

JUVENILE JUSTICE: SECURING THE RIGHTS OF CHILDREN DURING 1998 - 2008

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*This article seeks to assess functioning of the legislative framework for juvenile offenders over the past ten years. It discusses various technical issues under the Juvenile Justice Act, 2000 such as the date of application of the Act, whether it overrides other special Acts in its application to children, methods for determination of age of children and procedural relaxations for raising the plea that the offender is a child, and concludes that significant reform has been achieved in these areas. The absence of an explicit provision for allowing legal representation before the Child Welfare Committee under the Act, interpretative ambiguities in the Commission for Protection of Child Rights Act, 2005 and the lack of establishment of Children's Courts despite stipulation by the same to that effect are, however, the problems left unsettled under the current legal framework. The concluding remarks are appreciative of the judiciary's recent decisions that uphold the protection of child rights against some procedural or formalistic hurdles.***

I. INTRODUCTION

The last ten years have been action-packed in the area of juvenile justice in India as it saw replacement of the Juvenile Justice Act, 1986 (*hereinafter* JJA) by the Juvenile Justice (Care and Protection of Children) Act, 2000 (*hereinafter* JJA 2000), amendments to the JJA 2000 in the year 2006 and framing of Model Rules, 2007 as well as a remarkable increase in the number of cases reaching the High Courts and the Supreme Court. However, consolidated literature on the subject is almost non-existent. This article aims to fill this gap and analyses the provisions of the Juvenile Justice Acts and the judicial decisions of the Supreme Court and High Courts between 1998 and 2008. The word 'child' has been used in preference to 'juvenile' despite its differential usage in the JJA 2000¹ as in the

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** Abstract supplied by Editors.

¹ § 2(k) of the JJA 2000 defines 'juvenile' or 'child' means a person who has not completed eighteenth year of age but later on uses of the word 'juvenile' in provisions relating to children in conflict with law and the term 'child' in provisions relating to children in need of care and protection.

opinion of the author, the word 'juvenile' is not only a socially negative term carrying a stigma, but also the differential usage has only created confusion in the scheme and serves no real purpose.

II. BRIEF LEGISLATIVE BACKGROUND²

The Apprentices Act, 1850 was the first legislation dealing with children in conflict with law, providing for binding over of children under the age of 15 years found to have committed petty offences as apprentices. Subsequently, the Reformatory Schools Act, 1897 provided that children up to the age of 15 years sentenced to imprisonment may be sent to reformatory schools rather than prison. The Madras Act started the era of diversion of all children from the criminal justice system by establishment of a separate juvenile court and the residential institutions under it in 1920 which was followed by many other States. The Children Acts passed around this time had certain common features though they laid down different cut-off ages for defining children.³ They all included two categories of children: delinquent and neglected children. However, the definition of 'neglected children' differed in these legislations. They all provided for establishment of a separate children's court to deal with all cases of children covered by the Children Act. These Children Acts also made provisions for the establishment of separate residential institutions⁴ to house the children during the pendency of their proceedings or after disposal of their cases by the children's courts, directing them to be sent to an institution. Use of prison was permitted in exceptional circumstances under these legislations.

Parliament enacted the first central legislation, namely, the Children Act, 1960⁵ as the model legislation. All the states that enacted their Children Acts after 1960 followed the same pattern. The central Act was applicable only to the Union Territories. The Education Minister, who moved the Children Bill in 1959, stated that the subject matters constituting juvenile justice fell in the State list⁶ of the Constitution of India. The Children Act, 1960 introduced a sex-discriminatory definition of child⁷ and established two separate adjudicatory bodies to deal with children in conflict with law⁸ and children in need of care.⁹ It prohibited imposition of death penalty or sentence of imprisonment or use of jails or police station for

² See VED KUMARI, *THE JUVENILE JUSTICE SYSTEM IN INDIA: FROM WELFARE TO RIGHTS*, Chapter 2 (2004).

³ For example, the Madras Children Act defined child as persons below the age of 14 years but applied it to young offenders till the age of 18 years. The Bombay Children Act included children till the age of 16 years and the West Bengal Children Act included children up to the age of 17 years.

⁴ The nomenclature of these institutions differed in different legislations. They were referred to as (junior or senior) remand homes, or children home or special home etc.

