a "juvenile"? Since here the police inspector had filed a counter-affidavit on behalf of the respondent that the appellant in conspiracy with his father had obtained a birth and school leaving certificate fraudulently, the court speaking through Ranjana P. Desai J (Madan Lokur J concurring) relied upon *Abuzar Hossain* v. *State of WB*[30] that had clearly laid down the procedure for claim of juvenility thus: "For making a claim with regard to juvenility after conviction the claimant must produce some material which may prima-facie satisfy the court that an inquiry into the claim of juvenility is necessary. The initial burden has to be discharged by the person who claims juvenility… If such documents prima-facie inspires confidence of the court the court may act upon such documents for the purpose of section 7-A and order an inquiry for determination of the age of the delinquent".[31] Applying the Abuzar Hossian rule to the case on hand the court decided: [32]

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27 (2014) 4 SCC 28.

28 *Id*. at 30.

29 (2014) 12 SCC 332(here in after *Kulai Ibrahim* case)

30 (2012) 9 SCC 750.

31 *Id.* at 338.

32 *Id*. at 340

> In the instant case the documents are available but they are according to the police, fabricated or manipulated and therefore as per the above observations of this court if the fabrication is confirmed it is necessary to go for medical report for age determination of the appellant. Delay cannot act as an impediment in seeking medical report as section 7-A of the JJ Act 2000 gives right to an accused to raise the question of juvenility at any point of time even after disposal of the case.

The Supreme Court in the present case did not only decline the plea of juvenility but also persued the logical consequences of filing a false plea that had already led to the registration of a case against his father and the appellant under sections 467, 471 and 420 1PC. The court also directed that: [33]

> We direct the police to complete the investigation in respect of case registered against the appellant's father (and the appellant, if any) within one month. The charge sheet, if any, may be filed within fifteen days, therewith. After filing of the charge sheet the trial court shall dispose of the case within two months… List the criminal appeal after the trial court's judgment is received.

This way the Supreme Court introduced a procedure for deterring the unprincipled accused from abusing the privilege of plea of juvenility meant to protect the genuine children only.

In *Hakkim* v. *State*,[34] *Mahesh Jogi* v. *State*[35] and *Nand Kishore* v. *State*[36] the plea of juvenility was raised by the juveniles who had crossed the age as per the 1986 Act, but could claim the benefit of extended age till 18 years as per section 20 of the JJ Act, 2000. In *Hakkim* case the appellant a juvenile of 17 years 9 months had along with his associates forced entry into a house and caused multiple injuries including the killing of one of the inmates. The Supreme Court followed the earlier Supreme Court rulings in *Hari Ram* v. *State;*[37] *Ajai Kumar* v. *State*[38] and *Jitendra Singh* v. *State*[39] and extended the benefit of the higher age of juvenility *i.e.* 18 years. The court relied upon rule 98 of the JJ Rules, 2007 for the dispersal of the sentencing issue by extending the benefits of section 15 of JJ Act 2000 that places a limitation of any sentence beyond three years. Similarly in *Mahesh* case the 17 years 4 months delinquent was extended the benefits of the JJ Act, 2000 in matter of sentencing. Therefore, the court in the order held:[40]

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33 *Ibid.*

34 (2014) 13 SCC 427(hereinafter Hakkim case).

35 2014 SCC Online SC 1055(hereinafter *Mahesh* case).

36 2014 SCC Online SC 1068 (hereinafter *Nand Kishore* case).

37 (2009) 13 SCC 211.

38 (2010) 115 SCC 83.

39 (2013) 11 SCC 193.

40 *Supra* note 35 para 8.

> Therefore, even while affirming the conviction we hold the appellant was a juvenile and has to be dealt with on that basis for imposition of sentence.

In *Nand Kishore* case again, though the juvenile aged 17 year 2 months on the day of the offence had already served an imprisonment of 11 years for murder, the court felt obliged to re-open the case in terms of the requirements of the JJ Act, 2000. The court issued directions to set the juvenile at liberty.

