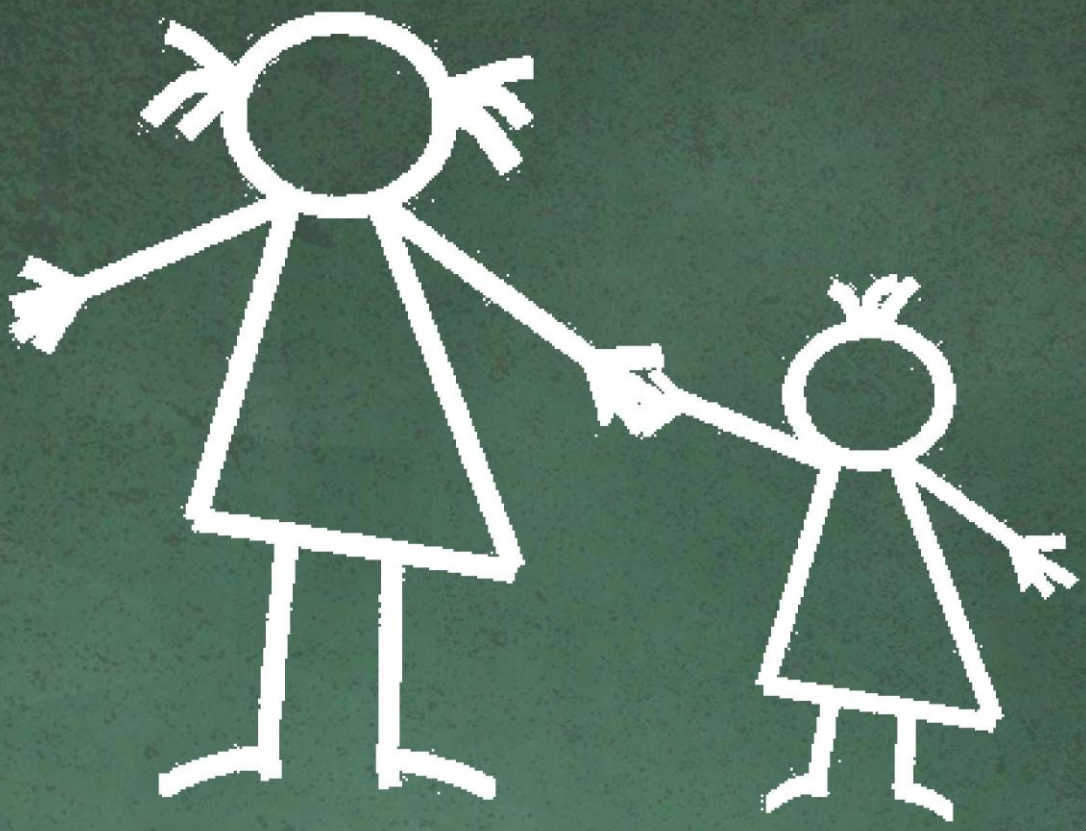

NATIONAL CONSULTATION ON CHILD RIGHTS

28TH APRIL - 1ST MAY 2018
SAMBHAAVNAA INSTITUTE, PALAMPUR

HRLN

HUMAN RIGHTS LAW NETWORK

अन्ताक्षरी फाउण्डेशन

CCRI

CENTRE FOR CONSTITUTIONAL RIGHTS, INDIA

HAQ Centre for Child Rights

National Consultation on Child Rights, 28th Apr - 1st May 2018

Meeting Report

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Venue Partner: Sambhaavnaa Institute, Palampur

Consultation Facilitators: Kranti L C, Enakshi Ganguly, Bharti Ali, Anant Kumar Asthana, Nicole Menezes, Govind Beniwal

Organisational Partners: Human Rights Law Network, HAQ: Centre for Child Rights, Antakshari Foundation, Leher

Education Partner: Career Point University, Hamirpur

Meeting Coordinators: Swati Sood, Y Asenla Pongen, Aditi Gupta

Reporting: Neha Philip, Sneha Singh, Anne T P

Supported By: Donors & Partners: Oak Foundation, INCLO, MISEREOR

Human Rights Law Network (Institution of Socio-Legal Information Centre)
Address: 576, Masjid Road, Jungpura, New Delhi – 110014
Contact Nos.: +91-11-24374501, +91-11-24379855, +91-11-24374502(Fax)
Email ID: contact@hrln.org

Abbreviations

ASHA	Accredited Social Health Activist
AWC	Anganwadi Centres
BDO	Block Development Officer
BLCPC	Block Level Committee for Protection of Children
CARA	Central Adoption Resource Authority
CCL	Child in Conflict with Law
CDPO	Child Development Project Officer
CNCP	Child in need of care and protection
CRC	Convention On The Rights Of The Child
CWC	Child Welfare Committee
DARA	District Adoption Resource Authority
DCPC	District Committee for Protection of Children
DCPU	District Child Protection Unit
DLSA	District Legal Services Authority
ICDS	Integrated Child Development Scheme
ICPS	Integrated Child Protection Scheme
JJ Act	Juvenile Justice (Care And Protection Of Children) Act, 2015
JJB	Juvenile Justice Board
JJC	Juvenile Justice Committees of High Courts
MDMS	Mid Day Meal Scheme
NALSA	National Legal Services Authority
NCFTE	National Curriculum Framework For Teacher Education
NCPCR	National Commission For Protection Of Child Rights
NFSA	National Food Security Act, 2013
NHRC	National Human Rights Commission
NPAG	National Physical Activity Guidelines.
NPC	National Policy For Children
PITA	Immoral Traffic Prevention Act
POCSO	Protection Of Children From Sexual Offences Act, 2012
PwD	Persons With Disabilities
RTE Act	Right of Children to Free and Compulsory Education Act, 2009
SABLA Scheme	Rajiv Gandhi Scheme for the Empowerment of Adolescent girls
SARA	State Adoption Resource Authority
SC/ST	Scheduled Caste/Scheduled Tribes
SCPCR	State Commission For Protection Of Child Rights
SHRC	State Human Rights Commission
SJPU	Special Juvenile Police Unit
SLSA	State Legal Services Authority
SNP	Supplementary Nutrition Food
UDHR	Universal Declaration on Human Rights
UNCRC	United Nation Committee On The Rights Of The Child
VLCPC	Village Level Committee for Protection of Children

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Executive Summary

The National Consultation on Child Rights 2018 conducted from 28th April - 1st May 2018 at Sambhaavnaa Institute, Palampur (Himachal Pradesh) was organised by HAQ: Centre for Child Rights, Antakshari Foundation, Leher and Centre for Constitutional Rights India/HRLN.

The last decade has seen a furore of laws coming into force as regards children that has in a way been a step back from the progress that was made in the preceding decade. The meeting was aimed at bringing together activists and advocates who have been working in the field of child rights to discuss and mull over the conflicts and challenges while litigating and while doing advocacy and chalk out strategies for the future plan of action at the national level and local level. The sessions were planned and designed by the facilitators in such a manner that enabled maximum participation and interaction. The first day of the meeting began with a round of introductions from the consultation conveners and participants who are stakeholders working in varied capacities from different parts of India, where they spoke about their work and what were their expectations from the Consultation. Over the next few days the various aspects of where the law was failing children and how to address them through use of Law and Courts were discussed. Various achievements in litigating for child rights were also discussed. The meeting wrapped up on the fourth day where in the final session everyone was asked to jot down what area they would like to work on and in how much time. This helped the conveners to promulgate the Plan of Action.

The Facilitators

Kranti L C, *Executive Director, Human Rights Law Network*

"A lot of instances pertaining to violation of basic rights of children get lost or do not come out in the dominant narrative."

Enakshi Ganguly, *Co-founder, HAQ: Centre for Child Rights*

"As a human rights activist I have seen a plethora of rights getting explored - transgender rights, women rights etc, but Child Rights come at the end… that has to be addressed."

Bharti Ali, *Co-Founder, HAQ: Centre for Child Rights*

"There is a need to really have more discussions about child rights & to develop a common understanding of human rights."

Govind Beniwal, *Project Director, Antakshari Foundation*

"*When we go to work with the government we see that our idea of child rights does not match theirs, and when it comes to spending on children, they look at it as an expenditure and not an investment*"

Nicole Menezes, *Co-Founder, Leher*

"The system has to reach and build in itself a community for children"

Anant Kumar Asthana, *Advocate*

"Question- if we don't refer rights of children as Human rights and rather refer it as Children rights, would it make any difference?"

Objectives of the meeting

The conveners of the consultation came together and planned this meeting to come to a **Common understanding on Child rights** as it is seen that there is a disconnect in the litigation strategies and the work that was taking place as regards activism in the child rights field. Apart from that the litigation that has been done is only confined to protection, other areas of right to food, nutrition, education etc, need to be focused upon. Despite the work happening around development of child rights, at the ground level the protection is not reaching the children. The main aim of the consultation was to create a cadre of lawyers and activists from various states to build a common perspective towards Child Rights, to mentor and further guide them to take forward litigation in the various areas of child rights holistically.

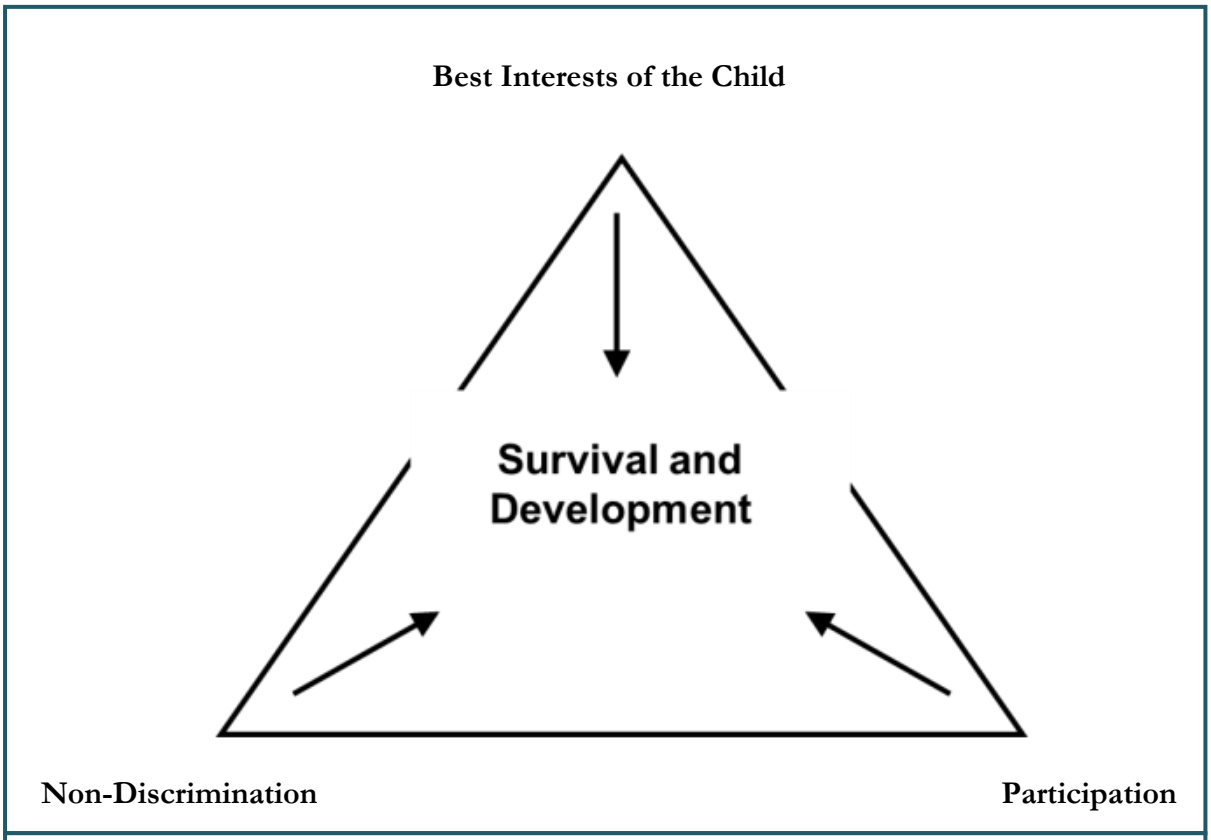


Figure 1: Child Rights Guiding Principles

Day 1

Introductions

The first day begun with a round of introductions from the consultation conveners and participants who are stakeholders working in varied capacities from different parts of India, where they spoke in short about their work and what were their expectations from the Consultation.

Screening of Film aimed on identification of Child Rights Violations followed by open session & experience-sharing by participants

A short video clip "**Victims of Garbage dump"** was shown to all the participants. Four groups were formed and were each asked to present on what the Human rights violations are noticed in the video clip and what are the remedies available to the children in the situation shown in the video clip.

The groups deliberated and presented the

various violations of rights children would possibly face in their day to day life. They then further explained the remedies children in such situations had and the forums they could approach. The group presentations laid the foundation for the consultation in the sense of what are really the rights children should enjoy and the understanding of the participants of child rights.

CHILD Rights

The next session by Bharti Ali covered the basics of "Child Rights"; the discussion began with the pertinent question "*What is a Right?*" Some needs are so basic that can't be compromised with, hence they are called rights. *What do Children want?* The minimum-needs of the child that can't be compromised are rights. Rights become entitlement only when it attains force of law and it can't differentiate between children. Children's Rights are not different from human rights.

Evolution of Child Rights and India's International Obligations[1]

History of child rights shows that 1920s onwards, children's issues started receiving systematic attention across the world.

In India, the seeds were laid with the social reform movement in the 19th century during the colonial rule.

The Brahmo Samaj founded in 1828 by Raja Ram Mohan Roy was the first of its kind to raise a voice against sati and child marriage. As a result, the then Governor General Lord William Bentinck by a legislation in 1829 abolished *Sati*. The Brahmo Samaj also worked equally hard for the less privileged ones by setting up orphanages.

The Prarthana Samaj came into existence in 1867, under the guidance of Keshab Chandra Sen, whose efforts led to abolishing early marriage of girls and polygamy and recognition of widow remarriage and inter-caste marriage through the passing of the Government Act III.

Social reformers like Raja Ram Mohun Roy, Ishwar Chandra Vidyasagar, Dayanand Saraswati, etc. have thus played a crucial role in drawing attention to issues such as child marriage, widow remarriage, infanticide, abolition of Sati, devadasi tradition, dowry, women's property rights, the purdah system and education of girls.

Alongside, issues such as vagrancy, truancy, begging, orphan and destitute children, street and working children, children in jails, also started receiving attention from the colonial masters,

[1] Annexure 1. Presentation prepared by HAQ: Centre for Child Rights

since they affected law and order and general administration.

The worst forms of the exploitation of children started during the Industrial Revolution. Just as the case was in Great Britain, new industrialists started hiring children who were forced to work in inhuman conditions. Laws against child labour were passed under various Factories Acts 1881 onwards, and laws relating to mines, ports, plantations, motor transport works, shipping, shops and establishments etc. Most laws against child labour were formulated in the 19th and early 20th century.

Issues of guardianship and custody received attention in 1890 with the passing of the first ever Guardianship and Wards Act, followed by laws governing succession, marriage, divorce, maintenance and custody among Hindus and other religious communities that came into existence between 1925 and 1956.

Of the first set of laws relating specifically to children/minors are the Indian Majority Act of 1875, the various Children's Acts in different provinces of Madras, Bombay, North Western Provinces and Bengal that were enacted between 1920 and 1924, the Sarda Act, 1929 (later came to be known as the Child Marriage Restraint Act, the Children (Pledging of Labour) Act, 1933, and the Employment of Children Act, 1938.

The Constitution of India specifically provides for taking special measures for women and children (Article 15). Subsequently, several progressive laws have been enacted such as the law on juvenile justice, prohibition of use of technology for sex-selective abortions, right to education, sexual offences against children etc. and many old laws have been amended from time to time or repealed to provide better protection to children and their rights.

The first legislation having a bearing on juvenile justice came in 1850 with the Apprentices Act which required that children between the ages of 10-18 convicted in courts to be provided vocational training as part of their rehabilitation process. This act was transplanted by the Reformatory Schools Act, 1897, the Indian Jail Committee and later the Children Act of 1960. This gave way to the **Reformatory Schools Act, 1897.** The Madras Children Act 1920 was the first Children Act to be enacted, closely followed by Bengal and Bombay in 1922 and 1924, respectively. Later, many more states enacted their own Children Acts, covering within their sphere two categories of children, viz., (i) delinquent children, and (ii) destitute and neglected children. The Government of India enacted the Children Act 1960, to apply only to the Union Territories and serve as a model to be followed by the states in the enactment of their respective Children Acts. All of these gave protection to children and included measures for reformation.

In 1986, India introduced its first Juvenile Justice law (Juvenile Justice Act 1986), providing

measures for protection, rehabilitation and reformation of juveniles who broke the law and for those who were neglected and in need of care.

In 2000, the Government of India enacted the **Juvenile Justice (Care and Protection of Children) Act, 2000** (JJA 2000)**,** which **is based on the best interests of children and aims at protection, restoration and reformation of all children or juveniles**. While the new 2015 law does continue to adhere to the principle of restoration, it also creates a convoluted systemic approach to children in conflict with law between the ages of 16-18 who are involved in heinous offences.

State of Jammu and Kashmir repealed its existing juvenile law of 1997 and enacted Jammu & Kashmir (Care and Protection of Children) Act 2013. This legislation is very similar to India's national Juvenile law except that it does not contain any provision on adoption.

A Firm National Commitment to address Children's Human Rights is reinforced through:

- The Constitution of India
- A plethora of laws concerning children
- National Policy for Children, 1974 and 2013
- National Plans of Action, 1979, 1992, 2005
- Setting up of a Separate Ministry for Women and Child Development in 2006
- Recognition of children's issues in the Five Year Plans since the 3rd Five Year Plan and inclusion of a distinct section on child rights in the Chapter entitled 'Women's Agency and Child Rights' since the 11th Five Year Plan
- Establishment of the National Commission for Protection of Child Rights (NCPCR) in 2007 and State Commissions thereafter
- Defining the child as a person below the age of 18 years in the national policy framework and different laws

Reinforcing Commitment through International Law

- The drafters of Indian Constitution had undertaken a careful comparison of the Constitution of the United States, Ireland and the Universal Declaration on Human Rights (UDHR) and ingrained their principles that had stood the test of time.
- Over the years India has reinforced its commitment to its citizens, including children through ratification of several international human rights instruments.

Table 1: UDHR and parallel provisions in Indian Constitution	
UDHR (Article Number)	**Indian Constitution**
1. All people are entitled to rights without distinction based on race, colour, sex, language, religion, opinion, origin, property, birth or residency.	Art. 14 (equality before the law and equal protection of the laws), as limited by Art. 31C. Art. 16 (1) (equality of public employment), as limited by Art 16(3)-16(5).
2. All Human beings are free and equal in dignity and rights	Art. 15 (on the basis of religion, race, caste, sex, or place of birth), except under Arts. 15(3) and 15(4) (special provisions for women and children, and affirmative action). Art. 15 apply to all state action, and to private action restricting access to public places and facilities. Art. 17 (abolition of untouchability); and Art. 16(2) (employment discrimination on the basis of religion, race, caste, sex, descent, place of birth, and residence), as limited by Art 16(3)-16(5).
3. Right to life, liberty and security of person.	Art. 21 (Right to life with dignity, no extrajudicial executions). Art. 23 (prohibition of traffic in human beings and forced labour); Art. 24 (prohibition of hazardous labour by children under age 14); Art. 17, Abolition of Untouchability
4. Freedom from slavery	Art 17 and Art 23, 24. Specific Act of Parliament exists for abolition of Bonded labour.
5. Freedom from torture	Art 20, 21, 22
6. Right to be treated equally by the law	Art 14
7. Right to equal protection by the law	Art 14, Art 39A
8. Right for all to effective remedy by competent tribunal	Art 14, 20, 21,22
9. Freedom from arbitrary arrest.	Art 22

10. Right to a fair public hearing by independent tribunal	Art 20, 21, 22, 39A
11. Right to presumption of innocence until proven guilty at public trial with all guarantees necessary for defence	Art 20, 21,22, 39A
12. Right to privacy in home, family and correspondence	Though not specific, Art 21 is invoked
13. Freedom of movement in your own country and the right to leave and return to any countries	Though not covered specifically, Art 21 is invoked. Maneka Gandhi v. UOI is a classical case.
14. Right to political asylum in other countries	N/A
15. Right to nationality	Art. 19(1)(d) as to movement, and (e) at to residence, as limited by Art. 19(5) (reasonable restrictions in the interests of the public or of a "scheduled tribe").
16. Right to marriage and family and to equal rights of men and women during and after Marriage	Covered by separate Acts, specific to cultures and religions.
17. Right to own property	Art 31
18. Freedom of thought and conscience and religion	Art 19, 25, 26, 27, 28
19. Freedom of opinion and expression and to seek, receive and impart information	Art. 25 (freedom of religion and of conscience, "subject to public order, morality and health"), though under Art. 25(2) any level of government may restrict *economic* activities related to religion. Special mention is made of the religious practices of the Sikh religion. Under Art. 26, all religious orders have limited powers to establish places of worship and teaching, while Art. 28 ensures the separation of religious and state education. In addition, The Right To Information Act 2005

20. Freedom of Association and assembly	Art. 19(1) (b) (freedom of peaceful assembly), as limited by Art. 19(3) (reasonable restrictions to advance national security).
21. Right to take part in and select government	There are numerous provisions, throughout the text of the Constitution, including those relating to election of the President, local village committees (Panchayats), and detailed rules for elections, eligibility for public service, etc.
22. Right to social security and realization of economic, social and cultural rights	Art 29, 30, 43
23. Right to work, to equal pay for equal work and to form and join trade unions	Art 19, 39, 42
24. Right to reasonable hours of work and paid holidays	Art 42, 43
25. Right to adequate living standard for self and family, including food, housing, clothing, medical care and social security	Art 47, and other Provisions of Part IV of Constitution
26. Right to education	Art 45
27. Right to participate in cultural life and to protect intellectual property rights	Art 29, 30
28. Right to social and international order permitting these freedoms to be realized	Art 38
29. Each person has responsibilities to the community and others as essential for a democratic society	Art 48A, Art 51A
30. Repression in the name of rights is unacceptable.	Art 32, 32 A, 33-35, Art 226

Ratification of the CRC

India ratified the UN Convention on the Rights of the Child (CRC) in 1992, thus once again reinforcing its commitment to children's rights.

Optional Protocols to the CRC

- Very often, human rights treaties are followed by "Optional Protocols" which may either provide for procedures with regard to the treaty or address a substantive area related to the treaty. Optional Protocols to human rights treaties are treaties in their own right, and are open to signature, accession or ratification by countries who are party to the main treaty.
- The CRC has three Optional Protocols. These are:
  - Optional Protocol to CRC on Sale of Children, Child Prostitution and Child Pornography, 2000, Signed by India on 15 November 2004 and Ratified on 16 August 2005
  - Optional Protocol to CRC on involvement of Children in Armed Conflict, 2000, Signed by India on 15 November 2004 and Ratified on 30 November 2005
  - On 19 December 2011, the UN General Assembly approved a third Optional Protocol on a communications procedure, which allows individual children to submit complaints regarding specific violations of their rights under the Convention and its first two optional protocols. India is yet to ratify this third optional protocol.

India has made a declaration on Article 32 of the CRC stating that "...economic, social and cultural rights can only be progressively implemented in the developing countries, subject to the extent of available resources..."

Overview of the (CRC)

The UNCRC draws attention to four sets of civil, political, social, economic and cultural rights:

- **Survival –** e.g. right to life; highest attainable standard of health; nutrition; adequate standard of living; right to a name and nationality.
- **Development –** e.g. right to education; early childhood care and development; social security; right to leisure, recreation and cultural activities.
- **Protection –** e.g. freedom from all forms of exploitation, abuse, inhuman or degrading treatment, neglect; special protection in situations of emergency and armed conflicts.
- **Participation –** e.g. respect for the views of the child; freedom of expression; access to age appropriate information; freedom of thought, conscience and religion; right to be heard in administrative and judicial proceedings.

All Rights are Interrelated, Indivisible and Interdependent

While child rights may be grouped into four clusters for easier understanding - survival, development, protection and participation, the rights in these clusters cannot totally be separated from each other. They are interrelated and integrated.

For example,

- the right of the child to a name and nationality has direct bearing on the right of the child to access his/her survival and development rights such as health care and education
- when girls do not have toilet facilities in schools, they keep away from school as they are unable to maintain personal hygiene, they do not feel protected and it hampers their overall growth

Clearly, **children encounter their realities not as a fragmented experience but as a whole.** Childhood and the range of children's needs and rights are one whole, and must be addressed holistically. A life-cycle approach must be maintained.

At the same time, it must be remembered that while all children have equal rights, their situations are not uniform.

Civil and Political Rights (Immediate Rights)

They include such things as right to life and liberty, non-discrimination, right to nationality, freedom of expression, right to re-unification with the family, right to justice and a fair hearing in criminal cases, a separate system of juvenile justice for children in conflict with the law and most protection rights.

Economic, Social and Cultural Rights (Progressive Rights)

They include right to a reasonable standard of living, health and education, and the rights which are not covered by the first category.

Convention on the Rights of the Child — General Principles[2]

The Convention on the Rights of the Child is rooted in some basic values about the treatment of children, their protection and participation in society. These ideas are expressed in some of the early articles in the text. The choice of these articles as "general principles" was made by the UN Committee on the Rights of the Child during its first session in September-October 1991, when

[2] Source: International Save the Children Alliance, Getting it Right for Children, A practitioner's guide to child rights programming, 2007

it agreed on guidelines on how the initial reports by governments should be written and structured. That was the context for the important decision to give special emphasis to the four general principles - **Non-discrimination, Best interests of the child, Right to Survival and Development and Respect for the views and participation of the child** contained in articles 2, 3, 6 and 12 of the CRC.

These articles were put under a special heading in the guidelines before norms on civil rights, family aspects, health, education and the other more substantive provisions. It was made clear that the committee wanted governments also to report on the application of these principles in relation to the realization of the other articles in the CRC. Thereby the convention became something more than a mere list of obligations; it offered a comprehensive message.

Non-discrimination

The UNCRC focuses on the elimination of discrimination in three main areas: against individual children; against specific groups of children; and against the population group as a whole. Tackling discrimination is not simply about imposing top-down strategies. Instead, programmes should analyse power relationships and discrimination and the impacts these have on the children.

In practice this means that State should promote non-discrimination and diversity awareness. It should also provide appropriate information and training to children, their families and communities, and to governments and partners

State should include non-discrimination/diversity analysis as part of its child rights situation analysis. This would consider:

- which groups of children experience discrimination (make sure data is disaggregated)
- multiple forms of discrimination on the basis of different aspects of social identity; for example, a disabled girl from a minority ethnic group
- an analysis of work that other local, national or international groups are doing to tackle discrimination

State should plan objectives and advocacy goals that reflect the non-discrimination analysis and clearly demonstrate how discrimination will be addressed

State should implement your programme in ways that engage with, empower and impact on children who face discrimination; that build internal and public awareness around issues of discrimination; and that demonstrate to others the value and abilities of vulnerable children, viewing them as social actors.

Monitoring and evaluation: State should use clear indicators to measure a reduction in discrimination and changes in attitude. It should also consider the intended and unintended impacts on different groups and get the views of a range of stakeholders.

Survival and development

While children's survival often relates directly to children's right to life, children's right to development (as described in the UNCRC) must be interpreted in its broadest sense,

encompassing the physical, psychological, emotional, social and spiritual development of the child. The state, as main duty-bearer, has a responsibility to ensure the survival and development of children to the maximum extent possible. Where the state is unable to assume its responsibilities, international donors, NGOs, civil society organisations and the private sector may need to support and complement the state through financial, technical and logistical responses.

In practice this means:

- an awareness and understanding of childhood and children's evolving capacities. You should also provide appropriate information and training to the children you work with, to government, and to partners an analysis of the state's capacity to prioritise children's survival and development, including: financial resources, budget allocation and funding mechanisms; policies and legislation; technical capacity; and organisational capacity. You should also analyse the capacity of other groups (civil society, international organisations, private sector, etc) who contribute to the fulfilment of children's survival and development rights
- to plan programmes based on this analysis, including the perspectives of all relevant stakeholders in the process
- to implement responses that strengthen the state's capacity to fulfil its obligations while also working with a broad range of other partners
- to monitor and evaluate against clear indicators that measure direct changes in children's lives, as well as changes in capacity, policies, legislation and attitudes.

Best interests of the child

This principle touches on every aspect of a child's life. It means, when adults make decisions, they should think about how their decisions will affect children. This particularly applies to budget, policy and law makers. Whenever decisions are taken that affect children's lives, the impact of those decisions must be assessed to ensure that the best interests of children are the main consideration. The interests of others – such as parents, the community and the civil society – should not be the overriding concern, even though they may influence the final decision.

In practice this means:

- State should promote awareness of the best interests principle and its implications for decision-making
- State should analyse how local and national policy, legislation and practice is informed by children's best interests
- Planning: allow children's views to influence programme design
- Implementation: State should facilitate children's direct involvement in the practical implementation of programme activities
- Monitoring and evaluation: State should measure the impact of programme activities on

children to assess whether their best interests are being realised. State should also measure the impact of programme activities on policies, practice, attitudes and communities to assess the extent to which children's best interests are being prioritised.

Child participation and the right to be heard

Participation, as enshrined in the UNCRC, is about children and young people having the opportunity to express their views, influence decision making and achieve change in areas that affect their lives. Children's participation is informed and willing involvement of children, including the most marginalised and those of different ages and abilities, in all matters concerning them.

This does not mean that children can now tell their parents what to do. The UNCRC does not interfere with parents' right and responsibility to express their views on matters affecting their children.

Moreover, the Convention recognizes that the level of a child's participation in decisions must be appropriate to the child's level of maturity. Children's ability to form and express their opinions develops with age and most adults will naturally give the views of teenager's greater weight than those of a preschooler, whether in family, legal or administrative decisions.

In practice this means:

- State must be aware of and understand children's evolving capacities and their ability to act on their own behalf. (For example, there are different ways of involving older and younger children depending on their level of understanding and ability to participate.)
- State should analyse the programme environment to identify the barriers to children speaking out or to their voices being heard
- Planning: State should create space and opportunity for children's views to influence programme design
- Implementation: create space and opportunity for children's voices to be heard within their families, communities and beyond; build children's confidence, knowledge of their rights and ability to protect themselves; give children an opportunity to learn and practice important life skills; and empower children as members of civil society and as active and responsible citizens
- Monitoring and evaluation: use clear indicators to measure the extent of children's participation and the creation of spaces and mechanisms for their views to be taken into account in decision-making
- Be accountable to children through feedback.

Recognizing the Agency of Children – A Case Study[3]

Ameena, (name changed to protect identity) a thirteen-year-old Muslim girl, was sold by her parents for a small sum to a Saudi Arabian sheikh. She was one of several siblings, many of whom were girls. Her father worked as a weaver; the family was impoverished. The "sale" was disguised as a marriage, although even under Muslim law, Ameena was too young to give her consent to the "nikah." Ameena would not have come to public notice had it not been for a vigilant and sensitive air hostess, Ms. Ahluwalia, who noticed the young distraught child in the aircraft before it flew out of the country. On Ms. Ahluwalia's sounding an alert, the police were informed, the sheikh was arrested, and Ameena was sent to a government protective home for children in New Delhi. The home is located within the complex which houses the notorious Tihar Central Jail in Delhi, and the proximity does not end there. The home functions as a prison despite the status of a "home" under the law.

A police case was registered against the sheikh and Ameena's parents. During the several months the case went on, Ameena lived in the prison-like confines of the protective home. While her parents travelled from distant Andhra Pradesh at devastating cost to attend court hearings, the sheikh sought refuge in the Saudi Arabian embassy in Delhi, and managed to eventually flee the country. Ameena's relationship with her parents naturally was strained and she developed a friendship with Ms. Ahluwalia, who visited her regularly. Ms. Ahluwalia expressed her desire to adopt Ameena, or at least take her into temporary custody till the case was decided, but her requests were refused by the state as well as the courts.

In a case filed by Ms. Ahluwalia and several women's organizations the Delhi High Court directed that Ameena be restored to the custody of her parents and sent home. To prevent her being sold again, the Court issued directives to the state government that Ameena be provided with free education, and that the state monitor her well-being at regular intervals and make some provisions for providing economic security to the family. Ameena went home with her parents, even with the criminal case pending against them.

Ameena was at no stage seen as a person with any agency or capacity to take decisions for herself. Her father gave consent on her behalf to the "nikah," Ms. Ahluwalia activated the police and the legal system, the state placed her in the protective home, the court sent her back to her parents, and eventually her parents prevailed upon her to dilute her testimony against them in the criminal case.

What did Ameena want? We don't really know because she was not asked. While the law and her parents obviously believed her to be old enough to be married and become sexually active, she was not given even a limited amount of control over directing the path of her life. Perhaps all she wanted was not to be separated from her brothers and sisters, and to enjoy the last few years of her childhood in peace.

Lack of recognition of the capacity of children to decide has very negative implications for certain categories of children, such as street children, who become accustomed at an early age to taking their own decisions and to a certain type of freedom. Treating all children as bereft of any agency without reference to their age and situation seems to be a direct assault on their rights as individuals.

[3] Source: University of Minnesota, Human Rights Resource Centre, Circle of Rights, Economic, Social and Cultural Rights Activism, A Training Resource, Section 3, Module 5, Children and ESC Rights.

Implementing the CRC and the Reporting Process

Article 42 - State parties are obliged to make the rights contained in the Convention widely known to both adults and children.

Article 43 – A Committee on the Rights of the Child consisting of 18 elected experts nominated by States Parties to be set up at the UN level to examine progress made by the States Parties on implementation of the CRC and its Optional Protocols.

Article 44 – States Parties are to send their reports to the CRC Committee on the implementation of CRC in their countries – first one after 2 years of ratifying the CRC and then every 5 years.

Article 45 – Other competent groups (including NGOs & specialized UN and International agencies) to submit information to the committee as alternate or shadow reports.

