

JUVENILE JUSTICE: DETERMINING JUVENILITY & ANALYSIS OF PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

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ABSTRACT

India is the second largest child population in the world. About 42% of India's population is below 18 years of age. Jawaharlal Nehru once said, "Children are like buds in a garden and should be carefully and lovingly nurtured, as they are the future of the nation and citizens of tomorrow". However, the aberrant behavior of children in recent times has caused long standing problems for the law enforcement in dealing with them. The NCRB report of 2013 states an alarming increase of 13.2% in crimes committed by delinquent juveniles as compared to the data of 2003. On the other hand, sexual crimes against children have also increased rapidly. Child sexual abuse is the sexual mistreatment of the child.

This research paper will focus on determining the age of delinquent juveniles. It will also deal with sexual offences that take place against children and the legal provisions to deal with them as enshrined in the Protection of Children from sexual offences Act, 2012. The research assumes that the age of juvenility should be 16 years for heinous crimes and the step taken by Indian Legislature to reduce the juvenile age by bringing Juvenile Justice (Care and Protection) Act, 2015 is an acceptable step.

Key words- delinquent juveniles; sexual crimes against children; age of juvenility; 16 years; heinous crimes.

Introduction

Juvenile crime does happen and we have to deal with it. Our goal is not to investigate 9 year olds, but we cannot turn a blind eye towards it.

-Keith Kameg

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Nelson Mandela once said, “Our children are our greatest treasure. They are our future. Those who abuse them tear at the fabric of our society and weaken our nation.” Roughly, 27 million children are born each year in India. Our laws defend and protect the rights of these children to the utmost integrity. However, the deviant behavior of children has posed long-standing problems. And what has changed is only the nature and definition of the ill-favored behavior.

In India, children are exempted from severe punishment for any wrong committed on their part irrespective of the gravity of the act. Both civil and criminal law have virtually exonerated a “minor” from any adverse consequences or liability.

The objective behind not subjecting juveniles with harsh punishments and to deal with them with a humane touch, is, that they are future citizens of the nation and the most valuable asset of mankind. Therefore, a reformative approach should be undertaken while dealing with juvenile offenders.

In India, the first legislation for keeping children out of jails, was enacted in the form of The Apprentices Act, 1850. From the early 1920s, when states enacted their Children Acts, legislation provided for juvenile offenders and adult offenders to be treated differently. The first act which dealt with issues concerning children in the independent India was Children’s Act, 1960. Juvenile legislation has always focused on reformation and rehabilitation instead of penalizing the child. It is not the past misdemeanors of the child, but his future welfare that concerns the juvenile justice system. The Indian Penal Code, 1860 under section 82 states that nothing is an offence done by a child under the age of 7 years. This doctrine is known as *doli incapax*, while section 83 states that nothing is an offence done by a child between the age of 7 years and 12 years if he hasn’t matured thoroughly.

The Juvenile Justice (Care and Protection of Children) Act 2000 was a legislation that conformed to the United Nations Minimum Standards for Administration of Justice to Children, 1985. The delinquent juvenile, termed in the act as “juvenile in conflict with law” , have been given practically unmitigated immunity from criminal liability for any offence committed during juvenility, with the maximum punishment of being sent to a special home for a period of three years.²

²Vedkumari, the Juvenile System in India: From Welfare to Rights, Oxford India Paperback, 2010.

This had become the cause of widespread demand for amendment in the immunity to juveniles found guilty of commission of grave, heinous and violent crimes, particularly against women.

The gang rape case of Nirbhaya in 2012 raised a lot of pertinent questions in the minds of the public in regard to amending the age of juvenility. In this case, a 17 year old was described as the most brutal of the 6 who were accused in the crime by the Delhi Police. The accused was declared as 17 years and 3 months on the day of the crime by the Juvenile Justice Board (JJB), which relied solely on his birth certificate and school records. The JJB also rejected the demand for a bone ossification test for positive documentation of his age. On 28th January, 2013, the JJB declared that the juvenile would not be tried as an adult. The minor was tried separately and was convicted of rape and murder under the Juvenile Justice Act, 2000. He was given a sentence of 3 years imprisonment in a reform facility, inclusive of the 8 months he spent in a remand home, during the trial.