⁵ Prior to this Act, Parliament discussed the Children Bill, 1953 at great length but that was dropped in view of reorganization of States in 1954.

⁶ Namely Entries 1 and 3.

⁷ It applied to girls till the age of 18 years and to boys till the age of 16 years.

⁸ Namely, the Children's Court.

⁹ Namely, the Child Welfare Board.

keeping children under any circumstance. It did not recognize the right to a lawyer in the proceedings before the children's courts. A similar provision in the Saurashtra Children Act was declared to be unconstitutional by the Gujarat High Court in 1969.¹⁰ The Children Act, 1960 was amended in 1978 to permit lawyers before the children's courts but not before the Child Welfare Board.

In 1986, Parliament passed the Juvenile Justice Act for the whole country. There was no discussion during Parliamentary debates on the competence of Parliament to enact such legislation. The Act was enforced throughout the territory of India except the State of Jammu and Kashmir on October 2, 1987, bringing in a uniform system of juvenile justice throughout the country. While it retained the scheme and primary features of the Children Act 1960, the JJA substituted the word 'juvenile' for 'child'. It continued the same sex-discriminatory definition of child. It provided two separate authorities¹¹ to deal with the two categories of delinquent and neglected children.¹² It had the same three categories of residential institutions¹³ as provided by the Children Act, 1960. The three new provisions provided for establishment of Advisory Boards, creation of a Children's Fund and appointment of visitors for each institution.

In 2000, Parliament enacted the JJA 2000 as it found it "expedient to re-enact the existing law relating to juveniles bearing in mind the standards prescribed in the Convention on the Rights of the Child, 1989 (*hereinafter* CRC), the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), and all other relevant international instruments."¹⁴ The JJA 2000 was amended in 2006 and new Model Rules, 2007 under it were notified on October 26, 2007.¹⁵ These Model Rules are applicable to every state unless replaced by their own new Rules.¹⁶ In *Pratap Singh v. State of Jharkhand*, (*hereinafter* *Pratap Singh*)¹⁷ the Supreme Court had not found itself bound by the Model Rules framed by Parliament as it had no rule making power under the provisions of the JJA 2000 as it existed then. However, a proviso has been inserted in § 68 making the Model Rules framed by Parliament binding till the State Government frame new rules.¹⁸

¹⁰ Kario @ Mal Singh Malu and Others v. State of Gujarat, (1969) 10 CriLJ 66.

¹¹ Renamed as Juvenile Court and Juvenile Welfare Board.

¹² Though the term 'neglected juvenile' was defined a bit differently.

¹³ Namely, Observation Home for all children during the pendency of proceedings under the Act; Children Homes for children found to be neglected; Special Homes for children found to have committed an offence.

¹⁴ Opening statement of the JJA 2000.

¹⁵ G.S.R.679(E), Ministry of Women and Child Development, available at <http://www.wcd.nic.in/> (Last visited on October 8, 2008).

¹⁶ This paper is limited to the provisions contained in the Model Rules, 2007.

¹⁷ (2005) 3 SCC 551.

¹⁸ § 68 as amended reads: **Power to make rules.**-(1) The State Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act. *Provided* that the Central Government may, frame model rules in respect of all or any of

III. MAIN FEATURES OF THE JJA 2000

The JJA 2000 seeks to use the term ‘child’ as distinguished from ‘juvenile’ while both of them have been defined as “a person who has not completed eighteenth year of age.” However, the distinct usage gets blurred in many sections and interpreting the sections strictly by reference to the specific term used in different parts of the sections results in confusion.¹⁹ As is apparent from the nomenclature of the JJA 2000, it provides for a segregated approach in dealing with the two categories of children covered under it, namely, ‘juveniles in conflict with law’ and ‘children in need of care and protection’. It continues to have two separate adjudicatory bodies to deal with the two categories of children. The JJA 2000 lays down that juveniles in conflict with law may be kept in an observation home while children in need of care and protection need to be kept in a children home during the pendency of proceedings before the competent authority. This provision is in contradistinction with the earlier Acts which provided for keeping all children in an observation home during the pendency of their proceedings, presuming children to be innocent till proved guilty.