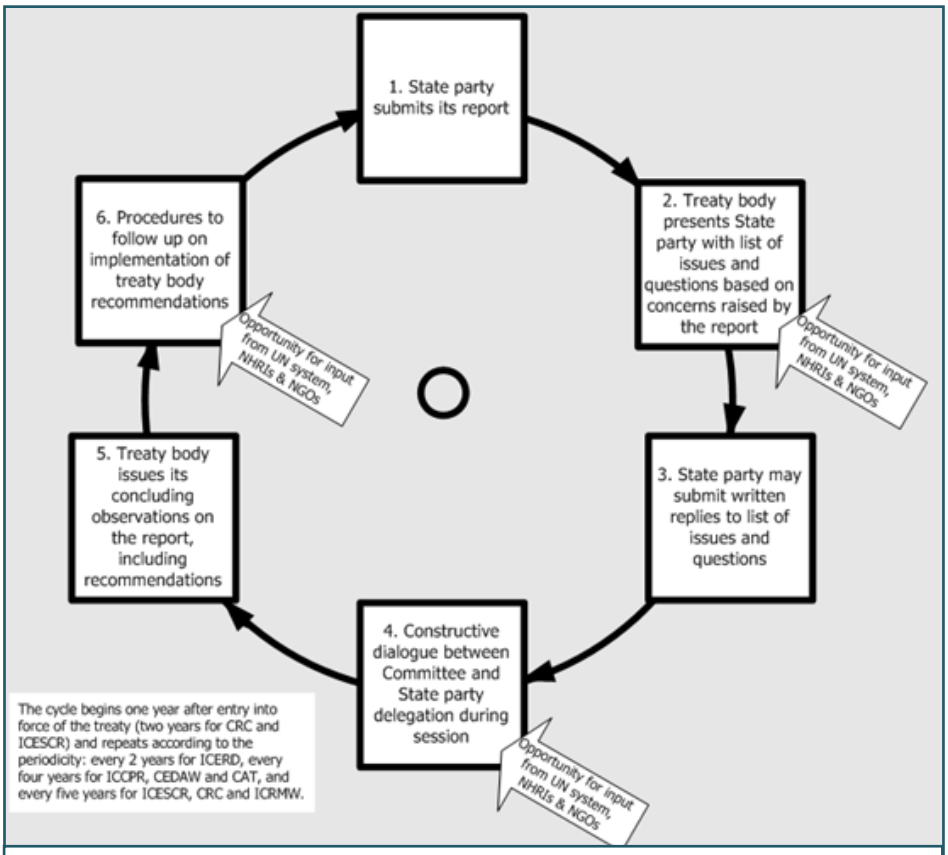


Figure 2: The Reporting Cycle under Human Rights Treaties

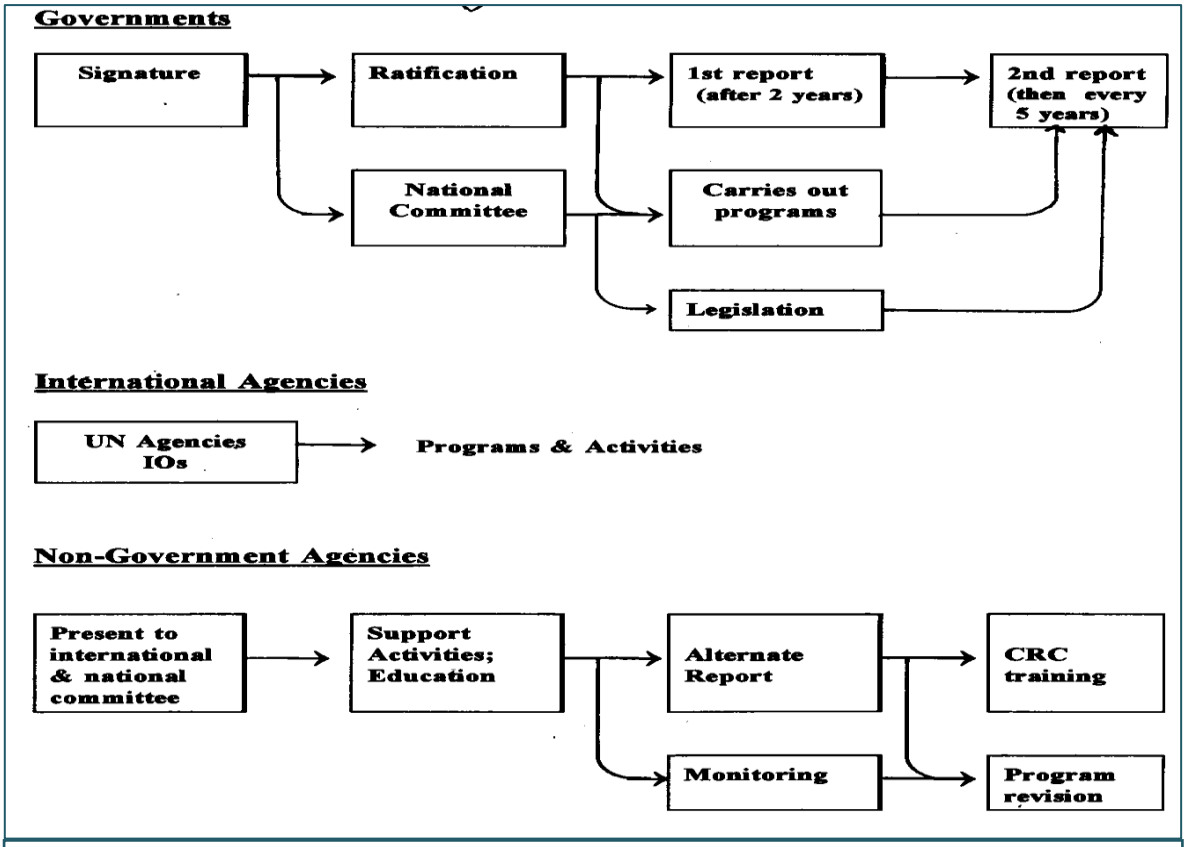


Figure 3: Role of various Stakeholders

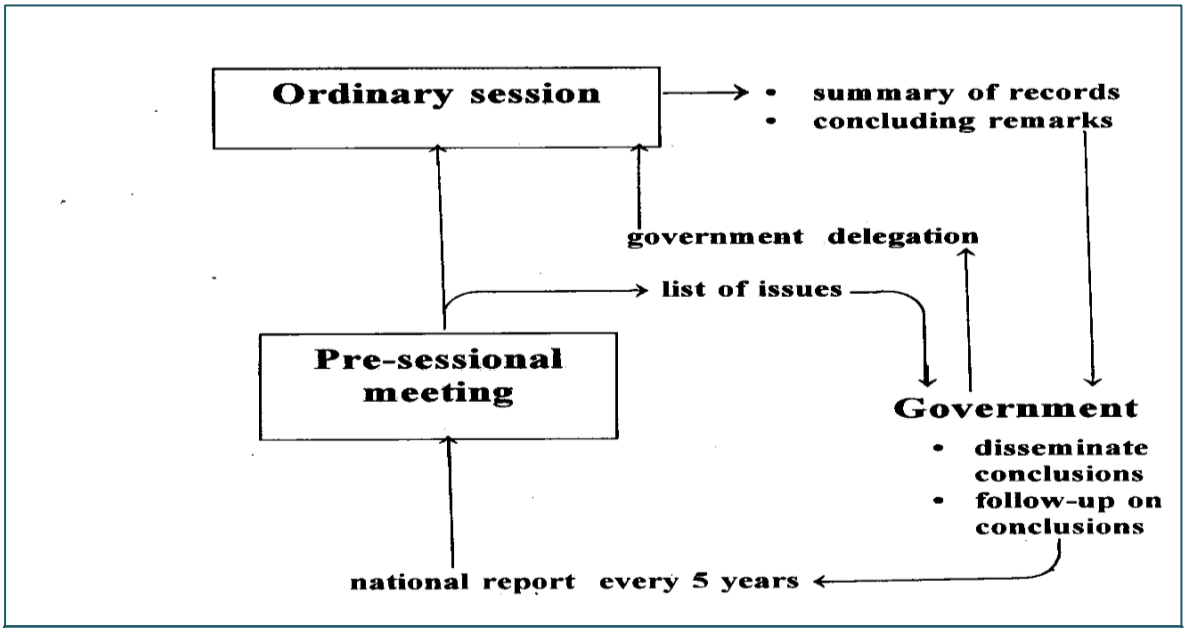


Figure 4: UN Committee on the Rights of the Child

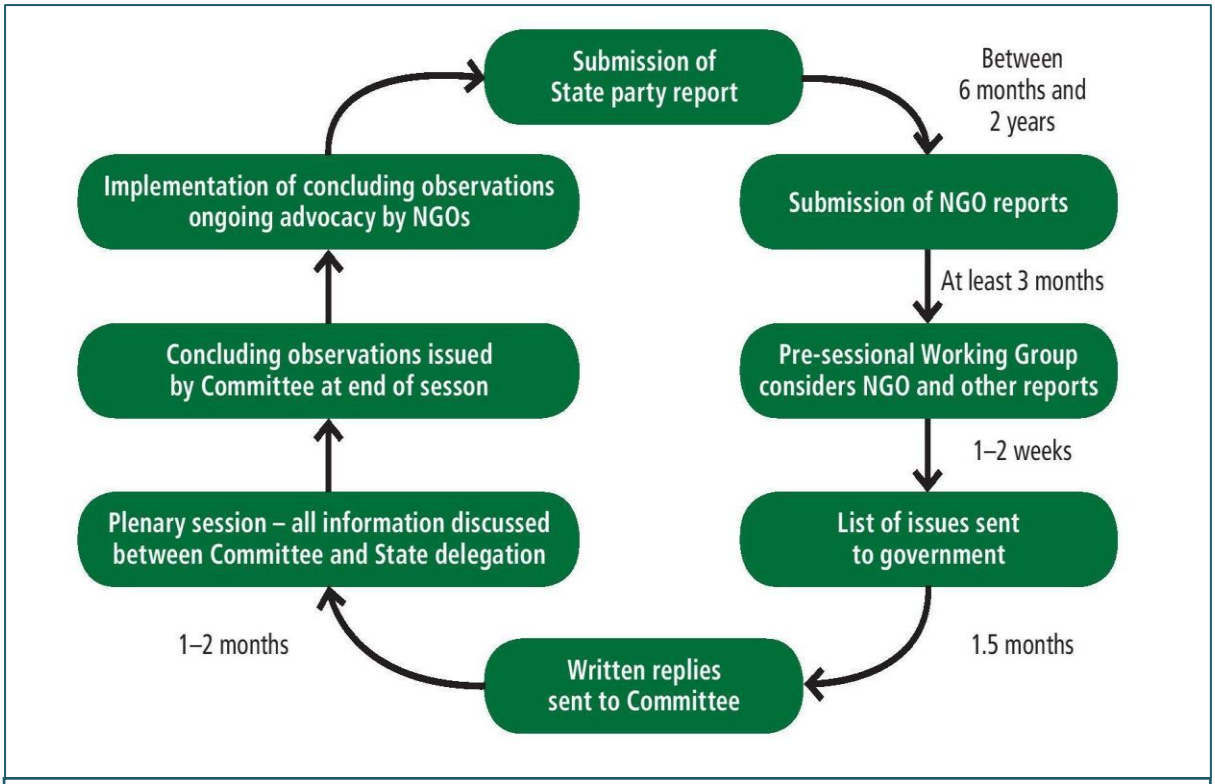


Figure 5: Reporting Process of the Committee on the Rights of the Child by NGOs

Table 2: Report Submission under CRC by Govt. Of India

Reporting by Government of India	**Due Date**	**Date of submission**
Initial Report	10 January 1995	19 March 1997
Second Report	10 January 2000	10 December 2001
Third Report	10 January 2005	Government of India missed the due date. As an exceptional measure, a consolidated third and fourth periodic report was due before 28 May 2008. Missing this date, a new date was set out as 10 July 2008. The combined report was submitted only as recently as September 2011.
Fourth Periodic Report	As an exceptional measure India was to submit a consolidated third and fourth report before 28 May 2008.	Government of India later set out to submit the report before 10 July 2008. The combined report was submitted in September 2011.

Table 3 : Report Submission under the Optional Protocols of CRC by Govt. Of India		
Reporting by Government of India	**Due Date**	**Date of submission**
Optional Protocol on sale of children, child prostitution and child pornography Date of ratification/accession – 16 Aug 2005 Date of Entry into Force –16 September 2005 http://www2.ohchr.org/english/bodies/ratification/11_c.htm and http://www.bayefsky.com/html/crc_sc_ratif_table.php		
First Report	The first report was due in September 2007. Government of India had requested for submission of the report along with the combined Third and Fourth Periodic report on CRC in July 2008.	Submitted in September 2011.
Optional Protocol on children in armed conflict Date of ratification/accession – 30 November 2005 Date of Entry into Force – 30 December 2005 http://www2.ohchr.org/english/bodies/ratification/11_b.htm, and http://www.bayefsky.com/html/crc_ac_ratif_table.php		
First Report	The first report was due in January 2008. Government of India had requested for submission of the report along with the combined Third and Fourth Periodic report on CRC in July 2008.	Submitted in September 2011

India has 48 special & local laws pertaining to children. India signed the UN Child Rights Convention in 1989 and ratified it in 1992. Reporting under the Convention is twofold "Country report" which the state will do and 'Shadow report' that can be submitted by the civil society. The Child Rights Convention Committee even meets NGOs and other civil institutions/organizations. Then a Concluding report is made by the CRC Committee where it assesses State's action as per the reports. Civil Society can send the report under complaint mechanism as well.

What is the Definition of Child Rights in Indian Context?[4]

Govind Beniwal went on to discuss "what is the definition of child rights in Indian context?" How does one determine *Age of discretion,* when one discusses Child rights it is seen mostly from the purview of a victim and when it comes to child accused, we get biased somewhere, why?

As per the CRC age of child is defined as any person under 18 years, but it allows member country to choose different age of majority as per their own domestic laws, but still try to be at parity with the CRC. If we define child below the age of 18 years, can it still be possible to have different age cut-off under different statues? What is the need to change the age of child in the labour laws?

Para 2.3 of National Policy for Children –

"This Policy is to guide and inform all laws, policies, plans and programmes affecting children. All actions and initiatives of the national, state and local government in all sectors must respect and uphold the principles and provisions of this Policy."

Policy Framework must Guide the Legal Framework

A Uniform age definition of the child in accordance with NPC, 2013 must therefore be brought into all laws relating to children

Child in the existing Legal Framework

- The age of majority giving a citizen the right to vote is 18 years.
- A person below 18 years cannot enter into a legal contract. Therefore, a person below 18 years cannot even sign the 'vakalatnama' to fight a court case or put up a defence.
- A driving license can only be acquired on completion of 18 years of age.
- No one below the age of 18 years can donate blood.
- The legal age for marriage is 18 years for girls and 21 years for boys.
- The Juvenile Justice Act, 2015 defines a child as a person up to the age of 18 years. The 2000 Act brought it in consonance with the UNCRC and other international instruments on juvenile justice. But the new Act allows a child between the ages of 16 - 18 who has

[4] Annexure 2. Presentation prepared by HAQ: Centre for Child Rights

committed heinous offence to be tried as an adult.

- The Protection of Children from Sexual Offences Act, 2012 also defines a child as a person up to the age of 18 years.

But …

- The Child Labour (Prohibition and Regulation) Act, 1986, as amended in 2016, defines a child as a person up to the age of 14 years.
- The Right of Children to Free and Compulsory Education is restricted to children in the age of 6-14 years
- The Immoral Traffic (Prevention) Act, 1956, makes a distinction between a child and a minor defining a child as a person below the age of 16 years and a minor as a person between the age of 16 and 18 years.

There is no Uniform Age Definition in the Existing Laws!

Why a Uniform Definition of the Child?

- Lack of a Uniform definition of the child affects planning and programming for children, leaving many of their problems unaddressed
- It leads to, or perpetuates, discrimination between children
- It causes conflict between different existing laws and protections offered by them

Legal Definitions of the Child and Resulting Discrimination and Confusions

- **Some children are allowed to work for economic reasons and some are not.** A 16-year-old domestic worker cannot seek justice under the Child Labour (Prohibition and Regulation) Act because the law defines a child as a person below the age of 14 years. The only situation of child labour that gets covered under the Juvenile Justice legislation which defines child as a person below 18 years is a situation where a child has been procured for employment in hazardous work and kept in bondage and in addition his/her wages have been withheld or used by the procurer for his own purposes.
- **When matters such as custody, maintenance and marriage are governed by personal laws** that define children differently and also treat children differently, rights of some children are bound to get affected while their counterparts covered by a more progressive

legislation enjoy better protections.

- While the **child marriage law** does not declare all child marriages null and void and hence **treats them as valid marriages** until either party to the marriage seeks annulment. On the other hand, **by virtue of the POCSO Act**, **sexual activity between or with minors amounts to statutory rape** since the question of consent has no meaning when it comes to children below the age of 18 years.

Age of consent vs. Age of Child

- A strong demand from civil society for lowering the age of sexual consent
- Treating age of consent as the age of the child is a common mistake we make
- When a child is defined as a person below the age of 18 years, the state has to ensure his/her protection, including protection from being criminalized for actions that result from immature behaviour. Demand for lowering the age of sexual consent to 16 years is therefore a demand for protecting young people eloping to get married from being criminalized and not a demand that would give effect to any change in the definition of the child.

Child vs. Child Labour

- Similarly, if all children below the age of 18 years are to be ensured their right to protection from exploitation, violence and abuse, the definition of child labour as persons below the age of 14 years takes away those guarantees.
- Therefore there has been a strong demand for keeping the age definition of child labour same as the age definition of the child.

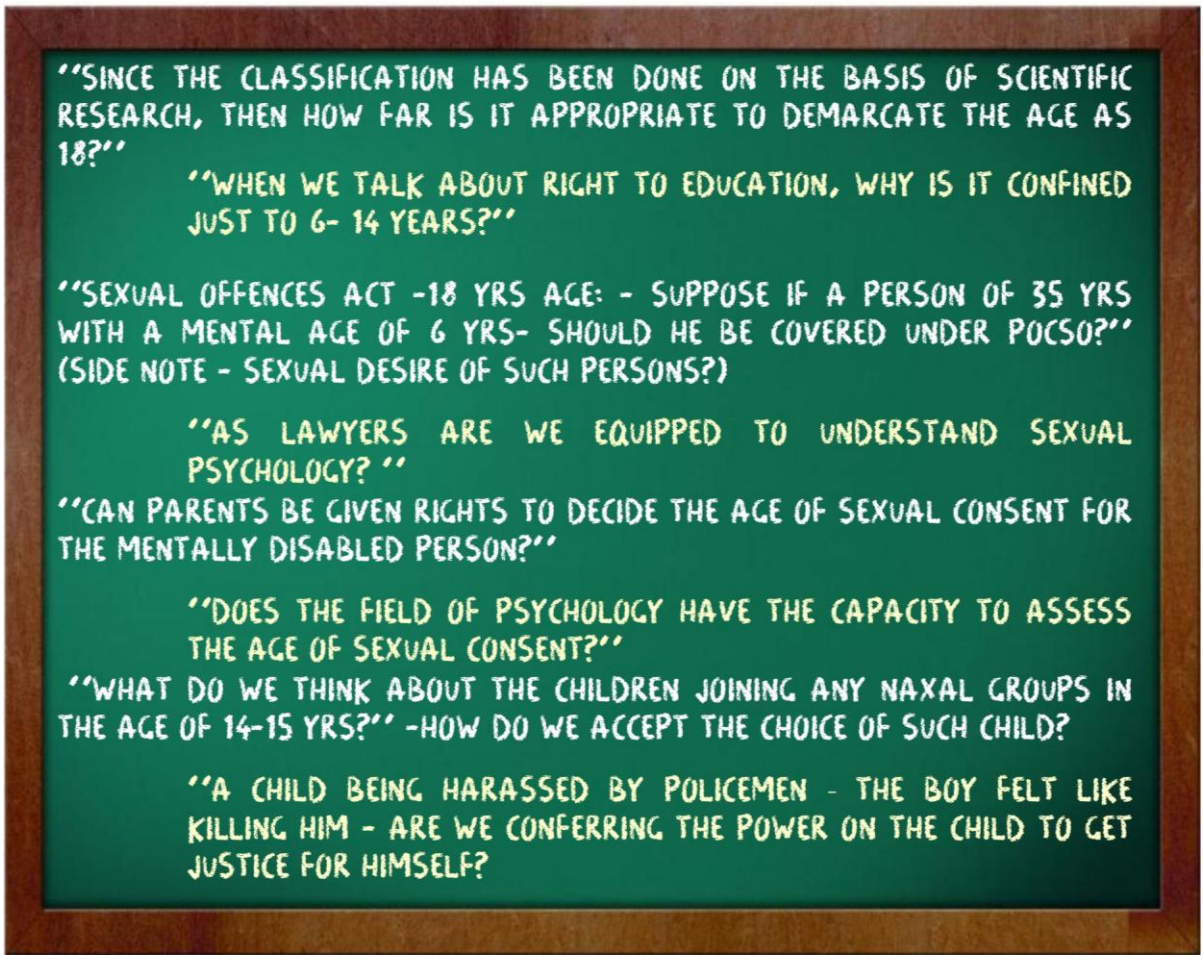
Conclusion:

The vulnerable situations that child find themselves in can be addressed through law even without changing the definition of the child. In doing so the guiding factor should be child protection.

The day ended with the participants having to contemplate how one would agree upon an *age of consent* and whether a child can consent.

Day 2:

The second day picked up from where the conversation was paused on the previous day, the discussion on Age of Consent/Agency. Certain questions were put forth by both resource persons as well as participants as follows:



CONCLUSION - These are not the easy situations, the treatment has to be different because the needs, social background and circumstances are different.

"The criminal system is retributive till now, we should move to broaden our horizon. The law will always prescribe an age, but there will always be situation when there we have to look into legal agency, society, circumstances as exceptions."

Role of Judiciary and key cases on Children's' rights

In the next session Adv. Kranti L C discussed Judicial Trends and child rights where it was pointed out that criticism with Public Interest Litigation is always that the orders were passed but implementation has always been a question. A need to pick up issues pertaining to children apart from POCSO and JJ Act was identified. A lot of instances pertaining to violation of basic rights of children get lost or do not come out in the dominant narrative. The judgments of Supreme

Court in Sampurna Behrua[5] case in which roving orders as regards rights of children were passed was finally disposed off. The Independent thought case[6] at the Supreme Court where in cases of rapes of children up to the age of 18 within the confines of marriage will be considered as statutory rape. Basically bringing POCSO into the realm of marriage, be it in any religion.

Bottom-line - It's not just litigation which is required to be done; rather a more holistic approach has to be adopted and we as lawyers have to proceed strategically. Need to work constantly, creatively, and document it for a strategic performance.

Important Acts

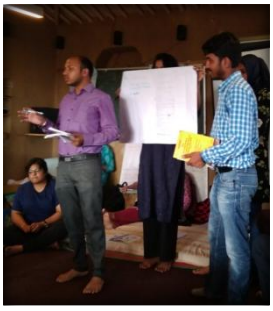
In keeping with the spirit of the sessions being interactive, four of the prominent special laws pertaining to children were divided among 5 groups of participants being (JJ Act, POCSO, RTE and Prohibition of Child Labour Act). The groups had to present on issues under the various Acts.

Juvenile Justice (Care and Protection of Children) Act, 2015[7]

The JJ Act was divided into two groups one which would cover the children in conflict with law and the other children in need of care and protection.

The group that covered the aspect of Children in conflict with law went section wise and discussed through experience how despite there being provisions for certain aspects of protection to a child when he comes in the criminal justice system, most of those provisions do not get followed and the child is treated similarly to an adult. The participants gave examples of cases that they have worked on. The presentation was followed by a question and answer session discussing the approach of a lawyer when it comes to heinous offences.

The group that covered the aspect of Children in need of care and protection talked about the role of CWC and when a child is to be considered in need of care and protection. They spoke about the importance of the Integrated Child Protection Scheme (ICPS) which covers all funds for infrastructure and processes under the JJ Act. The role of the DCPO was also expounded upon.



[5] Sampurna Behura Vs. UoI, Writ Petition (Civil) No. 473 Of 2005. Annexure 3
[6] Independent Thought vs. Union Of India, Writ Petition (Civil) No. 382 Of 2013. Annexure 4
[7] Annexure 5. Summary of judgements under JJ Act by Adv. Anant Kumar Asthana

Day 3

Protection of Children from Sexual Offences Act, 2012

The group that talked about POCSO noticed that when they read the Act the idea of protection of a child does not come out in the Act; rather it is more about punishment than protection. The Act nowhere defines protection nor does it define person. The Act is the only Act which talks about mandatory reporting which is problematic as it can be abused. There is no provision for the victim to seek remedy when the chargesheet is not filed in time and improper investigation. There is no sex education for children to know what safe or unsafe touch is. The POCSO is already considered as a draconian law, when one gets death penalty in the picture it makes it more draconian.

Prohibition of Child Marriage Act, 2006

Govind Beniwal took this session and introduced the topic saying that the Act was enacted before independence, and after signing the CRC India passed the Child marriage act as it is today. He discussed the provisions under the Act, the issues and the ground reality of implementation of the Act. All child marriages are not void but they are voidable. He mentioned that there are two instances when the marriage is void ab initio one being when an injunction has been passed under this act[8], second[9], when the child has been kidnapped out of lawful guardianship to be married, or deceitfully been taken from any place or if the child has been trafficked after marriage. Child marriage Act applies to all religions. It needs to be treated as a crime, an FIR should be registered. At the village level, the Police may try to protect the villagers, the villagers on a whole may be in favour of the child marriage but one can go to the magistrate for injunction on the marriage.

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[8] **S. 14. Child marriages in contravention of injunction orders to be void. -** Any child marriage solemnised in contravention of an injunction order issued under section 13, whether interim or final, shall be void ab initio.

[9] **S. 12. Marriage of a minor child to be void in certain circumstances. -** Where a child, being a minor-

a. is taken or enticed out of the keeping of the lawful guardian; or
b. by force compelled, or by any deceitful means induced to go from any place; or
c. is sold for the purpose of marriage; and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes, such marriage shall be null and void.

Child and Adolescent Labour (Prohibition and Regulation) Act, 1986

The group presenting on Child Labour Act talked about how the government very conveniently in consonance with the Right to Education Act defined the a child and an adolescent separately to be up to 14 years and 14-18 years respectively. Basically the Government simply gave children free education till 14 years and put their hands up and said that they can work beyond the age of 14 in hazardous conditions.

Right of Children to Free and Compulsory Education Act, 2009

The group presenting on the RTE Act talked about how there is provision for free and compulsory education the same is not seen on the ground level. The RTE covers free education for children between the ages of 6-14 years. On the ground level the access is missing, as schools are far from where children who really need the benefit of the RTE Act reside. It is also a fundamental duty[10] of the parent to ensure their child goes to school to avail education. If anyone is aggrieved by the functioning of the RTE Act there is a grievance redressal mechanism[11], which is supposed to solve the grievance within three months which in reality doesn't work, as the child will be sitting at home all the while the complaint is being heard. If there is no redressal from the Local authority then one can go to the State Commission for Protection of Child Rights, but then again they also do not necessarily function.

Right to Food[12]

The next session was around Right to food when it comes to children. Adv. Dipika Sahani charted the history of litigation pertaining to right to food and the provisions relevant to children. She talked about how right o food is a fundamental right as it is a basic right to survival. She broke down the understanding of right to survival to include:

- Right to be born;
- Right to minimum standards of food, shelter and clothing;

[10] Art.51A(k) of Constitution of India

[11] S. 34 of RTE

[12] Annexure 6. Presentation prepared by Adv. Dipika Sahani.

- Right to live with dignity;
- Right to health care, to safe drinking water, nutritious food, a clean and safe environment, and information to help them stay healthy;
- The Right to Food is a human, legal and clearly defined right which gives obligations of states to reduce both chronic undernourishment and malnutrition.

She went on to cover the provisions under the constitution of India where:

- Article 21 protects for every citizen's right to live with human dignity. Would the very existence of life of those families which are below poverty line not come under danger for want of appropriate schemes and implementation thereof, to provide requisite aid to such families?
- Also article 47 which inter alia provides that the State shall has to raise the level of nutrition and the standard of living of its people and has to regard the improvement of public health as among its primary duties.

Supreme Court has passed extensive orders in the People's Union for Civil Liberties vs. Union of India[13] (popularly known as the Right to Food case). The case was filed by the Rajasthan Chapter of PUCL pursuant to a severe state of famine in the state of Rajasthan. All the important directions that are applicable to children have been listed below as per dates of such orders:

- **28.11.2001**[14]
  - MIDDAY MEAL SCHEME : *We direct the State Governments/ Union Territories to implement the Mid-Day Meal Scheme by providing every child in every Government and Government assisted Primary Schools with a prepared mid day meal with a minimum content of 300 calories and 8-12 grams of protein each day of school for a minimum of 200 days. Those Governments providing dry rations instead of cooked meals must within three months start providing cooked meals in all Govt. and Govt. aided Primary Schools in all half the Districts of the State (in order of poverty) and must within a further period of three months extend the provision of cooked meals to the remaining parts of the State.*
  - INTEGRATED CHILD DEVELOPMENT SCHEME (ICDS) : *We direct the State Govts./ Union Territories to implement the Integrated Child Development Scheme (ICDS) in full and to ensure that every ICDS disbursing centre in the country shall provide as under:*
    - *(a) Each child up to 6 years of age to get 300 calories and 8-10 grams of protein;*
    - *(b) Each adolescent girl to get 500 calories and 20-25 grams of protein;*
    - *(c) Each pregnant woman and each nursing mother to get 500 calories and 20-25 grams of protein;*
    - *(d) Each malnourished child to get 600 calories and 16-20 grams of protein;*
    - *(e) Have a disbursement centre in every settlement.*

- **20.04.2004**[15]

[13] Writ Petition (Civil) No. 196 of 2001
[14] Annexure 7

- ❑ All such States and Union Territories, who have not fully complied with the order dated 28th November, 2001 shall comply with the said directions fully in respect of the entire State/Union Territory, not later than 1st September, 2004.
- ❑ The conversion costs for a cooked meal, under no circumstances, shall be recovered from the children or their parents.
- ❑ In appointment of cooks and helpers, preference shall be given to Dalits, Scheduled Castes and Scheduled Tribes.
- ❑ The Central Government shall make provisions for construction of kitchen sheds and shall also allocate funds to meet with the conversion costs of food-grains into cooked mid-day meals. It shall also periodically monitor the low take off of the food-grains.
- ❑ Attempts shall be made for better infrastructure, improved facilities (safe drinking water etc.), closer monitoring (regular inspection etc.) and other quality safeguards as also the improvement of the contents of the meal so as to provide nutritious meal to the children of the primary schools.

❑ **07.10.2004**[16]

- ❑ The efforts shall be made that all SC/ST hamlets/habitations in the country have Anganwadi Centres as early as possible.
- ❑ The contractors shall not be used for supply of nutrition in Anganwadis and preferably ICDS funds shall be spent by making use of village communities, self-help groups and Mahila Mandals for buying of grains and preparation of meals.
- ❑ All State Governments/Union Territories shall put on their website full data for the ICDS schemes including where AWCS are operational, the number of beneficiaries category-wise, the funds allocated and used and other related matters.
- ❑ All the State Governments/Union Territories shall allocate funds for ICDS on the basis of norm of one rupee per child per day, 100 beneficiaries per AWC and 300 days feeding in a year, i.e., on the same basis on which the Centre make the allocation.
- ❑ BPL shall not be used as an eligibility criterion for ICDS.
- ❑ All sanctioned projects shall be operationalised and provided food as per these norms.
- ❑ All the State Governments/Union Territories shall utilise the entire State and Central allocation under ICDS/PMGY and under no circumstances, the same shall be diverted and preferably also not returned to the Centre and, if returned, a detailed explanation for non- utilisation shall be filed in this Court.
- ❑ All State/Union Territories shall make earnest effort to cover the slums under ICDS.

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[15] Annexure 8
[16] Annexure 9

- The Central Government and the States/Union Territories shall ensure that all amounts allocated are sanctioned in time so that there is no disruption whatsoever in the feeding of children.

- **13.12.2006**[17]
  - Government of India shall sanction and operationalize minimum of 14 lakh AWCs before December 2008. In doing so, the Central Government shall identify SC and ST hamlets/habitations for AWCs on a priority basis.
  - Government of India shall ensure that population norms for opening of AWCs must not be revised upward under any circumstances. Further, rural communities and slum dwellers should be entitled to an "Anganwadi on demand" (not later than three months) form the date of demand in cases where a settlement has at least 40 children under six but no anganwadi.
  - The universalisation of the ICDS involves extending all ICDS services (Supplementary nutrition, growth monitoring, nutrition and health education, immunization, referral and pre-school education) to every child under the age of 6, and all adolescent girls.
  - Chief Secretaries of all State Governments/UTs are directed to submit affidavits giving details of the steps that have been taken with regards to the order of this Court of October 7th, 2004 directing that "contractors shall not be used for supply of nutrition in Anganwadis and preferably ICDS funds shall be spent by making use of village communities, self-help groups and Mahila Mandals for buying of grains and preparation of meals". Chief Secretaries of all State Governments/UTs. must indicate a time-frame within which the decentralisation of the supply of SNP through local community shall be done.

- **22.04.2009**[18]
  - The letter dated 24.02.2009 No.5-9/2005/ND/Tech (Vol.II) has been annexed to the affidavit dated 2nd March 2009 filed by the Union of India. It is directed that norms indicated in the said letter addressed to all the State Governments and Union Territories have to be implemented forthwith and the respective States/UTs would make requisite

[17] Annexure 10
[18] Annexure 11

financial allocation and undertake necessary arrangements to comply with the stipulations contained in the said letter.

- ❏ Supplementary Nutrition Food (SNP) in the form of THR shall be provided to all children in the age group of 6 months to 3 years, an additional 300 calories to severely underweight children in the age group of 3 to 6 years, pregnant women and lactating mothers as per paras 5(c), 5(d) and 5(e) of the letter dated 24th February 2009.
- ❏ As far as adolescent girls are concerned, they would continue to be covered by the entitlements of the Nutritional Programme for Adolescent Girls (hereinafter referred to as 'NPAG') and Kishori Shakti Yojana (hereinafter referred to as 'KSY') till such time as a comprehensive universal scheme for the empowerment of adolescent girls called 'The Rajiv Gandhi Scheme for the Empowerment of Adolescent girls' is implemented within six months from the date of the order.
- ❏ SABLA - for adolescent girls in certain districts.

- ❏ **10.02.2017**[19]
  - ❏ In view of the passage of the National Food Security Act, 2013, nothing further survives in this petition. It is accordingly disposed of.
  - ❏ In case the petitioner has any grievance with regard to the implementation or otherwise of the National Food Security act, 2013, he may file a fresh petition.

National Food Security Act, 2013 10.09.2013, w.e.f 05.07.2013

The following are the important sections of the NFSA that pertain to children:

- *S. 2(9) - meal means hot cooked or pre-cooked and heated before its service meal or take home ration, as may be prescribed by central govt.* As till date only 17 states provide hot-cooked meals and the rest provide ready to eat meals.
- *S. 5 - Nutritional Support to Children (up to 14 years)* - whether it should be for only up to 14 years or should be beyond is a matter of discussion. (See Table 4 for Schedule II)
- *S. 6 - Prevention and management of child malnutrition*
- *S. 7 - Implementation of schemes for realization of entitlements.* - Between the state and the centre the funds goes 50-50 between all states except the north east states where it is 90% Centre 10% State
- *S. 8 - Right to receive food security allowance*
- *S. 14 - Internal grievance Redressal Mechanism* - Can approach Food Commission to ensure the grievance cells are set up. But the Food Commission is busy handling PDS violation cases. In the Swaraj Abhiyan[20] case the Food Commissions need to be mandatorily set up. As none of

[19] Annexure 12
[20] Writ Petition (C) No. 857 of 2015. Annexure 13

the redressal cells are not set up one can go directly to High Courts for implementation of the NFSA

- *S. 15 - District Redressal Officer*
- *S. 16 - State Food Commission*

Sr. No.	Category	Type of meal	Calories (Kcal)	Protein (g)
1	Children (6 months to 3 years)	Take Home Ration	500	12-15
2	Children (3 to 6 years)	Morning Snack and Hot Cooked Meal	500	12-15
3	Children (6 months to 6 years) who are malnourished	Take Home Ration	800	20-25
4	Lower primary classes	Hot Cooked Meal	450	12
5	Upper primary classes	Hot Cooked Meal	700	20
6	Pregnant women and Lactating mothers	Take Home Ration	600	18-2

Table 4: Nutritional standards in schedule II

The Midday Meal Rules, 2015 w.e.f. 30.09.2015[21]

- *R. 2 (d) -Meal means hot cooked meal*
- *R. 3 - Entitlement for nutritional meal*
- *R. 4 - Place of serving meal* - school only
- *R. 5 - Preparation of meals and maintenance of standard and quality.*
- *R. 9 - Food Security Allowance*

The Supplementary Nutrition (under the ICDS Scheme) Rules, 2017 - w.e.f. 20/02/2017[22]

These rules have been made to regulate the entitlements specified under the provisions of the NFSA for every pregnant woman and lactating mother till six months after child birth, and every child in the age group of six months to six years (including those suffering from malnutrition) for three hundred days in a year, as per the nutritional standards specified in Schedule II to the said Act.

- *R. 3 - Nature of Entitlements*
- *R. 4 - Place of serving meal* - The Anganwadi centre
- *R. 5 - Supplementary Nutrition under ICDS* (Table No. 5)
- *R. 6 - Nutritional Standards* - As per Nutritional and Feeding norms
- *R. 7 - Preparation of meal and maintenance of its standard and quality* - Periodic checks need to be carried out
- *R. 8 - Food Security Allowance*
- *R. 9 - Responsibility to monitor and review* - The national nutritional discussion ready to eat meal is to be strictly not allowed

[21] Annexure 14
[22] Annexure 15

Sr. No.	Categories	Type of meal or food as per the nutritional standards specified in Schedule II of the Act
1.	Children (Between 6 to 36 months)	Take home ration as per Anganwadi Services (Integrated Child Development Services) guidelines in conformity with the provisions of the Act.
2.	Malnourished children (Between 6 to 36 months)	The same type of take home ration as above with food supplement of 800 calories and 20-25 grams of protein.
3.	Children (Between 3 to 6 years)	Morning snacks and hot cooked meal as per Anganwadi Services (Integrated Child Development Services) norms.
4.	Malnourished children (Between 3 to 6 years)	Additional 300 calories of energy and 8-10 grams of protein in addition to the meal or food provided to children between three to six years.
5.	Pregnant women and lactating or nursing mothers	Take home ration as per Anganwadi Services (Integrated Child Development Services) guidelines in conformity with the provisions of the Act.

Table 5: Supplementary Nutrition under ICDS

Despite the exhaustive list of positive orders the following were the issues and challenges flagged when it comes to right to food of children:

1. ICDS - budget cuts have been there since 2014 and onwards (See Figure 6)
2. Non supply
3. Hygiene
4. Cooking quality
5. Funds misappropriation
6. Food security act
7. BPL criteria
8. Implementation of AGWs
9. AGWS on demand
10. Privatisation – contractors appointed - proviso under rules
11. Allocation – misused – State diverts the fund and uses it somewhere else
12. Corruption
13. Pilferages

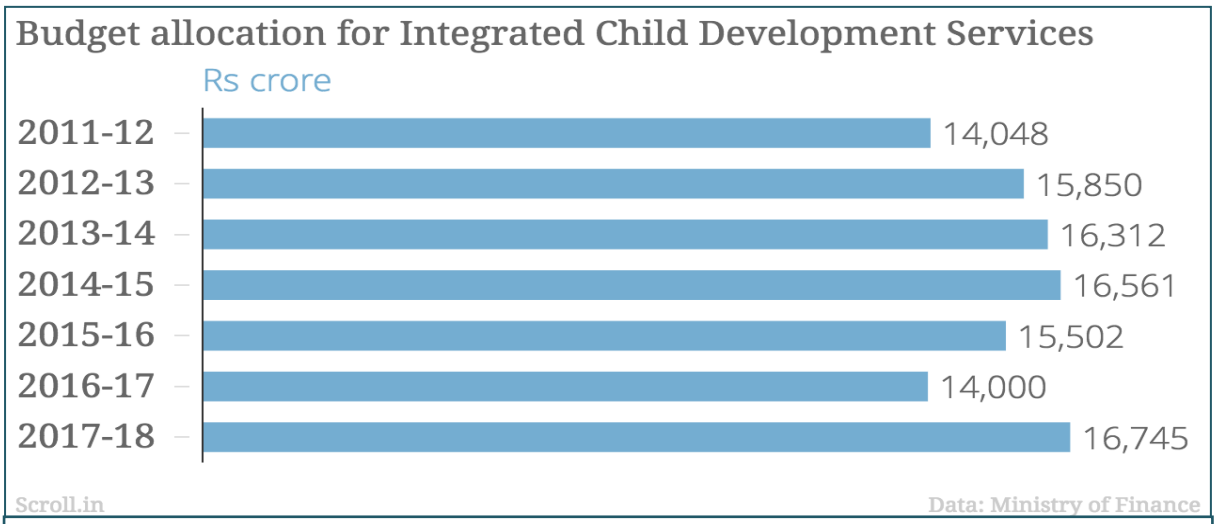


Figure 6: Budget Cuts

Litigation in Trial Courts and Juvenile Justice Boards: Strategies & Challenges

The day ended with a session on Strategies which lawyers can use in trial courts which focused on the JJ and POCSO Acts. The resource persons, Zishaan Iskandari, Rachit Gupta and Ashish Kumar, pointed out if a lawyer is working on POCSO & JJ, it becomes compulsory to visit the trial courts as we are the appreciator of law and interpreter too.

The session had two JJB lawyers from Delhi doing a mock trial of instances where children get caught in different types of offences and the points that were put forward as regards their bail. They put forward the Prosecution and defence points and sought judgment from the participants.

Issue- we all agree that in criminal law bail is a right and while arguing the case of a CCL we often compromise with the best interest of the child.

Conclusion - *"The responsibility of the persons who are going to represent the CCL is not just to present a strong case and prove his innocence but also to see the best interest of the child and play a thrust as a child rights advocate – ask for the action against the gangs and other persons who are forcing such persons into it and consequently liable for it."*

The third resource person talked about the specific issue of burden of proof under s. 29 of the POCSO Act as it had come up numerous times in the preceding sessions and also special representation for victims under POCSO Act. As victim's representation is generally sidelined it is tried that to make the voice of the child-victim reaches the court - sec 301 CrPC says that one can represent the victim with 2008 amendment - special public prosecutor - proviso - victim also has a right to choose the lawyer.

It is so because the legislative intent was to reinforce the special focus of this Act and therefore lawyers have been given an opportunity to represent the intent of the Act. Though they have a very limited scope as being the victim's lawyer under POCSO, but if one catches the spirit of the intent of the law nothing is more important than the victim and his/her lawyer.

Day 4

Child Protection System in India

On the Final Day of the Consultation the first session was on the Child Protection system where each stakeholder and institution at the block, village/town, district, State and national level was listed down and their constitution and their functions were listed.