Juvenile law in other countries & United Nations Standard Minimum Rules for the administration of juvenile justice (The Beijing rules)

The minimum age of criminal responsibility differs widely owing to history and culture. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless.

Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally. United Nations has also emphasized upon humanitarian aspect and expressed the view that “there is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare protected, that their lives are free from fear and want and that they grow up in peace.”³

The conference in Beijing wherein United Nations Standard Minimum Rules for the administration of Juvenile Justice (Beijing rules) were formulated which was adopted by General Assembly through resolution on 29th November 1985. India is signatory to the convention and

³Kofi annan, Foreword, The State of the World’s Children, 2000 UNICEF, 4 (2000).

has also ratified it and in pursuance of the convention, enacted the present Juvenile Justice Act, 2015.

The Beijing convention formulated 30 rules enumerated under six different parts.

The part one of the convention talks of general principles and rules 1 to 9 are included in this part. Fundamental approach of the convention is to provide protection of the young and maintenance of peaceful order in the society at the same time.⁴ The aim of the convention is at promoting juvenile welfare to the greatest possible extent, which will minimize the necessity of intervention by the Juvenile Justice System. The convention has not superimposed any particular age to determine the juvenility of the offender and has left the juvenile age determination upon member states, which will determine the juvenile age depending upon respective legal system of each member state.⁵ Wellbeing of the juvenile and reformatory theory is the underlining of the convention. The convention enlists that the principle of proportionality should be adopted wherein the response of justice system should be based on the consideration not only of the gravity of the offence but also of personal circumstances such as social status, family situation and other similar circumstances.⁶ Guidelines for protection of juvenile's right to privacy has been enshrined in the convention and the convention has held that no information which would lead to identification of juvenile would be published⁷, the objective of this rule is to prevent stigmatization of the juvenile.

The part two of the convention talks of the investigation procedure that needs to be adopted in reference to cases where the accused is a juvenile. Rules 10 to 13 are included in this part. The underlining of the investigational approach is of compassion and kind firmness.

The part three of the convention deals with adjudicatory process that needs to be adopted in cases pertaining to juveniles, rules 14 to 22 are included in this part. Principles of fair and just trial are the underlining theme of this part of the convention. The adjudication shall be conducted in an atmosphere of understanding wherein the juvenile participates and put forth his stand in a free manner and without any sort of fear.⁸ An integral part of adjudicatory process pertaining to juveniles is the social inquiry reports which have been held to be indispensable part of legal

⁴ Rule 1.4, United Nations Standard Minimum Rules for the administration of Juvenile Justice,1985.

⁵ Rule 2.2(a), United Nations Standard Minimum Rules for the administration of Juvenile Justice,1985.

⁶ Rule 5, United Nations Standard Minimum Rules for the administration of Juvenile Justice,1985.

⁷ Rule 8.2, United Nations Standard Minimum Rules for the administration of Juvenile Justice,1985.

⁸ Rule 14.2, United Nations Standard Minimum Rules for the administration of Juvenile Justice, 1985.

proceedings involving juveniles.⁹ The social inquiry report would cover all the relevant facts about the juvenile such as social and family background, schooling, educational qualification and similar areas, this inquiry report plays an important role in deciding the punishment that is to be awarded to the juvenile offender and therefore the personnel conducting such inquiry should be properly trained for the same in order to meet the ends of justice which is the main objective of juvenile justice system. The reformatory approach towards the juvenile is evident as the convention has categorically held that capital punishment shall not be imposed for any crime committed by juveniles.¹⁰ Community based correction approach is to be adopted in cases pertaining to juveniles and sanctions such as community service orders, financial penalties; compensation, orders to participate in group counselling should be encouraged instead of traditional sanctions.¹¹ Progressive criminology advocates the use of non-institutional over institutional treatment, the convention has held this to be an integral part of adjudication and the convention has laid that placing of juvenile in an institution should be last resort and for the minimum necessary time period.¹² Moreover records of juvenile offenders shall not be used in subsequent adult proceedings if any involving the same offender. It is therefore clear that the juvenile can't be subjected to increased punishment for repeat offenders on the basis of his offence which he committed during juvenility.

Part four of the convention deals with non-institutional treatment rules 23 to 25 are included in this part. This part emphasizes on the importance of providing rehabilitative facilities, vocational training and other facilities that may further the best interests of juveniles.¹³

The part six of the convention deals with research, planning, policy formulation and evaluation. This part mainly focuses on promotion of juvenile justice policy its formulation and its implementation in member states. This part also provides the scope of periodic evaluation and amending the policy related to juvenile justice in member states.