The plea of juvenility was the basis of legal contention in the four High Court decisions namely *Raj Pal* v. *State*[41] (Allahabad), *Ratnadeep* v. *State* [42] (Bombay), *Ruby* v. State (Delhi) [43] and *Re-juvenile in conflict with law* v. *State* (Orissa)[44] also. In *Rajpal* case, out of the five or more accused, two were below 18 years on the day of occurrence, and after being sentenced to life imprisonment under sections 302/149, the parties came in appeal before the Allahabad High Court. The judgment of Amar Saran and Vijay Lakshmi JJ held that the two appellants who were below 18 years had not raised the argument of juvenility because the incident occurred, when the age under the Uttar Pradesh Children's Act 1961, was 16 years. In view of the state not contesting the below 18 age assertion of the accused the juveniles, if they were below 18 years, could not be denied the benefit of the beneficent provision of the JJ Act, 2000. Therefore, the sentence of the two accused who had served considerable period of their life imprisonment sentence were set at liberty. In the *Ratandeep* case, the accused, after conviction and sentence for an offence under section 302, filed an appeal before the high court in which it was claimed that on the day of the occurrence he was a juvenile. The high court passed an order directing the JJ Board to conduct an age inquiry. The board declared the accused to be a juvenile on the relevant date. The high court set aside the sessions court conviction and remitted the case to the concerned JJ Board for appropriate action as per JJ Act 2000. In *Ruby* case the Delhi High Court was faced with an appeal of a juvenile facing a murder charge whose earlier plea of juvenility had already been rejected, because her school certificate age showed that she was above 18 years at the time of the offence. The accused raised the age issue second time in appeal before the high court and this time submitted the Delhi Municipal Corporation birth certificate, which is duly verified by the state. The high court speaking through Mukta Gupta J (Pradeep Nandra Jog J concurring) laid down certain useful propositions such as: [45]

It is well settled that the plea of juvenility can be raised at any stage even after the culmination of proceedings till the Supreme Court and in the present case since a cogent evidence in the form of birth certificate from the Municipal Corporation of Delhi has been produced by the appellant, we are of the considered view that the plea needs to be reconsidered.

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41 2014 (4) ALJ 189 (hereinafter *Raj Pal* case).

42 Cri. Application No. 1816 of 2014 in Cr. Appeal No. 290 of 2013 (hereinafter *Ratnadeep* case).

43 2014 (4) JCC 2997 (hereinafter *Ruby* case).

A school certificate giving the date of birth which is not based on any contemporaneous document cannot have a better evidentiary value than the date of birth mentioned in the municipal records which was got registered immediately after the birth of the child. This material document was neither before the JJB which conduction the inquiry into the age nor before this court at the time of hearing the revision petition.

By allowing the reconsideration of the plea of juvenility at the appellate stage the court not only gave a welcome extension to a beneficent legislation, but also ensured that despite the conviction no disqualification would attach by virtue of section 19 of the JJ Act, thus: [46]

> We dispose the appeal and the application by upholding the judgment of conviction however, setting aside the order on sentence as per provisions of section 19 of the JJ Act which provides that no disqualification would attach to the appellant.

Finally, in *Re-Juvenile in Conflict with Law* case, the Orissa High Court appreciated the plight of a juvenile whose age was 15 years 4 months and 27 day on the date of the incident, but was tried by sessions court for various offences under sections 302,376(2),511, 201 and sentenced to life imprisonment and various other sentences. His first petition for suspension of sentence and release on bail having been rejected, he filed the second petition, specifically on grounds of juvenility. Since the petitioner had already spent more than ten years in prison the Court speaking through D. Das J (P. Mohanty concurring J) held thus: [47]

> It may be kept in mind that the Act is extended to protect the juveniles from the rigors of a trial by a Criminal Court it prohibits sentencing a juvenile and committing him to prison. As its preamble suggests, it seeks to adopt a child friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation to bring them to mainstream as a responsible future citizen of the nation.