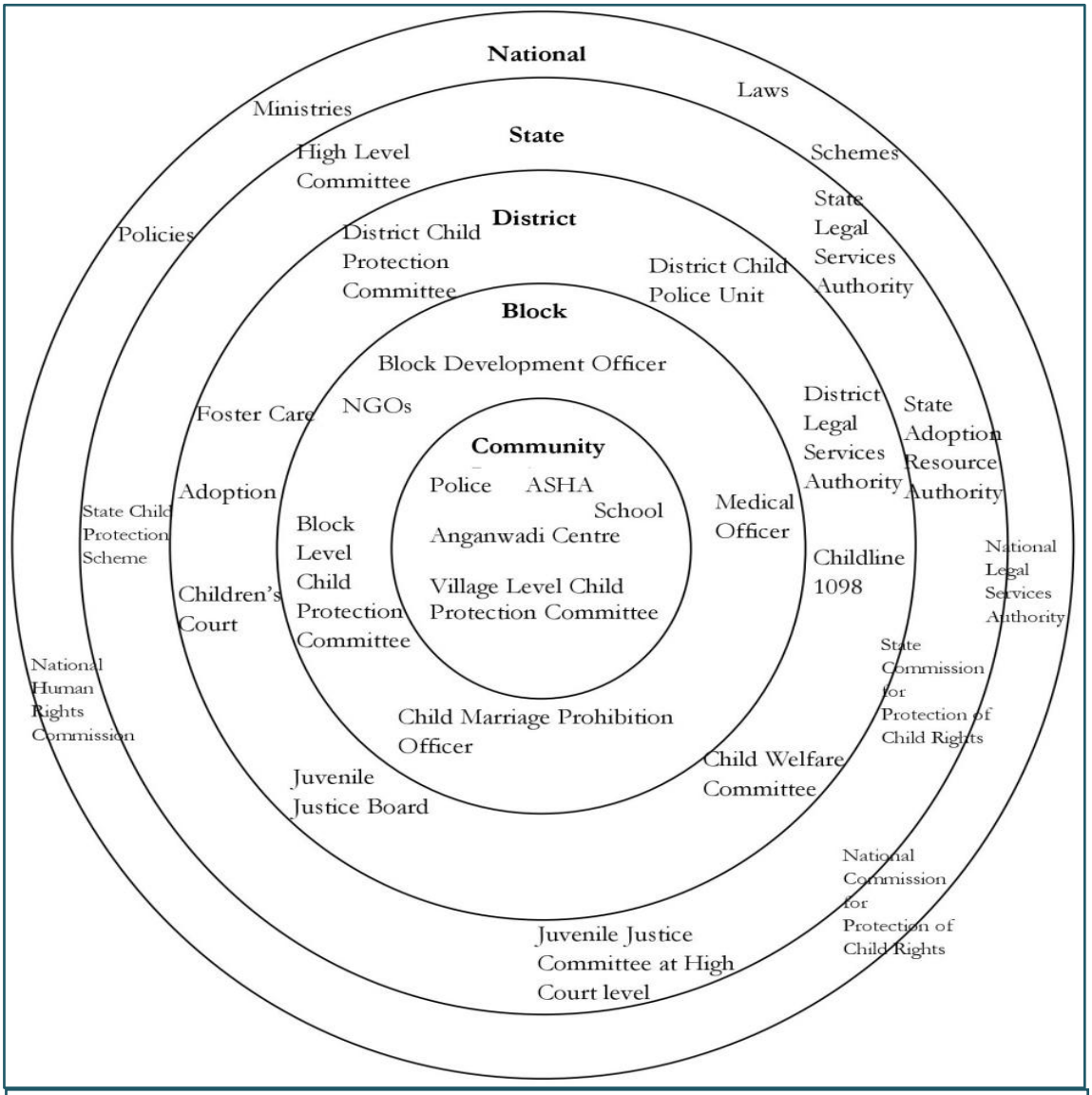


Figure 7: Child Protection System at various levels

Children with Disabilities and Drug & Substance Abuse among children[23]

The next session was on Children with disabilities and Drug abuse among children. The various types of disabilities were listed as defined under the persons with disabilities act and the various issues generally faced by children with disabilities as regards accessibility.

[23] Annexure 16. Presentation prepared by Adv. Swati Sood an Vaibhav Sharma

This session covered the topic of Children with disabilities which was discussed by Delhi Advocate Swati Sood and those children who get involved in the vicious cycle of Substance abuse which was examined by Vaibhav Sharma from Safe Society.

1. Children with Disabilities:

The discussion began with talking about the various categories the new Persons with disabilities which have been listed below as per Schedule I of the Persons with Disabilities Act, 2016:

i. Physical disability – Loco motor disability, Visual impairment, Hearing impairment, speech and language disability etc.
ii. Intellectual disability – specific learning disabilities, autism spectrum etc.
iii. Mental behaviour - mental illness
iv. Disability caused due to - chronic neurological conditions, Blood disorder, etc
v. Multiple Disabilities

The relevant sections which were discussed are reproduced below:

Sec 3: Equality and non-discrimination:

Sec 4: Women and children with disabilities:

Sec 6: Protection from cruelty and inhuman treatment:

(1) The appropriate Government shall take measures to protect persons with disabilities from being subjected to torture, cruel, inhuman or degrading treatment.

(2) No person with disability shall be a subject of any research without,—

(i) his or her free and informed consent obtained through accessible modes, means and formats of communication; and

Sec 17: Specific measures to promote and facilitate inclusive education:

The following Relevant Government Plans were elaborated upon briefly:

- NATIONAL POLICY FOR CHILDREN, 2013
- NATIONAL POLICY OF EDUCATION, 2016

National Policy for Children, 2013

4.6 of National Policy for Children

❑ (v) Ensure that all out of school children such as child labourers, migrant children, trafficked children, children of migrant labour, street children, child victims of alcohol and substance abuse, children in areas of civil unrest, orphans, children with disability (mental and physical), children with chronic ailments, married children, children of manual scavengers, children of

sex workers, children of prisoners, etc. are tracked, rescued, rehabilitated and have access to their right to education

- (vi) Address discrimination of all forms in schools and foster equal opportunity, treatment and participation irrespective of place of birth, sex, religion, disability, language, region, caste, health, social, economic or any other status
- (vii) Priorities education for disadvantaged groups by creating enabling environment through necessary legislative measures, policy and provisions

National Policy of Education, 2016

- 6.11 Education of Children with Special Needs
  - 6.11.1 Every child has the right to develop to her full potential and schools are expected to offer a stimulating experience that nurtures learning by all students. But children are different from each other and among them diversities exist on various dimensions. Having special needs is one such dimension. An inclusive approach has long been advocated by education experts. The recognition that learners with different degrees of disability, also referred to as children with special needs (CWSN), which would include varying degrees of visual, speech and hearing, loco motor, neuromuscular and neurodevelopmental disorders, (dyslexia, autism and mental retardation), need to be given the opportunity to participate in the general educational process has yet to become widely acceptable by school managements. The need to provide for students exhibiting difficulty with behavioral communication or encountering from intellectual, physical or multiple challenges is often treated as something that only special schools can handle.
  - 6.11.2 There is a marked difference between what was earlier envisaged and the prevailing situation on the ground.
  - The National Policy for Persons with Disabilities, 2006 (PWD) voiced the need for mainstreaming of persons with disabilities in the general education system through inclusive education, identification of children with disabilities through regular surveys, enrolment in appropriate and disabled friendly schools till successful completion of education. More recently the RTE Amendment Act (2012) stated that "disadvantaged groups" includes children with disabilities and thus all the rights provided to children belonging to disadvantaged group shall apply to children with disabilities also. According to another important provision of the RTE Amendment Act, certain specific excluded categories of disabled children namely children with "multiple" or "severe" disabilities were to be provided with the choice of attaining home based education.
  - 6.11.3 The importance of preparing teachers who can teach in inclusive classrooms following an inclusive pedagogy has been referred to in the National Curriculum Framework for teacher education (NCFTE), 2009. NCERT in various position papers has underscored the need for developing a positive attitude among teachers, administrators, and other students in their attitudes to children with special needs.

➢ 6.11.4 Providing special training to every teacher will neither be feasible nor cost-effective. There is a need for a mechanism which can respond to the school Principal or teacher who seeks special training to be imparted to handle children with specific kinds of learning difficulties. Sometimes all that may be needed is professional advice for a limited duration; sometimes it may need more training.

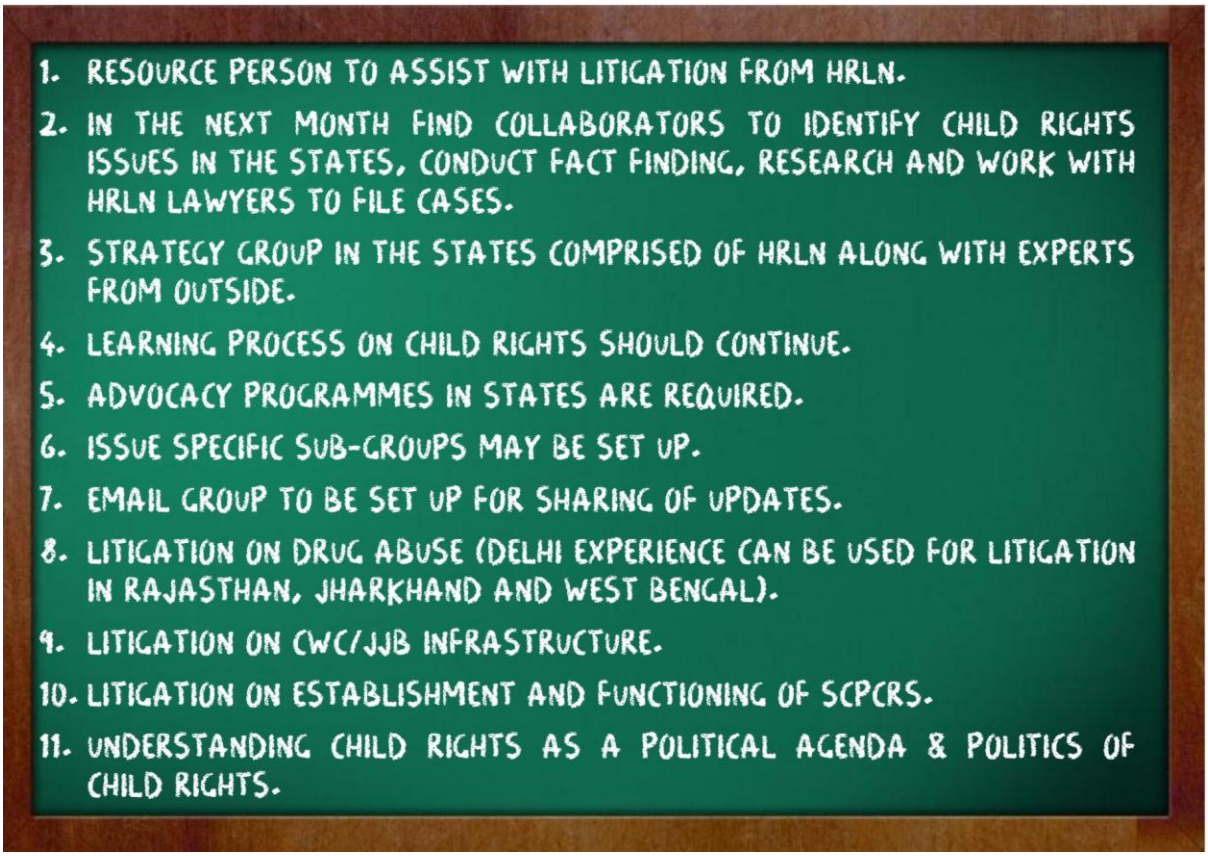
2. Drug and Substance Abuse among children

A short video of the vulnerabilities of street children to drug abuse was shown. Thereafter litigation on this aspect was discussed by Vaibhav Sharma from Safe Society.

Relevant court orders: Delhi High Court has directed in AASHA vs. State Govt. Of NCT of Delhi[24] the police to enforce Section 77 of Juvenile Justice Act which provides for punishment to anyone giving intoxicating liquor/drugs to children by treating thinners, whiteners, correction fluid, vulcanizing solutions as "intoxicating liquor"

Plan of Action and way forward

The Consultation concluded with the Action Plan, which was decided as follows:



[24] W.P.(CRL) 2401/2017. Annexure 17

History of Child Rights in India and the world and Overview of the CRC

Foundation Course

Session 3: Evolution of Child Rights and India's International Obligations

PPT1

2014

LBSNAA

- History of child rights shows that 1920s onwards, children's issues started receiving systematic attention across the world.

- In India, the seeds were laid with the social reform movement in the 19th century during the colonial rule.
  - The Brahmo Sabha founded in 1828 by Raja Ram Mohan Roy was the first of its kind to raise a voice against sati and child marriage. As a result, the then Governor General Lord William Bentinck by a legislation in 1829 abolished "Sati.
  - The Brahmo Samaj also worked equally hard for the less privileged ones by setting up orphanages.
  - The Prarthana Samaj came into existence in 1867, under the guidance of Keshab Chandra Sen, whose efforts led to abolishing early marriage of girls and polygamy and recognition of widow remarriage and inter-caste marriage through the passing of the Government Act III.
  - Social reformers like Raja Ram Mohun Roy, Ishwar Chandra Vidyasagar, Dayanand Saraswati, etc. have thus played a crucial role in drawing attention to issues such as child marriage, widow remarriage, infanticide, abolition of Sati, devadasi tradition, dowry, women's property rights, the purdah system and education of girls.

- Alongside, issues such as vagrancy, truancy, begging, orphan and destitute children, street and working children, children in jails, also started receiving attention from the colonial masters, since they affected law and order and general administration.

- The worst forms of the exploitation of children started during the Industrial Revolution. Just as the case was in Great Britain, the new industrialists started hiring children who were forced to work in inhuman conditions. Laws against child labour were passed under various Factories Acts 1881 onwards, and laws relating to mines, ports, plantations, motor transport works, shipping, shops and establishments etc. Most laws against child labour date to the 19th and early 20th century.

- Issues of guardianship and custody received attention in 1890 with the passing of the first ever Guardianship and Wards Act, followed by laws governing succession, marriage, divorce, maintenance and custody among Hindus and other religious communities that came into existence between 1925 and 1956.

- Of the first set of laws relating specifically to children/minors are the Indian Majority Act of 1875, the various Children's Acts in different provinces of Madras, Bombay, North Western Provinces and Bengal that were enacted between 1920 and 1924, the Sarda Act, 1929 (later came to be known as the Child Marriage Restraint Act, the Children (Pledging of Labour) Act, 1933, and the Employment of Children Act, 1938.

- The Constitution of India specifically provides for taking special measures for women and children (Article 15). Subsequently, several progressive laws have been enacted such as the law on juvenile justice, prohibition of use of technology for sex-selective abortions, right to education, sexual offences against children etc. and many old laws have been amended from time to time or repealed to provide better protection to children and their rights.

- The first legislation having a bearing on juvenile justice came in 1850 with the Apprentices Act which required that children between the ages of 10-18 convicted in courts to be provided vocational training as part of their rehabilitation process. This act was transplanted by the Reformatory Schools Act, 1897, the Indian Jail Committee and later the Children Act of 1960. This gave way to the **Reformatory Schools Act, 1897.** The Madras Children Act 1920 was the first Children Act to be enacted, closely followed by Bengal and Bombay in 1922 and 1924, respectively. Later, many more states enacted their own Children Acts, covering within their sphere two categories of children, viz., (i) delinquent children, and (ii) destitute and neglected children. The Government of India enacted the Children Act 1960, to apply only to the Union Territories and serve as a model to be followed by the states in the enactment of their respective Children Acts. All of these gave protection to children and included measures for reformation.

- In 1986, India introduced its first Juvenile Justice law (Juvenile Justice Act 1986), providing measures for protection, rehabilitation and reformation of juveniles who broke the law and for those who were neglected and in need of care.

- In 2000, the Government of India enacted the **Juvenile Justice (Care and Protection of Children) Act, 2000** (JJA 2000)**,** which **is based on the best interests of children and aims at protection, restoration and reformation of all children or juveniles**.

- Recently State of Jammu and Kashmir has repealed its existing juvenile law of 1997 and has enacted Jammu & Kashmir (Care and Protection of Children) Act 2013. This legislation is very similar to India's national Juvenile law except that it does not contain any provision on adoption.

A Firm National Commitment to address Children's Human Rights is reinforced through:

- The Constitution of India
- A plethora of laws
- National Policy for Children, 1974 and 2013
- National Plans of Action, 1979, 1992, 2005
- Setting up of a Separate Ministry for Women and Child Development in 2006
- Recognition of children's issues in the Five Year Plans since the 3rd Five Year Plan and inclusion of a distinct section on child rights in the Chapter entitled 'Women's Agency and Child Rights' since the 11th Five Year Plan
- Establishment of the National Commission for Protection of Child Rights (NCPCR) in 2007 and State Commissions thereafter
- Defining the child as a person below the age if 18 years in the national policy framework and different laws

Parallel Developments in the World

Feb 1923 Eglantyne Jebb, founder of Save the Children, drafts the five points of the first Declaration of the Rights of the Child, which gets adopted by the International Save the Children Union in Geneva

Nov 1924 Jebb's Declaration is adopted by the League of Nations and becomes known as the Declaration of Geneva.

Dec 1948 The UN adopts the Universal Declaration of Human Rights, a document that implicitly includes the rights of children.

Many argue that the special needs of children justified an additional separate document.

Nov 1959 UN General Assembly adopted a Second Declaration of Rights of the Child based on the experiences of World War II.

The UN Human Rights Commission group started to work on the draft of the CRC.

1979 The International Year of the Child.
The ten points of the Declaration were highly publicized….

Nov 1989 Work on the draft convention on the Rights of the Child was completed.
Convention adopted by the UN General Assembly.

Sept 1990 World Summit for Children held at the UN

May 2000 Two Optional Protocols to the CRC were adopted:
- Optional Protocol on the involvement of Children in Armed Conflict
- Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography

May 2002 A World Fit for Children is agreed to as a consensus document at the United Nations General Assembly Special Session for Children.

Dec 2011 Optional Protocol to the Convention on the Rights of the Child on Communications Procedure (Communication of Complaint relating to violation of children's rights)

Reinforcing Commitment through International Law

The drafters of Indian Constitution had undertaken a careful comparison of the Constitution of the United States, Ireland and the Universal Declaration on Human Rights (UDHR) and ingrained their principles that had stood the test of time.

Over the years India has reinforced its commitment to its citizens, including children through ratification of several international human rights instruments.

UDHR (Article Number)	Indian Constitution
1. All people are entitled to rights without distinction based on race, color, sex, language, religion, opinion, origin, property, birth or residency.	Art. 14 (equality before the law and equal protection of the laws), as limited by Art. 31C. Art. 16 (1) (equality of public employment), as limited by Art 16(3)-16(5).
2. All Human beings are free and equal in dignity and rights	Art. 15 (on the basis of religion, race, caste, sex, or place of birth), except under Arts. 15(3) and 15(4) (special provisions for women and children, and affirmative action). Art. 15 applies to all state action, and to private action restricting access to public places and facilities. Art. 17 (abolition of untouchability); and Art. 16(2) (employment discrimination on the basis of religion, race, caste, sex, descent, place of birth, and residence), as limited by Art 16(3)-16(5).
3. Right to life, liberty and security of person.	Art. 21 (Right to life with dignity, no extrajudicial executions). Art. 23 (prohibition of traffic in human beings and forced labor); Art. 24 (prohibition of hazardous labor by children under age 14); Art. 17, Abolition of Untouchability
4. Freedom from slavery	Art 17 and Art 23, 24. Specific Act of Parliament exists for abolition of Bonded labour.
5. Freedom from torture	Art 20, 21, 22
6. Right to be treated equally by the law	Art 14
7. Right to equal protection by the law	Art 14, Art 39A
8. Right for all to effective remedy by competent tribunal	Art 14, 20, 21,22
9. Freedom from arbitrary arrest.	Art 22

UDHR (Article Number)	Indian Constitution
10. Right to a fair public hearing by independent tribunal	Art 20, 21, 22, 39A
11. Right to presumption of innocence until proven guilty at public trial with all guarantees necessary for defense	Art 20, 21,22, 39A
12. Right to privacy in home, family and correspondence	Though not specific, Art 21 is invoked
13. Freedom of movement in your own country and the right to leave and return to any countries	Though not covered specifically, Art 21 is invoked. Menaka Gnadhi v. UOI is a classical case.
14. Right to political asylum in other countries	N/A
15. Right to nationality	Art. 19(1)(d) as to movement, and (e) at to residence, as limited by Art. 19(5) (reasonable restrictions in the interests of the public or of a "scheduled tribe").
16. Right to marriage and family and to equal rights of men and women during and after Marriage	Covered by separate Acts, specific to cultures and religions.
17. Right to own property	Art 31
18. Freedom of thought and conscience and religion	Art 19, 25, 26, 27, 28
19. Freedom of opinion and expression and to seek, receive and impart information	Art. 25 (freedom of religion and of conscience, "subject to public order, morality and health"), though under Art. 25(2) any level of government may restrict *economic* activities related to religion. Special mention is made of the religious practices of the Sikh religion. Under Art. 26, all religious orders have limited powers to establish places of worship and teaching, while Art. 28 ensures the separation of religious and state education. In addition, The Right To Information Act 2005

UDHR (Article Number)	Indian Constitution
20. Freedom of Association and assembly	Art. 19(1) (b) (freedom of peaceful assembly), as limited by Art. 19(3) (reasonable restrictions to advance national security).
21. Right to take part in and select government	There are numerous provisions, throughout the text of the Constitution, including those relating to election of the President, local village committees (Panchayats), and detailed rules for elections, eligibility for public service, etc.
22. Right to social security and realization of economic, social and cultural rights	Art 29, 30, 43
23. Right to work, to equal pay for equal work and to form and join trade unions	Art 19, 39, 42
24. Right to reasonable hours of work and paid holidays	Art 42, 43
25. Right to adequate living standard for self and family, including food, housing, clothing, medical care and social security	Art 47, and other Provisions of Part IV of Constitution
26. Right to education	Art 45
27. Right to participate in cultural life and to protect intellectual property rights	Art 29, 30
28. Right to social and international order permitting these freedoms to be realized	Art 38
29. Each person has responsibilities to the community and others as essential for a democratic society	Art 48A, Art 51A
30. Repression in the name of rights is unacceptable.	Art 32, 32 A, 33-35, Art 226

Ratification of the CRC

India ratified the UN Convention on the Rights of the Child (CRC) in 1992, thus once again reinforcing its commitment to children's rights.

Optional Protocols to the CRC

- Very often, human rights treaties are followed by "Optional Protocols" which may either provide for procedures with regard to the treaty or address a substantive area related to the treaty. Optional Protocols to human rights treaties are treaties in their own right, and are open to signature, accession or ratification by countries who are party to the main treaty.

- The CRC has three Optional Protocols. These are:
  - Optional Protocol to CRC on Sale of Children, Child Prostitution and Child Pornography, 2000, Signed by India on 15 November 2004 and Ratified on 16 August 2005
  - Optional Protocol to CRC on involvement of Children in Armed Conflict, 2000, Signed by India on 15 November 2004 and Ratified on 30 November 2005
  - On 19 December 2011, the UN General Assembly approved a third Optional Protocol on a communications procedure, which allows individual children to submit complaints regarding specific violations of their rights under the Convention and its first two optional protocols. India is yet to ratify this third optional protocol.

Signature, Ratification and Accession

Signature of a Convention by a government indicates that the country will seriously consider ratification.

Ratification is the formal commitment of the government to uphold the Convention.

Accession is the term given to the process when a government ratifies a Convention without having previously signed it, thus making signature and ratification a single act.

Reservations

A reservation is a statement that a government makes at the time of ratification which either puts a limit on a right or cuts out a right completely.

Declaration

States Parties to the Convention can also enter declarations which serve to clarify that particular country's interpretation for a section of the Convention.

India has made a declaration on Article 32 of the CRC stating that "...economic, social and cultural rights can only be progressively implemented in the developing countries, subject to the extent of available resources...".

LEGAL STATUS

The legal status of the Convention on the Rights of the Child varies from country to country depending upon the constitutional culture and traditions of the country in question.

The Two Approaches

Transformation approach - the provisions of international treaties such as the Convention are used by the state concerned as a basis for adopting appropriate legislation at national level. The treaty provisions do not become a part of national law in themselves. **This is what India follows.**

Automatic incorporation approach - once the treaty has been ratified it becomes part of the law of the land. In some states international treaties even become part of the 'supreme law of the land', giving their provisions a status that is generally superior to other legislation.

Overview of the Convention on the Rights of the Child (CRC)

The UNCRC draws attention to four sets of civil, political, social, economic and cultural rights:

- **Survival –** e.g. right to life; highest attainable standard of health; nutrition; adequate standard of living; right to a name and nationality.
- **Development –** e.g. right to education; early childhood care and development; social security; right to leisure, recreation and cultural activities.
- **Protection –** e.g. freedom from all forms of exploitation, abuse, inhuman or degrading treatment, neglect; special protection in situations of emergency and armed conflicts.
- **Participation –** e.g. respect for the views of the child; freedom of expression; access to age appropriate information; freedom of thought, conscience and religion; right to be heard in administrative and judicial proceedings.

All Rights are Interrelated, Indivisible and Interdependent

While child rights may be grouped into four clusters for easier understanding - survival, development, protection and participation, the rights in these clusters cannot totally be separated from each other. They are interrelated and integrated.

For example,

- the right of the child to a name and nationality has direct bearing on the right of the child to access his/her survival and development rights such as health care and education
- when girls do not have toilet facilities in schools, they keep away from school as they are unable to maintain personal hygiene, they do not feel protected and it hampers their overall growth

Clearly, **children encounter their realities not as a fragmented experience but as a whole.** Childhood and the range of children's needs and rights are one whole, and must be addressed holistically. A life-cycle approach must be maintained.

At the same time, it must be remembered that while all children have equal rights, their situations are not uniform.

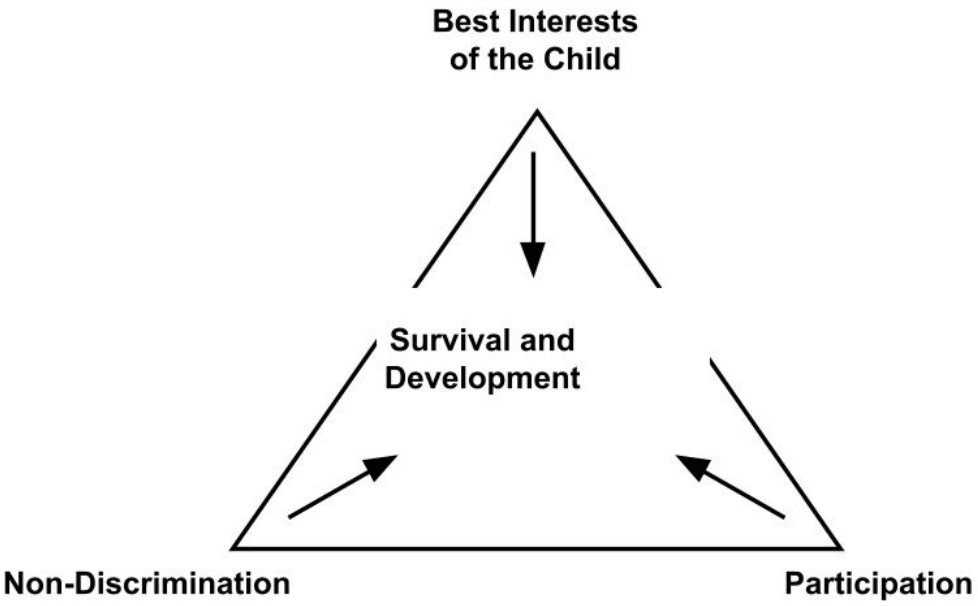
Civil and Political Rights (Immediate Rights)

They include such things as right to life and liberty, non-discrimination, right to nationality, freedom of expression, right to re-unification with the family, right to justice and a fair hearing in criminal cases, a separate system of juvenile justice for children in conflict with the law and most protection rights.

Economic, Social and Cultural Rights (Progressive Rights)

They include right to a reasonable standard of living, health and education, and the rights which are not covered by the first category.

Child Rights Guiding Principles



Convention on the Rights of the Child— General Principles

Source: International Save the Children Alliance, Getting it Right for Children, A practitioners' guide to child rights programming, 2007.

- The Convention on the Rights of the Child is rooted in some basic values about the treatment of children, their protection and participation in society. These ideas are expressed in some of the early articles in the text. The choice of these articles as "general principles" was made by the UN Committee on the Rights of the Child during its first session in September-October 1991, when it agreed on guidelines on how the initial reports by governments should be written and structured. That was the context for the important decision to give special emphasis to the four general principles - **Non-discrimination, Best interests of the child, Right to Survival and Development and Respect for the views and participation of the child** contained in articles 2, 3, 6 and 12 of the CRC.

- These articles were put under a special heading in the guidelines before norms on civil rights, family aspects, health, education and the other more substantive provisions. It was made clear that the committee wanted governments also to report on the application of these principles in relation to the realization of the other articles in the CRC. Thereby the convention became something more than a mere list of obligations; it offered a comprehensive message.

Non-discrimination

- The UNCRC focuses on the elimination of discrimination in three main areas: against individual children; against specific groups of children; and against the population group as a whole. Tackling discrimination is not simply about imposing top-down strategies. Instead, programmes should analyse power relationships and discrimination and the impacts these have on the children.
- In practice this means:
  - State should promote non-discrimination and diversity awareness. It should also provide appropriate information and training to children, their families and communities, and to governments and partners
  - State should include non-discrimination/diversity analysis as part of its child rights situation analysis. This would consider:
    - which groups of children experience discrimination (make sure data is disaggregated)
    - multiple forms of discrimination on the basis of different aspects of social identity; for example, a disabled girl from a minority ethnic group
    - an analysis of work that other local, national or international groups are doing to tackle discrimination
  - State should plan objectives and advocacy goals that reflect the non-discrimination analysis and clearly demonstrate how discrimination will be addressed

  - State should implement your programme in ways that engage with, empower and impact on children who face discrimination; that build internal and public awareness around issues of discrimination; and that demonstrate to others the value and abilities of vulnerable children, viewing them as social actors.

  - Monitoring and evaluation: State should use clear indicators to measure a reduction in discrimination and changes in attitude. It should also consider the intended and unintended impacts on different groups and get the views of a range of stakeholders.

Survival and development

- While children's survival often relates directly to children's right to life, children's right to development (as described in the UNCRC) must be interpreted in its broadest sense, encompassing the physical, psychological, emotional, social and spiritual development of the child. The state, as main duty-bearer, has a responsibility to ensure the survival and development of children to the maximum extent possible. Where the state is unable to assume its responsibilities, international donors, NGOs, civil society organisations and the private sector may need to support and complement the state through financial, technical and logistical responses.

- In practice this means:
    - an awareness and understanding of childhood and children's evolving capacities. You should also provide appropriate information and training to the children you work with, to government, and to partners an analysis of the state's capacity to prioritise children's survival and development, including: financial resources, budget allocation and funding mechanisms; policies and legislation; technical capacity; and organisational capacity. You should also analyse the capacity of other groups (civil society, international organisations, private sector, etc) who contribute to the fulfilment of children's survival and development rights
    - to plan programmes based on this analysis, including the perspectives of all relevant stakeholders in the process
    - to implement responses that strengthen the state's capacity to fulfil its obligations while also working with a broad range of other partners
    - to monitor and evaluate against clear indicators that measure direct changes in children's lives, as well as changes in capacity, policies, legislation and attitudes.

Best interests of the child

- This principle touches on every aspect of a child's life. It means, when adults make decisions, they should think about how their decisions will affect children. This particularly applies to budget, policy and law makers. Whenever decisions are taken that affect children's lives, the impact of those decisions must be assessed to ensure that the best interests of children are the main consideration. The interests of others – such as parents, the community and the civil society – should not be the overriding concern, even though they may influence the final decision.
- In practice this means:
    - State should promote awareness of the best interests principle and its implications for decision-making
    - State should analyse how local and national policy, legislation and practice is informed by children's best interests
    - Planning: allow children's views to influence programme design
    - Implementation: State should facilitate children's direct involvement in the practical implementation of programme activities
    - Monitoring and evaluation: State should measure the impact of programme activities on children to assess whether their best interests are being realised. State should also measure the impact of programme activities on policies, practice, attitudes and communities to assess the extent to which children's best interests are being prioritised.

Child participation and the right to be heard

- Participation, as enshrined in the UNCRC, is about children and young people having the opportunity to express their views, influence decision making and achieve change in areas that affect their lives. Children's participation is informed and willing involvement of children, including the most marginalised and those of different ages and abilities, in all matters concerning them.

- This does not mean that children can now tell their parents what to do. The UNCRC does not interfere with parents' right and responsibility to express their views on matters affecting their children.

- Moreover, the Convention recognizes that the level of a child's participation in decisions must be appropriate to the child's level of maturity. Children's ability to form and express their opinions develops with age and most adults will naturally give the views of teenagers greater weight than those of a preschooler, whether in family, legal or administrative decisions.

- In practice this means:
  - State must be aware of and understand children's evolving capacities and their ability to act on their own behalf. (For example, there are different ways of involving older and younger children depending on their level of understanding and ability to participate.)
  - State should analyse the programme environment to identify the barriers to children speaking out or to their voices being heard
  - Planning: State should create space and opportunity for children's views to influence programme design
  - Implementation: create space and opportunity for children's voices to be heard within their families, communities and beyond; build children's confidence, knowledge of their rights and ability to protect themselves; give children an opportunity to learn and practice important life skills; and empower children as members of civil society and as active and responsible citizens
  - Monitoring and evaluation: use clear indicators to measure the extent of children's participation and the creation of spaces and mechanisms for their views to be taken into account in decision-making
  - Be accountable to children through feedback.

- In practice this means:
  - State must be aware of and understand children's evolving capacities and their ability to act on their own behalf. (For example, there are different ways of involving older and younger children depending on their level of understanding and ability to participate.)
  - State should analyse the programme environment to identify the barriers to children speaking out or to their voices being heard
  - Planning: State should create space and opportunity for children's views to influence programme design
  - Implementation: create space and opportunity for children's voices to be heard within their families, communities and beyond; build children's confidence, knowledge of their rights and ability to protect themselves; give children an opportunity to learn and practice important life skills; and empower children as members of civil society and as active and responsible citizens
  - Monitoring and evaluation: use clear indicators to measure the extent of children's participation and the creation of spaces and mechanisms for their views to be taken into account in decision-making
  - Be accountable to children through feedback.

Recognizing the Agency of Children – A Case Study

Source: University of Minnesota, Human Rights Resource Centre, Circle of Rights, Economic, Social and Cultural Rights Activism, A Training Resource, Section 3, Module 5, Children and ESC Rights.

- Ameena, a thirteen-year-old Muslim girl, was sold by her parents for a small sum to a Saudi Arabian sheikh. She was one of several siblings, many of whom were girls. Her father worked as a weaver; the family was impoverished. The "sale" was disguised as a marriage, although even under Muslim law, Ameena was too young to give her consent to the "nikah." Ameena would not have come to public notice had it not been for a vigilant and sensitive air hostess, Ms. Ahluwalia, who noticed the young distraught child in the aircraft before it flew out of the country. On Ms. Ahluwalia's sounding an alert, the police were informed, the sheikh was arrested, and Ameena was sent to a government protective home for children in New Delhi. The home is located within the complex which houses the notorious Tihar Central Jail in Delhi, and the proximity does not end there. The home functions as a prison despite the status of a "home" under the law.

- A police case was registered against the sheikh and Ameena's parents. During the several months the case went on, Ameena lived in the prison-like confines of the protective home. While her parents traveled from distant Andhra Pradesh at devastating cost to attend court hearings, the sheikh sought refuge in the Saudi Arabian embassy in Delhi, and managed to eventually flee the country. Ameena's relationship with her parents naturally was strained and she developed a friendship with Ms. Ahluwalia, who visited her regularly. Ms. Ahluwalia expressed her desire to adopt Ameena, or at least take her into temporary custody till the case was decided, but her requests were refused by the state as well as the courts.

- In a case filed by Ms. Ahluwalia and several women's organizations the Delhi High Court directed that Ameena be restored to the custody of her parents and sent home. To prevent her being sold again, the Court issued directives to the state government that Ameena be provided with free education, and that the state monitor her well-being at regular intervals and make some provisions for providing economic security to the family. Ameena went home with her parents, even with the criminal case pending against them.

- Ameena was at no stage seen as a person with any agency or capacity to take decisions for herself. Her father gave consent on her behalf to the "nikah," Ms. Ahluwalia activated the police and the legal system, the state placed her in the protective home, the court sent her back to her parents, and eventually her parents prevailed upon her to dilute her testimony against them in the criminal case.

- What did Ameena want? We don't really know because she was not asked. While the law and her parents obviously believed her to be old enough to be married and become sexually active, she was not given even a limited amount of control over directing the path of her life. Perhaps all she wanted was not to be separated from her brothers and sisters, and to enjoy the last few years of her childhood in peace.

- Lack of recognition of the capacity of children to decide has very negative implications for certain categories of children, such as street children, who become accustomed at an early age to taking their own decisions and to a certain type of freedom. Treating all children as bereft of any agency without reference to their age and situation seems to be a direct assault on their rights as individuals.

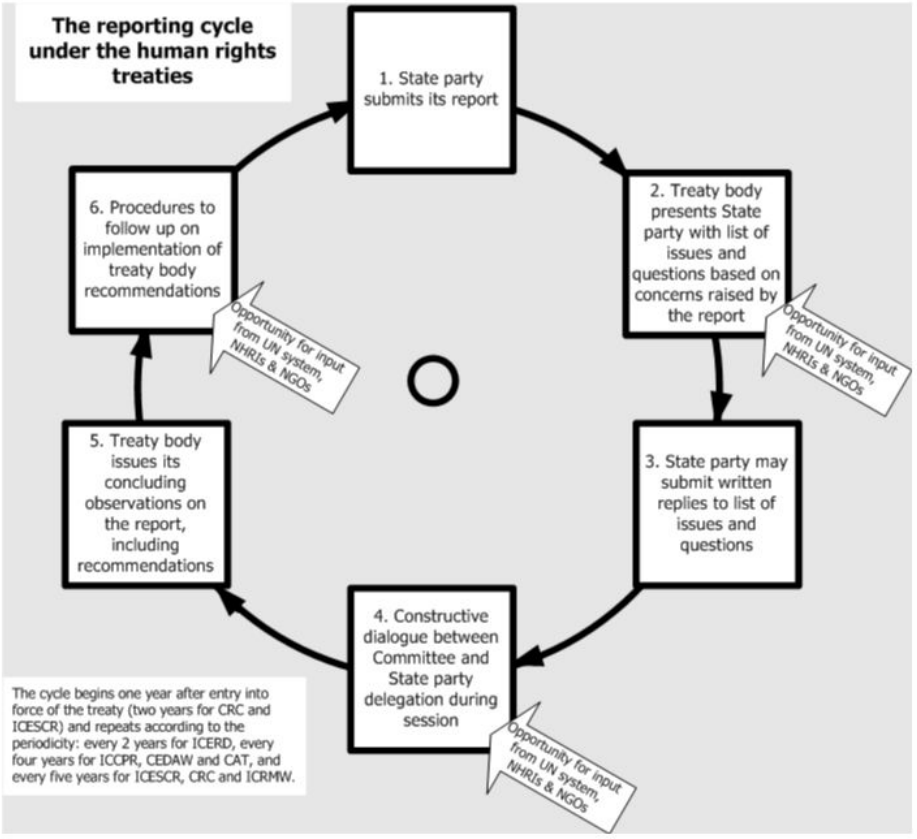
Implementing the CRC and the Reporting Process

Article 42 - State parties are obliged to make the rights contained in the Convention widely known to both adults and children.