The Beijing rules have provided the much needed literature on juvenile justice system but the rules are not exhaustive and member states can formulate their own juvenile justice system depending upon the prevalent legal system of their states provided that the formulated policy is not in contradiction with the provisions of the convention. The convention has few shortcomings

⁹ Rule 16, United Nations Standard Minimum Rules for the administration of Juvenile Justice, 1985.

¹⁰ Rule 17.2, United Nations Standard Minimum Rules for the administration of Juvenile Justice, 1985.

¹¹ Rule 18.1, United Nations Standard Minimum Rules for the administration of Juvenile Justice, 1985.

¹² Rule 19.1, United Nations Standard Minimum Rules for the administration of Juvenile Justice, 1985.

¹³ Rule 24, United Nations Standard Minimum Rules for the administration of Juvenile Justice, 1985.

which need to be addressed, a major shortcoming is related to heinous offences such as rape and murder in which the gravity of offence committed is such that no leniency should be provided to a convict but under the present rules leniency has to be provided by member states in order to not contradict the main objective of the convention. The other shortcoming of the convention is that the juvenile age has not been fixed by the convention and it leaves the member states to decide the juvenile age. This has led to lack of uniformity in juvenile age around the globe. These two shortcomings should be addressed by the member states in order to meet the ends of justice and in order to provide universal equality to all the juveniles around the globe.

In USA age to determine juvenility varies from state to state, in most of the states it is 18 years, barring a few. Many states permit execution of juvenile of 16 years for murder as an adult and depending upon the gravity of the alleged offence. Till now many juvenile offenders have been executed under capital punishment but in 2005, Supreme Court of USA in the case of *Roper v. Simmons*¹⁴, held that it is unconstitutional to impose capital punishment for crimes committed while under the age of 18. In *Graham v. Florida*¹⁵, U.S Supreme Court held that a State is not required to guarantee eventual freedom to a juvenile offender convicted of a non-homicide crime. What the State must do, however, is give defendants some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

In U.K, child between 10 to 18 years becomes criminally responsible for his action and can be tried by the Youth Court and could be tried in an adult court as per the gravity of the offence.

In Canada, the youth criminal justice act provides for criminal justice to young persons aged between 12 to 18 years. Custody sentences for young persons are reserved for violent and serious crimes but cannot exceed the maximum punishment that can be awarded to adults for the same offence. This implies that for serious offences, juveniles can be tried as adults.

The basic rule which is followed by most of the countries is that the plea of juvenility would be set aside and he would be tried in a criminal court if the crime committed by the minor is a heinous one such as murder, rape.

Role of Judiciary in assimilating the problem& analysis of committee reports

¹⁴Roper v. Simmons, 543 U.S 551 (2005).

¹⁵Graham v. Florida, 560 U.S 48 (2010).

In India, judicial decisions of Supreme Court are binding throughout the country¹⁶, while decisions of one high court only carry a persuasive power upon other high courts. Supreme Court has talked about juveniles in 287 Judgments till date.¹⁷

In India, a child below 18 years is considered as a Juvenile. Various groups of people have regularly approached Supreme Court pleading to reduce the Juvenile age. To determine whether the accused is juvenile or not the age is calculated on the basis of the date mentioned on the birth certificate, In case the birth certificate isn't available then the age mentioned in school records is relied upon. In Indian Context particularly rural areas, there is no accurate information about the birth date of person, and adults committing crimes can take shelter of being juvenile by producing suspicious certificates.

Provision of medical verification of age isn't there and only when no source is available to ascertain the age of an accused, reliance is put on medical methods to ascertain the age. Various committees have regularly advocated removing the dependence upon birth certificates/ school records to determine the age. They have stressed upon adopting a standardized protocol in its place whereby the age of accused is objectively assessed by a body of experts using well recognized tests like ossification test.¹⁸ Justice Verma Committee extensively looked into the possibility of reducing the age of juvenility from existing 18 years to 16 years. The committee went through decisions of not just Indian courts and committees but also took into consideration the decisions given by U.S Supreme Court in landmark cases. The committee was against reducing the age of juvenility from 18 years to 16 years and a number of reasons in support of their argument were given by the commission. The commission in its report highlighted that our jails do not have reformatory and rehabilitation policies, instead they breed more criminals. It added that if a person at the age of 16 years is sent to life imprisonment, he would be released in mid 30s and there is little assurance that the convict would emerge as a reformed person, who will not commit the same crime that he was imprisoned for.¹⁹ In the view of the committee the maximum punishment of 3 years in special home is a period for correction with respect to the

¹⁶ INDIA CONST, art, 141.