In their decision the court not only highlighted the objectives of the JJ Act, 2000 but also castigated the justice functionaries for their laxity in enforcing the Act in clear terms, thus:[48]

> The case in hand is an exposition of a sad scenario, because of the manner; the JCL has been dealt with for all these years since the time of his arrest and forwarding to the court and thereafter. It is more so when we view as to how the State with its statutory

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44 2014 (1) OLR 965 hereinafter *Re-Juvenile* in conflict with law case.

45 *Supra* note 43, para 3

46 *Id.,* para 13.

47 *Re- Juvenile Case,* para 8

48 Re-Juvenile Case, para 23

> functionaries have allowed such carelessness and insensitivity throwing the statutory duty cast upon them to the winds possibly harbouring the attitude of utter indifference and adopting cavalier fashion… Their wooden approach has led to the piquant situation where advantage of the beneficial legislation provided with emphatic terms seems to have been denied to the unfortunate JCL at the earliest.

The court backed up the aforesaid judgmental observations by directing that the decision should be circulated to all the concerned functionaries and the high court is directed to send the copies of the decision to the concerned quarters.

The two later high court decisions, one from Allahabad and the other from Karnataka namely *Manoj* v. *State*[49] and *A.K. Vargese* v. *State*[50] have re-iterated the statutory framework of claiming juvenility under section 7-A of the JJ Act and the consequences of non-compliance with it. In *Manoj* case the trial court trying the accused and others under sections 307 and 302, refused to extend juvenility benefit on the basis of the opinion of the medical board. On a revision filed the court directed the trial court to reconsider the juvenility issue in terms of the Rule 12 of the JJ Rules, 2007. The high court faulted the trial court for their approach in respect to the relevant date of determining juvenility, as the date of accused surrender before the magistrate and not the date of the occurrence. Therefore, the high court upheld the plea of juvenility and allowed the revision. In *Vargese* case the high court considered the appeal of the accused who had been convicted for an offence under section 304 II IPC. The high court directed the concerned sessions judge to conduct age determination proceedings as per 7-A and Rule 12. Since the trial court had relied upon the school certificate which was in conflict with the date of birth certificate the high court required the trial court to conduct fresh age inquiry as per the statutory requirements.

Questioning unhampered privilege conferred by section 7-A

The privilege of claiming juvenility and its fall-out of the benefits of a distinct adjudication and sentencing for juveniles has come under sharp criticism of late. Apart from the legislative moves under way the judiciary has also come in for some re-thinking on the liberal pro-child legislative wisdom. Such a judicial trend can be witnessed in the High Court of Allahabad ruling of *Vinod Singh* v. *State*[51] in which the second bail application on ground of juvenility in a case relating to double murder was in question. The appellant, who was already 38-39 years of age, was seeking the benefits of the JJ Act, 2000. Amar Saran and Vijay Lakshmi JJ have critiqued the wisdom of giving the privilege of pleading 'juvenility' at any stage, even after conviction by the highest court, in these terms: [52]

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49 2014 (8) ADJ 293; hereinafter *Manoj* Case

50 Cri. App. No. 1377/2006 decided on 03/01/2014; here in after Vargese Case

51 2014 (85) ALL CC 156 (hereinafter *Vinod* case).

52 *Id.*, para 5.

> We think it is unreasonable to give benefit of Juvenile Justice Act to persons who were above 16 and below 18 years on the date of the incident and could fully understand the nature and consequences of their action, and the propriety of giving the benefit to accused who may be 30 or 40 years when their matters are examined by way of appeal.

Almost the same issue was raised by the Supreme Court decisions *Central Bureau of Investigation* v. *Swapn Roy* [53] and *Mumtaz* v. *State* [54] both decided on October 27 and November 19, 2014. In the first case the apex court gave the following two suggestions to the Attorney General namely: Whether there is any consideration in regard to reduction of age and whether the juvenility will depend upon the nature of the offence committed. In the second case the Supreme Court had more specifically raised the issue of giving freedom to claim juvenility at any stage and the implications of extending the benefits of juvenility to accused who have already attained the age of 40 or 45 years. The Supreme Court (Dipak Mishra and Uday U. Lalit JJ) endorsing the submissions of the counsels of the appellant and the respondent the court has queried, Whether there should be rethinking on the provision for raising the issue of juvenility at any stage of the criminal proceedings? Whether successful plea will negate the sentence passed by duly constituted court?