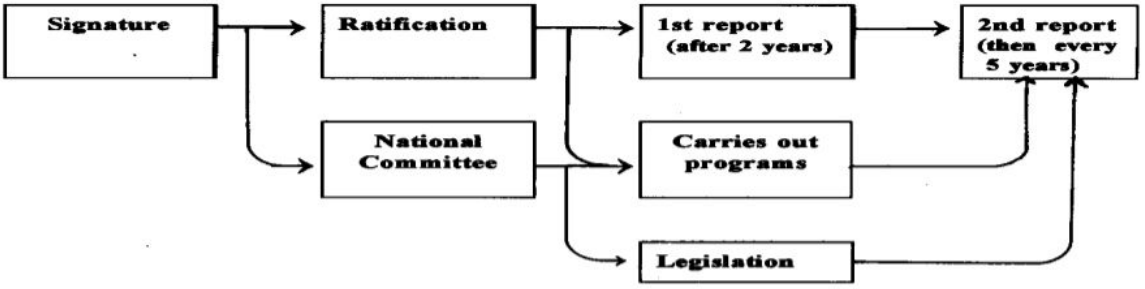
Article 43 – A Committee on the Rights of the Child consisting of 18 elected experts nominated by States Parties to be set up at the UN level to examine progress made by the States Parties on implementation of the CRC and its Optional Protocols.

Article 44 – States Parties are to send their reports to the CRC Committee on the implementation of CRC in their countries – first one after 2 years of ratifying the CRC and then every 5 years.

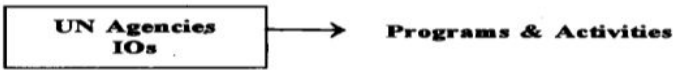
Article 45 – Other competent groups (including NGOs & specialized UN and International agencies) to submit information to the committee as alternate or shadow reports.



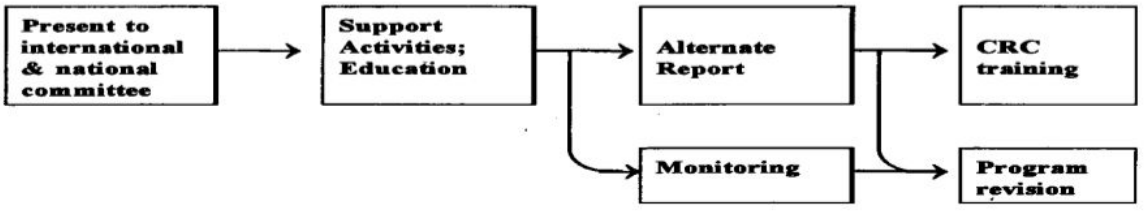
Governments



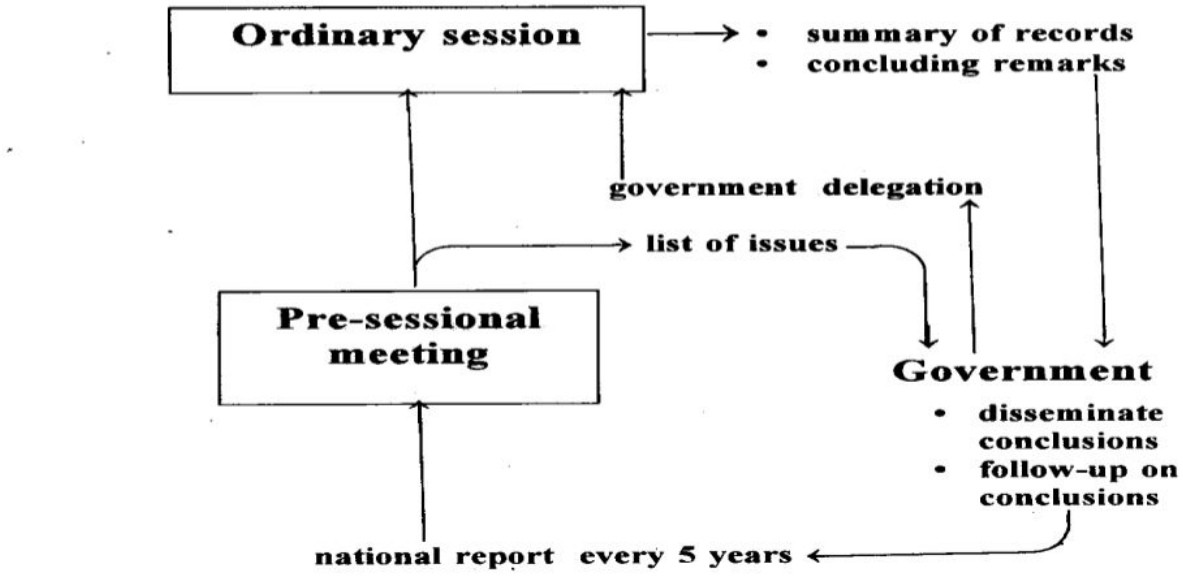
International Agencies



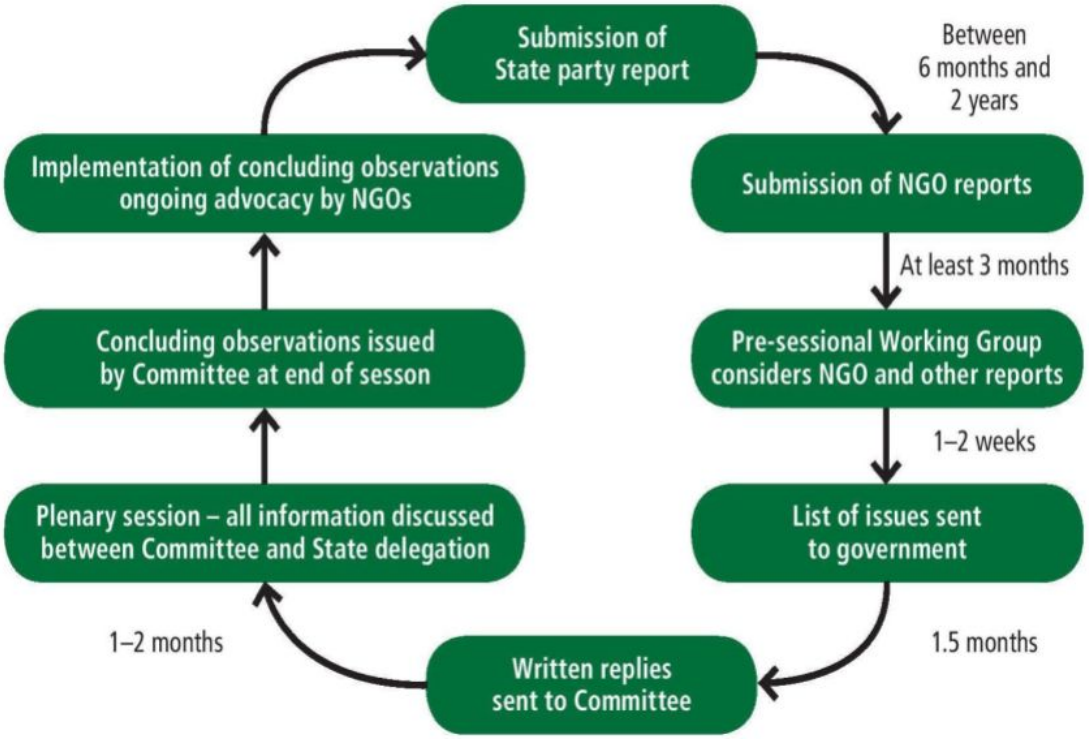
Non-Government Agencies



UN Committee on the Rights of the Child



Reporting process of the Committee on the Rights of the Child



Reporting by Government of India	Due Date	Date of submission
Initial Report	10 January 1995	19 March 1997
Second Report	10 January 2000	10 December 2001
Third Report	10 January 2005	Government of India missed the due date. As an exceptional measure, a consolidated third and fourth periodic was due before 28 May 2008. Missing this date, a new date was set out as 10 July 2008. The combined report was submitted only as recently as September 2011.
Fourth Periodic Report	As an exceptional measure India was to submit a consolidated third and fourth report before 28 May 2008.	Government of India later set out to submit the report before 10 July 2008. The combined report was submitted in September 2011.

Reporting by Government of India	Due Date	Date of submission
Optional Protocol on sale of children, child prostitution and child pornography Date of ratification/accession – 16 Aug 2005 Date of Entry into Force –16 September 2005 http://www2.ohchr.org/english/bodies/ratification/11_c.htm, and http://www.bayefsky.com/html/crc_sc_ratif_table.php		
First Report	The first report was due in September 2007. Government of India had requested for submission of the report along with the combined Third and Fourth Periodic report on CRC in July 2008.	Submitted in September 2011.
Optional Protocol on children in armed conflict Date of ratification/accession – 30 November 2005 Date of Entry into Force – 30 December 2005 http://www2.ohchr.org/english/bodies/ratification/11_b.htm , and http://www.bayefsky.com/html/crc_ac_ratif_table.php		
First Report	The first report was due in January 2008. Government of India had requested for submission of the report along with the combined Third and Fourth Periodic report	Submitted in September 2011

Definition of the Child in Indian Laws and Policies

Phase I

Session 1: **An Overview on Child Rights and Rights-based Approach**

PPT 2

2014

LBSNAA

Child and the age of 18 in India …

The 2013 National Policy for Children (NPC) defines a child as a person below the age of 18 years

Para 2.3 of NPC –

"This Policy is to guide and inform all laws, policies, plans and programmes affecting children. All actions and initiatives of the national, state and local government in all sectors must respect and uphold the principles and provisions of this Policy."

Policy Framework must Guide the Legal Framework

A Uniform age definition of the child in accordance with NPC, 2013 must therefore be brought into all laws relating to children

Child in the existing Legal Framework

- The age of majority giving a citizen the right to vote is 18 years.
- A person below 18 years cannot enter into a legal contract. Therefore, a person below 18 years cannot even sign the 'vakalatnama' to fight a court case or put up a defense.
- A driving license can only be acquired on completion of 18 years of age.
- No one below the age of 18 years can donate blood.
- The legal age for marriage is 18 years for girls and 21 years for boys.
- The Juvenile Justice Act, 2000 (amended in 2006) defines a child as a person up to the age of 18 years, thus bringing it in consonance with the UNCRC and other international instruments on juvenile justice.
- The Protection of Children from Sexual Offences Act, 2012 also defines a child as a person up to the age of 18 years.

But …

- The Child Labour (Prohibition and Regulation) Act, 1986 defines a child as a person up to the age of 14 years.
- The Right of Children to Free and Compulsory Education is restricted to children in the age of 6-14 years
- The Immoral Traffic (Prevention) Act, 1956, makes a distinction between a child and a minor defining a child as a person below the age of 16 years and a minor as a person between the age of 16 and 18 years.

There is no Uniform Age Definition in the Existing Laws!

Why a Uniform Definition of the Child?

- Lack of a Uniform definition of the child affects planning and programming for children, leaving many of their problems unaddressed
- It leads to, or perpetuates, discrimination between children
- It causes conflict between different existing laws and protections offered by them

Reading Notes

Legal Definitions of the Child and Resulting Discrimination and Confusions

- **Some children are allowed to work for economic reasons and some are not.** A 16-year-old domestic worker cannot seek justice under the Child Labour (Prohibition and Regulation) Act because the law defines a child as a person below the age of 14 years. The only situation of child labour that gets covered under the Juvenile Justice legislation which defines child as a person below 18 years is a situation where a child has been procured for employment in hazardous work and kept in bondage and in addition his/her wages have been withheld or used by the procurer for his own purposes.

- **When matters such as custody, maintenance and marriage are governed by personal laws** that define children differently and also treat children differently, rights of some children are bound to get affected while their counterparts covered by a more progressive legislation enjoy better protections.

- While the **child marriage law** does not declare all child marriages null and void and hence **treats them as valid marriages** until either party to the marriage seeks annulment. On the other hand, **by virtue of the POCSO Act**, **sexual activity between or with minors amounts to statutory rape** since the question of consent has no meaning when it comes to children below the age of 18 years.

Reading Notes (Contd.)

Age of consent vs. Age of Child

- A strong demand from civil society for lowering the age of sexual consent
- Treating age of consent as the age of the child is a common mistake we make
- When a child is defined as a person below the age of 18 years, the state has to ensure his/her protection, including protection from being criminalized for actions that result from immature behaviour. Demand for lowering the age of sexual consent to 16 years is therefore a demand for protecting young people eloping to get married from being criminalized and not a demand that would give effect to any change in the definition of the child.

Child vs. Child Labour

- Similarly, if all children below the age of 18 years are to be ensured their right to protection from exploitation, violence and abuse, the definition of child labour as persons below the age of 14 years takes away those guarantees.
- Therefore there has been a strong demand for keeping the age definition of child labour same as the age definition of the child.

Conclusion:

The vulnerable situations that child find themselves in can be addressed through law even without changing the definition of the child. In doing so the guiding factor should be child protection.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 473 OF 2005

Sampurna Behura ....Petitioner

Versus

Union of India & Ors. ....Respondents

J U D G M E N T

Madan B. Lokur, J.

1. What can a citizen do if the State pays no attention to his or her fundamental or human or statutory right, nor takes serious interest in fulfilling its constitutional or statutory obligations? What if that citizen is a voiceless child or someone whose voice cannot be heard over the din of governance – for example, physically or mentally challenged persons, senior citizens, and other disadvantaged sections of society such as scheduled castes, tribals and several others? The aggrieved would perhaps approach the judiciary (if he or she could and as a last resort) for the enforcement of a human right. Should the judiciary take corrective

steps and be accused of 'judicial activism' or overreach – or should the cynics and skeptics have their day resulting in the grievance of the voiceless and the disadvantaged remaining unheard and the fundamental and human rights lying unaddressed?

2. These questions arise in the context of the virtual non-implementation or tardy implementation of laws beneficial to voiceless (and sometimes silenced) children, particularly, the Juvenile Justice (Care and Protection of Children) Act, 2000 (the Act of 2000) and the Juvenile Justice (Care and Protection of Children) Act, 2015 (the JJ Act). We record and acknowledge our appreciation for the efforts of Sampurna Behura in highlighting some of these issues by way of a Public Interest Litigation and to learned counsel for the appearing parties in rendering assistance enabling us to address some of these issues by not making these proceedings adversarial, but a constructive effort for the benefit of the children of our country. No one has any doubt that it is time for the State to strongly and proactively acknowledge that even children in our country have fundamental rights and human rights and they need to be enforced equally strongly.

3. If Nelson Mandela is to be believed, "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."[1] Our policy and decision makers need to heed this advice and warning and appreciate that they are not doing any favour to the children of our country by caring for them – it is their constitutional obligation and the social justice laws enacted by Parliament need to be effectively and meaningfully enforced.

Background and Chief Justices Conferences

4. In a prescient understanding of child rights, the Chief Justices' Conference held in 2006 (presided by the Chief Justice of India with participation by the Chief Justice of every High Court) the following resolution was passed:

> "a) That High Courts will impress upon the State Governments to set up Juvenile Justice Boards, wherever not set-up. The Chief Justices may nominate a High Court Judge to oversee the condition and functioning of the remand/observation homes established under the Juvenile Justice (Care and Protection of Children) Act, 2000.
>
> b) The Chief Justices of the High Courts will expedite the matter with the respective State Governments for setting up of Juvenile Justice Boards, wherever they have not yet been set up.
>
> c) The Chief Justices of the High Courts will nominate a Judge to make periodical visits to Juvenile Homes, wherever set up, and the learned Judge may suggest remedial measures for the betterment of the conditions of the juvenile homes and inmates."

[1] Address by President Nelson Mandela at National Men's March, Pretoria on 22 November 1997

5. The above resolution was passed almost six years after the Act of 2000 came into force – meaning thereby that even about six years after Parliament enacted a law for the benefit of children, the State Governments had not taken steps to fulfill one basic requirement of the law, that is, to set up Juvenile Justice Boards.

6. In 2009 the Chief Justices' Conference discussed the progress made in setting-up of Juvenile Justice Boards and the resolution passed in the Conference in 2006 was reiterated indicating that little or no progress had still been made by the State Governments in setting up Juvenile Justice Boards. So, almost a decade had gone by without compliance by the State Governments of a basic statutory obligation laid down by Parliament.

7. In 2013 the issue of strengthening the juvenile justice system was again discussed at the Chief Justices' Conference and the resolutions passed in 2006 and 2009 were reiterated. In addition, the mandate of setting up Child Welfare Committees in all districts was also emphasized to meet the requirements of children in need of care and protection and to give full effect to the provisions of the Act of 2000. It was the further resolved:

> "It was further resolved that Juvenile Justice Committees, as had been set up in the Delhi High Court, under the guidance of the Chief Justice and senior judges and others concerned with the welfare of juveniles and the working

> of the Juvenile Justice (Care and Protection of Children) Act, 2000, be set up in all the High Courts to monitor the implementation of the provisions of the Act in their true spirit.
>
> It was noticed that the State Governments had not taken serious steps to establish and set-up the various Homes, referred to in the Juvenile Justice (Care and Protection of Children) Act, 2000, as amended in 2006 and the Juvenile Justice (Care and Protection of Children) Rules, 2007. It was noticed that the conditions in the Remand/ Observation Homes and Shelter Homes are not up to the standard and a lot of improvement was required to make these facilities meaningful, as envisaged under the above Act and Rules. It was also noticed that After-care Homes for adolescents passing into adulthood and, in particular girls, have not been taken up seriously by the concerned Authorities. The Chief Justices shall take up the matter with the State Governments for improving the conditions of the various Homes, referred to in the above Act and the Rules, and to provide for permanent staff to run the said establishments, as it was reported by some of the Chief Justices that many of the employees of the Homes had been working on an ad-hoc basis, even for as many as fifteen years. The Chief Justices were requested to take up the matter with the State Authorities to ensure that services of such persons, who have been working on ad-hoc basis, are regularised, if necessary, by creation of posts.
>
> Particular notice was taken of the fact that the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000, had not yet been implemented in the State of Jammu and Kashmir."

8. In 2015 the issue of strengthening the juvenile justice system was once again discussed at the Chief Justices' Conference and the following resolution passed:

> "Resolved that the High Courts shall continue to take all steps necessary, including evolving ways to ensure greater sensitivity, to effectively deal with cases in the field of Juvenile Justice in their respective States. The High Courts should ensure that constitution of Juvenile Justice Boards and Child Welfare Committees are in place, that visits are regularly made to the Juvenile Homes, Special Homes, Observation Homes, Shelter Homes and Rescue Centres etc. and that such homes are set up wherever they have not already been set up. It shall also be ensured that the requisite facilities are provided as per the Standards, Rules, Policies and Guidelines in all such Homes/Centres. The assistance of State Legal Services Authorities and District Legal Services Authorities shall also be taken in this regard."

9. Finally, in 2016 at the Chief Justices' Conference the following resolution was passed:

> "The Conference has noted the necessity for ensuring institutional support for juveniles in conflict of law and children in need of care and protection.
>
> **Resolved** that:
>
> (i) cases pending for a period in excess of one year be disposed of on priority by the JJBs;
>
> (ii) Juvenile Justice Committees of the High Courts shall monitor the pendency and disposal of adoption cases and applications for declaring children free for adoption on a priority basis;
>
> (iii) steps be taken to ensure that every district is equipped with a Child Protection Unit, Special Juvenile Police Unit, Observation Homes and Children Homes;
>
> (iv) pending cases of orphaned, abandoned and surrendered children be monitored by the Juvenile Justice Committees of High Courts;

(v) training and refresher training be imparted to judicial officers;

(vi) vacancies in juvenile justice institutions be filled up on a mission mode basis in three months; and

(vii) State Legal Services Authorities should actively discharge their role."

10. At this stage, it may be mentioned that pursuant to the resolutions passed in the Chief Justices' Conferences, every High Court has constituted a Juvenile Justice Committee headed by a judge of the High Court to take stock of and look into issues concerning children. We may note that every High Court has responded more than positively and each Juvenile Justice Committee has brought about some improvements in the living conditions in Homes and in the well-being and lives of many children.

11. Appreciating that the judiciary has a constitutional obligation to ensure that everybody acts in the best interests of the child, the Chief Justice of India set up a Committee in the Supreme Court to address the issues of effective implementation of the Act of 2000 – such is the importance given by the judiciary to the rights of children.

12. Notwithstanding nudging by the judiciary, judicial 'activism'

and criticism of it, over the last decade or so, State Governments and Union Territories have not fully complied with the provisions of a law solemnly enacted by Parliament for the benefit of children. In many instances, only cosmetic changes have been introduced at the ground level with the result that voiceless children continue to be subjects of official apathy. However, it must be acknowledged that the Union of India through the Ministry of Women and Child Development (for short MWCD) has taken some bold steps in recognizing the rights of the children and giving them some importance. Nevertheless, the overall picture relating to the recognition of the rights of children and their realization is far from satisfactory and remains gloomy as we continue to trudge along the long and winding road.

Writ petition in Public Interest

13. Sampurna Behura, the petitioner before us, has done her Masters in Sociology and was pursuing her Doctoral Thesis in the same subject at the relevant time. She has been involved in handling cases of child sexual abuse, street children and working children and has also undertaken various studies on child rights.

14. Concerned with the plight of children in the country, Sampurna Behura filed a writ petition under Article 32 of the

Constitution drawing attention to several Articles of the Constitution which impose primary responsibility on the State to ensure that the needs of children are met and their basic human rights are protected. The Articles in the Constitution referred to by her include those in the Chapter on Directive Principles of State Policy. She has also drawn attention to the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November, 1989. The Convention, to which India is a signatory, emphasizes *inter alia*, securing the best interests of the child, social reintegration of child victims etc.

15. She has also stated in the writ petition that the Act of 2000 was passed by Parliament bearing in mind various standards prescribed in the Convention on the Rights of the Child, 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 other relevant international instruments.

16. The main burden of the writ petition is the failure of State Governments to implement various provisions of the Act of 2000 including, *inter alia*, the establishment of Child Welfare Committees, Juvenile Justice Boards, Special Juvenile Police Units,

establishment of appropriate Homes for children in need of care and protection, improving the living conditions of juveniles in conflict with law, medical facilities for children in the custody of the State and several other human rights issues. It is on these broad facts and averments that relief was prayed for in public interest.

17. The writ petition also drew attention to surveys and researches conducted in 2004-2005 in various States but it is not necessary to refer to them in any great detail, notwithstanding their significance and importance, since they might have lost immediate relevance with the passage of time.

18. The prayer in the Public Interest Litigation is to the effect that the Chief Secretaries and the Directors General of Police and Superintendents of Police of all the States should forthwith implement the Act of 2000 in its true spirit.

19. There is also a prayer that all respondent States be directed to provide basic amenities like nutritious food, proper and hygienic accommodation, educational facilities, recreational facilities and rehabilitation centres for juveniles in various Homes and to direct the Collectors of each district to involve reputed NGOs in implementing the orders of this Court.

20. The Act of 2000 has since been repealed and what is now in

force is the JJ Act. The repeal of the Act of 2000 does not at all change the sum and substance of the reliefs claimed in the Public Interest Litigation. As such this petition though filed way back in 2005 is not infructuous, the issues raised being very much topical and alive even today.

Proceedings in this Court

21. The writ petition was first taken up for consideration on 26th September, 2005 when notices were issued to all the respondents (Union of India and States). After service of notice (which itself took about one year!) the matter was taken up on 3rd January, 2007 and it was observed that the prayer in the writ petition was for forthwith implementation of the Act of 2000 in its true letter and spirit and that the petition highlighted some provisions of the said Act which had not been implemented despite a number of years having elapsed. It was noted that the writ petition highlights the horrible conditions in some Homes for children and that this was a violation of Article 21 of the Constitution. Under these circumstances, the Court required detailed affidavits to be filed by the respondent States through the Chief Secretary of each State.

22. Reference was made in the order dated 3rd January, 2007 to

Sheela Barse II v. Union of India[2] which also dealt with abandoned or destitute children lodged in various jails across the country for "safe custody". It was noted in that decision that the National Policy for the Welfare of Children contained the following preamble:

> "The nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Children's programmes should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skill and motivations needed by society. Equal opportunities for development of all children during the period of growth should be our aim, for this would serve our large purpose of reducing inequality and ensuring social justice".

23. The Court noted in that decision that if a child is a national asset (as per the National Policy), it is the duty of the State to look after the child with a view to ensuring full development of the personality and that is why statutes dealing with children provide that a child shall not be kept in jail. It was directed that on no occasion should children be kept in jail and if a State Government does not have sufficient accommodation in its remand homes or observation homes for children, they should be released on bail instead of being subjected to incarceration in jail.

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[2] (1986) 3 SCC 632

24. It was also emphasized that Juvenile Courts should be set up in each district and there must be a special cadre of Magistrates who are suitably trained for dealing with cases against children. Some other directions were also issued but they arise out of the Childrens' Act and are presently not relevant. Reference was also made in the order to ***Sheela Barse v. Union of India***[3] wherein this Court reiterated its decision referred to above.

25. It was noted that Juvenile Justice Boards (for short 'JJBs') and Child Welfare Committees (for short 'CWCs') under the Act of 2000 have been constituted in very few districts. It was also noted that some observation homes are like prisons with uniformed or armed police.

26. After a few subsequent hearings and completion of pleadings, the Court impleaded the National Commission for Protection of Child Rights (the NCPCR) by an order dated 14th February, 2011 and the National Legal Services Authority (for short 'NALSA') by an order dated 11th July, 2011. In the hearing on 19th August, 2011 quite a few suggestions were made by NALSA in respect of child rights. We will consider these submissions at the appropriate stage.

27. During the course of hearing, the Court lamented the

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[3] (1988) 4 SCC 226

confusion and uncertainty about the availability of statistics relating to the number of juveniles in conflict with law in each district and details of such children. This made it difficult to make an effective plan for providing legal aid or providing appropriate Homes. The State Legal Services Authorities were therefore required to collect data and NALSA was required to make data available to the Court for issuing further directions. The Court also observed that CWCs and JJBs are not functional or not constituted in every district. Accordingly the State Legal Services Authorities were requested to coordinate with the appropriate Department in the State Government to ensure that CWCs and JJBs are established as per the Act of 2000.

28. Pursuant to the order dated 19th August, 2011 a detailed and excellent Report was prepared by NALSA in three parts on the existing facilities for implementation of the Act of 2000, with the month and year of reporting being August 2011.

29. When the case was again taken up on 12th October, 2011 the Court reiterated the importance of the directions passed on 19th August, 2011 and also added focus to setting up Special Juvenile Police Units under Section 63 of the Act of 2000. Directions were given in this regard to the Home Department and the Director

General of Police of all the States and Union Territories to ensure that there is at least one police officer in every Police Station who has the necessary aptitude and is given appropriate training and orientation to function as a Juvenile or Child Welfare Officer. The State Legal Services Authorities and NALSA were requested to provide necessary training and orientation in phases to such officers.

30. The Home Department and the Directors General of Police were also directed to ensure that Special Juvenile Police Units are set up in every district and city to coordinate and upgrade the treatment of juveniles in conflict with law and children in need of care and protection as required by sub-section (3) of Section 63 of the Act of 2000.

31. When the case was taken up for consideration on 11th September, 2015 by the Social Justice Bench of this Court, it was noticed that the Union of India had filed affidavits on 31st July, 2015 and 9th September, 2015. From a reading of these affidavits, it appeared that a large number of Homes were not registered under the provisions of the Act of 2000. Since this was a matter of concern (with a possibility of trafficking of children), the learned Additional Solicitor General appearing for the Union of India was

requested to look into the matter and he submitted that the Union of India had initiated steps to ensure that the Homes run by NGOs get registered under the Act of 2000 in a few months time.

32. Soon thereafter, the JJ Act was passed by Parliament and brought into force on 15th January, 2016. The JJ Act brought in several changes in the juvenile justice regime but the substratum of the petition filed by Sampurna Behura remained unaffected.

33. Her PIL was taken up on 15th February, 2016 in the above background and after hearing learned counsel for the parties and going through various orders passed by this Court from time to time, the following issues were identified as needing serious consideration and deliberation:

1. Constitution of State Child Protection Society.
2. Constitution of State Commissions for the Protection of Child Rights.
3. Establishment of Juvenile Justice Boards (JJBs) in every district (if necessary more than one in some districts) and their training.
4. Establishment of Child Welfare Committees (CWCs) and their training.
5. Appointment of Probation Officers and their training.
6. Establishment of Special Juvenile Police Units in every Police Station, their training and updating the Police Training Manual.
7. Provision for legal aid lawyers and their training.
8. Proper selection of members of JJBs and CWCs.
9. Assessment of manpower requirements of JJBs and

CWCs and filling up the vacancies.

10. Furnishing of on-line quarterly reports by the State Governments.
11. Significance of Social Investigation Report.
12. Principal Magistrates should exclusively deal with Juvenile Justice inquiries.
13. Registration of child care institutions.
14. Improvement of living conditions in government run child care institutions.
15. Establishment of Juvenile Justice Fund.

34. Thereafter, the matter was taken up on 9th May, 2016 when the learned Additional Solicitor General stated that the process of collecting and updating information online was underway in MWCD and was proceeding at a fast pace and that he expected it to be completed very soon. He also stated that the names of persons in various positions, such as members of JJBs and CWCs would be placed on the website of MWCD so that it would be easy to contact them whenever necessary. Learned Additional Solicitor General stated that the assistance of the State Governments and the Union Territories was required for completing the project. Accordingly this Court directed the State Governments and the Union Territories to render necessary assistance to the Union of India for updating the information and keeping it updated from time to time.

35. As far as NALSA is concerned, it submitted on record a copy of the Training Module for Legal Services Lawyers and Probation Officers but it was suggested by the learned Senior Counsel appearing for NALSA that since the Modules were prepared on the basis of the Juvenile Justice (Care and Protection of Children) Rules, 2007 NALSA would conduct some pilot training programmes to ascertain their efficacy and subsequently bring them in line with the new Rules to be framed under the JJ Act.

36. In the hearing on 22nd August, 2016 the Union of India was required to consider the feasibility of urgently providing computers and internet connectivity to the Juvenile Justice Boards and Child Welfare Committees.

37. The matter was again taken up on 17th February, 2017 by which time considerable progress had been made by MWCD in the online collection of information to the extent that a Central Level Monitoring Format had been prepared which could easily be filled up by the States and Union Territories for providing full information which could be collated.

38. We also required, in addition to the collated information, that the State Commission for Protection of Child Rights (SCPCR) should be in place in every State and Union Territory. It may be

mentioned that the SCPCR is a body constituted under the provisions of the Commissions for Protection of Child Rights Act, 2005 with a variety of functions as detailed in Section 13 of the said Act.

39. On 5th April, 2017 and on 11th July, 2017 we noted the information made available on the composition and constitution of the SCPCRs and on an overall view of the matter it was found that a large number of vacancies existed and that little or nothing was being done by some of the State Governments to fill them up or to show any urgency in respect of protection of the rights of children.

40. Subsequently, on 15th November, 2017 we required MWCD to inform us of the amounts lying in the Juvenile Justice Fund in each State and Union Territory.

41. With all this information available on record in some form or the other, we heard the submissions of learned counsel for the parties on 20th November, 2017 and reserved judgment.

42. We have gone into detail with regard to some of the more important proceedings that have taken place in the matter from the time when the Public Interest Litigation was instituted only to highlight various dimensions to the problems faced by children and the casual approach that most State Governments and Union

Territories have towards the rights of children. It is easy to forget that children also deserve dignified treatment and merely because they have no voice in the affairs of State, it does not mean that they are inconsequential members of society who can be compelled to live in conditions that are uncomfortable (to say the least) and who have little or no access to justice.

Affidavits filed by MWCD

43. During the progress of the case, MWCD filed a few status reports and affidavits.

44. In an affidavit filed on 31st July, 2015 the status of an online Central Level Monitoring System being implemented by MWCD was indicated. Briefly, each State and Union Territory is given a login ID and password to access the formats, feed data and submit Reports to MWCD. Very broadly, the areas covered by the Reports are Homes and Children, Open Shelters, Specialized Adoption Agencies, Non-Institutional Care, Child Welfare Committees, Juvenile Justice Boards and Service Delivery Structures. This is a very forward-looking step and a major attempt to collect information so that the JJ Act could be effectively implemented and the planning process more structured rather than *ad hoc*.

45. MWCD filed another affidavit on 8th September, 2015 which

indicated requests made to States and Union Territories to adhere to the requirements of entering information in the software as required by the Central Level Monitoring System. An indication was given in the affidavit regarding the extent of compliance. For the period 2014-15 it was stated that while most States and Union Territories had provided the necessary information, as many as 7 States were not fully compliant. For the period 2015-16 most States did not provide the necessary information. Those who did were Assam, Union Territory of Chandigarh, Chhattisgarh, Himachal Pradesh, Madhya Pradesh, Meghalaya, Mizoram, Nagaland, Punjab, Tamil Nadu and Tripura.

46. MWCD filed a status report on 4th December, 2015 giving the details of Child Care Institutions and their registration as well as the availability of Probation Officers in the States and Union Territories. Unfortunately, as per the affidavit the status was quite unsatisfactory in the sense that not many Child Care Institutions had been registered and there was a serious shortage of Probation Officers. In a further affidavit of 12th February, 2016 MWCD stated that steps were being taken for the registration of Child Care Institutions and it also indicated the role of a Probation Officer in the scheme of things.

47. In yet another affidavit filed by MWCD on 29th March, 2016 a factual response was given with regard to the 15 issues identified by this Court on 15th February, 2015.

48. MWCD filed its final status report on 3rd May, 2016 in which it was stated that some formats for information given in the Central Level Monitoring System were added in view of the 15 issues identified by this Court.

49. In the affidavit dated 11th January, 2017 it was disclosed by MWCD that the availability and use of computers and peripherals for juvenile justice issues was in quite a poor state. In fact, complete information in this regard was not made available to MWCD by the States and Union Territories.

50. In the final affidavit filed by MWCD it was disclosed that a National Consultation was held on 26th September, 2017 and it appears from a reading of the affidavit that there is considerable improvement in the understanding of child rights and juvenile justice issues by the participants, but there is still a lot to be done. Unfortunately, the minutes of the National Consultation have not been placed on record.

Information and data provided by NALSA

51. As far as NALSA is concerned, it had carried out a

remarkable study and placed on record a three part Report on issues pertaining to Juvenile Justice Boards, Child Welfare Committees and Homes under the Act of 2000. Even though the reports prepared by NALSA are extremely useful, since they are now quite dated (with data upto August 2011) they are not being referred to in any detail.

52. NALSA gave another Report on 20th July, 2015 in which it was pointed out that a large number of inquiries are pending before the JJBs. It was pointed out that in Uttar Pradesh alone there are 34,569 inquiries pending and in district Durg in Chhattisgarh, there are 1883 inquiries pending before the JJBs. It was pointed out in the report that many of the JJBs did not sit on a regular basis with some sitting maybe once or twice a week. It was also pointed out that in some places the distance between the Observation Home and the JJB was considerable. It was submitted that there was a need for Probation Officers who would deal exclusively with juvenile justice issues.

53. At this stage, it may be mentioned that in May 2016 a Training Module for Probation Officers was brought out by NALSA. This Training Module has since been utilized by NALSA and we have been given to understand that it has been found to be

extremely useful and beneficial as a training guide.

Submissions made by the petitioner

54. On its part, the petitioner submitted a large number of steps that need to be taken to improve the lives of children in Child Care Institutions and enable them to live with dignity. Suggestions were also given by the petitioner on 10th and 25th September, 2013 and 10th May, 2016 on several aspects of child rights and juvenile justice. Most of these suggestions complement the suggestions given by NALSA.

Discussion, suggestions and recommendations

(i) National and State Commissions for Protection of Child Rights

55. Child related laws enacted by Parliament provide for two extremely important policy and decision-making institutions in respect of children and child rights, namely the NCPCR and the SCPCRs. Similarly, two extremely important bodies have been provided for at the ground or grass-roots level for implementation of the JJ Act, namely the State Child Protection Society and the District Child Protection Unit. In our opinion, if these institutions and bodies perform their duties as required by the laws made by Parliament, under the supervision and guidance of the concerned

State Government and the Government of India, recognition and enforcement of child rights could actually become a reality in our country.

56. The Commissions for Protection of Child Rights Act, 2005 provides for the Central Government constituting a body to be known as the NCPCR at the national level and the State Governments constituting a body to be known as the SCPCR at the State level. The composition of the NCPCR is provided for in Section 3 of the statute while a similar composition of the SCPCR is provided for in Section 17 of the statute. Section 3 of the Commissions for Protection of Child Rights Act reads as follows:

> "**3. Constitution of National Commission for Protection of Child Rights.—**(1) The Central Government shall, by notification, constitute a body to be known as the National Commission for Protection of Child Rights to exercise the powers conferred on, and to perform the functions assigned to it under this Act.
>
> (2) The Commission shall consist of the following Members, namely:—
> (a) a Chairperson who, is a person of eminence and has done outstanding work for promoting the welfare of children; and
> (b) six Members, out of which at least two shall be women, from the following fields, to be appointed by the Central Government from amongst persons of eminence, ability, integrity, standing and experience in,—
> (i) education;
> (ii) child health, care, welfare or child development;
> (iii) juvenile justice or care of neglected or marginalized children or children with disabilities;

(iv) elimination of child labour or children in distress;
(v) child psychology or sociology; and
(vi) laws relating to children.

(3) The office of the Commission shall be at Delhi."

57. It is quite apparent that at the national level, the NCPCR is an institution consisting of eminent persons and experts in their respective fields. As such, they are expected to look at issues concerning the welfare of children in the national perspective taking into consideration the views of every SCPCR and other stakeholders. At the State level, the SCPCR is an equally significant body consisting of eminent persons and experts. They are expected to take policy decisions for the benefit of the children in their State, regardless of which State the children originally belong to, for there might be children of one State who are in need of care and protection but in a Child Care Institution of another State.