¹⁷ SCC online.

¹⁸ Justice JS Verma committee on amendments to criminal law, 2013.

¹⁹ Justice JS Verma committee on amendments to criminal law,2013, 253

damage done to the personality of the child²⁰, this view of the committee is in tune with the objectives of Beijing Rules that were formulated in 1985. The committee, to further strengthen its point of argument that there is no need to reduce the age of juvenility highlighted that recidivism has actually decreased in India. In 2010 it was 8.2% while it decreased to 6.9% in the year 2011 and under such circumstances the committee was not inclined to reduce the age of juvenile to 16 years.²¹ The committee also highlighted that the efforts on part of the central government to provide better restorative justice to juveniles needs to be increased in order to meet the spirit of juvenile laws world over. The committee also took in consideration the neurological state of the adolescent brain. On consideration of the above stated reports, circumstances, medical conditions and decisions of foreign courts the committee came to the following conclusion “54. *We are of the view that the material before is sufficient for us to reach the conclusion that the age of ‘juveniles’ ought not to be reduced to 16 years.*”²²

The percentage of crimes committed by juveniles out of the total crimes committed is less than 2 % which asserts that there should not be any urgency to amend the law. It has been argued that one or two incidents like Nirbhaya gang rape case and Shakti Mills gang rape case should not become the reason for drastic changes in the JJ Act. The activists also hold that a child takes to crime because society has failed in its duty to take care of the child. It has to be highlighted that the contributory factors towards increase in juvenile crimes can be traced back to the economic conditions, social conditions, crime environment, lack of care and attention by the parents and failure of the school education system. Sending 16-18 year olds to jail will create even greater danger to society. This is because a child going to jail at 16 and coming out at 26 will not be reformed. He will not have a job, and will probably turn to a life of crime.²³

A Special Leave Petition²⁴ was filed in Supreme Court challenging the constitutionality of Juvenile laws in India and with a plea to lower down the Juvenile age. The Apex court not only

²⁰ Justice JS Verma committee on amendments to criminal law,2013,254

²¹ Justice JS Verma committee on amendments to criminal law,2013 , 254

²² Justice JS Verma committee on amendments to criminal law,2013

²³ Abantika Ghose, Indian Express, May 15,2015.

²⁴ INDIA CONST. art, 136.

rejected the plea but also highlighted that the age fixed by the legislature is constitutionally permissible.²⁵

In *Ram Suresh Singh Vs. Prabhat Singh*²⁶, Supreme Court faced a major problem. The age on the basis of birth certificate and school records didn't match the age deduced through medical examination. In that case the accused pleaded that he was a juvenile and supported his plea by providing evidence such as birth certificate and school records which supported his argument and proved that he was a juvenile, while the ossification test conducted on order of magistrate held that the accused was aged more than 18 thus wasn't a juvenile. The court faced the problem of deciding which source to accept as authentic. After deliberations Supreme Court held that ossification test was more authentic and reliable. This judicial precedent clearly shows us that the court is also in favor of ossification test in order to determine the age of the individual as it is more reliable as compared to other sources.

In the case of *Salil Bali*²⁷ which was filed before the Supreme Court after the fateful Delhi Gang rape case it was challenged that the sections 15 & 16 of Juvenile Justice (care and protection of children) Act, 2000 were unconstitutional as they were violative of fundamental rights under Article 14 and 21 of Indian constitution, 1950. It was held by the court that they weren't violative and that Article 15 (3) of the constitution empowers the state to enact special provisions for women and children, which reveals that the Juvenile Justice (care and protection of children) Act, 2000 was in conformity with the provisions of constitution. In the same case Supreme Court also rejected the plea that the Psychological age should be taken as criterion for determining the Juvenility.