A revolutionary change introduced by the JJA 2000 is in the constitution of the children court referred to as the Juvenile Justice Board (*hereinafter* JJB). It is constituted as a bench consisting of one Magistrate and two social workers. The decisions are to be made by majority and the Magistrate has a casting vote in case of a tie. The JJB is required to determine age, decide the question of bail, determine if the child has committed the alleged offence or not, as well as pass appropriate orders in the matter. In deciding any of these matters, the two social workers together may overrule the decision of the Magistrate. It means that the members of the JJB do not have to decide the matter in strict compliance of technicalities of laws as two of the three members of the JJB are non-law persons. However, this aspect of the provision has not been given its due recognition either in the functioning of the JJB or in the Model Rules. In Delhi, the Principal Magistrates take help of the lay members only at the stage of choosing appropriate measure under the Act. The lay members also neither feel empowered nor have been enabled to appreciate technicalities of evidence to decide matters relating to bail, age, and commission of offence.

the matters with respect to which the State Government may make rules under this section, and where any such model rules have been framed in respect of any such matter, they shall apply to the State until the rules in respect of that matter is made by the State Government and while making any such rules, so far as is practicable, they conform to such model rules.

¹⁹ For example, usage of both terms in §§ 23-26 is unnecessary. On the other hand, § 40 uses only the term ‘child’ but includes ‘children in special schools’ while in the scheme of the Act, only juvenile found to have committed an offence could be sent to a special home. § 52(2)(b) collapses the distinction completely and uses the phrase ‘neglected juvenile’.

The JJA 2000 has provided for appointment of special police officer in each police station to deal with children under it. It continues to provide for grant of bail to all children irrespective of the offence being bailable or non-bailable, except when the release will expose the child to moral danger or bring the child in contact with known criminals or will be against the interest of justice.²⁰

IV. CRUCIAL ISSUES

This part of the paper deals with various crucial issues which have been raised repeatedly before the higher courts since the first Children Act was passed in 1920 and focuses on how many of these issues have been taken care of by the JJA as amended in 2006. However, many decisions delivered since 2006 do not refer to the amended provisions of the JJA 2000.

A. RELEVANT DATE FOR APPLICABILITY OF THE ACT

While all the Acts dealing with children in conflict with law laid down the cut-off age defining child, these legislations did not spell out when the child should be below that age. Is it the date of commission of offence, or arrest, first production before the magistrate, or submission of charge sheet, or beginning of trial?²¹ The Supreme Court in *Umesh Chandra v State of Rajasthan*²² held that it is the date of commission of offence that is relevant for determining the applicability of the Act. However, in *Arnit Das v. State of Bihar*,²³ the Supreme Court held that it is the age on the date of first production of the child before the competent authority that determines the applicability of the Act. A Five Judge Bench in *Arnit Das v. State of Bihar (hereinafter Arnit Das II)*²⁴ reviewed *Arnit Das* as the Division Bench could not have been overruled *Umesh Chandra* decided by a bench of three judges. The Five Judge Bench decided not to reconsider the issue being of only academic interest in the case²⁵ and upheld the ruling of *Umesh Chandra*. The confusion created by these contradictory decisions of the Supreme Court has now been set at rest by the following definition of “juvenile in conflict with law” replaced by the JJA (Amendment) Act 2006 making it clear that the age at the date of commission of offence is relevant for applicability of the JJA 2000:

“§ 2(1)-“juvenile in conflict with law” means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence.”

²⁰ § 12, JJA 2000.

²¹ In case the child ceased to be so during the pendency of proceedings, the Acts provided that the case has to continue as if the child has continued to be so. E.g., § 3, JJA 2000.

²² (1982) 2 SCC 202.

²³ AIR 2000 SC 2264.

²⁴ (2001) 7 SCC 657.

²⁵ The court had already given a finding that the accused before them was above the specified age on the date of offence.