58. The functions of the NCPCR and the SCPCR are more or less the same except that one performs these functions at the national level, while the other performs these functions at the State level. Section 13 of the Commissions for Protection of Child Rights Act, 2005 details the functions of the NCPCR and this reads as follows:

"**13. Functions of Commission.—**(1) The Commission shall perform all or any of the following functions, namely:—

(a) examine and review the safeguards provided by or under any law for the time being in force for the protection of child rights and recommend measures for their effective implementation;

(b) present to the Central Government, annually and at such other intervals, as the Commission may deem fit, reports upon the working of those safeguards;

(c) inquire into violation of child rights and recommend initiation of proceedings in such cases;

(d) examine all factors that inhibit the enjoyment of rights of children affected by terrorism, communal violence, riots, natural disaster, domestic violence, HIV/AIDS, trafficking, maltreatment, torture and exploitation, pornography and prostitution and recommend appropriate remedial measures;

(e) look into the matters relating to children in need of special care and protection including children in distress, marginalized and disadvantaged children, children in conflict with law, juveniles, children without family and children of prisoners and recommend appropriate remedial measures;

(f) study treaties and other international instruments and undertake periodical review of existing policies, programmes and other activities on child rights and make recommendations for their effective implementation in the best interest of children;

(g) undertake and promote research in the field of child rights;

(h) spread child rights literacy among various sections of the society and promote awareness of the safeguards available for protection of these rights through

publications, the media, seminars and other available means;

(i) inspect or cause to be inspected any juvenile custodial home, or any other place of residence or institution meant for children, under the control of the Central Government or any State Government or any other authority, including any institution run by a social organisation; where children are detained or lodged for the purpose of treatment, reformation or protection and take up with these authorities for remedial action, if found necessary;

(j) inquire into complaints and take *suo motu* notice of matters relating to,—
(i) deprivation and violation of child rights;
(ii) non-implementation of laws providing for protection and development of children;
(iii) non-compliance of policy decisions, guidelines or instructions aimed at mitigating hardships to and ensuring welfare of the children and to provide relief to such children,
or take up the issues arising out of such matters with appropriate authorities; and

(k) such other functions as it may consider necessary for the promotion of child rights and any other matter incidental to the above functions.

(2) The Commission shall not inquire into any matter which is pending before a State Commission or any other Commission duly constituted under any law for the time being in force."

59. It will be seen from the above that both the NCPCR and the SCPCR have a range and variety of functions to perform and each one of them entails a great deal of responsibility. We have been given to understand that both the Government of India and the State Governments have not been giving these bodies the freedom

to decide on broad policy matters and indeed in some instances, particularly relating to the SCPCR, vacancies have not been filled up for several months. In fact, the NCPCR was compelled to file a writ petition in the Punjab and Haryana High Court for a mandamus to the State Governments of Punjab and Haryana and the Union Territory of Chandigarh to fill up the vacancies of members of the SCPCR.[4] Unfortunately, at one point of time, even the position of the Chairperson of the NCPCR was lying unfilled for several months, until, on the directions of this Court, the position was eventually filled up. We need hardly say that unless the NCPCR and the SCPCRs are given due importance by the Government of India and the State Governments and vacancies are filled up in time, the enforcement of the rights of children will remain on the back burner and any number of welfare schemes formulated by the Government of India or by the State Governments will remain unimplemented or their implementation will remain sketchy and symbolic.

60. We hope and trust that those in authority and power in the Government of India and in the State Governments appreciate the

[4] Court on its own motion v. State of Punjab and The National Commission for the Protection of Child Rights (NCPCR) v. The State of Haryana and Others, Decided on 9th April, 2013 and reported as MANU/PH/0599/2013

importance of adhering to the provisions of the laws enacted by Parliament and ensure that the NCPCR at the National level and the SCPCR at the State level actually function and perform their duties and recognize their responsibilities.

(ii) State Child Protection Society and the District Child Protection Unit

61. In the absence of any clear-cut guidelines on who should be appointed to these two bodies, the State Governments have found an easy way out by appointing Government officials only and leaving out members of civil society. In our opinion, the constitution of the State Child Protection Society and the District Child Protection Unit need serious consideration so that all stake-holders, including the police and NGOs are actively involved in the performance of the functions, duties and responsibilities of these two bodies.

62. The functions of the State Child Protection Society and the District Child Protection Unit are detailed in Rule 84 and Rule 85 of the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 framed by the Government of India. [It may be noted that some States have framed their independent Rules, but we are not referring to them]. The functions are varied, extensive and

geared to improve the living conditions of children through different strategies and with the involvement of all stake-holders.

63. For the effective implementation of the JJ Act and the policies laid down by the NCPCR and the SCPCRs, Section 106 of the JJ Act provides for the constitution of a State-level Child Protection Society and a District-level Child Protection Unit. Section 106 of the JJ Act reads as follows:

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

64. A perusal of the above provision broadly indicates that the primary function of the State Child Protection Society and the District Child Protection Unit is to ensure implementation of the JJ Act. In addition, these bodies are obliged to ensure that the institutions under the JJ Act are established and maintained, competent authorities in relation to children and their rehabilitation are in place and these two bodies are also required to coordinate with Government officials as well as NGOs to discharge their

wide-ranging functions. The involvement of civil society through NGOs is a progressive step and these two bodies are expected to take their assistance from time to time.

65. If these two bodies actually perform their duties, responsibilities and functions in the manner expected of them, the implementation of the JJ Act would no longer be an issue. Unfortunately, we have been informed that these bodies are not functioning in many places or in the manner in which they are expected to and in several districts the District Child Protection Unit has not even been constituted. We expect remedial steps to be taken by all concerned.

(iii) Juvenile Justice Boards and Child Welfare Committees

66. With regard to the establishment of JJBs, we were given to understand that most districts now have a JJB, but it is high time that every district in every State must have a JJB. An exception could perhaps be made, such as in some districts of Arunachal Pradesh where there is perhaps no juvenile crime or, there could be some districts where the number of inquiries are very few in which event the JJB may appropriately schedule its sittings. Similarly, a 'circuit JJB' could be considered if there are some adjacent districts where the number of pending inquires is quite few.

67. We have also been given to understand that the appointment of some social workers as members of the JJB is not necessarily in accordance with the provisions of Section 4 of the JJ Act. The relevant provision in this regard reads as follows:

> "**4. Juvenile Justice Board :**– 1. xxx xxx xxx
>
> 2. A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of First Class not being Chief Metropolitan Magistrate or Chief Judicial Magistrate (hereinafter referred to as Principal Magistrate) with at least three years experience and two social workers selected in such manner as may be prescribed, of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974) on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class.
>
> 3. No social worker shall be appointed as a member of the Board unless such person has been actively involved in health, education, or welfare activities pertaining to children for atleast seven years or a practicing professional with a degree in child psychology, psychiatry, sociology or law.
>
> 4. xxx xxx xxx
>
> 5. The State Government shall ensure that induction training and sensitization of all members including Principal Magistrate of the Board on care, protection, rehabilitation, legal provisions and justice for children, as may be prescribed, is provided within a period of sixty days from the date of appointment.
>
> 6. and 7. Xxx xxx xxx."

68. The selection of social workers as members of the JJB is

required to be carried out in accordance with the provisions of Rule 88 read with Rule 87 of the Model Rules. It must be appreciated that the appointment of social workers is serious business, inasmuch as they bring their experience - practical and professional - while conducting an enquiry under the JJ Act. This becomes all the more important when it is appreciated that the social workers can also conduct an enquiry independent of the Principal Magistrate as provided for in Section 7 of the JJ Act. However, the final disposition of the enquiry cannot be without the Principal Magistrate as mandated in the proviso to sub-section (3) of Section 7 of the JJ Act. There is therefore a heavy responsibility on the social workers to make a meaningful contribution during the course of an enquiry and also at the time of its disposition.

69. In this context, it is important to note that the training of the Principal Magistrate as well as the social workers is extremely important and this is provided for in Rule 89 of the Model Rules. Unfortunately, the duration of training and the curriculum and course have not yet formulated, and the nature of training given to the Principal Magistrate and the social workers is somewhat *ad hoc* and unstructured. The lack of meaningful and effective training (and refresher courses) can have a vital impact on the ultimate

disposition of an enquiry as also on the rehabilitation and reintegration of a juvenile in conflict with law who is before the JJB. Serious thought is required to be given to this not only from the point of view of awareness of the law and child rights but also from the point of view of sensitization of the JJBs, case management and creation of a child friendly ambience and environment within the JJB for a juvenile in conflict with law. It appears to us that not much thought has been given to these aspects of the functioning of the JJBs and that is perhaps the reason why a very large number of inquiries are pending as mentioned above, with the State of Uttar Pradesh topping the list.

70. On the functioning of the JJBs, it is worth referring to the following passage from a decision of the Gauhati High Court in ***Naisul Khatun v. State of Assam and Ors.***[5]

> "The second disturbing aspect of the case is that it appears the Juvenile Justice Board constituted under section 4 of the Act did not actually sit or assemble to deal with the case of the juvenile. We say so because from the original case records we find that all the order sheets passed in the matter, including those refusing bail, to juvenile have all been signed only by the Principal Magistrate of the Juvenile Justice Board. There is nothing to suggest that the two social worker members of the Board ever met to consider the request of the juvenile's father to grant him bail. This is rather unfortunate because the application of

[5] 2011 Cri LJ 326 = 2010 SCC Online Gau 225

> mind has to be by the Juvenile Justice Board and not only by the Principal Magistrate."

71. The submissions made before us by learned counsel for the petitioner as well as by learned counsel appearing for NALSA suggest that the JJBs do not have daily sittings. Of course, this would depend upon the number of inquiries pending before each JJB, but clearly if there are a large number of inquiries pending, it is the obligation of the JJB to sit on a daily basis so that the enquiry is concluded within the time limit prescribed by the JJ Act. It does not serve any purpose at all if an enquiry remains pending for a considerable period of time - no one benefits by the delay in the disposition of an enquiry. In this context, we may also add that where a large number of inquiries are pending, it would be worthwhile for the State Government and the High Court to consider having more than one JJB. In Delhi, for instance, there are as many as three JJBs functioning at any given point of time and that is because of the large number of pending enquiries. Similar steps can be taken by some of the other State Governments as well as by the High Courts after evaluating and making an assessment of the need for more than one JJB being established in a district.

72. During the course of hearing, we had emphasized the need for a study to be conducted by the State Governments on whether

there is adequate staff available with the JJBs. Unfortunately, the response was rather poor and we were only told that there is adequate staff available. It must be appreciated that a JJB is virtually in the nature of a court, although it does not conduct a trial, but only conducts an enquiry. Nevertheless, it does need adequate staff to perform its functions in an efficient manner. The JJB also has several administrative functions and they need due attention so that there is effective coordination between the JJB, the officials of the Observation Home, the police, the juvenile in conflict with law and the parents of that juvenile and lawyers representing the police as well as the juvenile in conflict with law. These administrative duties need attention if the JJB is to function effectively and a casual statement that the JJB has adequate staff, though possibly correct, is neither here nor there considering the requirements of the stake-holders who attend the enquiry before the JJB.

73. In this context, it must also be mentioned that there is a dire need to have quality legal aid lawyers who can assist juveniles in conflict with law. This is an issue that must be taken up with all earnestness by the State Legal Services Authority. Unless a child is given adequate legal representation, it may impact his or her future,

more so if the child in conflict with law is found guilty and placed in a Special Home. On its part, NALSA has brought out a manual for training of legal aid lawyers and we believe that it will be extremely useful not only for legal aid lawyers who are representing juveniles in conflict with law, but also for legal aid lawyers generally. Similarly, prosecutors also need to be sensitized and we hope that the State Governments will take necessary steps to educate and train them keeping in mind the primary objective of the JJ Act, which is to reintegrate a juvenile in conflict with law in society and to rehabilitate that juvenile.

74. In the context of conducting an effective enquiry, the role of a Probation Officer cannot be underestimated nor can we underestimate the significance of an accurate Social Investigation Report prepared by a Probation Officer. The duties of a Probation Officer have been detailed in Rule 64 of the Model Rules and this reads as follows:

> "**64. Duties of a Probation Officer. —** (1) On receipt of information from the Police or Child Welfare Police Officer under clause (ii) of sub-section (1) of section 13 of the Act, without waiting for any formal order from the Board, the Probation Officer shall inquire into the circumstances of the child as may have bearing on the inquiry by the Board and submit a social investigation report in Form 6 to the Board.

(2) The social investigation report should provide for risk assessment, including aggravating and mitigating factors highlighting the circumstances which induced vulnerability such as traffickers or abusers being in the neighbourhood, adult gangs, drug users, accessibility to weapons and drugs, exposure to age inappropriate behaviours, information and material.

(3) The Probation Officer shall carry out the directions given by the Board and shall have the following duties, functions and responsibilities:

(i) To conduct social investigation of the child in Form 6;

(ii) To attend the proceedings of the Board and the Children's Court and to submit reports as and when required;

(iii) To clarify the problems of the child and deal with their difficulties in institutional life;

(iv) To participate in the orientation, monitoring, education, vocational and rehabilitation programmes;

(v) To establish co-operation and understanding between the child and the Person- in-charge;

(vi) To assist the child to develop contacts with family and also provide assistance to family members;

(vii) To participate in the pre-release programme and help the child to establish contacts which could provide emotional and social support to the child after release;

(viii) To establish linkages with Probation Officers in other Districts and States for obtaining social investigation report, supervision and follow-up;

(ix) To establish linkages with voluntary workers and organisations to facilitate rehabilitation and social reintegration of children and to ensure the necessary follow-up;

(x) Regular post release follow-up of the child extending help and guidance, enabling and facilitating their return to social mainstreaming;

(xi) To prepare the individual care plan and post release plan for the child;

(xii) To supervise children placed on probation as per the individual care plan;

(xiii) To make regular visits to the residence of the child under his supervision and places of employment or school attended by such child and submit periodic reports as per Form 10;

(xiv) To accompany children where ever possible, from the office of the Board to the observation home, special home, place of safety or fit facility as the case may be;

(xv) To evaluate the progress of the children in place of safety periodically and prepare the report including psycho-social and forward the same to the Children's Court;

(xvi) To discharge the functions of a monitoring authority where so appointed by the Children's Court;

(xvii) To maintain a diary or register to record his day to day activities such as visits made by him, social investigation reports prepared by him, follow up done by him and supervision reports prepared by him;

(xviii) To identify alternatives of community services and to establish linkages with voluntary sector for facilitating rehabilitation and social reintegration of children; and

(xix) Any other task as may be assigned."

75. It is clear from a reading of the above provision that a Probation Officer has a very important role to play in ensuring that

a juvenile in conflict with law is given adequate representation and a fair hearing before the JJB and the enquiry is conducted in a manner that is conducive to the rehabilitation of the juvenile in conflict with law. In this regard, the preparation of an individual care plan and post release plan gain immense significance and a Probation Officer has an important role to play in this.

76. Once again, it is of great importance that a Probation Officer should be given adequate training, sensitization and awareness of his or her duties and responsibilities. NALSA has made a significant contribution in this regard by preparing a training module for Probation Officers. We expect all the State Governments as well as MWCD to ensure that training is given to Probation Officers on the lines suggested by NALSA with improvements being made in adult learning techniques, training methodology, the curriculum and the course content in due course of time.

77. The submissions made by learned counsel for all the parties and our views and conclusions pertaining to the JJBs are equally applicable to the CWCs and it is not necessary to repeat them. However, it might be noted that it is not always necessary for the State Legal Services Authority to appoint legal aid lawyers to assist

the CWC - this would depend on a case to case basis and only as an Amicus Curiae for the purpose of advising the CWC on a question of law, should the need arise.

78. We were informed, somewhat unfortunately, that Child Welfare Committees are sometimes treated as 'second class bodies' and that payment of honorarium is not made to them on a regular basis. In addition, they are compelled to hold their sittings in buildings with very poor infrastructure facilities. This is a sad commentary on the working of the JJ Act for which the full responsibility rests on the shoulders of the concerned State Governments who must remedy the situation.

(iv) Use of technology

79. The use of technology, both by the JJBs as well as by the CWCs is extremely important and we are disheartened to note from the affidavits and submissions made by MWCD that there is an acute shortage of computers and peripherals with the JJBs and CWCs. Technology is important not only for the effective functioning of the JJBs and CWCs, but also to deal with issues that would arise from time to time concerning the tracing and tracking of missing children, the rescue of children working in hazardous industries, trafficked children, children who leave the Child Care

Institutions, victims of child sexual abuse and follow-up action, among several other requirements. It is well-known that our country is a technological power-house and if we are unable to take advantage of the resources available with us and fully utilize the benefits of technology through computers and the internet for the benefit of children, our status as a technological power-house would be in jeopardy and would remain only on paper. Data, particularly of the magnitude of the kind that we are concerned with, can be easily collected through the use of computers and the internet. This would be of great assistance in planning and management of resources and MWCD and others concerned with child rights must take full advantage of this.

80. That apart, there can be no doubt that the use of computers and peripherals would make an immense contribution to the administrative functioning of the JJBs and CWCs. Both the Government of India and the State Governments need to look into this and provide necessary software and hardware to the JJBs and the CWCs for obvious reasons. We were informed by learned counsel that the Police authorities in Telangana and Andhra Pradesh in consultation with the Juvenile Justice Committee of the High Court have made considerable use of information and

communication technology and we are of the view that innovative steps must be encouraged. Similarly, the use of video conferencing could also be considered in appropriate cases where some inconvenience to the juvenile in conflict with law necessitates the use of video conferencing facilities.

81. In the context of the use of technology, MWCD must be complimented for bringing out an online Central Level Monitoring System. We have been told by the learned Additional Solicitor General that this online system is working rather effectively although it would need upgrading from time to time as the months go by. The unfortunate part is that there does not seem to be much active cooperation extended by the State Governments in updating the information on the Central Level Monitoring System. In one of the affidavits filed by MWCD and adverted to above, it was stated that while almost every State Government has filled up the relevant information for the year 2014-15, but the response was rather lukewarm with regard to the period 2015-16. Needless to say, updating information is extremely important so that there can be efficient planning which will ultimately lead to better management of issues concerning children. We may mention that the State Governments are required to fill up the information on the Central

Level Monitoring System once a quarter and surely that cannot be a difficult task.

(v) Role of Police

82. An extremely important stake-holder in the effective implementation of the JJ Act is the local police. Section 107 of the JJ Act mandates the appointment of a Child Welfare Police Officer (for short 'CWPO') and a Special Juvenile Police Unit (for short 'SJPU') in each district. The SJPU must also include two social workers having experience of work in the field of child welfare, one of them being a woman. The responsibility for appointment lies on the State Government. Section 107 of the JJ Act reads as follows:

> "**107. Child Welfare Police Officer and Special Juvenile Police Unit. —** 1. In every police station, at least one officer, not below the rank of assistant sub-inspector, with aptitude, appropriate training and orientation may be designated as the child welfare police officer to exclusively deal with children either as victims or perpetrators, in co-ordination with the police, voluntary and non-governmental organisations.
>
> 2. To co-ordinate all functions of police related to children, the State Government shall constitute Special Juvenile Police Units in each district and city, headed by a police officer not below the rank of a Deputy Superintendent of Police or above and consisting of all police officers designated under sub-section (1) and two social workers having experience of working in the field of child welfare, of whom one shall be a woman.

> 3. All police officers of the Special Juvenile Police Units shall be provided special training, especially at induction as child welfare police officer, to enable them to perform their functions more effectively.
>
> 4. Special Juvenile Police Unit also includes Railway police dealing with children."

83. We have been given to understand by learned counsel for the parties that many States have actually appointed CWPOs and set up SJPUs. Unfortunately, their duties and responsibilities have not been clearly identified but are generally stated in Rule 86 of the Model Rules. We have also been given to understand that no system of effective training for CWPOs and SJPUs has evolved and many of them exist only symbolically and only because the law requires them to exist. Since the duties and responsibilities of the CWPOs and SJPUs have not been specified or identified, it is high time in our opinion, that the Bureau of Police Research & Development and the National Police Academy in consultation with the State Police Academies identify the functions, duties and responsibilities of the CWPOs and SJPUs. In this regard, we may note that NALSA has prepared Guidelines for Training Juvenile/Child Welfare Officers attached to every police station and members of the Special Juvenile Police Unit. Perhaps this could be a starting point for their training through the Bureau of

Police Research & Development and the Police Academies.

84. The importance of training can be appreciated from the allegations made before the Patna High Court in ***The Matter of Letter of Sanat Kumar Sinha (Chief Co-ordinator), Bal Sakha v. The State of Bihar through the Chief Secretary, Govt. of Bihar and Ors.***[6] It was alleged in that case that a child was handcuffed by policemen in uniform during his transit from the Police Station to the Civil Court for his appearance before the Chief Judicial Magistrate. Additionally, it was alleged that contrary to the provisions of the Act of 2000 the identity of the child was disclosed. Of course, the Patna High Court took up the issue with due seriousness but such a situation ought not to have occurred at all and could have been avoided through proper training and sensitization.

85. With regard to the Police generally, it was submitted that due to the policy of rotation, it often happens that soon after a police officer completes his or her training that officer is transferred out to another department. This is a waste of effort and one of the ways of resolving problems arising out of transfers is for every State Police Academy to conduct regular training programmes under the

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[6] MANU/BH/0384/2008

guidance of senior police officials of the State and for the State Government to optimally utilize the services of its officers.

86. Similarly, the Government of India is required to involve Railway Police for dealing with children. No information or data is forthcoming in this regard and learned counsel for the parties were unable to assist us insofar as this aspect is concerned. We expect the Government of India through the Railways to look into the matter with some degree of urgency. We were told by learned counsel that a large number of runaway children and children on drugs are found in railway stations (and other places) working as rag-pickers or performing other menial activities. It was submitted before us that even otherwise, there is rampant drug abuse among such children. Efforts must be made to establish de-addiction centres especially for such children and also generally for juveniles in conflict with law and children in need of care and protection.

(vi) Child Care Institutions

87. There is a lot to be said with regard to Child Care Institutions. Many of them are housed in run-down buildings and are hardly conducive to comfortable living even to a minimum degree. State Governments must appreciate that they are not doing any charity by putting up children in Child Care Institutions - they

are merely performing their statutory and constitutional obligations. There is, therefore, an urgent need to make an evaluation and assessment of all the Child Care Institutions in every State to ascertain their condition, the infrastructure requirements and staffing requirements. Children live in these Institutions, not because they want to but because they have no other option, since most of them are children in need of care and protection. The obligation of society is to provide solace and comfort to these children and adherence to the minimum standards of care. Model Rules contain details for improved Child Care Institutions and their requirements. The State Governments have merely to adhere to these minimum requirements. The condition of some State managed Child Care Institutions is best illustrated by the observations made by the Punjab and Haryana High Court in ***Court on its own motion v. State of Punjab*** (supra) to the following effect:

> "….The sordid state of the said Observation Home depicted that Observation Home at Sonepat had two barracks and a front side courtyard with high walls. The entry gate was similar to jail gate. The Home was having no source of recreation facilities or playground for the juveniles housed therein. The courtyard was filled with stagnated water due to blockage of drainage system and there was hardly any place for going out of barrack for using courtyard. Enquiry revealed that there was no arrangement for potable water. The bathrooms and kitchen

> were also in deplorable condition. The Observation Home was managed by a single teacher who, besides performing job of a teacher, was also looking after the overall administration of the Home. In this manner, no meaningful education was being imparted to the children. The Observation Home was found to be worse than a prison. Observation Home at Hoshiarpur (Punjab) was found to be no better with almost similar dilapidated conditions…..”

88. There are, of course, additional duties and responsibilities obligated by the Constitution on the State Governments such as providing education, health-care (both physical and psychological) and adequate nutrition. These are huge areas that need to be looked into with all sincerity by the bodies and institutions established under the Commissions for Protection of Child Rights Act, 2005 and the JJ Act. Concerned citizens like Sampurna Behura can only highlight the systemic implementation lapses and flaws and hope that the State Governments and the various bodies constituted under statutes enacted by Parliament perform their duties and functions. But, in such exceptional circumstances, the courts are constitutionally obliged to issue a continuing mandamus in public interest for implementation of the laws enacted by Parliament, which is essentially the primary responsibility of the Executive. If the Executive ignores the mandate of Parliament with continuing callousness, it will only be to the detriment of the children of our country.

89. In this context, we may add that MWCD has made considerable efforts in ensuring that Child Care Institutions run and managed by individuals and NGOs are registered in accordance with the provisions of the JJ Act. We are quite surprised that there has been some resistance to registration from some institutions, as informed by the learned Additional Solicitor General, and therefore we must make it clear that the law has to be obeyed as long as it exists on the statute books. It might be uncomfortable for those who manage some of these Child Care Institutions, but registration is compulsory and in public interest to ensure that minimum standards of care are maintained and the children in those Institutions are well looked after. We may note that occasionally there are allegations originating from Child Care Institutions of trafficking and child sexual abuse, some of which may be unverified, but to avoid any such shameful allegations it is necessary that their registration, their management and functioning are strictly monitored by the State Governments and by MWCD.

90. It was suggested by learned counsel that in all Child Care Institutions, there should be a segregation of children in terms of age and wherever applicable segregation based on the nature of the offence allegedly committed so that the possibility of sexual abuse

or any other kind of violence is eliminated. Additionally, all such institutions should be advised to provide vocational or continuing education with a view to re-settling children in conflict with law and children in need of care and protection by reintegrating and mainstreaming them in society. All these are issues of serious concern and need to be addressed by the State Governments and SCPCRs.

91. It was emphasized that there should be adequate staff available in all Child Care Institutions so that they are able to perform their duties efficiently. It was also suggested that the location of the JJBs and CWCs should be in close proximity of the Child Care Institutions to avoid children having to travel long distances for their appearance before these statutory bodies. All these suggestions and recommendations made by learned counsel are issues of concern and must be dutifully addressed by the State Governments and the SCPCRs.

92. One of the submissions made with regard to Child Care Institutions was that District Legal Services Authorities may make unscheduled visits to them to ascertain whether they are in fact functioning as they should. We are of opinion that this 'Visitor'

system is definitely worth implementing and we expect NALSA to go ahead with the suggestion given. In fact, the Chief Justices Conference in 2006 had specifically adverted to the appointment of Visitors to Child Care Institutions and in the Chief Justices Conference in 2013 and 2015 improving the living conditions in Child Care Institutions was also adverted to. NALSA and the District Legal Services Authorities must respect the views expressed in the Chief Justices Conferences.

(vii) Juvenile Justice Fund

93. The JJ Act provides for the constitution of a Juvenile Justice Fund. The learned Additional Solicitor General placed before us figures relating to the contribution of the State Governments in the Juvenile Justice Fund. We are quite distressed to note that some of the State Governments have not even set up the Juvenile Justice Fund while one or two State Governments have set up the Fund with an embarrassing amount of only a few thousand rupees. We wonder how the welfare of children can be looked after by these State Governments with such a pittance in the kitty. Obviously, these State Governments are not seriously concerned about the welfare of children, which is a pity. This is yet another example of official apathy to the rights of children and a cause for worry.

(viii) Evaluation and assessment

94. Finally, it would be appropriate if some sort of an evaluation or social audit is carried out every six months for the next couple of years to monitor and supervise the implementation of the JJ Act. More than sufficient time has already elapsed since the Act of 2000 was enacted by Parliament and certainly the children of our country deserve much better and cannot wait for another 15 or 16 years for the effective implementation of the JJ Act. Most of the children who were born when the Act of 2000 was enacted are nearing adulthood and many of them have not had the benefit of the provisions of the Act of 2000. This mistake, a serious one at that, cannot be repeated in the implementation of the JJ Act. It is said that children are the future of the country and if they are not looked after, it is the future of the country that is at stake.

Conclusions and Directions

95. Keeping in mind the concerns expressed by all learned counsel and the need to invigorate the juvenile justice system in the country, we are of the view that the following directions ought to be given and we do so.

1. The Ministry of Women and Child Development in the Government of India and the State Governments should

ensure that all positions in the NCPCR and the SCPRs are filled up well in time and adequate staff is provided to these statutory bodies so that they can function effectively and meaningfully for the benefit of the children.

2. The NCPCR and the SCPCRs should take their duties, functions and responsibilities with great earnestness keeping in mind the faith reposed in them by Parliament. A position in these statutory institutions is not a sinecure. These bodies have a very significant and proactive role to play in improving the lives of children across the country.
3. The State level Child Protection Societies and the District level Child Protection Units have an enormous responsibility in ensuring that the JJ Act is effectively implemented and Child Care Institutions are managed and maintained in a manner that is conducive to the well being of children in all respects including nutrition, education, medical benefits, skill development and general living conditions. These two bodies would be well advised to take the assistance of NGOs and civil society to ensure that the JJ Act serves the purpose for which it is enacted by Parliament.
4. The State Governments must ensure that all positions in the

JJBs and CWCs are filled up expeditiously and in accordance with the Model Rules or the Rules framed by the State Government. Any delay in filling up the positions might adversely impact on children and this should be avoided.

5. The JJBs and CWCs must appreciate that it is necessary to have sittings on a regular basis so that a minimal number of inquiries are pending at any given point of time and justice is given to all juveniles in conflict with law and social justice to children in need of care and protection. This is a constitutional obligation.
6. The NCPCR and the SCPCRs must carry out time-bound studies on various issues, as deemed appropriate, under the JJ Act. Based on these studies, the State Governments and the Union Territories must take remedial steps.
7. In particular the NCPCR and the SCPCRs must carry out a study for estimating the number of Probation Officers required for the effective implementation of the JJ Act. Based on this study, the State Government must appoint the necessary number of Probation Officers. It must be emphasised that the role of a Probation Officer is critical for

the rehabilitation and social reintegration of a juvenile in conflict with law and due importance must be given to their duties as postulated in the Model Rules and Rules, if any, framed by the State Governments and the Union Territories.

8. The MWCD must continue to make creative use of information and communication technology not only for the purpose of collecting data and information but also for other issues connected with the JJ Act such as having a database of missing children, trafficked children and for follow up of adoption cases etc. With the utilization of technology to the fullest extent, administrative efficiency will improve considerably, which in turn will have a positive impact on the lives of children.

9. It is important for the police to appreciate their role as the first responder on issues pertaining to offences allegedly committed by children as well as offences committed against children. There is therefore a need to set up meaningful Special Juvenile Police Units and appoint Child Welfare Police Officers in terms of the JJ Act at the earliest and not only on paper. In this context, it is necessary to clearly identify the duties and responsibilities of such Units and

Officers and wherever necessary, guidance from the available expertise, either the National Police Academy or the Bureau of Police Research and Development or NGOs must be taken for the benefit of children.

10. The National Police Academy and State Police Academies must consider including child rights as a part of their curriculum on a regular basis and not as an isolated or sporadic event.

11. The management of Child Care Institutions is extremely important and State Governments and Union Territories would be well advised to ensure that all such institutions are registered so that children can live a dignified life in these Institutions and issues of missing children and trafficking are also addressed.

12. State Governments and Union Territories would be well advised to appoint eminent persons from civil society as Visitors to monitor and supervise the Child Care Institutions in all the districts. This will ensure that the management and maintenance of these Institutions are addressed. We have no doubt that the State Legal Service Authorities and the District Legal Service Authorities will extend full assistance

and cooperation to the government authorities in this venture as well as to the Visitors.

13. The JJ Fund is a bit of an embarrassment with an absence of an effective response from the State Governments and the Union Territories. If financial resources are not made available for the welfare of the children we shudder to think what could be better utilization of the funds.

14. NALSA has done a remarkable job in collecting data and information relating to the JJ Act, as evidenced by the three part Report prepared by it. We request NALSA to carry forward the exercise and complete a similar Report preferably before 30th April, 2018 to assist all the policy making and decision taking authorities to plan out their affairs.

15. The importance of training cannot be over-emphasized. It is vital for understanding and appreciating child rights and for the effective implementation of the JJ Act. All authorities such as JJBs and CWCs, Probation Officers, members of the Child Protection Societies and District Child Protection Units, Special Juvenile Police Units, Child Welfare Police Officers and managerial staff of Child Care Institutions must

be sensitized and given adequate training relating to their position. A very positive step has been taken in this regard by NALSA and we expect the NCPCR with the assistance of the SCPCRs to carry forward this initiative so that there is meaningful implementation of the JJ Act.

16. Since the involvement of the State Governments and the Union Territories is critical to child rights and the effective implementation of the JJ Act, it would be appropriate if each High Court and the Juvenile Justice Committee of each High Court continues its proactive role in the welfare of children in their State. To make the involvement and process more meaningful, we request the Chief Justice of every High Court to register proceedings on its own motion for the effective implementation of the Juvenile Justice (Care and Protection of Children) Act, 2015 so that road-blocks if any, encountered by statutory authorities and the Juvenile Justice Committee of the High Court are meaningfully addressed after hearing the concerned governmental authorities. A copy of this judgment and order should be sent by the Secretary General of this Court to the Registrar General of each High Court for being placed before the Chief Justice of

every High Court for initiating *suo motu* proceedings.

96. Finally, we request and urge the Chief Justice of each High Court to seriously consider establishing child friendly courts and vulnerable witness courts in each district. Inquiries under the JJ Act and trials under other statutes such as the Protection of Children from Sexual Offences Act, 2012, the Prohibition of Child Marriage Act, 2006, trials for sexual offences under the Indian Penal Code and other similar laws require to be conducted with a high degree of sensitivity, care and empathy for the victim. It is often said that the experience in our courts of a juvenile accused of an offence or the victim of a sexual offence is traumatic. We need to have some compassion towards them – even juveniles in conflict with law, since they are entitled to the presumption of innocence - and establishing child friendly courts and vulnerable witness courts is perhaps one manner in which the justice delivery system can respond to ease their pain and suffering. Another advantage of such child friendly courts and vulnerable witness courts is that they can be used for trials in which adult women are victims of sexual offences since they too are often traumatized by the not so friendly setting and environment in our courts.

97. We record our appreciation for Sampurna Behura for

highlighting the issues raised in this Public Interest Litigation and to learned counsel for the appearing parties in not making this an adversarial proceeding, but a constructive effort for the benefit of the children of our country.

98. The petition stands disposed of.

99. The Registry should list the matter on 13th March, 2018 for directions after obtaining a response from the Registrar General of each High Court.

...……J
(Madan B. Lokur)

…….....J
(Deepak Gupta)

New Delhi;
February 9, 2018

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 382 OF 2013

Independent Thought .....Petitioner

versus

Union of India and Anr. ....Respondents

J U D G M E N T

Madan B. Lokur, J.

1. The issue before us is limited but one of considerable public importance – whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape? Exception 2 to Section 375 of the Indian Penal Code, 1860 (the IPC) answers this in the negative, but in our opinion sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The exception carved out in the IPC creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and

discriminatory and is definitely not in the best interest of the girl child. The artificial distinction is contrary to the philosophy and ethos of Article 15(3) of the Constitution as well as contrary to Article 21 of the Constitution and our commitments in international conventions. It is also contrary to the philosophy behind some statutes, the bodily integrity of the girl child and her reproductive choice. What is equally dreadful, the artificial distinction turns a blind eye to trafficking of the girl child and surely each one of us must discourage trafficking which is such a horrible social evil.

2. We make it clear that we have refrained from making any observation with regard to the marital rape of a woman who is 18 years of age and above since that issue is not before us at all. Therefore we should not be understood to advert to that issue even collaterally.

The writ petition

3. The petitioner is a society registered on 6th August, 2009 and has since been working in the area of child rights. The society provides technical and hand-holding support to non-governmental organizations as also to government and multilateral bodies in several States in India. It has also been involved in legal intervention, research and training on issues concerning children and their rights. The society has filed a petition under Article 32 of the Constitution in public interest with a view to draw attention

to the violation of the rights of girls who are married between the ages of 15 and 18 years.

4. According to the petitioner, Section 375 of the IPC prescribes the age of consent for sexual intercourse as 18 years meaning thereby that any person having sexual intercourse with a girl child below 18 years of age would be statutorily guilty of rape even if the sexual activity was with her consent. Almost every statute in India recognizes that a girl below 18 years of age is a child and it is for this reason that the law penalizes sexual intercourse with a girl who is below 18 years of age. Unfortunately, by virtue of Exception 2 to Section 375 of the IPC, if a girl child between 15 and 18 years of age is married, her husband can have non-consensual sexual intercourse with her, without being penalized under the IPC, only because she is married to him and for no other reason. The right of such a girl child to bodily integrity and to decline to have sexual intercourse with her husband has been statutorily taken away and non-consensual sexual intercourse with her husband is not an offence under the IPC.

5. Learned counsel for the petitioner submitted that absolutely nothing is achieved by entitling the husband of a girl child between 15 and 18 years of age to have non-consensual sexual intercourse with her. It was also submitted that whatever be the (unclear) objective sought to be achieved by

this, the marital status of the girl child between 15 and 18 years of age has no rational nexus with that unclear object. Moreover, merely because a girl child between 15 and 18 years of age is married does not result in her ceasing to be a child or being mentally or physically capable of having sexual intercourse or indulging in any other sexual activity and conjugal relations. It was submitted that to this extent Exception 2 to Section 375 of the IPC is not only arbitrary but is also discriminatory and contrary to the beneficial intent of Article 15(3) of the Constitution which enables Parliament to make special provision for women and children. In fact, by enacting Exception 2 to Section 375 of the IPC in the statute book, the girl child is placed at a great disadvantage, contrary to the visionary and beneficent philosophy propounded by Article 15(3) of the Constitution.

Law Commission of India – 84th Report

6. Learned counsel for the petitioner drew our attention to the 84th report of the Law Commission of India (LCI) presented on 25th April, 1980 dealing with the rape of a girl child below the prescribed minimum age. The report considered the anomalies in the law relating to rape, particularly in the context of the age of consent for sexual intercourse with a girl child. The view expressed by the LCI is quite explicit and is to be found in paragraph 2.18, 2.19 and 2.20 of the report. The view is that since the Child Marriage

Restraint Act, 1929 prohibits the marriage of a girl below 18 years of age, sexual intercourse with a girl child below 18 years of age should also be prohibited and the IPC should reflect that position thereby making sexual intercourse with a girl child below 18 years of age an offence. These paragraphs read as follows:

> **2.18. Section 375, fifth clause.** – The discussion in the few preceding paragraphs was concerned with rape constituted by sexual intercourse without consent. The fifth clause of section 375 may now be considered. It is concerned with sexual intercourse with a woman under 16 years of age. Such sexual intercourse is an offence irrespective of the consent of the woman.
>
> **2.19. History. –** The age of consent has been subjected to increase more than once in India. The historical development may, for convenience, be indicated in the form of a chart as follows:-

Year	**Age of consent under sec. 375, 5th clause, I.P.C.**	**Age mentioned in the Exception to sec. 375, I.P.C**	**Minimum age of marriage under the Child Marriage Restraint Act, 1929**
1860……	10 years	10 years	__
1891 (Act 10 of 1891) (after the amendment of I.P.C.	12 years	12 years	__
1925 (after the amendment of I.P.C.)	14 years	13 years	__
1929 (after the passing of the Child Marriage Act)	14 years	13 years	14 years
1940 (after the amendment of the Penal Code and the Child Marriage Act)	16 years	15 years	15 years
1978……	16 years	15 years	18 years
[as of 2017]* *The bracketed portion	[Age of consent under	[15 years]	[Minimum age of marriage under the

in this row has been inserted by us.	Sec. 375, Sixthly of the IPC - 18 years]		PCMA, 2006 – 18(F)/21(M) years]

> **2.20. Increase in minimum age. –** The question to be considered is whether the age should be increased to 18 years. The minimum age of marriage now laid down by law (after 1978) is 18 years in the case of females and the relevant clause of Section 375 should reflect this changed attitude. **Since marriage with a girl below 18 years is prohibited (though it is not void as a matter of personal law), sexual intercourse with a girl below 18 years should also be prohibited.** (Emphasis supplied by us).