In the same case another plea which was taken by the petitioners was that the records of inquiry conducted by Juvenile Justice Board should be maintained so as to enable the authorities concerned to assess criminal propensity of an individual and that the S.19 of JJ Act²⁸ which pertains to removal of disqualification attaching to conviction as juvenile should be deleted. The Apex court rejected the plea and held that the essence of JJ Act, 2000 is restorative and not

²⁵ Dr. Subramanian Swamy & others VS. Raju THR. Member Juvenile Justice Board & others, SLP CrI. No.1953 of 2013.

²⁶ Ramesh Suresh Singh v. Prabhat Singh, (2009) 6 SCC 681.

²⁷ Salil Bali Vs. Union of India & others, (2013) 7 SCC 705.

²⁸ Juvenile Justice (Care and protection of children) Act, 2000, No. 56, acts of parliament, 2000.

retributive, providing for rehabilitation and reintegration of children in conflict with law into mainstream society.

It is clear from the various judgments and reports of committees that neither the law committees nor judiciary is in favor of reducing the juvenile age as laid down in the JJ Act.

The Supreme Court has held in 2013²⁹ that the Juvenile Justice Act was enacted after years of deliberation and in conformity with international standards as laid down in the UN Convention on the rights of the child, 1989, the Beijing rules 1985, Havana rules 1990.

The Supreme Court has also acknowledged the report of Crimes Record Bureau which has pegged crimes committed by Juveniles at 2% of total country's crime rate³⁰ and held that there is no need at present to reduce the juvenile age.

The case for reduction in age of the “Delinquent Juvenile”

NCRB report for the year 2013 states that the share of delinquent juveniles in the total crimes enumerated under IPC was 1.2 % increasing from 1% in the year 2003-2005. Taking into account the crime committed by juveniles separately, there was an increase by 13.6%. The highest increase in the incidents of crime by juveniles was observed under the head ‘Assault on women with the intention to outrage her modesty’. During the year 2013, as per NCRB report, 33,201 murders were registered of which 955 were committed by juveniles which constitutes 2.87% of total murders. Rape is the most violent of crimes committed by juveniles. As per NCRB report, total of 33,707 reported incidents of rapes took place of which 1737 were committed by juveniles. This constitutes 5.15 % of the total. The data for the year 2013 reveals that the involvement of juveniles in conflict with law, against human body and property is higher than the overall figures of involvement in IPC crimes. There is a steep increase in juveniles committing heinous offences. The issue of growing criminality among juveniles has not only been a cause of concern for the law enforcing authorities but also for social scientists and judicial

²⁹ Salil Bali Vs union of India, (2013) 7SCC 705.

³⁰ Salil Bali vs. Union of India, (2013) 7SCC 705.

system. After the failure of the SLP³¹ the view emerged that whatever was created by way of a legislation protecting juveniles can be undone only through a legislative process.

Under the Juvenile justice Act, 2000 maximum punishment that could be awarded was 3 years in juvenile home, irrespective of the heinousness of the offence committed. This led to a serious question whether the act served its purpose of reforming the delinquent who was severely in conflict of law after committing heinous offences such as rape and murder. Under the old Juvenile justice Act, 1986 a juvenile meant a boy who had not attained 16 years of age and a girl who had not attained 18 years,³² which according to many criminologists was appropriate as boys are more exposed to adverse social influences than girls and delinquency comes to them earlier as compared to the latter who lack opportunities due to their socialization in the society, therefore in order to restore the same position prior to Juvenile Act 2000, the new Act of 2015 was brought in which allows treating juveniles as adults for heinous offences.³³

Criminal law around the world is based on this basis, and punishments are given depending on the seriousness and gravity of offences.

The new Juvenile Justice (Care and Protection of children) Act, 2015 which allows juveniles aged between 16 and 18 years to be tried as adults for heinous crimes such as rape, murder is the right step taken. The government has thus stroked a fine balance to ensure that no injustice is done to innocent children. This amendment is in line with the Plea of petitioners in Dr. Subramanian Swamy Vs Raju THR Member juvenile justice board case³⁴ which was of judicial waiver. In their plea the petitioners said that in judicial waiver perpetrators of certain grave offences can be prosecuted as adults once the special juvenile courts waive off the jurisdiction and transfer the juvenile's case to an ordinary court of law.