B. APPLICATION OF THE ACT TO PENDING CASES

§§ 20 and 64 of the JJA 2000 lay down that the provisions of this Act will apply to the children's cases pending in various courts as well as of those undergoing imprisonment. These sections were primarily relevant for boys above the age of 16 but below the age of 18 years on the date of commission of offence who were being dealt by the regular criminal courts under the criminal justice system since they were above the age of juvenility under the earlier legislation. However, the age having been increased to eighteen years, their cases were sought to be dealt with under the provisions of the JJA 2000. The Supreme Court held in *Pratap Singh v. State of Jharkhand*²⁶ that if a person was below the age of eighteen years on the date when the JJA 2000 came into force, that is, April 1, 2001, only then provisions of §§ 20 and 64 applied to them. The same test was applied in *Bijender Singh v. State of Haryana*.²⁷

§§ 20 and 64 of the JJA 2000 were amended in 2006 and a proviso and an explanation were added to each.²⁸ Explanation to § 20 makes it abundantly clear that the question of juvenility is to be determined by reference to the age of the person on the date of offence. The explanations added to these sections clearly state that if the person was below the age of 18 years on the date of commission of offence, the final orders in the pending cases of such persons are to be made under the JJA 2000, "even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed". However, the Supreme Court has continued to apply the test of age at the date of enforcement of the JJA 2000 in cases decided even after the amendment of the Act without any reference to the amended provisions of the Act.

²⁶ (2005) 3 SCC 551.

²⁷ (2005) 3 SCC 685.

²⁸ Proviso and the Explanation to §20:

Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.

Explanation.— In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of clause (1) of § 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed.

Proviso and the Explanation to § 64 read as follows: *Provided* that the State Government, or as the case may be the Board, may, for any adequate and special reason to be recorded in writing, review the case of a juvenile in conflict with law undergoing a sentence of imprisonment, who has ceased to be so on or before the commencement of this Act, and pass appropriate order in the interest of such juvenile.

Explanation.— In all cases where a juvenile in conflict with law is undergoing a sentence of imprisonment at any stage on the date of commencement of this Act, his case including the issue of juvenility, shall be deemed to be decided in terms of clause (1) of § 2 and other provisions contained in this Act and the rules made thereunder, irrespective of the fact

Jameel's plea for transfer of his case to the juvenile court for final orders as per the provisions of the JJA was refused by the Supreme Court in a judgment given on January 10, 2007.²⁹ Similarly, in *Jyoti Prakash Rai v. State of Bihar*³⁰ decided on March 4, 2008, the Supreme Court again refused to transfer the case to the juvenile court for final orders on the ground that he had ceased to be 18 years of age on April 1, 2001 as laid down in *Pratap Singh*.

While reference was made to the JJ (Amendment) Act 2006 in *Balu @ Bakthvatchalu v. State of Tamil Nadu*,³¹ the Supreme Court referred the matter back to the lower court for age determination but the question for which such age determination was necessary was framed on *Pratap Singh* terms, namely, to determine "if the child was below the age of 18 years on April 1, 2001". Neither was the amendment in § 20 mentioned nor was the question rephrased in accordance with its amended language. It is apparent that even in 2008 neither the judges nor the lawyers practising in the Supreme Court are aware of the amendments made in the JJA 2006 in 2006. The only case in which the amended provisions were applied is *Jayasingh v. State by Inspector of Police*³² in which the accused was sentenced to life imprisonment for murder as he was above the age of sixteen years. As he was below the age of 18 years on the date of commission of offence, he was ordered to be released forthwith having already spent seven years in prison while he could not have been kept in custody for more than three years in view of § 15(1)(g) read with §§ 20 and 64.

C. APPLICATION OF THE ACT TO COMMISSION OF SPECIAL OFFENCES

The question whether the JJA (and earlier Children Acts) will apply to a child who has committed a serious offence has been raised many times under different legislations. The earlier cases questioned applicability of the Acts to children committing offences punishable with death penalty or life imprisonment in view of the provisions contained in the Code of Criminal Procedure.³³ The Supreme Court in *Rohtas v. State of Haryana*³⁴ and *Raghubir v. State of Haryana*³⁵ held that the Children Act applicable at that time applied to such cases.

that he ceases to be a juvenile on or before such date and accordingly he shall be sent to the special home or a fit institution, as the case may be, for the remainder of the period of the sentence but such sentence shall not in any case exceed the maximum period provided in § 15 of this Act."

²⁹ *Jameel v. State of Maharashtra*, AIR 2007 SC 971.

³⁰ AIR 2008 SC 1696.

³¹ AIR 2008 SC 1434.