Law Commission of India – 172nd Report

7. The issue was re-considered by the LCI in its 172nd report presented on 25th March, 2000. In that report, it is recommended that an exception be added to Section 375 of the IPC to the effect that sexual intercourse by a man with his own wife, the wife not being under 16 years of age, is not sexual assault. In other words, the earlier recommendation made by the LCI was not approved.

8. Apparently at the stage of discussions, the recommendation of the LCI (still at the stage of proposal) did not find favour with an NGO called Sakshi who suggested deletion of the exception. According to the NGO, "where a husband causes some physical injury to his wife, he is punishable under the appropriate offence and the fact that he is the husband of the victim is not an extenuating circumstance recognized by law." Therefore, there is no reason

why a concession should be made in the matter of an offence of rape/sexual assault only because the wife happens to be above 15/16 years of age. The LCI did not agree with the NGO and the reason given is that if the exception that is recommended is deleted, it "may amount to excessive interference with the marital relationship." In other words, according to the LCI the husband of a girl child who is not below 16 years of age can sexually assault and even rape his wife and the assault or rape would not be punishable - and if it is made punishable, then it would amount to excessive interference with the marital relationship. (It may be mentioned that Exception 2 to Section 375 of the IPC has not increased the age to 16 years from 15 years as recommended by the LCI but has retained it at 15 years. According to the counter affidavit filed on behalf of the Union of India, the age of 15 years has been kept to give protection to the husband and the wife against criminalizing the sexual activity between them).

Counter affidavit of the Union of India

9. Since we have adverted to the counter affidavit filed by the Union of India opposing the writ petition, we propose to make a very brief reference to it. A somewhat more detailed reference is made to the counter affidavit of the Union of India at a later stage.

10. For the present, the counter affidavit of the Union of India refers to the National Family Health Survey - 3 (of 2005) in which it is stated that 46% of women in India between the ages of 18 and 29 years were married before the age of 18 years. It is also estimated, interestingly but disturbingly, that there are about 23 million child brides in the country. As far as any remedy available to a child bride is concerned, the counter affidavit draws attention to Section 3 of the Prohibition of Child Marriage Act, 2006 (the PCMA). Under Section 3(1) of the PCMA a child marriage is voidable at the option of any contracting party who was a child at the time of the marriage. The marriage can be declared a nullity in terms of the proviso to Section 3(1) of the PCMA through an appropriate petition filed by the child within two years of attaining majority and by approaching an appropriate court of law. It is also stated that in terms of Section 13(2)(iv) of the Hindu Marriage Act, 1955 a child bride can petition for a divorce on the ground that her marriage (whether consummated or not) was solemnized before she attained the age of 15 years and she has repudiated the marriage after attaining that age but before attaining 18 years of age. In other words a child marriage is sought to be somehow 'legitimized' by the Union of India and the onus for having it declared voidable or a nullity is placed on the child bride or the child groom.

Documentary material

11. Apart from but in addition to the legal issue, learned counsel for the petitioner and learned counsel for the intervener (The Child Rights Trust) relied on a large amount of documentary material to highlight several adverse challenges that a girl child might face on her physical and mental health and some of them could even have an inter-generational impact if a girl child is married below 18 years of age. The girl child could also face adverse social consequences that might impact her for the rest of her life.

(a) Reference was made to a report "**Delaying Marriage for Girls in India: A Formative Research to Design Interventions for Changing Norms**". This report was prepared in March 2011 under the supervision of UNICEF India.

(b) Reference was also made to a report "**Reducing Child Marriage in India: A Model to Scale up Results**". This report was prepared in January 2016 and also under the supervision and guidance of UNICEF India. The report contains statistics of widowed, separated and divorced girls who were married between 10 and 18 years of age based on Census 2011.

(c) Reference was also made to a useful study "**Economic Impacts of Child Marriage: Global Synthesis Report**" released in June 2017. This report is a collaborative effort by the International Centre for Research on Women and the World Bank and it deals with the impact of child marriages on (i) fertility and population growth; (ii) health, nutrition, and intimate partner violence; (iii) educational attainment; (iv) labour force participation, earnings and welfare, and (v) women's decision-making and other impacts. The economic cost of child marriages and implications has also been discussed in detail in the report. A child marriage is defined as a marriage or union taking place before the age of 18 years and this definition has been arrived at by relying on a number of conventions, treaties and international agreements as well as resolutions of the UN Human Rights Council and the UN General Assembly.

(d) Another extremely useful report referred to is "**A Statistical Analysis of Child Marriage in India based on Census 2011**". This report is prepared by a collaborative organization called Young Lives and the National Commission for the Protection of Child Rights and was released quite recently in June 2017.

12. This refers to the consequences of child marriage in Chapter 5.

Broadly, it is stated :

> "Child marriage is not only a violation of human rights, but is also recognized as an obstacle to the development of young people. The practice of child marriage cut shorts a critical stage of self-discovery and exploring one's identity. Child marriage is an imposition of a marriage partner on children or adolescents who are in no way ready and matured, and thus, are at a loss to understand the significance of marriage. Their development gets comprised due to being deprived of freedom, opportunity for personal development, and other rights including health and well-being, education, and participation in civic life and nullifies their basic rights as envisaged in the United Nation's Convention on the Right of the Child ratified by India in 1989. Marriage at a young age prevents both girls and boys from exercising agency in making important life decisions and securing basic freedoms, including pursuing opportunities for education, earning a sustainable livelihood and accessing sexual health and rights." ……..
>
> "**The key consequences of child marriage of girls** may include early pregnancy; maternal and neonatal mortality; child health problems; educational setbacks; lower employment/livelihood prospects; exposure to violence and abuse, including a range of controlling and inequitable behaviours, leading to inevitable negative physical and psychological consequences; and limited agency of girls to influence decisions about their lives.
>
> Census data have demonstrated an **upswing of female deaths** in the age group of 15-19 years. This high mortality rate could be attributed to the deaths of teenage mothers. Child marriage virtually works like a double-edged sword; lower age at marriage is significantly associated with worse outcomes for the child and worse pregnancy outcomes for the mother. All these factors push girls and their families into perpetuation of intergenerational poverty and marginalization. The impact of early marriage on girls - and to a lesser extent on boys - is wide-ranging, opines the Innocenti Digest on child marriage. Child brides often experience overlapping vulnerabilities - they are young, often poor and undereducated. This affects the resources and assets they can bring into their marital household, thus reducing their decision-making ability. Child marriage places a girl under the control of her husband and often

> in-laws, limiting her ability to voice her opinions and form and pursue her own plans and aspirations. While child marriage is bound to have a detrimental effect on boys who would need to shoulder the responsibility of a wife and in most cases, have to also discontinue their education, there is very little research evidence to capture the long term economic and psychological effect on boys who are married early. The Lancet 2015 acknowledges that adolescent boys are not important and neglected part of the equation. The assumption that girls need more attention than boys is now being challenged.
>
> Looking at the impact of early marriage from rights perspective, it can be said that the key concerns are denial of childhood and adolescence, curtailment of personal freedom, deprivation of opportunities to develop a full sense of selfhood and denial of psychosocial and emotional well-being reproductive health and educational opportunity along with consequences described earlier." (Emphasis supplied by us).

13. There is a specific discussion in the Statistical Analysis on the impact of early child birth on health in which it is stated that "girls aged 15 to 19 [years] are twice more likely than older women to die from childbirth and pregnancy, making pregnancy the leading cause of death in poor countries for these age groups. Girls from the Scheduled Castes and Scheduled Tribes were on an average 10 per cent more likely (after accounting for other variables) to give birth earlier than girls from the other castes." It has been found that girls most likely to have had a child by 19 years (as compared with all other married and unmarried girls) were from the poorest groups; were more likely to live in rural areas; had the least educated mothers; had earlier experiences of menarche; had lower education aspirations; and were

less likely to be enrolled in school between the age of 12 and 15 years. Being young and immature mothers, they have little say in decision-making about the number of children they want, nutrition, health-care etc. Lack of self-esteem or of a sense of ownership of her own body exposes a woman to repeated unwanted pregnancies.

14. There is also a useful discussion on violence, neglect and abandonment; psychosocial disadvantage; low self-esteem; low education and limited employability; human trafficking and under-nutrition, all of which are of considerable importance for the well-being of a girl child.

We are not dealing with these reports in any detail but draw attention to them since they support the view canvassed by learned counsel. All that we need say is that a reading of these reports gives a good idea of the variety and magnitude of problems that a girl child who is married between 15 and 18 years of age could ordinarily encounter, including those caused by having sexual intercourse and child-bearing at an early age.

In-depth Study on all forms of violence against women

15. On 6th July, 2006 the Secretary-General of the United Nations submitted a report to the General Assembly called the "**In-depth Study on all forms of violence against women**". In the chapter relating to violence against women within the family and harmful traditional practices, early

marriage was one of the commonly identified forms of violence.[1] Similarly, early marriage was considered a harmful traditional practice[2] - a thought echoed a year later in the **Study on Child Abuse: India 2007** (referred to later) by the Government of India.

16. An early marriage is explained as involving the marriage of a child, that is, a person below the age of 18 years. It is stated that "Minor girls have not achieved full maturity and capacity to act and lack ability to control their sexuality. When they marry and have children, their health can be adversely affected, their education impeded and economic autonomy restricted. Early marriage also increases the risk of HIV infection." Among the under-documented forms of violence against women are included traditional harmful practices, prenatal sex selection, early marriage, acid throwing and dowry or "honour" related violence etc.[3]

17. On the concern of appropriate legislation to deal with issues of violence against women, the right of a woman to bodily integrity and legislations that allow early marriages, the Secretary General had this to say:

> "**The treaty bodies have expressed concerns about the scope and coverage of existing legislation**, in particular in regard to:

1 Paragraph 111

2 Paragraph 118

3 Paragraph 222

> definitions of rape that require use of force and violence rather than lack of consent; **definitions of domestic violence that are limited to physical violence**; treatment of sexual violence against women as crimes against the honour of the family or crimes against decency rather than violations of **women's right to bodily integrity**; use of the defence of "honour" in cases of violence against women and the related mitigation of sentences; provisions allowing mitigation of sentences in rape cases where the perpetrator marries the victim; inadequacy of protective measures for trafficked women, as well as their treatment as criminals rather than victims; termination of criminal proceedings upon withdrawal of a case by the victim; penalization of abortion in rape cases; **laws that allow early or forced marriage**; inadequate penalties for acts of violence against women; and discriminatory penal laws."[4] (Emphasis supplied by us)

National Policy and National Plan

18. What has been the response of the Government of India to studies carried out from time to time and views expressed? The National Charter for Children, 2003 was notified on 9th February, 2004. While it failed to define a child, we assume that it was framed keeping in mind the generally accepted definition of a child as being someone below 18 years of age. Proceeding on this basis, for the present purposes, Clause 11 of the National Charter is of relevance in the context of child marriages. It recognized that child marriage is a crime and an atrocity committed against the girl child. It also provided for taking "serious measures" to speedily abolish the practice of child marriage. Clause 11 reads:

4 Paragraph 277

> "11. a. The State and community shall ensure that crimes and atrocities committed against the girl child, including child marriage, discriminatory practices, forcing girls into prostitution and trafficking are speedily eradicated.
>
> b. The State shall in partnership with the community undertake measures, including social, educational and legal, to ensure that there is greater respect for the girl child in the family and society.
>
> c. The State shall take serious measures to ensure that the practice of child marriage is speedily abolished."

19. As a first step in this direction, child marriages were criminalized by enacting the PCMA in 2006 but no corresponding amendment was made in Section 375 of the IPC, as it existed in 2006, to decriminalize marital rape of a girl child.

20. The National Charter was followed by the **National Policy for Children** notified on 26th April, 2013. The National Policy explicitly recognized in Clause 2.1 that every person below the age of 18 years is a child. Among the Guiding Principles for the National Policy was the recognition that every child has universal, inalienable and indivisible human rights; every child has the right to life, survival, development, education, protection and participation; the best interest of a child is the primary concern in all decisions and actions affecting the child, whether taken by legislative bodies, courts of law, administrative authorities, public, private, social, religious or cultural institutions.

21. The large 'to do list' in the National Policy led to the **National Plan**

of Action for Children, 2016: Safe Children – Happy Childhood. The National Plan appears to have been made available on 24th January, 2017. While dealing with child marriage, it is stated as follows:

> "In India, between NFHS-3 (2005-06) to RSOC (2013-14), there has been a considerable decline in the percentage of women, between the ages 20-24, who were married before the age of 18 (from 47.4% to 30.3%). The incidence is higher among SC (34.9%) and ST (31%) and in families with lowest wealth index (44.1%). Child marriage violates children's basic rights to health, education, development, and protection and is also used as a means of trafficking of young girls.
>
> Child marriage leads to pregnancy during adolescence, posing life-threatening risks to both mother and child. It is indicated by the Age-specific Marital Fertility Rate (ASMFR) which is measured as a number of births per year in a given age group to the total number of married women in that age group. SRS 2013 reveals that in the age group of 15-19 years; there has been an upward trend during the period 2001-2013. ASMFR is higher in the age group 15-19 years in comparison to 25-29 years."

22. The National Plan of Action for Children recognizes that the early marriage of girls is one of the factors for neo-natal deaths; early marriage poses various risks for the survival, health and development of young girls and to children born to them and most unfortunately it is also used as a means of trafficking.

23. A reading of the National Policy and the National Plan of Action for Children reveals, quite astonishingly, that even though the Government of India realizes the dangers of early marriages, it is merely dishing out

platitudes and has not taken any concrete steps to protect the girl child from marital rape, except enacting the Protection of Children from Sexual Offences Act, 2012.

Human Rights Council

24. The Report of the Working Group on the Universal Periodic Review for India (issued on 17th July, 2017 without formal editing) for the 36th Session of the Human Rights Council refers to recommendations made by several countries to remove the exception relating to marital rape from the definition of rape in Section 375 of the I.P.C. In other words, the issue raised by the petitioner has attracted considerable international attention and discussion and ought to be taken very seriously by the Union of India.

25. In our opinion, it is not necessary to detail the contents of every report or study placed before us except to say that there is a strong established link between early marriage and sexual intercourse with a married girl child between 15 and 18 years of age. There is a plethora of material to clearly indicate that sexual intercourse with a girl child below the age of 18 years (even within marriage) is not at all advisable for her for a variety of reasons, including her physical and mental well-being and her social standing – all of which should ordinarily be of paramount importance to everybody, particularly the State.

26. The social cost of a child marriage (and therefore of sexual intercourse with a girl child) is itself quite enormous and in the long run might not even be worth it. This is in addition to the economic cost to the country which would be obliged to take care of infants who might be malnourished and sickly; the young mother of the infant might also require medical assistance in most cases. All these costs eventually add up and apparently only for supporting a pernicious practice.

27. We can only express the hope that the Government of India and the State Governments intensively study and analyze these and other reports and take an informed decision on the effective implementation of the PCMA and actively prohibit child marriages which 'encourages' sexual intercourse with a girl child. Welfare schemes and catchy slogans are excellent for awareness campaigns but they must be backed up by focused implementation programmes, other positive and remedial action so that the pendulum swings in favour of the girl child who can then look forward to a better future.

Provisions of the Indian Penal Code (IPC)

28. Section 375 of the IPC defines 'rape'. This section was inserted in the IPC in its present form by an amendment carried out on 3rd February, 2013 and it provides that a man is said to commit rape if, broadly speaking, he has sexual intercourse with a woman under circumstances falling under any of

the seven descriptions mentioned in the section. (A woman is defined under Section 10 of the IPC as a female human being of any age). Among the seven descriptions is sexual intercourse against the will or without the consent of the woman; clause 'Sixthly' of Section 375 makes it clear that if the woman is under 18 years of age, then sexual intercourse with her - with or without her consent - is rape. This is commonly referred to as 'statutory rape' in which the willingness or consent of a woman below the age of 18 years for having sexual intercourse is rendered irrelevant and inconsequential.

29. However, Exception 2 to Section 375 of the IPC provides that it is not rape if a man has sexual intercourse with a girl above 15 years of age and if that girl is his wife. In other words, a husband can have sexual intercourse with his wife provided she is not below 15 years of age and this is not rape under the IPC regardless of her willingness or her consent.

30. However, sexual intercourse with a girl under 15 years of age is rape, whether it is with or without her consent, against her will or not, whether it is by her husband or anybody else. This is clear from a reading of Section 375 of the IPC including Exception 2.

31. Therefore, Section 375 of the IPC provides for three circumstances relating to 'rape'. **Firstly** sexual intercourse with a girl below 18 years of

age is rape (statutory rape). **Secondly** and by way of an exception, if a woman is between 15 and 18 years of age then sexual intercourse with her is not rape if the person having sexual intercourse with her is her husband. Her willingness or consent is irrelevant under this circumstance. **Thirdly** sexual intercourse with a woman above 18 years of age is rape if it is under any of the seven descriptions given in Section 375 of the IPC (non-consensual sexual intercourse).

32. The result of the above three situations is that the husband of a girl child between 15 and 18 years of age has blanket liberty and freedom to have non-consensual sexual intercourse with his wife and he would not be punishable for rape under the IPC since such non-consensual sexual intercourse is not rape for the purposes of Section 375 of the IPC. Very strangely, and as pointed out by Sakshi before the LCI, the husband of a girl child does not have the liberty and freedom under the IPC to commit a lesser 'sexual' act with his wife, as for example, if the husband of a girl child assaults her with the intention of outraging her modesty, he would be punishable under the provisions of Section 354 of the IPC. In other words, the IPC permits a man to have non-consensual sexual intercourse with his wife if she is between 15 and 18 years of age but not to molest her. This view is surprisingly endorsed by the LCI in its 172nd report adverted to

above.

Protection of Human Rights Act, 1993

33. The Protection of Human Rights Act, 1993 defines "human rights" in Section 2(d) as meaning the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in international covenants and enforceable by courts in India. There can be no doubt that if a girl child is forced by her husband into sexual intercourse against her will or without her consent, it would amount to a violation of her human right to liberty or her dignity guaranteed by the Constitution or at least embodied in international conventions accepted by India such as the Convention on the Rights of the Child (the CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW).

Protection of Women from Domestic Violence Act, 2005 (DV Act)

34. Section 3 of the Protection of Women from Domestic Violence Act, 2005 (for short 'the DV Act') provides that if the husband of a girl child harms or injures or endangers the health, safety, life, limb or well being, whether mental or physical, of his wife including by causing physical abuse and sexual abuse, he would be liable to have a protection order issued against him and pay compensation to his wife. Explanation I (ii) of Section

3 defines ‘sexual abuse’ as including any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of a woman.

Prohibition of Child Marriage Act, 2006 (PCMA)

35. One of the more important legislations on the subject of protective rights of children is the Prohibition of Child Marriage Act, 2006 (for short ‘the PCMA’). For the purposes of the PCMA, a ‘child’ is a male who has not completed 21 years of age and a female who has not completed 18 years of age and a ‘child marriage’ means a marriage to which either contracting party is a child.

36. Section 3 of the PCMA provides that a child marriage is voidable at the option of any one of the parties to the child marriage – a child marriage is not void, but only voidable. Interestingly, and notwithstanding the fact that a child marriage is only voidable, Parliament has made a child marriage an offence and has provided punishments for contracting a child marriage. For instance, Section 9 of the PCMA provides that any male adult above 18 years of age marrying a child shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both. Therefore regardless of his age, a male is penalized under this section if he marries a girl child. Section 10 of the PCMA provides that whoever performs, conducts, directs or abets any child

marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees; Section 11 of the PCMA provides punishment for promoting or permitting solemnization of a child marriage; and finally Section 13 of the PCMA provides that the jurisdictional judicial officer may injunct the performance of a child marriage while Section 14 of the PCMA provides that any child marriage solemnized in violation of an injunction under Section 13 shall be void.

37. It is quite clear from the above that Parliament is not in favour of child marriages *per se* but is somewhat ambivalent about it. However, Parliament recognizes that although a child marriage is a criminal activity, the reality of life in India is that traditional child marriages do take place and as the studies (referred to above) reveal, it is a harmful practice. Strangely, while prohibiting a child marriage and criminalizing it, a child marriage has not been declared void and what is worse, sexual intercourse within a child marriage is not rape under the IPC even though it is a punishable offence under the Protection of Children from Sexual Offences Act, 2012.

Protection of Children from Sexual Offences Act, 2012 (POCSO)

38. The Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act') is an important statute for the purposes of our discussion.

The Statement of Objects and Reasons necessitating the enactment of the POCSO Act makes a reference to data collected by the National Crime Records Bureau (NCRB) which indicated an increase in sexual offences against children. The data collected by the NCRB was corroborated by the **Study on Child Abuse: India 2007** conducted by the Ministry of Women and Child Development of the Government of India.

39. While the above Study focuses on child abuse, it does refer to the harmful traditional practice of child marriage and in this context adverts to child marriage as being a subtle form of violence against children. The Study notes that there is a realization that if issues of child marriage are not addressed, it would affect the overall progress of the country.

40. The above Study draws attention to the **Convention on the Elimination of All Forms of Discrimination Against Women** (CEDAW) to which India is a signatory. Article 16.2 thereof provides "The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for

marriage and to make the registration of marriages in an official registry compulsory." [5]

41. The above Study also makes a reference to gender equity to the effect that discrimination against girls results in child marriages and such an imbalance needs to be addressed by bringing about attitudinal changes in people regarding the value of the girl child.

42. The Preamble to the POCSO Act states that it was enacted with reference to Article 15(3) of the Constitution. The Preamble recognizes that the best interest of a child should be secured, a child being defined under Section 2(d) as any person below the age of 18 years. In fact, securing the best interest of the child is an obligation cast upon the Government of India having acceded to the **Convention on the Rights of the Child** (the CRC). The Preamble to the POCSO Act also recognizes that it is imperative that the law should operate "in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy, physical, emotional, intellectual and social development

5 India became a signatory to the CEDAW Convention on 30th July, 1980 (ratified on 9th July, 1993) but with a reservation to the extent of making registration of marriage compulsory stating that it is not practical in a vast country like India with its variety of customs, religions and level of literacy. Nevertheless, the Supreme Court in the case of *Seema (Smt.) v. Ashwani Kumar, (2006) 2 SCC 578* directed the States and Central Government to notify Rules making registration of marriages compulsory. However, the same has not been implemented in full.

of the child". Finally, the Preamble also provides that "sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed". This is directly in conflict with Exception 2 to Section 375 of the IPC which effectively provides that the sexual exploitation or sexual abuse of a girl child is not even a crime, let alone a heinous crime – on the contrary, it is a perfectly legitimate activity if the sexual exploitation or sexual abuse of the girl child is by her husband.

43. Under Article 34 of the CRC, the Government of India is bound to "undertake all appropriate national, bilateral and multi-lateral measures to prevent the coercion of a child to engage in any unlawful sexual activity". The key words are 'unlawful sexual activity' but the IPC declares that a girl child having sexual intercourse with her husband is not 'unlawful sexual activity' within the provisions of the IPC, regardless of any coercion. However, for the purposes of the POCSO Act, any sexual activity engaged in by any person (husband or otherwise) with a girl child is unlawful and a punishable offence. This dichotomy is certainly not in the spirit of Article 34 of the CRC.

44. Further, in terms of our international obligations under Article 1 and Article 34 of the CRC, the Government of India must undertake all appropriate measures to prevent the sexual exploitation or sexual abuse of

any person below 18 years of age since such sexual exploitation or sexual abuse is a heinous crime. What has the Government of India done? It has persuaded Parliament to convert what is otherwise universally accepted as a heinous crime into a legitimate activity for the purposes of Section 375 of the IPC if the exploiter or abuser is the husband of the girl child. But, contrarily the rape of a married girl child (called 'aggravated penetrative sexual assault' in the POCSO Act) is made an offence for the purposes of the POCSO Act.

45. Section 3 of the POCSO Act defines "penetrative sexual assault". Clause (n) of Section 5 provides that if a person commits penetrative sexual assault with a child, then that person actually commits aggravated penetrative sexual assault if that person is related to the child, *inter alia,* through marriage. Therefore, if the husband of a girl child commits penetrative sexual assault on his wife, he actually commits aggravated penetrative sexual assault as defined in Section 5(n) of the POCSO Act which is punishable under Section 6 of the POCSO Act by a term of rigorous imprisonment of not less than ten years and which may extend to imprisonment for life and fine.

46. The duality therefore is that having sexual intercourse with a girl child between 15 and 18 years of age, the husband of the girl child is said to have

not committed rape as defined in Section 375 of the IPC but is said to have committed aggravated penetrative sexual assault in terms of Section 5(n) of the POCSO Act.

47. There is no real or material difference between the definition of rape in the terms of Section 375 of the IPC and penetrative sexual assault in the terms of Section 3 of the POCSO Act.[6] The only difference is that the definition of rape is somewhat more elaborate and has two exceptions but the sum and substance of the two definitions is more or less the same and the punishment (under Section 376(1) of the IPC) for being found guilty of committing the offence of rape is the same as for penetrative sexual assault (under Section 4 of the POCSO Act). Similarly, the punishment for

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6 **3. Penetrative sexual assault**.—A person is said to commit "penetrative sexual assault" if—

(*a*) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(*b*) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(*c*) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(*d*) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.....

375. Rape.—A man is said to commit "rape" if he—

(*a*) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(*b*) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(*c*) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(*d*) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

'aggravated' rape under Section 376(2) of the IPC is the same as for aggravated penetrative sexual assault under Section 6 of the POCSO Act. Consequently, it is immaterial if a person is guilty of the same sexual activity under the provisions of the POCSO Act or the provisions of the IPC – the end result is the same and only the forum of trial changes. In a violation of the provisions of the POCSO Act, a Special Court constituted under Section 28 of the said Act would be the Trial Court but the ordinary criminal court would be the Trial Court for an offence under the IPC.

48. At this stage it is necessary to refer to Section 42-A inserted in the POCSO Act by an amendment made on 3rd February, 2013. This section reads:

> **42-A. Act not in derogation of any other law**.—The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.

The consequence of this amendment is that the provisions of the POCSO Act will override the provisions of any other law (including the IPC) to the extent of any inconsistency.

49. One of the questions that arises for our consideration is whether there is any incongruity between Exception 2 to Section 375 of the IPC and

Section 5(n) of the POCSO Act and which provision overrides the other. To decide this, it would be necessary to keep Section 42-A of the POCSO Act in mind as well as Sections 5 and 41 of the IPC which read:

> **5. Certain laws not to be affected by this Act.**—Nothing in this Act shall affect the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of the Government of India or the provisions of any special or local law.
>
> **41. "Special law".**—A "special law" is a law applicable to a particular subject.

50. These two provisions are of considerable importance in resolving the controversy and conflict presented before us.

Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act)

51. The Juvenile Justice (Care and Protection of Children) Act, 2015 (the JJ Act) is also relatable to Article 15(3) of the Constitution. Section 2(12) of the JJ Act defines a child as a person who has not completed 18 years of age. A child in need of care and protection is defined in Section 2(14) of the JJ Act, *inter alia*, as a child "who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnization of such marriage". Clearly a girl child below 18 years of age and who is sought to be married is a child in need of care and protection. She is therefore, required to be produced before a Child Welfare Committee constituted under Section 27

of the JJ Act so that she could be cared for, protected and appropriately rehabilitated or restored to society.

Brief summary of the existing legislations

52. It is obvious from a brief survey of the various statutes referred to above that a child is a person below 18 years of age who is entitled to the protection of her human rights including the right to live with dignity; if she is unfortunately married while a child, she is protected from domestic violence, both physical and mental, as well as from physical and sexual abuse; if she is unfortunately married while a child, her marriage is in violation of the law and therefore an offence and such a marriage is voidable at her instance and the person marrying her is committing a punishable offence; the husband of the girl child would be committing aggravated penetrative sexual assault when he has sexual intercourse with her and is thereby committing a punishable offence under the POCSO Act. The only jarring note in this scheme of the pro-child legislations is to be found in Exception 2 to Section 375 of the IPC which provides that sexual intercourse with a girl child between 15 and 18 years of age is not rape if the sexual intercourse is between the girl child and her husband. Therefore, the question of punishing the husband simply does not arise. A girl child placed in such circumstances is a child in need of care and protection and needs to

be cared for, protected and appropriately rehabilitated or restored to society. All these 'child-friendly statutes' are essential for the well-being of the girl child (whether married or not) and are protected by Article 15(3) of the Constitution. These child-friendly statutes also link child marriages and sexual intercourse with a girl child and draw attention to the adverse consequences of both.

Article 15(3) of the Constitution

53. Article 15(3) of the Constitution enables and empowers the State to make special provision for the benefit of women and children. The Constituent Assembly debated this provision [then Article 9(2) of the draft Constitution] on 29th November, 1948. Prof. K.T. Shah suggested an amendment to the said Article ("Nothing in this article shall prevent the State from making any special provision for women and children") so that it would read: "Nothing in this article shall prevent the State from making any special provision for women and children or for Scheduled Castes or backward tribes, for their advantage, safeguard or betterment." The view expressed was:

> "Sir, it must be distinguished from the preceding article. I read it, at any rate, that this is a provision for discrimination in favour of women and children, to which I have added the Scheduled Castes or backward tribes. This discrimination is in favour of particular classes of our society which, owing to an unfortunate legacy of the past,

> suffer from disabilities or handicaps. Those, I think, may require special treatment; and if they do require it, they should be permitted special facilities for some time so that real equality of citizens be established.
>
> The rage for equality which has led to provide equal citizenship and equal rights for women has sometimes found exception in regard to special provisions that, in the long range, in the interest of the country or of the race, exclude women from certain dangerous occupations, certain types of work. That, I take it, is not intended in any way to diminish their civic equality or status as citizens. It is only intended to safeguard, protect or lead to their betterment in general; so that the long-range interests of the country may not suffer."

The amendment was negatived by Dr. Ambedkar in the following manner:

> "With regard to amendment No. 323 moved by Professor K.T. Shah, the object of which is to add "Scheduled Castes" and "Scheduled Tribes" along with women and children, I am afraid it may have just the opposite effect.
>
> The object which all of us have in mind is that the Scheduled Castes and Scheduled Tribes should not be segregated from the general public.
>
> For instance, none of us, I think, would like that a separate school should be established for the Scheduled Castes when there is a general school in the village open to the children of the entire community. If these words are added, it will probably give a handle for a State to say, 'Well, we are making special provision for the Scheduled Castes'. To my mind they can safely say so by taking shelter under the article if it is amended in the manner the Professor wants it. I therefore think that it is not a desirable amendment."

The response given by Dr. Ambedkar suggests that he certainly favoured special provisions for women and children with a view to integrate them into

society and to take them out of patriarchal control. But a similar integration could not be achieved by making special provisions for Scheduled Castes and Scheduled Tribes – it would have the opposite effect and further segregate them from the general public.

54. What clearly emerges from this discussion is that Article 9(2) of the draft Constitution [now Article 15(3)] was intended to discriminate in favour of women and children – a form of affirmative action to their advantage. This intention has been recognized by decisions of this Court and of some High Courts. The earliest such decision is of the Calcutta High Court in ***Sri Mahadeb Jiew v. Dr. B.B. Sen***[7] in which it was said that: "The special provision for women in Article 15(3) cannot be construed as authorizing a discrimination against women, and the word "for" in the context means "in favour of"."

55. In ***Government of A.P. v. P.B. Vijayakumar***[8] affirmative action for women (and children) was recognized in paragraphs 7 and 8 of the Report in the following words:

> "The insertion of clause (3) of Article 15 in relation to women is a recognition of the fact that for centuries, women of this country have

7 AIR 1951 Cal 563

8 (1995) 4 SCC 520

> been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. **It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15(3) is placed in Article 15. Its object is to strengthen and improve the status of women**……
>
> What then is meant by "any special provision for women" in Article 15(3)? **This "special provision"**, which the State may make to improve women's participation in all activities under the supervision and control of the State **can be in the form of either affirmative action or reservation**." ….(Emphasis supplied by us)

56. ***Yusuf Abdul Aziz v. State of Bombay***[9] is a Constitution Bench decision of this Court in which the constitutional validity of Section 497 of the IPC was challenged on the ground that it unreasonably 'exempts' a wife from being punishable for an offence of adultery and therefore should be interpreted restrictively. Rejecting the contention that Article 15(3) of the Constitution places any restriction on the legislative power of Parliament, it was said:

> "It was argued that clause (3) [of Article 15 of the Constitution] should be confined to provisions which are beneficial to women and cannot be used to give them a licence to commit and abet crimes. We are unable to read any such restriction into the clause; nor are we able to agree that a provision which prohibits punishment is tantamount to a licence to commit the offence of which punishment has been prohibited."

57. The view that Article 15(3) is intended to benefit women has also

9 1954 SCR 930

been accepted in ***Cyril Britto v. Union of India***[10] wherein it was held that prohibition from arrest or detention of women in execution of a money decree under Section 56 of the Civil Procedure Code is a special provision calculated to ensure that a woman judgment-debtor is not put to the ignominy or arrest and detention in civil prison in execution of a money decree and that this provision is referable to Article 15(3) of the Constitution. A similar view was taken in respect of the same provision in the Civil Procedure Code in ***Shrikrishna Eknath Godbole v. Union of India***.[11]

58. It is quite clear therefore that Article 15(3) of the Constitution cannot and ought not to be interpreted restrictively but must be given its full play. Viewed from this perspective, it seems to us that legislation intended for affirmative action in respect of a girl child must not only be liberally construed and interpreted but must override any other legislation that seeks to restrict the benefit made available to a girl child. This would only emphasize the spirit of Article 15(3) of the Constitution.

Right to bodily integrity and reproductive choice

10 AIR 2003 Ker 259

11 PIL No. 166/2016 decided on 21st October, 2016

59. The right to bodily integrity and the reproductive choice of any woman has been the subject of discussion in quite a few decisions of this Court. The discussion has been wide-ranging and several facets of these concepts have been considered from time to time. The right to bodily integrity was initially recognized in the context of privacy in ***State of Maharashtra v. Madhukar Narayan Mardikar***[12] wherein it was observed that no one has any right to violate the person of anyone else, including of an 'unchaste' woman. It was said:

> "The High Court observes that since Banubi is an unchaste woman it would be extremely unsafe to allow the fortune and career of a government official to be put in jeopardy upon the uncorroborated version of such a woman who makes no secret of her illicit intimacy with another person. She was honest enough to admit the dark side of her life. **Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish.** She is equally entitled to the protection of law." (Emphasis supplied by us)

60. In ***Suchita Srivastava v. Chandigarh Administration***[13] the right to make a reproductive choice was equated with personal liberty under Article 21 of the Constitution, privacy, dignity and bodily integrity. It includes the right to abstain from procreating. In paragraph 22 of the Report it was held:

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12 (1991) 1 SCC 57

13 (2009) 9 SCC 1

> "There is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. **It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods**. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a "compelling State interest" in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices." (Emphasis supplied by us)

61. In issues of criminal law, investigations and recording of statements, the bodily integrity of a witness has been accepted by this Court in ***Selvi v. State of Karnataka***[14] wherein it was held in paragraph 103 of the Report:

> "The concerns about the "voluntariness" of statements allow a more comprehensive account of this right. If involuntary statements were readily given weightage during trial, the investigators would have a strong incentive to compel such statements—often through methods involving coercion, threats, inducement or deception. Even if such involuntary statements are proved to be true, **the law should not incentivise the use of interrogation tactics that violate the dignity and bodily integrity of the person being examined**." (Emphasis supplied by us)

14 (2010) 7 SCC 263

62. ***Ritesh Sinha v. State of Uttar Pradesh***[15] was a case relating to the collection of a voice sample during the course of investigation by the police. Relying of ***Selvi*** it was held that: "In a country governed by the rule of law, police actions which are likely to affect the bodily integrity of a person or likely to affect his personal dignity must have legal sanction."

63. Finally, in ***Devika Biswas v. Union of India***[16] it was observed that "Over time, there has been recognition of the need to respect and protect the reproductive rights and reproductive health of a person." This is all the more so in the case of a girl child who has little or no say in reproduction after an early marriage. As observed in ***Suchita Srivastava*** "…. the "best interests" test requires the Court to ascertain the course of action which would serve the best interests of the person in question."

64. The discussion on the bodily integrity of a girl child and the reproductive choices available to her is important only to highlight that she cannot be treated as a commodity having no say over her body or someone who has no right to deny sexual intercourse to her husband. The human rights of a girl child are very much alive and kicking whether she is married or not and deserve recognition and acceptance.

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15 (2013) 2 SCC 357

16 (2016) 10 SCC 726

Rape or penetrative sexual assault

65. Whether sexual intercourse that a husband has with his wife who is between 15 and 18 years of age is described as rape (not an offence under Exception 2 to Section 375 of the IPC) or aggravated penetrative sexual assault (an offence under Section 5(n) of the POCSO Act and punishable under Section 6 of the POCSO Act) the fact is that it is rape as conventionally understood, though Parliament in its wisdom has chosen to not recognize it as rape for the purposes of the IPC. That it is a heinous crime which also violates the bodily integrity of a girl child, causes trauma and sometimes destroys her freedom of reproductive choice is a composite issue that needs serious consideration and deliberation.