Therefore mentioned three cases, particularly the Supreme Court orders, have raised certain fundamental inquires that go to the roots of the juvenile justice philosophy, as it is ordinarily understood. Section 7-A was enacted to extend the benefits of the beneficent legislation even to those who for want of proper advice or lawyering could not claim juvenility at the earlier stages of the trial. The fact that there are accused of 40 or 45 years of age to claim the benefits of section 7-A is an indication of the slow and careless manner of the operation of the juvenile justice processes. The number of over-age claimants is likely to come down substantially only if the statutorily provided time limit is adhered to regarding determination of juvenility (Rule 12(1)) or the basis of the nature of offending or the culpability of the wrongdoer (Section 14(1) Proviso of the Act and Rule 13(6), (7) & (8)) are complied with strictly.

Juveniles' liberal right to bail

The juvenile justice philosophy ordains that every juvenile in conflict with law in the event of his apprehension (arrest) deserves a release on bail, irrespective of the nature of the offence, in terms of section 12 of the JJ Act, 2000. This liberal bail right philosophy has been further re-enforced by rule 11(7) of the JJ Rule 2007 that curtails the police power to apprehend in case of an offence punishable with less than seven years imprisonment. The essence of rule 11(7) is that the

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53 2015 4 SCC 223.

54 2015 4 SCC 318.

police has no legal power to apprehend for minor offence (punishable with less than 7 years imprisonment) and in effect the number of juvenile apprehensions would go down, so will the need for bail release. In the following discussion the decisions relating to bail right would be analyzed.

Of the seven high court cases relating to juvenile bail, six are from the High Court of Allahabad itself. The first Allahabad decision is *Parvez (Minor)* v. *State*[55] in which a minor aged 16 years 8 months and 2 days is apprehended for sexual assault of a girl of 4 years. The minor was apprehended soon after the incident and his bail application has been rejected by the board and the sessions court and by the time the bail appeal came before the high court the minor has already suffered incarceration for 4 years 9 months and 15 days. Het Singh Yadav J in his decision re-iterated that bail to a juvenile is a matter of right and cannot be refused on hypothetical considerations. Its refusal has to be strictly based on the three statutory grounds mentioned in section 12. The court held: [56]

> This brooks no dispute that the revisionist was a juvenile on the date when the offence was committed. Thus, certainly his case was to be dealt with under the provisions of the Act 2000. But unfortunately for him he was subjected to trial under the general criminal law applicable to adults and was declared juvenile only on September 7, 2013 after a period of more than three years from the date of moving application by his father, under 7-A of the Act 2000. By all reckoning this constitutes a serious lapse on the part of the authorities.

The high court had little difficulty in releasing the juvenile on bail and setting aside the order of detention by setting off the five year period of detention that he had already undergone.

In *Vishal* v. *State,*[57] a revisionist aged 15 years 2 months apprehended for offences under section 147, 148, 149, 307, 324 and 325 of IPC had been seeking bail under section 12. The lower courts had refused bail despite the 'no criminal' background report of the probation officer. The high court speaking through Vijay Lakshmi J observed: [58]

> Keeping in view the aforesaid legislative intent is enacting the Act and considering the welfare of the revisionist with a hope that he may recover himself after being released on bail by associating himself to the mainstream of life, it appears expedient in the interest of Justice that his prayer for bail be allowed.

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55 2014 (3) ADJ 191.

56 *Id*., para 19.

57 2014 (4) ALJ 294.