³² Date of Judgment, February 15, 2008; available at <http://www.judis.nic.in/supremecourt/helddis3.aspx> (Last visited on February 7, 2010).

³³ For example, § 27 of the Code of Criminal Procedure, 1973 permits that cases of children below the age of 16 years who have committed offences other than those punishable with death penalty or life imprisonment may be transferred to the children court.

³⁴ AIR 1979 SC 1839.

³⁵ 1981 CriLJ 1497 (SC).

Later the question arose in view of the *non-obstante* clause contained in legislations dealing with special offences providing for applicability of that Act to all offences committed under those legislations. For example, the Guwahati High Court³⁶ held that the TADA Act applied to children committing offences under that Act. The Orissa High Court³⁷ held that the bail provisions of the JJA were overshadowed by the NDPS Act. The Kerala High Court³⁸ took a completely different view of the matter and held the JJA applicable to children committing offences under the SC and ST (Prevention of Atrocities) Act, 1989. It resolved that there was no conflict between the provisions of the two Acts as the former dealt with offences and the latter with offenders. The Supreme Court in *Raj Singh v. State of Haryana*³⁹ held that JJA applied to a child charged under the NDPS Act without any analysis of the language of the Acts involved. In *Madan Singh v. State of Bihar*,⁴⁰ two children charged with TADA offences were dealt with under the JJA.

The issue now has been resolved by insertion of sub-section (4) to § 1 which reads as follows:

“Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all cases involving detention, prosecution, penalty or sentence of imprisonment of juveniles in conflict with law under such other law.”

It is apparent that now children committing any offence have to be dealt with under the provisions of the JJA 2000 notwithstanding anything contrary contained in any other special legislation.

D. AGE DETERMINATION

The National Family Health Survey III conducted in 29 States showed that nationally only 41% children under 5 years of age had their birth registered with civil authorities. In the households in the lowest wealth strata the registration of births was 25% and “only one in ten had a birth certificate.”⁴¹ Majority of children dealt with under the JJA come from the lowest wealth strata and do not have a birth certificate. The medical report provides a range of age and does not determine it accurately giving a wide discretion to the judges who determine the age using various factors. In *Bhoop Ram v. State of U.P.*,⁴² the Supreme Court gave precedence to authentic documentary evidence over the medical opinion

³⁶ Jagdish Bhuyan v. State of Assam, 1992 CriLJ 3194 (Gau).

³⁷ Antaryami Patra v. State of Orissa, 1993 CriLJ 1908 (Ori).

³⁸ *In re* Session Judge, Kalpetta, 1995 CriLJ 330 (Ker).

³⁹ (2000) 6 SCC 759.

⁴⁰ (2004) 4 SCC 622.

⁴¹ THE TIMES OF INDIA, (New Delhi), November 5, 2007, 17.

⁴² 1989 (1) SCALE 799.

saying that medical evidence was an estimate based on radiological examination and physical features and the possibility of an error of estimate creeping into the opinion cannot be ruled out. It further reiterated that school certificates should be accepted as reliable and genuine if there was no material on record to throw doubt about the authenticity of the entry. However, in *Ramdeo @ Rajnath Chauhan v. State of Assam*,⁴³ neither the school register nor the medical evidence was relied upon by the Sethi J., even though both supported the plea of the accused as being below the specified age on the date of offence. The medical examination conducted six years after the event stated that the accused was 20 years of age. In his cross examination the doctor opined that the age of the accused could not be below 20 years, but it could exceed by one year and he certainly was not 25 years of age. However, the trial court preferred to rely on the information culled out during cross-examination of the father to hold him to be 19 years of age:

“DWI Firato Chauhan was subjected to severe cross-examination and in the cross examination he admitted that Rajanth, the accused is his second son after Suraj Chauhan, his eldest son. ... When he was 30 years old, his first child was born, that means, before 40 years his first child was born and his second child was born before 37 years. Suraj was born before 34 years. So, Ramdeo Chauhan must be born before 31 years which means that the present age of Ramdeo Chauhan is 31 years. Furthermore, his first son Suraj has married before 10 years. He is now a father of one female child. Rajnath Chauhan is his second son, i.e. he was born after Suraj. Even if I hold that Suraj was 18 years at the time of his marriage, now he must be 28 years of age and Ramdeo Chauhan must be now 25 years of age. If he is now 25 years of age, at the time of alleged crime, he must be 19 years of age.