66. There have been several decisions rendered by this Court highlighting the horrors of rape. In ***State of Karnataka v Krishnappa***[17] an 8 year girl was raped and it was held in paragraph 15 of the Report:

> "Sexual violence apart from being a dehumanising act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity - **it degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience**." (Emphasis supplied by us)

17 (2000) 4 SCC 75

67. In ***Bodhisattwa Gautam v. Subhra Chakraborty***[18] it was observed by this Court that rape is a crime not only against a woman but against society. It was held in paragraph 10 of the Report that:

> "Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society. **It destroys the entire psychology of a woman and pushes her into deep emotional crisis.** It is only by her sheer will-power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21. To many feminists and psychiatrists, rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women. The rape laws do not, unfortunately, take care of the social aspect of the matter and are inept in many respects." (Emphasis supplied by us)

68. About a month later, it was pithily stated in ***State of Punjab v. Gurmit Singh***[19]

> "We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably **causes serious psychological as well as physical harm in the process**. Rape is not merely a physical assault — it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female." (Emphasis supplied by us)

69. There are several decisions in which similar observations have been made by this Court and it is not necessary to multiply the cases. However,

18 (1996) 1 SCC 490

19 (1996) 2 SCC 384

reference may be made to a fairly recent decision in ***State of Haryana v. Janak Singh***[20] wherein reference was made to ***Bodhisattwa Gautam*** and it was observed in paragraph 7 of the Report:

> "Rape is one of the most heinous crimes committed against a woman. It insults womanhood. It violates the dignity of a woman and erodes her honour. **It dwarfs her personality and reduces her confidence level.** It violates her right to life guaranteed under Article 21 of the Constitution of India." (Emphasis supplied by us)

70. If such is the traumatic impact that rape could and does have on an adult victim, we can only guess what impact it could have on a girl child – and yet it is not a criminal offence in the terms of Exception 2 to Section 375 of the IPC but is an offence under the POCSO Act only. An anomalous state of affairs exists on a combined reading of the IPC and the POCSO Act. An unmarried girl below 18 years of age could be a victim of rape under the IPC and a victim of penetrative sexual assault under the POCSO Act. Such a victim might have the solace (if we may say so) of prosecuting the rapist. A married girl between 15 and 18 years of age could be a victim of aggravated penetrative sexual assault under the POCSO Act, but she cannot be a victim of rape under the IPC if the rapist is her husband since the IPC does not recognize such penetrative sexual assault as rape. Therefore such a girl child has no recourse to law under the provisions of the IPC notwithstanding that

20 (2013) 9 SCC 431

the marital rape could degrade and humiliate her, destroy her entire psychology pushing her into a deep emotional crisis and dwarf and destroy her whole personality and degrade her very soul. However, such a victim could prosecute the rapist under the POCSO Act. We see no rationale for such an artificial distinction.

71. While we are not concerned with the general question of marital rape of an adult woman but only with marital rape of a girl child between 15 and 18 years of age in the context of Exception 2 to Section 375 of the IPC, it is worth noting the view expressed by the **Committee on Amendments to Criminal Law** chaired by Justice J.S. Verma (Retired). In paragraphs 72, 73 and 74 of the Report it was stated that the out-dated notion that a wife is no more than a subservient chattel of her husband has since been given up in the United Kingdom. Reference was also made to a decision of the European Commission of Human Rights which endorsed the conclusion that "a rapist remains a rapist regardless of his relationship with the victim." The relevant paragraphs of the Report read as follows:

> "72. The exemption for marital rape stems from a long out-dated notion of marriage which regarded wives as no more than the property of their husbands. According to the common law of coverture, a wife was deemed to have consented at the time of the marriage to have intercourse with her husband at his whim. Moreover, this consent could not be revoked. As far back as 1736, Sir Matthew Hale declared: '*The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual*

> *matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract*'.
>
> 73. This immunity has now been withdrawn in most major jurisdictions. In England and Wales, the House of Lords held in 1991 that the status of married women had changed beyond all recognition since Hale set out his proposition. Most importantly, Lord Keith, speaking for the Court, declared, '*marriage is in modern times regarded as a partnership of equals,* and no longer one in which the wife must be the subservient chattel of the husband.'
>
> 74. Our view is supported by the judgment of the European Commission of Human Rights in ***C.R. v UK*** [C.R. v UK Publ. ECHR, Ser.A, No. 335-C] which endorsed the conclusion that **a rapist remains a rapist regardless of his relationship with the victim**. Importantly, it acknowledged that this change in the common law was in accordance with the fundamental objectives of the Convention on Human Rights, the very essence of which is respect for human rights, dignity and freedom. This was given statutory recognition in the Criminal Justice and Public Order Act 1994." (Emphasis supplied by us)

72. In ***Eisenstadt v. Baird***[21] the US Supreme Court observed that a "marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."

73. On a combined reading of ***C.R. v. UK*** and ***Eisenstadt v. Baird*** it is quite clear that a rapist remains a rapist and marriage with the victim does not convert him into a non-rapist. Similarly, a rape is a rape whether it is described as such or is described as penetrative sexual assault or aggravated

21 405 US 438, 31 L Ed 2d 349, 92 S Ct 1092

penetrative sexual assault. A rape that actually occurs cannot legislatively be simply wished away or legislatively denied as non-existent.

Harmonizing the IPC, the POCSO Act, the JJ Act and the PCMA

74. There is an apparent conflict or incongruity between the provisions of the IPC and the POCSO Act. The rape of a married girl child (a girl child between 15 and 18 years of age) is not rape under the IPC and therefore not an offence in view of Exception 2 to Section 375 thereof but it is an offence of aggravated penetrative sexual assault under Section 5(n) of the POCSO Act and punishable under Section 6 of that Act. This conflict or incongruity needs to be resolved in the best interest of the girl child and the provisions of various complementary statutes need to be harmonized and read purposively to present an articulate whole.

75. The most obvious and appropriate resolution of the conflict has been provided by the State of Karnataka – the State Legislature has inserted sub-Section (1A) in Section 3 of the PCMA (on obtaining the assent of the President on 20th April, 2017) declaring that henceforth every child marriage that is solemnized is void *ab initio*. Therefore, the husband of a girl child would be liable for punishment for a child marriage under the PCMA, for penetrative sexual assault or aggravated penetrative sexual assault under the POCSO Act and if the husband and the girl child are living together in the

same or shared household for rape under the IPC. The relevant extract of the Karnataka amendment reads as follows:

> "(1A) Notwithstanding anything contained in sub-section (1) [of Section of the PCMA] every child marriage solemnized on or after the date of coming into force of the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016 shall be void ab initio".

76. It would be wise for all the State Legislatures to adopt the route taken by Karnataka to void child marriages and thereby ensure that sexual intercourse between a girl child and her husband is a punishable offence under the POCSO Act and the IPC. Assuming all other State Legislatures do not take the Karnataka route, what is the correct position in law?

77. There is no doubt that pro-child statutes are intended to and do consider the best interest of the child. These statutes have been enacted in the recent past though not effectively implemented. Given this situation, we are of opinion that a few facts need to be acknowledged and accepted. **Firstly**, a child is and remains a child regardless of the description or nomenclature given to the child. It is universally accepted in almost all relevant statutes in our country that a child is a person below 18 years of age. Therefore, a child remains a child whether she is described as a street child or a surrendered child or an abandoned child or an adopted child. Similarly, a child remains a child whether she is a married child or an

unmarried child or a divorced child or a separated child or a widowed child. At this stage we are reminded of Shakespeare's eternal view that a rose by any other name would smell as sweet - so also with the status of a child, despite any prefix. **Secondly**, the age of consent for sexual intercourse is definitively 18 years and there is no dispute about this. Therefore, under no circumstance can a child below 18 years of age give consent, express or implied, for sexual intercourse. The age of consent has not been specifically reduced by any statute and unless there is such a specific reduction, we must proceed on the basis that the age of consent and willingness to sexual intercourse remains at 18 years of age. **Thirdly**, Exception 2 to Section 375 of the IPC creates an artificial distinction between a married girl child and an unmarried girl child with no real rationale and thereby does away with consent for sexual intercourse by a husband with his wife who is a girl child between 15 and 18 years of age. Such an unnecessary and artificial distinction if accepted can again be introduced for other occasions for divorced children or separated children or widowed children.

78. What is sought to be achieved by this artificial distinction is not at all clear except perhaps to acknowledge that child marriages are taking place in the country. Such child marriages certainly cannot be in the best interest of the girl child. That the solemnization of a child marriage violates the

provisions of the PCMA is well-known. Therefore, it is for the State to effectively implement and enforce the law rather than dilute it by creating artificial distinctions. Can it not be said, in a sense, that through the artificial distinction, Exception 2 to Section 375 of the IPC encourages violation of the PCMA? Perhaps 'yes' and looked at from another point of view, perhaps 'no' for it cannot reasonably be argued that one statute (the IPC) condones an offence under another statute (the PCMA). Therefore the basic question remains - what exactly is the artificial distinction intended to achieve?

Justification given by the Union of India

79. The only justification for this artificial distinction has been culled out by learned counsel for the petitioner from the counter affidavit filed by Union of India. This is given in the written submissions filed by learned counsel for the petitioner and the justification (not verbatim) reads as follows:

i) Economic and educational development in the country is still uneven and child marriages are still taking place. It has been, therefore, decided to retain the age of 15 years under Exception 2 of Section 375 of IPC so as to give protection to husband and wife against criminalizing the sexual activity between them.

ii) As per National Family Health Survey-III, 46% of women between the ages 18-29 years in India were married before the age of 18. It is also estimated that there are 23 million child brides in the country. Hence, criminalizing the consummation of a marriage union with a serious offence such as rape would not be appropriate and practical.

iii) Providing punishment for child marriage with consent does not appear to be appropriate in view of socio-economic conditions of the country. Thus, the age prescribed in Exception 2 of Section 375 of IPC has been retained considering the basic facts of the still evolving social norms and issues.

iv) The Law Commission also recommended for raising the age from 15 years to 16 years and it was incorporated in the Criminal Law (Amendment) Ordinance, 2013. However, after wide ranging consultations with various stakeholders it was further decided to retain the age at 15 years.

v) Exception 2 of Section 375 of IPC envisages that if the marriage is solemnized at the age of 15 years due to traditions, it should not be a reason to book the husband in the case of offence of rape under the IPC.

vi) It is also necessary that the provisions of law should be in such a manner that it cannot affect a particular class of society. Retaining the age of 15 years in Exception 2 of Section 375 of IPC has been provided considering the social realities of the nation.

80. The above justifications given by the Union of India are really explanations for inserting Exception 2 in Section 375 of the IPC. Besides, they completely side track the issue and overlook the provisions of the PCMA, the provisions of the JJ Act as well as the provisions of the POCSO Act. Surely, the Union of India cannot be oblivious to the existence of the trauma faced by a girl child who is married between 15 and 18 years of age or to the three pro-child statutes and other human rights obligations. That these facts and statutes have been overlooked confirms that the distinction is artificial and makes Exception 2 to Section 375 of the IPC all the more arbitrary and discriminatory.

81. During the course of oral submissions, three further but more substantive justifications were given by learned counsel for the Union of India for making this distinction. The **first** justification is that by virtue of getting married, the girl child has consented to sexual intercourse with her husband either expressly or by necessary implication. The **second** justification is that traditionally child marriages have been performed in different parts of the country and therefore such traditions must be respected and not destroyed. The **third** justification is that paragraph 5.9.1 of the 167th report of the Parliamentary Standing Committee of the Rajya Sabha (presented in March 2013) records that several Members felt that marital rape has the potential of destroying the institution of marriage.

82. In law, it is difficult to accept any one of these justifications. There is no question of a girl child giving express or implied consent for sexual intercourse. The age of consent is statutorily and definitively fixed at 18 years and there is no law that provides for any specific deviation from this. Therefore unless Parliament gives any specific indication (and it has not given any such indication) that the age of consent could be deviated from for any rational reason, we cannot assume that a girl child who is otherwise incapable of giving consent for sexual intercourse has nevertheless given such consent by implication, necessary or otherwise only by virtue of being

married. It would be reading too much into the mind of the girl child and assuming a state of affairs for which there is neither any specific indication nor any warrant. It must be remembered that those days are long gone when a married woman or a married girl child could be treated as subordinate to her husband or at his beck and call or as his property. Constitutionally a female has equal rights as a male and no statute should be interpreted or understood to derogate from this position. If there is some theory that propounds such an unconstitutional myth, then that theory deserves to be completely demolished.

83. Merely because child marriages have been performed in different parts of the country as a part of a tradition or custom does not necessarily mean that the tradition is an acceptable one nor should it be sanctified as such. Times change and what was acceptable the few decades ago may not necessarily be acceptable today. This was noted by a Constitution Bench of this Court (though in a different context) in ***State of Madhya Pradesh v. Bhopal Sugar Industries Ltd.***[22] that:

> "But, by the passage of time, considerations of necessity and expediency would be obliterated, and the grounds which justified classification of geographical regions for historical reasons may cease to be valid."

22 [1964] 6 SCR 846

84. Similarly, in ***Rattan Arya v. State of Tamil Nadu***[23] it was observed that judicial notice could be taken of a change in circumstances. It was held:

> "It certainly cannot be pretended that the provision is intended to benefit the weaker sections of the people only. We must also observe here that whatever justification there may have been in 1973 when Section 30(*ii*) [of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960] was amended by imposing a ceiling of Rs 400 on rent payable by tenants of residential buildings to entitle them to seek the protection of the Act, the passage of time has made the ceiling utterly unreal. **We are entitled to take judicial notice of the enormous multifold increase of rents throughout the country, particularly in urban areas. It is common knowledge today that the accommodation which one could have possibly got for Rs 400 per month in 1973 will today cost at least five times more**. In these days of universal, day to day escalation of rentals any ceiling such as that imposed by Section 30(*ii*) in 1973 can only be considered to be totally artificial and irrelevant today. As held by this court in *Motor General Traders* v. *State of A.P.*[24] a provision which was perfectly valid at the commencement of the Act could be challenged later on the ground of unconstitutionality and struck down on that basis. What was once a perfectly valid legislation, may in course of time, become discriminatory and liable to challenge on the ground of its being violative of Article 14." (Emphasis supplied by us)

85. In ***Anuj Garg v. Hotel Association of India***[25] this Court was concerned with the constitutional validity of Section 30 of the Punjab Excise Act, 1914 which prohibited employment of "any man under the age of 25 years" or "any woman" in any part of such premises in which liquor or an intoxicating drug is consumed by the public. While upholding the view of

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23 (1986) 3 SCC 385

24 (1984) 1 SCC 222

25 (2008) 3 SCC 1

the Delhi High Court striking down the provision as unconstitutional, this Court held in paragraphs 46 and 47 of the Report:

> "It is to be borne in mind that legislations with pronounced "protective discrimination" aims, such as this one, potentially serve as double-edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. **The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means**.
>
> No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency until and unless there is a *compelling State purpose*. Heightened level of scrutiny is the normative threshold for judicial review in such cases." (Emphasis supplied by us)

86. Similarly, it was observed by this Court in ***Satyawati Sharma v. Union of India***[26] in paragraph 32 of the Report that legislation which might be reasonable at the time of its enactment could become unreasonable with the passage of time. It was observed as follows:

> "It is trite to say that **legislation which may be quite reasonable and rational at the time of its enactment may with the lapse of time and/or due to change of circumstances become arbitrary, unreasonable and violative of the doctrine of equality** and even if the validity of such legislation may have been upheld at a given point of time, the Court may, in subsequent litigation, strike down the same if it is found that the rationale of classification has become non-existent." (Emphasis supplied by us)

26 (2008) 5 SCC 287

There is therefore no doubt that the impact and effect of Exception 2 to Section 375 of the IPC has to be considered not with the blinkered vision of the days gone by but with the social realities of today. Traditions that might have been acceptable at some historical point of time are not cast in stone. If times and situations change, so must views, traditions and conventions.

87. We have adverted to the wealth of documentary material which goes to show that an early marriage and sexual intercourse at an early age could have detrimental effects on the girl child not only in terms of her physical and mental health but also in terms of her nutrition, her education, her employability and her general well-being. To make matters worse, the detrimental impact could pass on to the children of the girl child who may be malnourished and may be required to live in an impoverished state due to a variety of factors. An early marriage therefore could have an inter-generational adverse impact. In effect therefore the practice of early marriage or child marriage even if sanctified by tradition and custom may yet be an undesirable practice today with increasing awareness and knowledge of its detrimental effects and the detrimental effects of an early pregnancy. Should this traditional practice still continue? We do not think so and the sooner it is given up, it would be in the best interest of the girl child and for society as a whole.

88. We must not and cannot forget the existence of Article 21 of the Constitution which gives a fundamental right to a girl child to live a life of dignity. The documentary material placed before us clearly suggests that an early marriage takes away the self esteem and confidence of a girl child and subjects her, in a sense, to sexual abuse. Under no circumstances can it be said that such a girl child lives a life of dignity. The right of a girl child to maintain her bodily integrity is effectively destroyed by a traditional practice sanctified by the IPC. Her husband, for the purposes of Section 375 of the IPC, effectively has full control over her body and can subject her to sexual intercourse without her consent or without her willingness since such an activity would not be rape. Anomalously, although her husband can rape her but he cannot molest her for if he does so he could be punished under the provisions of the IPC. This was recognized by the LCI in its 172nd report but was not commented upon. It appears therefore that different and irrational standards have been laid down for the treatment of the girl child by her husband and it is necessary to harmonize the provisions of various statutes and also harmonize different provisions of the IPC inter-se.

89. We have also adverted to the issue of reproductive choices that are severely curtailed as far as a married girl child is concerned. There is every possibility that being subjected to sexual intercourse, the girl child might

become pregnant and would have to deliver a baby even though her body is not quite ready for procreation. The documentary material shown to us indicates that there are greater chances of a girl child dying during childbirth and there are greater chances of neonatal deaths. The results adverted to in the material also suggest that children born out of early marriages are more likely to be malnourished. In the face of this material, would it be wise to continue with a practice, traditional though it might be, that puts the life of a girl child in danger and also puts the life of the baby of a girl child born from an early marriage at stake? Apart from constitutional and statutory provisions, constitutional morality forbids us from giving an interpretation to Exception 2 to Section 375 of the IPC that sanctifies a tradition or custom that is no longer sustainable.

90. The view that marital rape of a girl child has the potential of destroying the institution of marriage cannot be accepted. Marriage is not institutional but personal – nothing can destroy the 'institution' of marriage except a statute that makes marriage illegal and punishable. A divorce may destroy a marriage but does it have the potential of destroying the 'institution' of marriage? A judicial separation may dent a marital relationship but does it have the potential of destroying the 'institution' of marriage or even the marriage? Can it be said that no divorce should be

permitted or that judicial separation should be prohibited? The answer is quite obvious.

91. Looked at from another perspective, the PCMA actually makes child marriages voidable and makes the parties to a child marriage (other than the girl child) punishable for an offence under the said Act. For someone who supports the institution of marriage, nothing could be more destructive of the institution of marriage than the PCMA which makes a child marriage voidable and punishable on the one hand and on the other, it otherwise collaterally legitimizes the pernicious practice of child marriages. It is doubtful if the Parliamentary Standing Committee intended such a situation along with its attendant adverse and detrimental impacts and so we leave it at that.

92. Assuming some objective is sought to be achieved by the artificial distinction, the further question is: what is the rational nexus between decriminalizing sexual intercourse under the IPC with a married girl child and an unclear and uncertain statutory objective? There is no intelligible answer to this question particularly since sexual intercourse with a married girl child is a criminal offence of aggravated penetrative sexual assault under the POCSO Act. Therefore, while the husband of a married girl child might not have committed rape for the purposes of the IPC but he would

nevertheless have committed aggravated penetrative sexual assault for the purposes of the POCSO Act. The punishment for rape (assuming it is committed) and the punishment for penetrative sexual assault is the same, namely imprisonment for a minimum period of 7 years which may extend to imprisonment for life. Similarly, for an 'aggravated' form of rape the punishment is for a minimum period of 10 years imprisonment which may extend to imprisonment for life (under the IPC) and the punishment for aggravated penetrative sexual assault (which is what is applicable in the case of a married girl child) is the same (under the POCSO Act). In other words, the artificial distinction merely takes the husband of the girl child out of the clutches of the IPC while retaining him within the clutches of the POCSO Act. We are unable to understand why this is so and no valid justification or explanation is forthcoming from the Union of India.

Application of special laws

93. Whatever be the explanation, given the context and purpose of their enactment, primacy must be given to pro-child statutes over the IPC as provided for in Sections 5 and 41 of the IPC. There are several reasons for this including the absence of any rationale in creating an artificial distinction, in relation to sexual offences, between a married girl child and an unmarried girl child. Statutes concerning the rights of children are special

laws concerning a special subject of legislation and therefore the provisions of such subject-specific legislations must prevail and take precedence over the provisions of a general law such as the IPC. It must also be remembered that the provisions of the JJ Act as well as the provisions of the POCSO Act are traceable to Article 15(3) of the Constitution which enables Parliament to make special provisions for the benefit of children. We have already adverted to some decisions relating to the interpretation of Article 15(3) of the Constitution in a manner that is affirmative, in favour of children and for children and we have also adverted to the discussion in the Constituent Assembly in this regard. There can therefore be no other opinion regarding the pro-child slant of the JJ Act as well as the POCSO Act.

94. A rather lengthy but useful discussion on this subject of special laws is to be found in ***Life Insurance Corporation of India v. D.J. Bahadur***[27] in paragraphs 52 and 53 of the Report. Briefly, it was held that the subject-matter and the perspective of the statute are determinative of the question whether a statute is a general law or a special law. Therefore, for certain purposes a statute might be a special law but for other purposes, as compared to another statute, it might be a general law. In respect of a dispute between the Life Insurance Corporation and its workmen qua workmen, the

27 (1981) 1 SCC 315

Industrial Disputes Act, 1947 would be a special law vis-à-vis the Life Insurance Corporation Act, 1956; but, "when compensation on nationalisation is the question, the LIC Act is the special statute". It was held as follows:

> "In determining whether a statute is a special or a general one, the focus must be on the principal subject-matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law. In law, we have a cosmos of relativity, not absolutes — so too in life. The ID Act is a special statute devoted wholly to investigation and settlement of industrial disputes which provides definitionally for the nature of industrial disputes coming within its ambit. It creates an infrastructure for investigation into, solution of and adjudication upon industrial disputes. It also provides the necessary machinery for enforcement of awards and settlements. From alpha to omega the ID Act has one special mission — the resolution of industrial disputes through specialised agencies according to specialised procedures and with special reference to the weaker categories of employees coming within the definition of workmen. Therefore, with reference to industrial disputes between employers and workmen, the ID Act is a special statute, and the LIC Act does not speak at all with specific reference to workmen. On the other hand, its powers relate to the general aspects of nationalisation, of management when private businesses are nationalised and a plurality of problems which, incidentally, involve transfer of service of existing employees of insurers. The workmen qua workmen and industrial disputes between workmen and the employer as such, are beyond the orbit of and have no specific or special place in the scheme of the LIC Act. And whenever there was a dispute between workmen and management the ID Act mechanism was resorted to.
>
> What are we confronted with in the present case, so that I may determine as between the two enactments which is the special? The only subject which has led to this litigation and which is the bone of contention between the parties is *an industrial dispute between the Corporation and its workmen qua workmen*. If we refuse to be obfuscated by legal abracadabra and see plainly what is so obvious,

> the conclusion that flows, in the wake of the study I have made, is that vis-a-vis "industrial disputes" at the termination of the settlement as between the workmen and the Corporation, the ID Act is a special legislation and the LIC Act a general legislation. Likewise, when compensation on nationalisation is the question, the LIC Act is the special statute. An application of the generalia maxim as expounded by English textbooks and decisions leaves us in no doubt that the ID Act being special law, prevails over the LIC Act which is but general law."

The scope and amplitude of the two significant pro-child statutes may now be examined in light of the law laid down by this Court including Sections 5 and 41 of the IPC.

(i) The JJ Act

95. A cursory reading of the JJ Act gives a clear indication that a girl child who is in imminent risk of marriage before attaining the age of 18 years of age is a child in need of care and protection (Section 2 (14) (xii) of the JJ Act). In our opinion, it cannot be said with any degree of rationality that such a girl child loses her status as a child in need of care and protection soon after she gets married. The JJ Act provides that efforts must be made to ensure the care, protection, appropriate rehabilitation or restoration of a girl child who is at imminent risk of marriage and therefore a child in need of care and protection. If this provision is ignored or given a go by, it would put the girl child in a worse off situation because after marriage she could be subjected to aggravated penetrative sexual assault for which she might not

be physically, mentally or psychologically ready. The intention of the JJ Act is to benefit a child rather than place her in difficult circumstances. A contrary view would not only destroy the purpose and spirit of the JJ Act but would also take away the importance of Article 15(3) of the Constitution. Surely, such an interpretation and understanding cannot be given to the provisions of the JJ Act.

(ii) The POCSO Act

96. Similarly, the provisions of the POCSO Act make it quite explicit that the dignity and rights of a child below 18 years of age must be recognized and respected. For this purpose, special provisions have been made in the POCSO Act as for example Section 28 thereof which provides for the establishment of a Special Court to try offences under the Act. Section 29 of the POCSO Act provides that where a person is prosecuted for committing or abetting or attempting to commit an offence under Section 3 (penetrative sexual assault) or under Section 5 (aggravated penetrative sexual assault) then the Special Court shall presume that such a person has committed or abetted or attempted to commit the offence unless the contrary is proved. Similarly, the procedure and powers of a Special Court have been delineated in Section 33 of the POCSO Act and this section provides for not only a child friendly atmosphere in the Special Court but also child friendly

procedures, some of which are given in subsequent sections of the statute. Once again the legislative slant is in favour of a child thereby giving substantive meaning to Article 15(3) of the Constitution.

97. However, of much greater importance and significance is Section 42-A of the POCSO Act. This section provides that the provisions of the POCSO Act are in addition to and not in derogation of the provisions of any other law in force which includes the IPC. Moreover, the section provides that in the event of any inconsistency between the provisions of the POCSO Act and any other law, the provisions of the POCSO Act shall have overriding effect. It follows from this that even though the IPC decriminalizes the marital rape of a girl child, the husband of the girl child would nevertheless be liable for punishment under the provisions of the POCSO Act for aggravated penetrative sexual assault.

98. *Prima facie* it might appear that since rape is an offence under the IPC (subject to Exception 2 to Section 375) while penetrative sexual assault or aggravated penetrative sexual assault is an offence under the POCSO Act and both are distinct and separate statutes, therefore there is no inconsistency between the provisions of the IPC and the provisions of the POCSO Act. However the fact is that there is no real distinction between the definition of rape under the IPC and the definition of penetrative sexual assault under the

POCSO Act. There is also no real distinction between the rape of a married girl child and aggravated penetrative sexual assault punishable under Section 6 of the POCSO Act. Additionally, the punishment for the respective offences is the same, except that the marital rape of a girl child between 15 and 18 years of age is not rape in view of Exception 2 to Section 375 of the IPC. In sum, marital rape of a girl child is effectively nothing but aggravated penetrative sexual assault and there is no reason why it should not be punishable under the provisions of the IPC. Therefore, it does appear that only a notional or linguistic distinction is sought to be made between rape and penetrative sexual assault and rape of a married girl child and aggravated penetrative sexual assault. There is no rationale for this distinction and it is nothing but a completely arbitrary and discriminatory distinction.

Harmonious and purposive interpretation

99. The entire issue of the interpretation of the JJ Act, the POCSO Act, the PCMA and Exception 2 to Section 375 of the IPC can be looked at from yet another perspective, the perspective of purposive and harmonious construction of statutes relating to the same subject matter. Long ago, it was said by Lord Denning that when a defect appears, a judge cannot fold his hands and blame the draftsman but must also consider the social conditions

and give force and life to the intention of the Legislature. It was said in ***Seaford Court Estates Ltd. v. Asher***[28] that:

> "A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature."

100. Similarly, in ***Collector of Customs v. Digvijaya Singhji Spinning & Weaving Mills***[29] it was said that where an alternative construction is open, that alternative should be chosen which is consistent with the smooth working of the system which the statute purports to regulate. It was said that:

> "It is one of the well-established Rules of construction that "if the words of a statute are in themselves precise and unambiguous no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature". It is equally well-settled principle of construction that "Where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system"."

28 [1949] 2 K.B. 481 affirmed in [1950] A.C. 508

29 AIR 1961 SC 1549

101. That a constructive attitude should be adopted in interpreting statutes was endorsed in ***Jugal Kishore v. State of Maharashtra***[30] when it was said that:

> "….. Unless the Acts [Maharashtra Agricultural Land (Ceiling on Holdings) Act, 1961 and the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958], with the intention of implementing various socio-economic plans, are read in such complementary manner, the operation of the different Acts in the same field would create contradiction and would become impossible. It is, therefore, necessary to take a constructive attitude in interpreting provisions of these types and determine the main aim of the particular Act in question for adjudication before the court."

102. Finally, from the purposive and harmonious construction point of view as well as the social context point of view, we may only draw attention to the opinion expressed by the Constitution Bench in ***Abhiram Singh v. C.D. Commachen***[31] by one of us (Lokur, J) to supplement our view. It is not necessary to repeat the observations made and conclusions given therein.

103. Viewed from any perspective, there seems to be no reason to arbitrarily discriminate against a girl child who is married between 15 and 18 years of age. On the contrary, there is every reason to give a harmonious and purposive construction to the pro-child statutes to preserve and protect the human rights of the married girl child.

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30 1989 Supp (1) SCC 589

31 (2017) 2 SCC 629

Implementation of laws

104. The Preamble to our Constitution brings out our commitment to social justice, but unfortunately, this petition clearly brings out that social justice laws are not implemented in the spirit in which they are enacted by Parliament. Young girls are married in thousands in the country, and as Section 13 of the PCMA indicates, there is an auspicious day – *Akshaya Trutiya* - when mass child marriages are performed. Such young girls are subjected to sexual intercourse regardless of their health, their ability to bear children and other adverse social, economic and psychological consequences. Civil society can do just so much for preventing such child marriages but eventually it is for the Government of India and the State Governments to take proactive steps to prevent child marriages so that young girls in our country can aspire to a better and healthier life. We hope the State realizes and appreciates this.

Conclusion

105. On a complete assessment of the law and the documentary material, it appears that there are really five options before us: (i) To let the incongruity remain as it is – this does not seem a viable option to us, given that the lives of thousands of young girls are at stake; (ii) To strike down as unconstitutional Exception 2 to Section 375 of the IPC – in the present case

this is also not a viable option since this relief was given up and no such issue was raised; (iii) To reduce the age of consent from 18 years to 15 years – this too is not a viable option and would ultimately be for Parliament to decide; (iv) To bring the POCSO Act in consonance with Exception 2 to Section 375 of the IPC – this is also not a viable option since it would require not only a retrograde amendment to the POCSO Act but also to several other pro-child statutes; (v) To read Exception 2 to Section 375 of the IPC in a purposive manner to make it in consonance with the POCSO Act, the spirit of other pro-child legislations and the human rights of a married girl child. Being purposive and harmonious constructionists, we are of opinion that this is the only pragmatic option available. Therefore, we are left with absolutely no other option but to harmonize the system of laws relating to children and require Exception 2 to Section 375 of the IPC to now be meaningfully read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the framers of our Constitution can be preserved and protected and perhaps given impetus.

106. We make it clear that we have not at all dealt with the larger issue of marital rape of adult women since that issue was not raised before us by the petitioner or the intervener.

107. We express our gratitude to Mr. Gaurav Agrawal, Advocate and Ms. Jayna Kothari, Advocate for the effort that they have put in and the able assistance that they have given us for the purpose of deciding this case.

……J

New Delhi; **(Madan B. Lokur)**
October 11, 2017

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 382 OF 2013

INDEPENDENT THOUGHT ...PETITIONER(S)

Versus

UNION OF INDIA & ANR. ...RESPONDENT(S)

J U D G M E N T

Deepak Gupta, J.

1. I have gone through the extremely erudite and well written judgment of my learned brother Lokur, J.. I fully agree with both the reasoning given by him and the conclusions arrived at. However, I am expressing my own views in this separate concurring judgment wherein I have given some other reasons while reaching the same conclusion.

2. "Whether Exception 2 to Section 375 of the Indian Penal Code, in so far as it relates to girls aged 15 to 18 years, is unconstitutional and liable to be struck down" is the question for consideration in this writ petition.

3. At the outset, it may be mentioned that in the main petition the challenge is laid to the entire Exception 2. However, during the course of arguments Mr. Gaurav Agarwal, learned counsel for the petitioner, Independent Thought, a registered Society and Ms. Jayna Kothari, learned counsel for the intervener, the Child Rights Group, submitted that they are limiting their challenge to Exception 2 only in so far as it deals with the girl child aged 15 to 18 years.

4. Section 375 of the Indian Penal IPC (for short 'IPC') defines rape and reads as follows:

> "**375. Rape**.- A man is said to commit "rape" if he-—
>
> a. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
>
> b. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
>
> c. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
>
> d. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,
>
> under the circumstances falling under any of the following seven descriptions:—
>
> First.—Against her will.
>
> Secondly.—Without her consent.
>
> Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.
>
> Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

> Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
>
> Sixthly.—With or without her consent, when she is under eighteen years of age.
>
> Seventhly.—When she is unable to communicate consent.
>
> Explanation 1.—For the purposes of this section, "vagina" shall also include *labia majora*.
>
> Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:
>
> Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.
>
> Exception 1.—A medical procedure or intervention shall not constitute rape.
>
> Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

5. A husband who commits rape on his wife, as defined under Section 375 of the IPC, cannot be charged with the said offence as long as the wife is over 15 years of age. It may be made clear that this Court is not going into the issue of "marital rape" of women aged 18 years and above and the discussion is limited only to "wives" aged 15 to 18 years. A man is guilty of rape if he commits any act mentioned in Section 375 IPC, without the consent of the women if she is above 18 years of age. If a man commits any of the acts mentioned in Section 375 IPC, with a girl aged less than 18 years, then the act will amount to rape even if done

with the consent of the victim. However, as per Exception 2 of Section 375 IPC, if the man is married to the woman and if the "wife" is aged more than 15 years then the man cannot be held guilty of commission of the offence defined under Section 375, whether the wife consented to the sexual act or not.

6. Section 375 of the IPC creates three classes of victims:

(i) The first class of victims are girls aged less than 18 years. In those cases, if the acts contemplated under Section 375 IPC are committed with or without consent of the victim, the man committing such an act is guilty of rape.

(ii) The second class of victims are women aged 18 years or above. Such women can consent to having consensual sex. If the sexual act is done with the consent of the woman, unless the consent is obtained in circumstances falling under clauses thirdly, fourthly and fifthly of Section 375 IPC no offence is committed. The man can be held guilty of rape, only if the sexual act is done in absence of legal and valid consent.

(iii) The third category of victims is married women. The exception exempts a man from being charged and convicted under Section 375 IPC for any of the acts contemplated

under this section if the victim is his "wife" aged 15 years and above.

To put it differently, under Section 375 IPC a man cannot even have consensual sex with a girl if she is below the age of 18 years and the girl is by law deemed unable to give her consent. However, if the girl child is married and she is aged above 15 years, then such consent is presumed and there is no offence if the husband has sex with his "wife", who is above 15 years of age. If the "wife" is below 15 then the husband would be guilty of such an offence.

7. The issue is whether a girl below 18 years who is otherwise unable to give consent can be presumed to have consented to have sex with her husband for all times to come and whether such presumption in the case of a girl child is unconscionable and violative of Articles 14, 16 and 21 of the Constitution of India.

THE LEGISLATIVE BACKGROUND

8. The IPC was enacted in the year 1860 and the age given in Exception 2 of Section 375 has been changed from time to time. Till 1929, no minimum age of marriage was legally fixed. It was only after passing of the Child Marriage Restraint Act, 1929 (for short 'the Restraint Act') that the minimum age for marriage was fixed. The Restraint Act was repealed by the Prohibition of Child Marriage Act, 2006 (for short 'the PCMA'). A chart showing the ages of consent,

from time to time, under clause Sixthly of Section 375 IPC, in Exception 2 to Section 375 IPC and the Restraint Act/PCMA is as follows:

Year	IPC	Age of Consent under Section 375, 6th Clause I.P.C	Age under Exception 2 to Sec. 375 I.P.C	Minimum Age of Marriage under the Restraint Act/PCMA
1860	-	10 Years	10 Years	-
1891	Act 10 of 1891 (After the Amendment of IPC)	12 Years	12 Years	-
1925	(After the Amendment of IPC)	14 Years	13 Years	-
1929	(After Passing of Child Marriage Restraint Act)	14 Years	13 Years	14 Years
1940	After the Amendment of the I.P.C and Child Marriage Act	16 Years	15 Years	15 Years
1978	-	16 Years	15 Years	18 Years
2013	-	18 Years	15 Years	18 Years

9. A perusal of the aforementioned chart clearly shows that when the IPC was originally enacted in the year 1860, the age of consent under clause Sixthly of Section 375 IPC and under Exception 2 of Section 375 IPC was 10 years. In this regard, the IPC was amended in 1891 and the age under both the provisions was raised to 12 years. In 1925, the age of consent was raised under clause Sixthly to 14 years but under the Exception 2 the age was retained at 13 years. In 1929, the Child Marriage Restraint Act was enacted. Section 3 of this Act provided that the

minimum age of the girl child, to be eligible for marriage, was 14 years. In 1940, the IPC was again amended and the age of consent under clause Sixthly was raised to 16 years, but under Exception 2 to Section 375 IPC, the age was raised to 15 years and the minimum age of marriage under the Restraint Act was also 15 years. In 1978, the IPC was again amended and the age of consent was raised to 16 years but under Exception 2 to Section 375 IPC, no change was made. In 1978, the minimum age for marriage of the girl child was raised to 18 years but no consequential amendment was made in the IPC. In 2013, after the unfortunate "Nirbhaya" incident took place, the Parliament raised the age of consent under clause Sixthly to 18 years. The minimum age for marriage of a girl child remained at 18 years, but no change was made in Exception 2 to Section 375 IPC and a girl child who was married before the minimum age of marriage, could be subjected to sexual intercourse (forcible or otherwise) by her husband and if she was over 15 years of age, the husband could not be charged with any offence.

10. At this stage, reference may be made to the Hindu Marriage Act. In the Hindu Marriage Act, as originally enacted in 1955, the minimum age for marriage of a bride was 15 years and of a groom 18 years. The Hindu Marriage Act was amended in 1978 and the minimum age of marriage for a bride was enhanced to 18 years and for a groom to 21 years. Identical amendment was made in the Restraint Act.

11. The Child Marriage Restraint Act, 1929 was repealed by the Prohibition of Child Marriage Act, 2006 and this Act defines a child as follows:

> "**2. Definitions**.—In this Act, unless the context otherwise requires,—
>
> (e) "child" means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age."

12. Section 3 of the PCMA makes child marriages voidable at the option of the contracting party who is a child and reads as follows:

> "**3. Child marriages to be voidable at the option of contracting party being a child.**—(1) Every child marriage, whether solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage:
>
> Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage.
>
> (2) If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend alongwith the Child Marriage Prohibition Officer.
>
> (3) The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority.
>
> (4) While granting a decree of nullity under this section, the district court shall make an order directing both the parties to the marriage and their parents or their guardians to return to the other party, his or her parents or guardian, as the case may be, the money, valuables, ornaments and other gifts received on the occasion of the marriage by them from the other side, or an amount equal to the value of such valuables, ornaments, other gifts and money:
>
> Provided that no order under this section shall be passed unless the concerned parties have been given notices to appear before the district court and show cause why such order should not be passed."