58 *Id.* at 296

Like the earlier two decisions the later three decisions namely *Bhola* v. *State*,[59] *Shabbir* v. *State* [60] and *Paplu* v. *State* [61] the favoured a liberal bail line. In *Bhola* Case the bail seeking juvenile was involved in kidnapping, abduction and rape of a minor aged 14 years. On apprehension the bail application was rejected by the board and the sessions judge on the ground that on release he is likely to come in association of his family members who are co-accused in this case. Vijay Lakshmi J ruled as follows: [62]

> The Juvenile Justice Act is a beneficial and social oriented legislation, which needs to be given full effect by all concerned whenever the case of a juvenile comes before them. In absence of any material or evidence or reasonable ground to believe that the delinquent juvenile, if released on bail is likely to come in association with any criminal or expose him to moral psychological danger, it cannot be said that the release would defeat the ends of justice.

In *Shabbir* case the juvenile had kidnapped and raped a minor aged $12^{1}/_{2}$ years. The courts below had refused bail on the ground that the juvenile had no proper guardianship and his family has no control over him. The high court found this as a fit case for the grant of bail on personal bond of the guardian and two sureties to the satisfaction of the CJM and an undertaking that the juvenile would not come in the association of any known criminal and not be exposed to moral, psychological as physical danger.

In *Paplu* case the 16 years 11 months and 25 days juvenile involved in serious offences like rape and sections 3 and 4 of the Protection of Children from Sexual Offences Act (POCSO Act), 2012 had been denied bail by the lower courts on grounds that as he consciously indulged in the offences, on release he is likely to be pushed into moral, physical and psychological danger and that the natural guardians are in no position to control him. Vishnu Chandra Gupta J overriding the lower court decision observed as follows: [63]

> In view of the above provisions contained in section 12 of the JJ Act grant of bail is rule and declining the bail to juvenile is exception. The exceptions mentioned herein above could only be given effect to where there are reasonable grounds to believe exist. A reasonable belief points to existence of such facts and circumstance as are sufficient to justify the satisfaction that release is likely to bring the juvenile in conflict with law into association with any known criminal or likely to expose him to moral, physical or psychological danger or would defeat the ends of justice.

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59 2014 (6) ADJ 185(hereinafter *Bhola* case).

60 2014 (3) ACR 3395 (hereinafter *Shabbir* case)

61 2015 (2) ALJ 92 (hereinafter *Paplu* case)

62 *Supra* note 59, para 12.

63 *Id.*, para 11.

The court further observed: [64]

> The heinousness or gravity of offence and the age in which the juvenile commits crime are not the grounds for declining the bail to a juvenile in conflict with law. The absconding of the co-accused form observation home is also not a ground for declining the bail to the other juvenile accused who did not join hands with such accused in his process of absconding from observation home.

However, in the *Virendra* case, in which a juvenile apprehended for the rape and murder of a six year old, follows a different line of reasoning for declining the bail application. The court speaking through Sudheer Kumar Saxena J finds justification for declining bail on grounds of exposure of the juvenile to the retribution of the society and the need to interpret 'ends of justice' in the light of the victim and the society as whole. The court opines that section 12 of the JJ Act, 2000 is broader than section 18 of the 1986 Act in as much as under the earlier provision exposure to 'moral danger' alone was enumerated but under section 12 the ambit of danger has been expanded to 'physical' and 'psychological' danger as well. In view of this, the court was inclined to give a wider and expansive interpretation to the condition of "release would defeat the ends of justice" by ruling as follows: [65]

> While gravity of offence cannot be considered under Section 12 of the Act but where rape is committed with helpless victim a child followed by the murder, cruel mentality of the author is more than manifest. Murder was committed to save himself from the clutches of justice. Discretion of bail to such a person will obviously tent-amount subverting the course of justice and by no stretch of imagination it can be said that it will be in ends of justice to grant bail to such a person… It cannot be interpreted to work only for the benefit of juveniles ignoring the cries of the child victim wherever a child becomes victim of offence, let alone heinous offences like murder or rape, society craves and cries for justice. By showing misplaced sympathy to juvenile, who has perpetrated offence like rape, murder, victim (child) and the society is denied justice which is not and cannot be the intention of law.