Under the Juvenile justice Act, 2015 preliminary assessment would be conducted by the board to determine whether the delinquent who is above 16 years and has committed the heinous offence should be tried by adult court or not depending upon various factors that is considered in the

³¹ Dr.Subramanian swamy & others VS. Raju THR. Member Juvenile Justice Board & others, SLP CrI. No.1953 of 2013.

³² Section 2(h), Juvenile Justice Act, 1986.

³³ Section 2(33), Juvenile Justice Act, 2015.

³⁴ Dr.Subramanian swamy & others VS. Raju THR. Member Juvenile Justice Board & others, SLP (CrI.) No.1953 of 2013.

assessment³⁵ this assessment needs to be completed in a period of 3 months from first production of the child before the board³⁶, it is further provided that where the board comes to the conclusion that there is a need for trial of the child as an adult then the board will transfer the case to children's court³⁷ for the trial³⁸. The children's court shall conduct the further trial according to the provisions of section 19 of JJ Act, 2015. The act further adds that no juvenile even for heinous offences can be subjected to life imprisonment or sentenced to death.³⁹

The new JJ Act, 2015 has drawn a lot of criticism from child rights activists who have called it a regressive step and a blow to the *parens patriae* philosophy of the state towards juveniles.

Protection of Children from sexual offences Act, 2012

In the second most populous country in the world-India⁴⁰, 46% consists of children of all ages which amount to 19% of the world's total child population. Of the total child population of the country, nearly half of these children are in the need of care and protection.⁴¹ According to World Health Organization (herein after referred as WHO), one in every four girls and one in every seven boys in the world are sexually abused. The WHO found that at any given time, one of ten Indian children is the victim of sexual abuse.⁴² Recent statistics released by the National Crime Reforms Bureau reveal that there has been a steady increase in the sexual crimes against children and nearly 8,800 cases of rape were registered under the Prevention of Children against sexual offences act,2012 (POCSO) in the year 2015 itself.⁴³ The study conducted by the Ministry of Women and Child Development in 2007⁴⁴ revealed that the suffering of more than half of the children surveyed is exacerbated by the lack of specific legislations to provide remedies for these crimes.

³⁵ Section 15, Juvenile Justice Act,2015.

³⁶ Section 14, Juvenile Justice Act,2015.

³⁷ Section 2(20), Juvenile Justice Act, 2015.

³⁸ Section 18(3), Juvenile Justice Act, 2015.

³⁹ Section 21, Juvenile Justice Act, 2015.

⁴⁰ India second most unequal country in the world: wealth report, Hindustan Times, November 24, 2016.

⁴¹ Study on child Abuse in India 2007, published by the Govt. of India (Ministry of Women & Child Development).

⁴² Pinki virani, (2000). Bitter Chocolate: Child Sexual Abuse in India. New Delhi: Penguin Books.

⁴³ Deepimantiwari, NCRB data: 25 per cent of children raped were targeted at work by their employers and co-workers, Indian Express, August 31, 2016.

⁴⁴ Study on child Abuse in India 2007, published by the Govt. of India (Ministry of Women & Child Development).

The Indian criminal system has been found to be deficient in dealing, recognizing and punishing sexual offences other than rape as rape is considered a very heinous and serious crime under the Indian Penal Code.⁴⁵ The prosecution while dealing with cases of sexual harassment, pornography, stalking, and other related offences had to rely on imprecise and complicated provisions such as outraging the modesty of women provided under section 354 of the IPC. The problem of child sexual abuse requiring less complicated and more stringent legal provisions was realized by the Parliament which led to the introduction of a special law which specifically dealt with child sexual abuse known as Prevention of Children against Sexual Offences Act, 2012. The Protection of Children from Sexual Offences Act, 2012 (POCSO) received the President's assent on 19th June 2012 and was notified in the Gazette of India on 14 November 2012 which coincidentally happened to be the Children's day.