....

But it seems that the entry in the school admission register is based on a transfer certificate issued by another school. As such, Mailoo Hindi School is not the first school where the accused first got admitted. Furthermore, from the cross examination, it appears that registers of the school are not maintained properly.... But age of the boy was entered into the register on basis of a Transfer Certificate produced at the time of his admission in that school. The source of the age recorded in the original school is not known to us in order to ascertain whether the information furnished at the time of first admission in the school was correct or not and in his respect, no evidence has been adduced. *Furthermore, if the admission of the father in his cross examination regarding the age of the accused is*

⁴³ (2001) 5 SCC 714, ¶ 5, Sethi, J.

accepted, entries in the school certificate cannot be said to be correct particulars of the age of the accused.

....

Furthermore, the manner in which he committed the murder in a pre-planned manner and without hesitation by chopping one after another with a spade, which has been vividly described by him in his confession made before the Judicial Magistrate, *I think such type of pre plan, cold blooded, ghastly, gruesome murder cannot be possible for a boy below 16 years of age.*" (Emphasis supplied)

The trial court was more influenced by the nature of offence committed by the accused rather than the entry in the school register supported by medical opinion indicating him to be a child on the date of the offence. This reasoning was, however, quoted with approval by Sethi J., while upholding death penalty given to the accused.

Such wide discretion has now been curtailed by clear rules on the subject. Rule 12 of the Model Rules 2007 lays down in detail the evidence to be taken into consideration in determining age.⁴⁴ It declares matriculation certificate,

⁴⁴ Rule 12, Procedure to be followed in determination of age.

(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat; (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the

age certificate from the school first attended and medical evidence as conclusive proof of age. In case of medical evidence, it further declares that in case the age cannot be determined accurately, the age determining body may “give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.”

Further, sub-rule 6 of Rule 12, provides that the provisions of sub-rule 3 apply even to those disposed off cases in which the age was not determined according to the rules laid down in Rule 12. It further provides that the sentences passed in such cases need to be dispensed with for “passing appropriate order in the interest of the juvenile in conflict with law.” Determination of age and the sentence passed in *Ram Deo Chauhan v. State of Assam*⁴⁵ may be reopened as per this Rule.

The Supreme Court, in *Rajendra Chandra v. State of Chhattisgarh*⁴⁶ has evolved one more principle in relation to age determination, namely, the benefit of doubt in age determination is to be given to the child. Now Rule 12(3)(b) of the Model Rules 2007 provides for giving benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

E. PLEA OF CHILD STATUS

‘Ignorance of law is not an excuse’ is a well known maxim of criminal liability. However, ignorance of law among the judges at different level, defence lawyers as well as prosecution lawyers is writ large in cases relating to juvenile justice. In *Gopinath Ghosh v. State of West Bengal*,⁴⁷ the Supreme Court, while allowing the plea of child status that was raised for the first time before it and that too, by amending the appeal petition, referred the matter back to the lower court for age determination. It said:

“Ordinarily the Supreme Court would be reluctant to entertain a contention based on factual averments raised for the first time before it. However, the Court is equally reluctant to ignore, overlook or nullify the beneficial provisions of a very

purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of § 7A, § 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule(3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.

⁴⁵ (2001) 5 SCC 714.

⁴⁶ (2002) 2 SCC 287.

⁴⁷ 1984 Cri LJ 168 (SC).

socially progressive statute by taking shield behind the technicality of the contention being raised for the first time in the Supreme Court.”

It further imposed a duty on the magistrates to determine age in all cases in which the accused appears to be 21 years of age or below to prevent the cases going all the way up to the Supreme Court and then being referred back to the lower court for age determination. However, there are many cases in which the plea of child status raised at a later stage was treated with suspicion as being an afterthought⁴⁸ or not allowed in the absence of evidence.⁴⁹

§ 7A has been inserted in the JJA in 2006 to deal with this problem and reads as follows:

“7A.Procedure to be followed when claim of juvenility is raised before any court.- (1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, *even after final disposal of the case*, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect.”

It is noteworthy in this section that the claim of juvenility may be raised even after disposal of a case.