In *Satendra Sharma* v. *State*,[66] the juvenile apprehended arrest in respect of offences under sections 394, 302 and 34 of IPC and moved an anticipatory bail application under section 439 CrPC before the high court. The respondent contested the anticipatory bail application on grounds that the JJ Act does not contain any such provision and that the sessions court and high court under section 6 (2) can

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64 *Id*., para 15.

65 *Id*., paras 24 and 28.

66 2014 (3) JLJ 91.

assume powers only by way of revision or appeal. B.D. Rathi J ruled on the issue as follows: [67]

> This Court is of the view that application for grant of anticipatory bail preferred by the juvenile cannot be entertained by the High Court or the Court of Session by applying the provision contained under section 6 (2) of the Act. The Power conferred by the Board can be used by High Court and Court of Session only when proceedings come before them in appeal revision or otherwise except under section 438 and 439 of Cr .P.C. Therefore, I respectfully disagree with the interpretation made by the learned Single Judge of the Hon. Rajasthan and Chhattisgarh High Court.
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> … However, the applicant is at liberty to appear before the competent authority and thereafter if he proves himself as juvenile and moves an appropriate application for his release on bail under section 12 of the Act, then the same be considered by the competent authority in accordance with law.

Denial of juvenile justice benefits in Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) cases

In *Khalid Mehmood* v. *State of NCT of Delhi*[68] High Court of Delhi was approached through a petition under section 482 of the CrPC by the juvenile, convicted and sentenced by the designated court for various offence under the TADA. The petitioner contended at by virtue of being a juvenile he was entitled to the benefits of the JJ Act, 2000, which was contested by the state. The issue before the court was whether as per section 4(1) of the JJ Act 2000 (as amended in 2006) the provision of the Act shall have an overriding effect over all other laws? V.P. Vaish J reviewed all the provisions under the JJ Act 2000 and the TADA that had an implications on the issue. The court appears to have been impressed by the logic of the apex court in *Essa @ Anjum Abdul Razak Memon* v. *State of Maharashtra*[69] that held: "The question does not arise as to whether the statutory provisions of JJ Act would have an overriding effect-over the provisions of TADA which left long back was admittedly not in force on 22/08/2006". The second reasoning for excluding the application of JJ Act was that TADA was a special statutory measure to deal with terrorist persons. The court had little difficulty in arriving at the following conclusion: [70]

> The plea of petitioner that JJ Act would override the provisions of TADA in all circumstances without any exception cannot be accepted and in case legislature itself has carved out an exception not to grant relief to a juvenile under the JJ Act, it cannot be held that it would prevail over TADA under all possible circumstance

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67 *Id*., paras 22 and 23.

68 2014 (4) JCC 2507(here in after *Khalid* case).

69 2013 (4) SCALE 1.

70 *Ibid*.

Role of the appellate court in removal of disqualification in juvenile case

In the Delhi High Court decision *State* v. *Jagtar*[71]several appeals on behalf of juvenile who are convicted and sentenced to life imprisonment and death sentence were clubbed together to resolve these two questions : Where plea of juvenility is successfully raised for the first time before the appellate court what happens to the appeal against conviction? Does the appellate Court have power and obligation to order removal of disqualification attaching to conviction? The high court decision by Gita Mittal (J.R. Midha concurring J) has very elaborately discussed the statutory framework, position in other jurisdictions and Indian judicial precedents on the point in issue. The court appears to have labored intently on the diverse approaches of the various apex and the high court decisions on the issue, namely (a) conviction sustained, sentence set aside (b) conviction and sentence set aside and case referred to the JJB, and (c) sentence set aside, but the court itself takes; initiative for removal of disqualification. Thus, the court gave a creative interpretation to the role of the appellate court in the implementation of the statutory protections in these words:[72]

> As per 19(2), the Board only ensures the implementation of the statutory right by ordering removal of records. The High Court is as much under an obligation to uphold the right, as is the Board. On contrary, Section 6(2) specifically reiterates the jurisdiction of the High Court as well as Sessions Courts to pass all orders which the JJB stands statutory empowered to do so.