According to WHO⁴⁶, Child Sexual abuse is an inappropriate sexual behavior with a child. It includes fondling with a child's genitals, making the child fondle the adult's genitals, intercourse, incest, rape, sodomy, exhibitionism and sexual exploitation. To be considered 'child abuse', these acts have to be committed by a person responsible for the care of a child (for example a baby-sitter, a parent, or a daycare provider), or related to the child. The Prevention of Children Against Sexual Abuse Act, 2012 (herein after referred to as "the act") in furtherance of the definition given by the WHO goes on to define child sexual abuse in a more comprehensive manner by incorporating penetrative sexual assault⁴⁷, aggravated penetrative sexual assault⁴⁸, sexual assault⁴⁹, aggravated sexual assault⁵⁰, sexual harassment⁵¹, using child for pornographic purposes⁵² and trafficking of children for sexual purposes within the ambit of child sexual abuse. The act deems the aforesaid offences to be treated as aggravated under certain circumstances when the abused child is mentally ill or when the offence is committed by a person who is in a position of trust or authority in relation to the victimized child.

⁴⁵Section 376, Indian Penal Code, 1872.

⁴⁶World Health Organization (1999): Report of the Consultation on Child Abuse Prevention; Geneva, http://www.who.int/violence_injury_prevention/violence/neglect/en/.

⁴⁷ Section 3, the prevention of children against sexual offences act, 2012.

⁴⁸ Section 5, the prevention of children against sexual offences act, 2012.

⁴⁹ Section 7, the prevention of children against sexual offences act, 2012.

⁵⁰ Section 9, the prevention of children against sexual offences act, 2012.

⁵¹ Section 11, the prevention of children against sexual offences act, 2012.

⁵² Section 13, the prevention of children against sexual offences act, 2012.

Section 2 (1) (d) of the act defines a child as any person below the age of 18 years and provides protection to all children against sexual abuse. The inclusion of any person below the age of 18 years under the act provides for gender neutrality of the act⁵³ and the sexual offence can be committed against any gender unlike rape which is a gender specific offence and can only be committed against a woman⁵⁴.

It has been noted in various cases that people who see an offence being committed, do not report it to the concerned authorities as they are not bound to do so. In order to regulate the increasing ignorance of the people, Section 19 and 20 of the act provide for mandatory reporting of sexual offences. This section creates a third party liability and casts a moral as well as legal duty on a person including but not limited to any personnel of media, hotel, lodge, club, hospital, etc who is privy to the knowledge that a child has been sexually abused to report the commission of the act with the Special Juvenile Police Unit or the local Police. Thus, a teacher finds out from somewhere that one of her students has been sexually abused by a colleague is legally obliged to bring the matter to the attention of the concerned authorities. If a person is aware about a child being subjected to sexual abuse and fails to report the same to the concerned authorities, shall be punished with imprisonment of either description which may extend to six months or with fine or with both.⁵⁵ The act further makes it an offence to report false information, when such report is made other than in good faith.⁵⁶ It states that any person, who makes false complaint or provides false information against any person, in respect of an offence committed under sections 3, 5, 7 and section 9, solely with the intention to humiliate, extort or threaten or defame him, shall be punished with imprisonment for a term which may extend to six months or with fine or with both. Where such information is provided against a child, the punishment may extend to one year.

Section 19 (5) of the act provides the police with the role of child protectors during the investigative process. Thus, the police personnel after receiving a report of sexual abuse of a child are given the responsibility of making urgent arrangements for the care and protection of

⁵³<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4557243/>.

⁵⁴ Section 375, Indian Penal Code, 1872.

⁵⁵ Section 21 (1), The Prevention of Children against Sexual Offences Act, 2012.

⁵⁶ Section 22 (1), The Prevention of Children against Sexual Offences Act, 2012.

the child, such as obtaining emergency medical treatment for the child and placing the child in a shelter home, should the need arise.

Around 27 million cases are pending in Indian courts.⁵⁷ In order to make sure that the victims of child sexual abuse do not meet the same fate of delayed and lengthy trials, section 28 Of the act provides for designation of special courts. A court of sessions in every district shall be designated as a special court to try the offences under this act. The honorable high court of Uttar Pradesh in *Ashish Kumar & others. V. State of U.P & others*⁵⁸ held that the magistrate of court of sessions is empowered under section 209 of IPC to refer the matter to the special court if the offence falls under POCSO act.

Child sexual abuse is a very multidimensional and complicated problem being faced by the country in the modern times. The Prevention of Children against Sexual offences Act tries to provide a legal framework which directly deals with the nucleus of the issue, moving away from the recurring use of Section 354 of IPC to deal with sexual offences other than rape. After a deep study into child sexual abuse, it has been realized that sexual offences are not confined to any one particular gender and all children, irrespective of gender are the victims of sexual abuse and the act also follows gender neutrality. The act further incorporates various heinous sexual offences within the ambit of the act which were lacking in the previous legislations. However, as this is relatively a new law, there are certain challenges which this enactment faces.