⁴⁸ *Supra* note 46.

⁴⁹ Murari Thakur and Another v. State of Bihar, AIR 2007 SC 1129.

F. THE UNADDRESSED ISSUES

The JJA 2000 applies to children in need of care and protection. While the section defining ‘children in need of care and protection’ contains a long list of categories of children included in it,⁵⁰ it has continued with the system of having a separate body for dealing with children in need of care and protection, namely, the Child Welfare Committee. The Committee consists of non-judicial members who have been vested with the powers of a Magistrate. The Committee has to follow the procedure of summons cases as prescribed in the Code of Criminal Procedure in holding proceedings.

There are very few cases reported in relation to neglected children⁵¹ and most of the issues relating to nature of the Committee and its proceedings, such as the right to a lawyer, burden of proof, standard of proof remain unaddressed. Since the constitutionality challenge in *Kario @ Mansingh Malu’s case*,⁵² prohibition against a lawyer before the juvenile court was abolished. However, the proceedings before the Committee continue to be conducted without a lawyer. The definition of deprivation of liberty under the UN Rules for Protection of Juveniles Deprived of Liberty⁵³ reads:

“The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to

⁵⁰ § 2(d), JJA 2000 reads, “child in need of care and protection” means a child-

- (i) who is found without any home or settled place of abode and without any ostensible means of subsistence,
- “(ia) who is found begging, or who is either a street child or a working child,”
- (ii) who resides with a person (whether a guardian of the child or not) and such person-
 - (a) has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out, or
 - (b) has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person,
- (iii) who is mentally or physically challenged or ill children or children suffering from terminal diseases or incurable diseases having no one to support or look after,
- (iv) who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child,
- (v) who does not have parent and no one is willing to take care of or whose parents have abandoned or surrendered him or who is missing and run away child and whose parents cannot be found after reasonable inquiry,
- (vi) who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts,
- (vii) who is found vulnerable and is likely to be inducted into drug abuse or trafficking,
- (viii) who is being or is likely to be abused for unconscionable gains,
- (ix) who is victim of any armed conflict, civil commotion or natural calamity;

⁵¹ *Supra* note 2, 214-17.

⁵² *Supra* note 10.

⁵³ G.A. res. 45/113, Annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990).

leave at will, by order of any judicial, administrative or other public authority”.⁵⁴

It is clear from this definition that children kept in children homes pursuant to the order of the Committee fall squarely in this definition as they cannot leave the home at will. All those children should have a right to legal counsel.⁵⁵ The Indian Constitution recognizes the right to a lawyer in case of deprivation of liberty for all.⁵⁶ All children are entitled to free legal aid under the Legal Services Authorities Act⁵⁷ also. The Child Rights Convention⁵⁸ and the Beijing Rules⁵⁹ direct that children should be provided with legal representation against deprivation of liberty. However, no provision is made for providing lawyer in the proceedings before the Child Welfare Committee (*hereinafter* CWC). The understanding is that the CWC is a welfare body and the proceedings before it are welfare and not judicial proceedings and hence, there is no need for a lawyer. However, the reality is that they remain deprived of their liberty without any legal assistance and their fundamental rights are thereby violated.

V. THE COMMISSION FOR PROTECTION OF CHILD RIGHTS ACT, 2005

The Commission for Protection of Child Rights Act, 2005 (*hereinafter* the CPR Act) has been made with the specific purpose of providing “for the constitution of a National Commission and State Commissions for Protection of Child Rights and Children’s Courts for providing speedy trial of offences against children or of violation of child rights and for matters connected therewith or incidental thereto.”⁶⁰ This statement of purpose clearly shows two objects of the CPR Act: one, to establish Commissions for Child Protection at the national and state level and second, to establish Children Courts to expeditiously deal with case of offences against children.

Pursuant to the coming into force of the CPR Act, the National Commission for Protection of Children Rights has been long established.⁶¹ Delhi also has recently established the State Commission of Protection of Child Rights.⁶² However, there is no word about establishing the Children Courts to deal with

⁵⁴ Rule 11(b).

⁵⁵ *Id.* Rule 18(a).

⁵⁶ Article 22(1).

⁵⁷ § 12(c).

⁵⁸ Article 37(d).

⁵⁹ Rule 15.1.