In the afore mentioned spirit the court conducted a *suo moto* juvenility inquiry in respect to the two persons who stood sentenced to death and found them to be juveniles. The court not only expounded a creative role of the appellate court in respect to the in extending the plea of juvenility but actually extended the relief to the petitioners and other convicts by observing: [73]

> It is noteworthy that so far as Amar Bahadur Thapa, Ravinder, Sheela, Jagtar and Ashok @ Ganja are concerned, they have undergone imprisonment beyond the maximum period of permissible detention of three years under the JJ Act, 2000. It would be impermissible to deprive such persons of their liberty, after having undergone confinement beyond the three years permitted by the JJ Act. In any case, all the persons with whom we are concerned in these cases are over 18 years of age now and cannot be lodged in the special homes.

IV CONCLUSION

Concluding the survey of the Child Rights in 2014 it may be useful to underscore a few positive as well as negative developments that may be helpful to assess the trajectory of the movement in the arena of children's rights in our society.

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71 213 (2014) DLT 389.

72 *Id*. at 421.

73 *Id*. at 425.

Social justice bench of the apex court gives direction for the search of missing children

The problem of 'missing children is the root cause for the continued exploitation, abuse and denial of rights to the children. Hitherto, the formal and informal procedure for the search and restoration of children has been so lax and casual that the Police and other authorities were emboldened to either not to follow any standard procedure for the registration of a missing person report or accept any accountability for reporting of the missing children, year after year. Alive to the problem of missing children the Social Justice Bench of the Supreme Court constituted by Madan B. Lokur and U.U, Lalit JJ have asked the Central Government to formulate standard operating procedures for tracing missing children and also sensitizing the police officers handling the issue. As a consequence most of the states have launched 'Operation Smile' and 'Operation Milap' and also set up track child portals. Already states like Bihar and Orissa that had a poor track record in matters of missing children recovery have shown good recovery rates. In Bihar, out of 2, 874 missing children till September 30 in 2014, 2528 children were traced. Similarly in Orissa, out of 9496 children missing since 2011, the Police traced 8, 622.[74]

Law commission recommendation for early childhood development and entitlements

The Law Commission of India in its report on "Early Childhood Development and Legal Entitlements" has focused on the entitlements of under 6 years children and stressed on need for crèche facilities, education and care rights of 0 to 6 year children *etc.* The commission has recommended the creation of a new right to care and assistance under article 24-A. Similarly, the commission has also recommended for the amendment of the Maternity Benefits Act, to make it available also to women working in unorganized sector.[75]

Growing legislative and judicial despair with the benign juvenile justice system

Just as the afore stated first two developments have a positive connotation for child rights, the legislative and the selective judicial trend to exclude or shrink the space of juvenile justice has a negative import for child rights. The Lok Sabha's decision to pass the JJ Bill 2014 that apart from other repressive measures contains the drastic measure for the trial of 16-18 heinous offending juveniles as adult criminals and face the possibility of imprisonment till the end of natured life or even death (in the event of conviction for an offence sections 376D and 376E) is a sure indication of re-criminalization of juvenile delinquency in India. Almost similar are the implications of the judicial response in *Vinod* case, *Swapan Roy* case, *Mumtaz* case, *Virendra* case and *Khalid* case. All these judicial decisions for one reason or the other question the extension of beneficial provisions in respect to juvenility, preferential bail, alternative sentencing and de-stigmatizing measures for child offenders. However, it is heartening for the child rights supporters that there are still large number of judicial rulings like the *Raju* case, *Goswami* case, *Ruby* case, *Re-Juvenile in Conflict with law* case and *Jagtar* case, which not only continue to interpret juvenile justice in its original spirit, but are involved in giving the most creative interpretation to the benign measures.

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74 *Times of India*, Delhi, Feb. 21, 2015.

75 "Panel for Early Childcare and Legal Entitlement; *The Hindu*, Alld, August 29, 2015.