Sexual contact between two adolescents or between an adolescent and an adult are considered illegal under the POCSO Act 2012, because no exception has been granted in the Act under which an act of sexual encounter with a person under 18 is an offence irrespective of consent or the gender or marriage or age of the victim/the accused. However, it is proposed that any consensual sexual act that may constitute penetrative sexual assault should not be an offence when it is between two consenting adolescents, otherwise both the adolescents will be charged under the POCSO Act, 2012.

Section 2 (1)(d) of POCSO act, 2012 defines children as those below the age of 18 years but the exception to section 375 provides that a husband will not be held guilty of having sexual

⁵⁷<https://www.theguardian.com/world/2016/may/05/indias-long-wait-for-justice-27-million-court-cases-trapped-in-a-legal-logjam>.

⁵⁸*Ashish Kumar & others. V. State of U.P & others*, MANU/UP/0439/2015.

intercourse with his 15 years old wife which is directly in violation to the whole idea behind the incorporation of the POCSO act.

CONCLUSION

The only effective way to reduce and prevent juvenile crime is to balance tough enforcement measures with targeted, effective and intervention initiatives.

*Janet Reno*⁵⁹

India is a secular country which provides for positive discrimination for children. Despite the Constitutional vision of a healthy and happy child protected against abuse and exploitation, and a National Policy for Children, the majority of children in India continue to live without a cared, protected and meaningful childhood. Effective implementation of the laws enacted is the key to the universal and uniform development of the society. There are several constraints which forbid effective implementation of the laws. Due to relatively unsuccessful outcomes of child development initiatives in India, the condition of underprivileged kids and youth is appalling and needs unwavering attention. Violation of the rights of children and violation of rights by children seems to have reached epidemic proportion in our country. There is a need to intensify efforts for children welfare at all levels to implement the policies and programs of the government and contribute to the safety of children. In pursuance of these provisions of constitution JJ Act and POCSO Act have been formulated.

Every victim of a crime demands not begs its rightful share of justice for the mankind, by the mankind from the mankind. Age below 18 years had become the 'getaway pass' from the criminal prosecution for juveniles. Analysis of heinous crimes committed by juveniles in context of crimes committed against women is more than 5 % which is certainly high. 63.92% of total juvenile crimes were committed by juveniles between the age group of 16 to 18 years in 2011. Studies conducted by NCRB, Ministry of Women and Child Development, reveal that poor education and poor economic set up are generally the main attributes of juvenile delinquents. Further, 56.7% of the total juveniles arrested fell into the lowest income category. In such circumstances the heinous crimes such as rape, murder which totally destroys the moral of the victim and its family deserves graver punishment. Many offenders of these crimes walked free

⁵⁹ Former Attorney General of the United States.

after serving a minimal period of sentence after being proven juvenile as per the so called records previously. It was high time that the law was brought on the same footing as of countries like U.S, U.K where a juvenile is also tried in a criminal court depending on the gravity of the offence committed by the minor. It was in pursuance of this, that the new Juvenile Justice Act, 2015 was formulated to bring the much needed reforms and to restore to a large extent the position of juveniles as given in the Juvenile Justice Act, 1986. The response to juvenile crime has to be fair, appropriate, and should take into consideration the developmental Psychology. The new legislation does not provide for uniform reduction of age for all juveniles in the country. It merely states that juveniles are to be tried as adults after considering the gravity of the offence. Therefore it can be concluded that the reduction in age for juveniles in relation to heinous offences is the right step taken by the legislature. POCSO act, 2012 has been drafted to strengthen the legal provisions for the protection of children from sexual abuse and exploitation. As crimes against the children are increasing, the future of this nation is at stake. Laws are codified to change the existing situation of society, but negligible difference has been made in the area of sexual offences against children. Rather it would be correct, saying that the situation is getting worse. The list of ones to blame is in exhaustive, few reasons namely are, high pendency rate of POCSO cases at specially designated courts under the POCSO Act,2012, insufficient policing system, corruption at investigational level and lack of awareness about the POCSO Act,2012 making it easy for the criminals to escape the punishments they deserve.