⁶⁰ Long Title, The Commission for Protection of Child Rights Act, 2005. *See* §§ 25, 26 for the procedure by which Children’s Courts may be established.

⁶¹ For more details, *see* <http://ncpcr.gov.in/> (Last visited on February 7, 2010).

⁶² Sobhana K, Kanth to head new child rights panel for Delhi, available at <http://www.indianexpress.com/news/kanth-to-head-new-child-rights-panel-for-delhi/359386/> (Last visited on February 6, 2010).

offences against children. The relevant provisions of the Act leave much to be desired in terms of clarity of purpose of such children courts as well as jurisdiction. All legislations dealing with children in conflict or in need of care and protection since the Madras Children Act, 1920 have included a chapter or provisions relating to offences against children. The standard offences included have been employing children for begging, cruelty and exploitation in employment, and giving liquor and psychotropic substance in public places.⁶³ What has always been a moot question is who is to have jurisdiction in such cases, how the cases will be instituted and proceeded with, under those provisions. There has been no reference to any of those sections under any of the Children Acts except few cases decided under the Bombay Children Act, 1948 in which the relevant sections were added to the IPC offences.⁶⁴ However, the CPCRA Act does not clarify whether the Children Court to be established under it, has to deal with those cases only or all cases in which children are victims under any legislation. The Rules framed under the CPCRA Act too are completely silent on these aspects.⁶⁵

VI. CONCLUSION

It is apparent from the above analysis that the juvenile justice system that started as a welfare measure of the state for its children, despite the specific reference to the CRC and the Beijing Rules as the reason for its making, continues to operate from the welfare perspective. Rights of the child have found a reference in the legislation but it is far from recognizing those rights to them. The operations under the JJA 2000 are replete with instances where the lawyers and judges did not apply the law correctly. In case of grave offences by children, the judges continue to apply the penal law approach and not that included under the JJA 2000. The interpretation in some of the recent judgments has been narrow and exclusionary, contrary to the scheme and spirit of the JJA 2000 and the Rules framed under it both of which are inclusionary in nature and strive to cover all cases of children on the border line.

VII. EPILOGUE

Even though the period of study in this article is limited to 1998-2008, the year 2009 has seen some very positive cases and a mention must be made before parting with this article even though they deserve a deliberate discussion in a separate article.⁶⁶

⁶³ See §§ 23-27, JJA 2000.

⁶⁴ State of Maharashtra v. Rajendra Jawanmal Gandhi, (1997) 8 SCC 386; State of Maharashtra v. Umesh Krishna Pawar, 1994 Cri LJ 774 (Bom).

⁶⁵ See http://ncpcr.gov.in/Acts/National_Commission_for_Protection_of_Child_Rights_NCPCR_Rules.pdf (Last visited on February 7, 2010).

⁶⁶ See Ved Kumari, *Quagmire of Age Issues under the Juvenile Justice Act: From Inclusion to Exclusion*, 51(2) JILI 163 (2009).

Justice Altamas Kabir has given full impact to the scope of § 20 by his judgement in *Hari Ram v. State of Rajasthan*⁶⁷ decided on May 5, 2009. The accused in the case was above 16 years but below the age of 18 years on the date of offence as well as on the date of enforcement of the Act on April 1, 2001. Even so, the Court categorically clarified that:

“The law as now crystallized on a conjoint reading of §§ 2(k), 2(l), 7A, 20 and 49 read with Rules 12 and 98, places beyond all doubt that all persons who were below the age of 18 years on the date of commission of the offence even prior to 1st April 2001, would be treated as juveniles, even if the claim of juvenility was raised after they had attained the age of 18 years on or before the date of commencement of the Act and were undergoing sentence upon being convicted.”⁶⁸

The judgment given by the Bombay High Court in *Imtiyaz Hussain Mumtiyaz Sheikh v. State of Maharashtra*⁶⁹ is also worth reading for it analyses the impact of the amendments on the decision given in *Pratap Singh* and how *Pratap Singh* is no more a good law.

⁶⁷ Criminal Appeal No. 907 of 2009 (Arising out of SLP (Cri.) No.3336 of 2006).

⁶⁸ *Id.*, ¶ 37.

⁶⁹ 2008 (110) Bom LR 1645.