13. It would be pertinent to note that under the Restraint Act the punishment under Section 3 for a male aged 18 years to 21 years, contracting a child marriage was simple imprisonment, which could extend up to 15 days or with fine up to Rs.1000/- or both and under Section 4, if a male over 21 years contracted a marriage with a female child, the punishment was simple imprisonment which could extend up to 3 months. Section 5 provided punishment of simple imprisonment up to 3 months and fine with regard to those who performed, conducted or directed any child marriage. Similar provisions existed in Section 6 with regard to the punishment of parents or guardians, who acted to promote child marriage or permitted it to be solemnized or negligently failed to prevent the child marriage to be solemnized. Surprisingly, the proviso to Section 6 provided that no women could be punished with imprisonment. The punishments provided under the Restraint Act were virtually illusory and no minimum punishment was prescribed.

14. The Restraint Act was repealed and replaced by the PCMA. The provisions of the PCMA are slightly more stringent. Under Section 9 of the PCMA, if a male adult above 18 years of age contracts a child marriage, he can be sentenced to rigorous imprisonment up to 2 years or fine which may extend up to one lakh rupees or both. However, no minimum sentence is provided even under this Act. Section 10 of the PCMA provides punishment for those persons who perform,

conduct, direct or abet a child marriage and the same sentence is provided. As far as the guardians and parents are concerned, the punishment for them is provided under Section 11 and it is the same. Again, the proviso lays down that no woman shall be punishable with imprisonment. Though this Court is not dealing with this question directly in the present petition, it is obvious that a woman would be placed in the forefront by any person who gets a child marriage conducted. Such a woman cannot be sentenced to undergo imprisonment and at the most, a fine can be levied. The punishments provided are neither sufficiently punitive nor deterrent. Therefore, the PCMA has been breached with impunity. I think the time has come when this Act needs serious reconsideration, especially in view of the harsh reality that a lot of child trafficking is taking place under the garb of marriage including child marriage. More stringent punishments should be provided and some minimum punishment should definitely be provided especially to those mature adults who promote such marriages and who perform, conduct, direct or abet any such marriage. Otherwise, this legislation will never act as a sufficient deterrent to prevent or even reduce child marriages.

15. Under Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000, a "juvenile" or "child" was defined to mean a person, who had not completed 18 years of age. The Juvenile Justice (Care and Protection of Children)

Act, 2015 defines a child under section 2(12) to mean a person who has not completed 18 years of age.

16. Under the Protection of Women from Domestic Violence Act, 2005, a child has been defined under Section 2(b) to mean any person below the age of 18 years.

17. Section 2(vii) of the Dissolution of Muslim Marriages Act, 1939 entitles a women married under Muslim law to obtain a decree of dissolution of marriage if she is given in marriage by her father or other guardian before she attained the age of 15 years and she repudiates the marriage before attaining the age of 18 years provided that the marriage has not been consummated. This provision deals with girls below the age of 15 years who are got married. Such a girl is required to repudiate her marriage before she attains majority and she can only repudiate the marriage if the marriage has not been consummated. This virtually makes mockery of the PCMA. Therefore, even in a marriage which is void under PCMA, the girl will have to obtain a decree for dissolution of her marriage, that too before she attains the age of majority and only if the marriage has not been consummated. Another anomalous situation is that if the husband has forcible sex with such a girl, the marriage is consummated and the girl child is deprived of her right to get the marriage annulled.

18. Similarly under Section 13(2)(iv) of the Hindu Marriage Act, 1955, a Hindu girl can file a petition for divorce on the ground that her marriage, whether

consummated or not, was solemnized before she attained the age of 15 years and she has repudiated her marriage after attaining the age of 15 years but before attaining the age of 18 years. This is also not in consonance with the provisions of PCMA, according to which marriage of a child bride below the age of 15 years is void and there is no question of seeking a divorce. A void marriage is no marriage. Another anomaly is that whereas a child bride, who is above 15 years under PCMA, can apply for annulment of marriage up to the age of 20 years, under Section 13(2)(iv) of the Hindu Marriage Act, a child bride under the age of 15 years must repudiate the marriage after attaining the age of 15 years but before she attains the age of 18 years, i.e. even before she attains majority. The question that remains unanswered is who will represent or help this child, who has been forced to marry to approach the Courts.

19. It is obvious that while making amendments to various laws, some laws are forgotten and consequential amendments are not made in those laws. After the PCMA was enacted both the Hindu Marriage Act, 1955 and the Dissolution of Muslim Marriages and Divorce Act, 1939 also should have been suitably amended, but this has not been done. In my opinion, the PCMA is a secular Act applicable to all. It being a special Act dealing with children, the provisions of this Act will prevail over the provisions of both the Hindu Marriage Act and the Muslim Marriages and Divorce Act, in so far as children are concerned.

20. Section 3 of the Majority Act, 1875 provides that a person shall attain the age of majority on completing the age of 18 years and not before. It would, however, be pertinent to mention that Section 2 of the Indian Majority Act contains a non-obstante clause excluding laws relating to marriage, divorce, dower and adoption from the provisions of that Act. Under Section 4(i) of the Guardians and Wards Act, 1890 a minor has been defined to mean a person, who has not attained majority under the Majority Act. Under Section 4(a) of the Hindu Minority and Guardianship Act, 1956 a minor has been defined to mean a person who has not completed the age of 18 years. Under the Representation of the People Act, 1951 a person is entitled to vote only after he attains the age of 18 years.

21. Under the provisions of the aforesaid Acts a person, who is a minor and not a major, is not entitled to deal with his property. The property of such a minor can be sold or transferred only if such sale or transfer is for the benefit of the minor and after the permission of the court. Section 11 of the Indian Contract Act, 1872 provides that only a person who has attained the age of majority and is of a sound mind is competent to enter into a contract. A contract entered into by a minor is treated to be a void contract.

22. Keeping in view the mounting crimes against children, regardless of the sex of the victim, Parliament enacted the Protection of Children from Sexual Offences

Act, 2012 (for short 'POCSO'), which came into force on 14.11.2012. The Statement of Objects and Reasons of this Act reads as follows:

> "**STATEMENT OF OBJECTS AND REASONS** 1. Article 15 of the Constitution, *inter alia*, confers upon the State powers to make special provision for children. Further, article 39, *inter alia*, provides that the State shall in particular direct its policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.
>
> 2. The United Nations Convention on the Rights of Children, ratified by India on 11th December, 1992, requires the State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; and (c) the exploitative use of children in pornographic performances and materials.
>
> 3. The data collected by the National Crime Records Bureau shows that there has been increase in cases of sexual offences against children. This is corroborated by the 'Study on Child Abuse: India 2007' conducted by the Ministry of Women and Child Development. Moreover, sexual offences against children are not adequately addressed by the existing laws. A large number of such offences are neither specifically provided for nor are they adequately penalised. The interests of the child, both as a victim as well as a witness, need to be protected. It is felt that offences against children need to be defined explicitly and countered through commensurate penalties as an effective deterrence.
>
> 4. It is, therefore, proposed to enact a self contained comprehensive legislation *inter alia* to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Courts for speedy trial of such offences.
>
> 5. The Bill would contribute to enforcement of the right of all children to safety, security and protection from sexual abuse and exploitation."

23. POCSO is a landmark legislation for protection of child rights and to prevent the sexual abuse and exploitation of children. This Act deals with sexual offences committed against a child and a child has been defined to be a person below the age of 18 years under Section 2(d). POCSO does not define rape, but it defines penetrative sexual assault under Section 3 and aggravated penetrative sexual assault under Section 5 and the punishments are provided for them under Section 4 and 6 respectively. Section 7 of the POCSO defines sexual assault, Section 9 defines aggravated sexual assault and punishments for those offences are provided under Section 8 and 10 respectively. Section 11 defines sexual harassment and Section 12 provides the punishment for sexual harassment. Chapter III of the POCSO deals with use of children for pornographic purposes with which we are not concerned in the instant case. This Act creates Special Courts to deal with offences against children. Section 42 of the POCSO is very important for our purpose and it provides that where an offence is punishable both under POCSO and under IPC, then the offender found guilty would be liable for that punishment, which is more severe.

24. Section 42 and Section 42A of the POCSO read as follows:

> "**42. Alternate punishment**. - Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code (45 of 1860), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to

punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree."

"**42A. Act not in derogation of any other law.** – The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency."

25. Section 42A provides that the provisions of POCSO shall be in addition to and not in derogation of the provisions of any other Act. Therefore, the legislature, in its wisdom, thought that POCSO would supplant and would be in addition to the other criminal provisions and where there was any inconsistency, the provisions of POCSO would override any other law to the extent of inconsistency.

26. Another important provision to which reference may be made is Section 198(6) of the Code of Criminal Procedure (for short 'the Code'). The same reads as follows:

"**198. Prosecution for offences against marriage**:

xxx xxx xxx

(6) No Court shall take cognizance of an offence under section 376 of the Indian Penal Code (45 of 1860), where such offence consists of sexual inter-course by a man with his own wife, the wife being under eighteen years of age, if more than one year has elapsed from the date of the commission of the offence."

The age "eighteen" was substituted for "fifteen" by Act 5 of 2009 w.e.f. 31.12.2009. A perusal of the aforesaid provision also makes it clear that a

complaint with regard to commission of offence under Section 375 IPC punishable under Section 376 IPC can be taken cognizance of by a court within one year of the commission of the offence even where "the wife" is below 18 years of age. It is, therefore, apparent that while amending Section 198 of the Code, the legislature was visualising that there can be marital rape with a "wife" aged less than 18 years but was prescribing a limitation of one year, for taking cognizance of such an offence. However, no consequential amendment was made to Exception 2 of Section 375 IPC.

WHO IS A CHILD?

27. If one analyses the provisions of all the laws which have been referred to above, it is apparent that the legislature, in its wisdom, has universally enacted that a person below the age of 18 years is deemed to be a child unable to look after his or her own interests. It would be very important to note that, in 2013 the IPC was amended, post the unfortunate "Nirbhaya" incident and the age of consent under clause Sixthly of Section 375 IPC was increased to 18 years. The position as on date is that under the Protection of Children from Sexual Offences Act, 2012, Juvenile Justice (Care and Protection of Children) Act, Child Marriage Restraint Act, 1929, Protection of Women from Domestic Violence Act, 2005, The Majority Act, 1875, The Guardians and Wards Act, 1890, The Indian Contract Act, 1872

and many other legislations, a person below the age of 18 years is considered to be a child unable to look after his or her own interests.

28. As far as marriage laws are concerned, as far back as 1978, the minimum age of marriage of a girl child was increased to 18 years. The Restraint Act, was replaced by the PCMA wherein also marriage of a girl child aged below 18 years is prohibited. However, Section 3 of the PCMA makes a child marriage voidable at the option of that party, who was a child at the time of marriage. The petition for annulling the child marriage must be filed within 2 years of the child attaining majority. Therefore, a girl who was married before she attained the age of 18 years, can get her marriage annulled before she attains the age of 20 years. Similarly, a male child can get the marriage annulled before attaining the age of 23 years. Even when the child is minor, a petition for annulment can be filed by the guardian or next friend of the child along with the Child Marriage Prohibition Officer. Unfortunately, both the number of prosecutions and the number of cases for annulment of marriage filed under PCMA are abysmally low.

THE ILL EFFECTS OF A CHILD MARRIAGE

29. A lot of material has been placed before us both by Mr. Gaurav Agarwal, learned counsel appearing for the petitioner and Ms. Jayna Kothari, learned Counsel appearing for the Intervener, to indicate that child marriage is not in the

interest of the girl child. In my opinion, it is not necessary to refer to all the material cited by learned counsel. The fact that child marriage is a reprehensible practice; that it is an abhorrent practice; that it violates the human rights of a child, cannot be seriously disputed. I am not oblivious to the harsh reality that most of the child brides are even below the age of 15 years. There is a practice in many parts of the country where children, both girls and boys, are married off, even before they attain puberty. They are innocent children, who do not even understand what marriage is. The practice which is widely prevalent is that a girl who is married pre-puberty is normally kept at her parents' home and is sent to her matrimonial home after she attains puberty in a ceremony which is commonly referred to as '*gauna*'. Can the marriage of a child aged 3-4 years, by any stretch of imagination, be called a legal and valid marriage?

30. A Child marriage will invariably lead to early child birth and this will adversely affect the health of the girl child. In a report by the UNICEF[32], there is an article on ending child marriage and the ill effects of child marriage have been set out thus:-

> "Married girls are among the world's most vulnerable people. When their education is cut short, girls lose the chance to gain the skills and knowledge to secure a good job and provide for themselves and their families. They are socially isolated. As I observed among my former schoolmates who were forced to get married, the consciousness of their isolation is in itself painful.

32 Report of UNICEF "ON THE STATE OF THE WORLD'S CHILDREN 2016".
A fair chance for girls - End Child Marriage by Angelique Kidjo

> Subordinate to their husbands and families, married girls are more vulnerable to domestic violence, and not in a position to make decisions about safe sex and family planning – which puts them at high risk of sexually transmitted infections, including HIV, and of pregnancy and childbearing before their bodies are fully mature. Already risky pregnancies become even riskier, as married girls are less likely to get adequate medical care. During delivery, mothers who are still children are at higher risk of potentially disabling complications, like obstetric fistula, and both they and their babies are more likely to die."

31. In a study conducted on child marriages in India, based on the census of 2011[33], it was found that 3% girls in the age group of 10 to 14 years were got married and about 20% girls were married before attaining the age of 19 years. Unfortunately, this report deals with girls below the age of 19 years and not 18 years, but the report does indicate that more than 20% girls in this country are married before attaining the age of 18 years. Therefore, more than one out of every 5 marriages violates the provisions of the PCMA and the Hindu Marriage Act, 1955.

32. The World Health Organisation, in a Report[34] dealing with the issue of child brides found that though 11% of the births worldwide are amongst adolescents, they account for 23% of the overall burden of diseases. Therefore, a child bride is more than doubly prone to health problems than a grown up woman.

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33 A Statistical analysis of CHILD MARRIAGE IN INDIA, Based on Census 2011 published by Young Lives and National Commission for Protection of Child Rights (NCPCR)

34 World Health Organisation Report on "Early Marriages, Adolescent and Young Pregnancies", Sixty- Fifth World Health Assembly dated 16th March, 2012

33. In the Report of the Convention on the Rights of the Child[35], certain recommendations have been made and the relevant portion of the Report is as follows:-

> "**Harmful Practices**
>
> **51**. The Committee is deeply concerned at the high prevalence of child marriages in the State party, despite the enactment of the Prohibition of Child Marriage Act (PCMA, 2006). It is further concerned at barriers impeding the full implementation of the PCMA, such as the prevalence of social norms and traditions over the legal framework, the existence of different Personal Status Laws establishing their own minimum age of marriage applicable to their respective religious community as well as the lack of awareness about the PCMA by enforcement officers. It is also concerned about the prevalence of other harmful practices against girls such as dowry and devadasi.
>
> **52**. The Committee urges the State party to ensure the effective implementation of the Prohibition of Child Marriage Act (PCMA, 2006), including by clarifying that the PCMA supersede the different religious-based Personal Status Laws. It also recommends that the State party take the necessary measures to combat dowry, child marriage and devadasi including by conducting awareness-raising programmes and campaigns with a view to changing attitudes, as well as counselling and reproductive education, to prevent and combat child marriages, which are harmful to the health and well-being of girls."

34. The General Assembly of United Nations adopted a Resolution[36], relevant portion of which, reads as follows:

> "Expressing concern about the continued prevalence of child, early and forced marriage worldwide, including the fact that there are still approximately 15 million girls married every year before they reach 18

35 Report of the United Nations Committee on the Rights of the Child (CRC) on the Convention of the Rights of the Child, dated 13th June, 2014 , dealing with India

36 Resolution adopted by the United Nations General Assembly on 19th December, 2016 on "Child, early and forced marriage", Seventy-first session, Agenda Item 64(a)

> years of age and that more than 720 million women and girls alive today were married before their eighteenth birthday.
>
> Recognizing that child, early and forced marriage is a harmful practice that violates, abuses or impairs human rights and is linked to and perpetuates other harmful practices and human rights violations and that such violations have a disproportionately negative impact on women and girls, and underscoring the human rights obligations and commitments of States to promote and protect the human rights and fundamental freedoms of women and girls and to prevent and eliminate the practice of child, early and forced marriage."

35. In the National Family Health Survey-4, 2015-2016[37] some startling figures are revealed. It was found that at the time of carrying out the survey in 2014, amongst women in the age group of 20-24 years, almost 26.8% women were married before they attained the age of 18 years, i.e. more than one out of 4 marriages was of a girl child. In the urban areas the percentage is 17.5% and it rises to 31.5% in the rural areas.

36. In the National Plan of Action for Children, 2016[38], the Government of India itself has recognised the high rate of child marriages prevalent in the country and the fact that a child marriage violates the basic rights of health, development and protection of the child. Relevant portion of the report reads as follows:

> "A large number of children, especially girls are married before the legal age in India. According to NFHS 3 (2005-06), 47.4 percent of women in the age 20-24 were married before 18, the percentage being higher for rural areas. The situation has improved in 2013-14 as the RSOC data shows that 30.3 percent women in the age 20-24 were

37 India Fact Sheet- Issued by Government of India, Ministry of Health and Family Welfare

38 Drawn up by the Ministry of Women and Child Development, Government of India,
(Published on 14th January, 2017)

married before their legal age. Early marriage poses various risks for the survival, health and development of young girls and to children born to them. It is also used as a means of trafficking."

37. In a Report[39] based on the Census, 2011, the consequences of child marriages have been dealt with in the following terms:

"**5.1 Consequences**

Child marriage is not only a violation of human rights, but is also recognized as an obstacle to the development of young people. The practice of child marriage cut shorts a critical stage of self-discovery and exploring one's identity. Child marriage is an imposition of a marriage partner on children or adolescents who are in no way ready and matured, and thus, are at a loss to understand the significance of marriage. Their development gets comprised due to being deprived of freedom, opportunity for personal development, and other rights including health and well-being, education; and participation in civic life and nullifies their basic rights as envisaged in the United Nation's Convention on the Right of the Child ratified by India in 1989. Marriage at a young age prevents both girls and boys from exercising agency in making important life decisions and securing basic freedoms, including pursuing opportunities for education, earning a sustainable livelihood and accessing sexual health and rights.

The prevalent practice of child marriage has detrimental consequences for both boys and girls, but has more grave and far-reaching adverse effects on girls. Within a patriarchal family structure, girls have relatively little power, but young and newly married women are particularly powerless, secluded and voiceless. Adolescent girls have little choice about whom and when to marry, whether or not to have sexual relations, and when to bear children. This is well elaborated in a study of girls in the age group 10-16 years. It was found that they were oppressed in several ways such as:

- They had to submit unquestioningly to the parents' decision regarding their marriage.
- They were over-burdened with household chores.
- They had limited knowledge of their body and its functioning.
- They were unaware of sexual changes, contraception, child bearing and rearing.

39 A Statistical Analysis of Child Marriage in India, Based on Census, 2011 (Published by Young Lives and National Commission for Protection of Child Rights(NCPCR) June 2017, New Delhi

- They dropped out of school on attaining puberty.
- They had no time for leisure and social interaction.
- They were discriminated in matters of food intake and expressing their views within the family.

Imagine the fate of a young girl with the above profile if she is to face marital life and its challenges during adolescence. The adolescent married girl is more at risk. She is less likely to be allowed out of the house, to have access to services and usually, not be given space or freedom to exert agency. Within the marital home, which in majority of the cases is a joint family, she will probably not have much communication with her husband, and will end up socially isolated, with very little contact with her parental home."

38. This Report[40] also notices upswing of female deaths during pregnancy in the age groups of 15-19 years and attributes these deaths to the death of teenage mothers. The relevant portion of the report reads as follows:

"Census data have demonstrated an upswing of female deaths in the age group of 15-19 years. This high mortality rate could be attributed to the deaths of teenage mothers. Child marriage virtually works like a double-edged sword; lower age at marriage is significantly associated with worse outcomes for the child and worse pregnancy outcomes for the mother. All these factors push girls and their families into perpetuation of intergenerational poverty and marginalisation....."

39. This Report[41] deals with various other aspects and some apposite observations are as follows:

"A young girl who is still struggling to understand her own anatomy, when forced to make conjugal relations, often shows signs of post-traumatic stress and depression owing to sexual abuse by her

40 A Statistical Analysis of Child Marriage in India, Based on Census, 2011 (Published by Young Lives and National Commission for Protection of Child Rights(NCPCR), June 2017, New Delhi

41 A Statistical Analysis of Child Marriage in India, Based on Census, 2011 (Published by Young Lives and National Commission for Protection of Child Rights(NCPCR) June 2017, New Delhi

> older partner. Neither the bodies of these young brides nor their innocent little minds are prepared, therefore, forced sexual encounters can lead to irreversible physical and psychological damage. A study conducted in 2013 showed that young girls are three times more likely to experience marital rape."

This report reveals a shocking aspect that girls below the age of 18 years are subjected to three times more marital rape as compared to the grown up women.

40. A perusal of the various reports and data placed before us clearly shows that marriage of the child not only violates the human rights of a child but also affects the health of the child.

41. Reference may be made to certain decisions cited before us. The Delhi High Court in ***Association for Social Justice & Research v. Union of India & Ors.***[42], was dealing with a case where a girl aged between 16 to 18 years was married off to a man stated to be over 40 years of age. The Court noted the ill effects of child marriage and gave a direction that the child will remain with her parents and her marriage will not be consummated till she attains the age of 18 years. Thereafter, a Full Bench of the Delhi High Court in ***Court on its own motion (Lajja Devi) & Ors.*** *v.* ***State & Ors.***[43]**,** while dealing with the provisions of PCMA and also referring to the provisions of Sections 375 and 376 IPC and after noticing the judgment passed in the case of ***Association For Social Justice & Research*** (supra), again reiterated that child marriage is a social evil, which endangers the

42 [2010 (118) DRJ 324(DB)]

43 W.P.(Crl.) No.338 of 2008

life and health of the child. The ill effects of child marriage have been summarised in the following manner:

> "(i) Girls who get married at an early age are often more susceptible to the health risks associated with early sexual initiation and childbearing, including HIV and obstetric fistula.
>
> (ii) Young girls who lack status, power and maturity are often subjected to domestic violence, sexual abuse and social isolation.
>
> (iii) Early marriage almost always deprives girls of their education or meaningful work, which contributes to persistent poverty.
>
> (iv) Child Marriage perpetuates an unrelenting cycle of gender inequality, sickness and poverty.
>
> (v) Getting the girls married at an early age when they are not physically mature, leads to highest rates of maternal and child mortality."

42. The Full Bench, with regard to Section 375 IPC before its amendment in 2013, made the following observations:

> "**32**. It is distressing to note that the Indian Penal Code, 1860 acquiesces child marriage. The exception to Section 375 specifically lays down that sexual intercourse of man with his own wife, the wife not being under fifteen years of age is not rape, thus ruling out the possibility of marital rape when the age of wife is above fifteen years. On the other hand, if the girl is not the wife of the man, but is below sixteen, then the sexual intercourse even with the consent of the girl amounts to rape? It is rather shocking to note the specific relaxation is given to a husband who rapes his wife, when she happens to be between 15-16 years. This provision in the Indian Penal Code, 1860 is a specific illustration of legislative endorsement and sanction to child marriages."

43. A Full Bench of Madras High Court in ***T. Sivakumar v. Inspector of Police***[44]**,** dealt with the provisions of the PCMA. It held that a marriage contracted

44 H.C.P. No. 907 of 2011, vide its judgment dated 3rd November, 2011

with a female less than 18 years and more than 15 years is not a void marriage but is only a voidable marriage. However, the Court went on to hold that *stricto sensu* the marriage could not be called a valid marriage since the child bride had the option of getting the marriage annulled till she attains the age of 20 years. It held as follows:

> "The marriage contracted by a person with a female of less than 18 years is voidable and the same shall be subsisting until it is annulled by a competent Court under Section 3 of the Prohibition of Child Marriage Act. The said marriage is not a "valid marriage" *stricto sensu* as per the classification but it is "not invalid". The male contracting party shall not enjoin all the rights which would otherwise emanate from a valid marriage *stricto sensu*, instead he will enjoin only limited rights."

Reference to these judgments has been made only for the purpose of highlighting the concern shown by the Courts with regard to child marriage and the manner in which the Courts have consistently held that the child marriage is an evil which should be avoided.

THE KARNATAKA EXPERIENCE

44. A writ petition[45] was filed in the Karnataka High Court, raising the issue of validity of child marriages. In its order dated 10th November, 2010 the Karnataka High Court noted as follows:

45 Writ Petition No.11154/2006 (GM-RES-PIL), Muthamma Devaya & Anr. v. Union of India & Ors.

> "The narration of facts in the present writ petition is heart rendering. The photographs appended to the writ petition have been a cause of deep distress to us. The photographs reveal, the marriage of minor girls, not yet in their teens, to fully grown men. In one of the photographs, the girl has been made to stand on a chair, so that she could garland her tall and fully grown groom. Forced marriage of the girl child, one realises, is one of the manifestations of cruelty, possibly without any equivalent comparison. It seems that the practice is common place in this part of the world. It may have remained unchecked for a variety of reasons including, poverty, lack of education, culture and ignorance. We are of the view that allowing the evil to continue without redressing it, would make us a party to the disgraceful activity."

45. After making the aforesaid observations, the Karnataka High Court constituted a four Member committee, headed by Dr. Justice Shivraj V. Patil, former Judge of this Court, to expose the extent of practice of child marriage. The Committee was also requested to suggest ways and means to root out the evil of child marriage from society and to prevent it to the maximum extent possible. The Core Committee submitted its report and made various recommendations. One of its recommendations was that marriage of a girl child below the age of 18 years should be declared *void ab initio*. Pursuant to the report of the Core Committee, in the State of Karnataka an amendment was made in the PCMA and Section 1(A) has been inserted after sub-section 2 Section 3, which reads as under:

> "(1A) Notwithstanding anything contained in sub-section (1) every child marriage solemnized on or after the date of coming into force of the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016 shall be void ab initio."

46. Therefore, any marriage of a child, i.e. a female aged below 18 years and a male below 21 years is *void ab initio* in the State of Karnataka. This is how the law should have been throughout the country. Where the marriage is void, there cannot be a husband or a wife and I have no doubt that protection of Exception 2 to Section 375 IPC cannot be availed of by those persons, who claim to be "husband" of "child brides" pursuant to a marriage which is illegal and void.

47. This leads to an anomalous situation. In Karnataka, if a husband has sexual intercourse with his "wife" aged below 18 years, since such marriage would be *void ab initio*, the wife cannot be treated to be a legal wife and, therefore, the husband cannot get the benefit of Exception 2 to Section 375 IPC whereas in rest of the country he would be entitled to the benefit of such exception and be immune from prosecution.

THE DEFENCE OF SOCIAL REALITY

48. The main defence raised on behalf of the Union of India is that though the practice of child marriage may be reprehensible, though it may have been made illegal, the harsh reality is that 20% to 30% of female children below the age of 18 years are got married in total violation of the PCMA. According to the Union of India, keeping in view this stark reality and also keeping in view the sanctity which is attached to a union like marriage, the Parliament, in its wisdom, thought

it fit to retain the age of fifteen in Exception 2 to Section 375 IPC. It has also been urged that when Parliament enacts any law which falls within its jurisdiction, then this Court should not normally interfere with that Act. When any law is passed, the Court must presume that the Parliament has gone into all aspects of the matter. Though it was faintly urged before us by learned counsel for the petitioner that the Parliament did not go into certain aspects, this Court is clearly of the view that such ignorance cannot be imputed to Parliament. In our constitutional framework, where there is division of powers, each repository of power must respect the other and this Court must extend to the Parliament the respect it deserves. One cannot and should not impute ignorance to the legislature.

49. The stand of the Union of India may be summarised as follows:-

> (i) "Economic and educational development in the country is still uneven and child marriages are still taking place. It has been, therefore, decided to retain the age of 15 years under Exception 2 of Section 375 of IPC so as to give protection to husband and wife against criminalizing the sexual activity between them.
>
> (ii) As per National Family Health Survey-III, 46% of women between the ages 18-29 years in India were married before the age of 18. It is also estimated that there are 23 million child brides in the country. Hence, criminalizing the consummation of a marriage union with a serious offence such as rape would not be appropriate and practical.
>
> (iii) Providing punishment for child marriage with consent does not appear to be appropriate in view of socio-economic conditions of the country. Thus, the age prescribed in Exception 2 of Section 375 of IPC has been retained considering the basic facts of the still evolving social norms and issues.
>
> (iv) The Law Commission also recommended for raising the age from 15 years to 16 years and it was incorporated in the Criminal Law (Amendment) Ordinance, 2013. However, after wide ranging

> consultations with various stakeholders it was further decided to retain the age at 15 years.
>
> (v) Exception 2 of Section 375 of IPC envisages that if the marriage is solemnized at the age of 15 years due to traditions, it should not be a reason to book the husband in the case of offence of rape under the IPC.
>
> (vi) It is also necessary that the provisions of law should be in such a manner that it cannot affect a particular class of society. Retaining the age of 15 years in Exception 2 of Section 375 of IPC has been provided considering the social realities of the nation."

50. Certain other facts may be noted which, though not strictly necessary for deciding the legal issues, are necessary to decide the background in which amendment to Section 375 IPC and other criminal laws were carried out. These facts clearly show that Parliament knowingly took a decision not to criminalize sexual activity between husband and wife. In the 84th Report of the Law Commission, it was recommended that the age of consent under clause Sixthly of Section 375 IPC, should be increased to 18 years and Exception 2 should be deleted. In the 172nd Report of the Law Commission, it was recommended that the age of consent under clause Sixthly should be retained at 16 years, but the Law Commission specifically opined that there should be no distinction on account of marriage of the girl child and the age in Exception 2 be raised from 15 to 16 years. The Justice Verma Committee did not make any recommendation to change the age of consent under clause Sixthly. However Parliament, while amending the IPC in the year 2014, in the wake of the "Nirbhaya" incident, decided to increase the

age of consent to 18 years under clause Sixthly, but did not make any change in Exception 2 of Section 375 IPC.

51. Interestingly, though the Verma Committee did not recommend that the age of consent should be increased under clause Sixthly from 16 to 18 years, but it did recommend that Exception 2 should be completely deleted. The Parliament took note of the Verma Committee report. It also took note of the recommendations of the Law Commission and a Standing Committee was constituted and Parliament enacted this law pursuant to the recommendations of the Standing Committee. It would also be pertinent to mention that one Member of Parliament, Mr. Saugata Roy moved a Private Member's Bill to fix the age at 18 years in Exception 2 of Section 375 IPC, but that amendment was not carried. Interestingly, the amendment to Section 375 IPC and other sections relating to offences against women and the POCSO were incorporated by one Amending Act i.e., The Criminal Law (Amendment) Act, 2013. After the "Nirbhaya" case, the Juvenile Justice (Care and Protection of Children) Act, 2015 was also amended in 2016 and a child in conflict with law over the age of 16 years, if charged with a heinous offence, can be tried in a court of law if the Juvenile Justice Board feels that he was mature enough to commit a crime.

POWER OF THE COURT TO INTERFERE

52. It is a well settled principle of law that when the constitutional validity of the law enacted by the legislature is under challenge and there is no challenge to the legislative competence, the Court will always raise a presumption of the constitutionality of the legislation. The courts are reluctant to strike down laws as unconstitutional unless it is shown that the law clearly violates the constitutional provisions or the fundamental rights of the citizens. The Courts must show due deference to the legislative process.

53. There can be no dispute with the proposition that Courts must draw a presumption of constitutionality in favour of laws enacted by the legislature. In ***Sub-Divisional Magistrate*** *v.* ***Ram Kali***[46], this Court observed as follows:

> ".....The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, and its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds."

54. Thereafter, in ***Pathumma & Ors.*** *v.* ***State of Kerala & Ors.***[47], this Court held that the Court would interfere only when the statute clearly violates the rights of the citizens provided under Part III of the Constitution or where the Act is beyond

46 (1968) 1 SCR 205

47 (1978) 2 SCC 1

the legislative competence or such similar grounds. The relevant observations are as follows:

> "**6**. It is obvious that the Legislature is in the best position to understand and appreciate the needs of the people as enjoined by the Constitution to bring about social reforms for the upliftment of the backward and the weaker sections of the society and for the improvement of the lot of poor people. The Court will, therefore, interfere in this process only when the statute is clearly violative of the right conferred on the citizen under Part III of the Constitution or when the Act is beyond the legislative competence of the legislature or such other grounds. It is for this reason that the Courts have recognised that there is always a presumption in favour of the constitutionality of a statute and the onus to prove its invalidity lies on the party which assails the same..."

55. In ***Government of A.P. v. P. Laxmi Devi***[48], this Court held thus:

> "**66**. As observed by the Privy Council in Shell Co. of Australia v. Federal Commr. of Taxation [1931 AC 275:1930 All ER Rep 671 (PC)] (All ER p. 680 G-H)
>
> "...unless it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will..."
>
> **67**. Hence if two views are possible, one making the provision in the statute constitutional, and the other making it unconstitutional, the former should be preferred vide Kedar Nath Singh v. State of Bihar [AIR 1962 SC 955]. Also, if it is necessary to uphold the constitutionality of a statute to construe its general words narrowly or widely, the court should do so vide G.P. Singh's Principles of Statutory Interpretation, 9th Edn., 2004, p. 497....."

56. In ***Subramanian Swamy v. Director, CBI***[49], a Constitution Bench of this Court laid down the following principle:

48 (2008) 4 SCC 720

49 (2014) 8 SCC 682

"**Court's approach**

49. Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognised by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognised and these are: (i) discrimination, based on an impermissible or invalid classification, and (ii) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders – if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is."

57. I am conscious of the self imposed limitations laid down by this Court while deciding the issue whether a law is constitutional or not. However, if the law is discriminatory, arbitrary or violative of the fundamental rights or is beyond the legislative competence of the legislature then the Court is duty bound to invalidate such a law.

58. Justice H.R. Khanna in the case of ***State of Punjab v. Khan Chand***[50] held that when Courts strike down laws they are only doing their duty and no element

50 (1974) 1 SCC 549

of judicial arrogance should be attributed to the Courts when they do their duty under the Constitution and determine whether the law made by the legislature is in conformity with the provisions of the Constitution or not. The relevant observations are as follows:

> "**12**. It would be wrong to assume that there is an element of judicial arrogance in the act of the Courts in striking down an enactment. The Constitution has assigned to the Courts the function of determining as to whether the laws made by the Legislature are in conformity with the provisions of the Constitution. In adjudicating the constitutional validity of statutes, the Courts discharge an obligation which has been imposed upon them by the Constitution. The Courts would be shirking their responsibility if they hesitate to declare the provisions of a statute to be unconstitutional, even though those provisions are found to be violative of the Articles of the Constitution. Articles 32 and 226 are an integral part of the Constitution and provide remedies for enforcement of fundamental rights and other rights conferred by the Constitution. Hesitation or refusal on the part of the Courts to declare the provisions of an enactment to be unconstitutional, even though they are found to infringe the Constitution because of any notion of judicial humility would in a large number of cases have the effect of taking away or in any case eroding the remedy provided to the aggrieved parties by the Constitution. Abnegation in matters affecting one's own interest may sometimes be commendable but abnegation in a matter where power is conferred to protect the interest of others against measures which are violative of the Constitution is fraught with serious consequences. It is as much the duty of the Courts to declare a provision of an enactment to be unconstitutional if it contravenes any Article of the Constitution as it is theirs to uphold its validity in case it is found to suffer from no such infirmity."

59. Therefore, the principle is that normally the Courts should raise a presumption in favour of the impugned law; however, if the law under challenge violates the fundamental rights of the citizens, the law is arbitrary, or is discriminatory, the Courts can either hold the law to be totally unconstitutional and strike down the law or the Court may read down the law in such a manner that the

law when read down does not violate the Constitution. While the Courts must show restraint while dealing with such issues, the Court cannot shut its eyes to the violations of the fundamental rights of the citizens. Therefore, if the legislature enacts a law which is violative of the fundamental rights of the citizens, is arbitrary and discriminatory, then the Court would be failing in its duty if it does not either strike down the law or read down the law in such a manner that it falls within the four corners of the Constitution.

60. It is not the job of the Court to decide whether a law is good or bad. Policy matters fall within the realm of legislature and not of the Courts. The Court, however, is empowered and has the jurisdiction to decide whether a law is unconstitutional or not.

61. "The law is an ass" said Mr. Bumble[51]. That may be so. The law, however, cannot be arbitrary or discriminatory. Merely because a law is asinine, it cannot be set aside. However, if the law is arbitrary, discriminatory and violates the fundamental rights guaranteed to the citizens of the country, then the law can either be struck down or can be read down to make it in consonance with the Constitution of India.

51 Oliver Twist: Author Charles Dickens

WHETHER EXCEPTION 2 TO SECTION 375 IPC IS ARBITRARY?

62. Before dealing with this issue, it would be necessary to point out that earlier there was divergence of opinion as to whether a law could be struck down only on the ground that it was arbitrary. In ***Indira Nehru Gandhi*** v. ***Raj Narain***[52] the Court struck down clauses 4 and 5 of Article 329A of the Constitution on the ground of arbitrariness. Reliance was placed on the celebrated judgment of this Court passed in the case of ***Keshavananda Bharati*** v. ***State of Kerala***[53]. In Para 681 of ***Raj Narain*** (supra), Chandrachud J., held as follows:

> "**681**. It follows that clauses (4) and (5) of Article 329A are arbitrary and are calculated to damage or destroy the rule of law. Imperfections of language hinder a precise definition of the rule of law as of the definition of 'law' itself. And the Constitutional Law of 1975 has undergone many changes since A.V. Dicey, the great expounder of the rule of law, delivered his lectures as Vinerian Professor of English Law at Oxford, which were published in 1885 under the title, "*Introduction to the Study of the Law of the Constitution*". But so much, I suppose, can be said with reasonable certainty that the rule of law means that the exercise of powers of government shall be conditioned by law and that subject to the exceptions to the doctrine of equality, no one shall be exposed to the arbitrary will of the Government. Dicey gave three meanings to rule of law: Absence of arbitrary power, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by ordinary law courts and that the Constitution is not the source but the consequence of the rights of individuals, as defined and enforced by the courts……."

52 1975 (Supp.) SCC 1

53 (1973) 4 SCC 225.

63. The aforesaid case was one of the first cases in which a law was set aside on the ground of being arbitrary. In ***E.P. Royappa*** v. ***State of Tamil Nadu*** [54] the doctrine of arbitrariness was further expanded. Bhagwati, J., eruditely explained the principle in the following terms.

> "**85**.....From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16."

64. The doctrine developed in ***Royappa's*** case (supra) was further advanced in the case of ***Maneka Gandhi*** v. ***Union of India***[55]. In this case, the test of reasonableness was introduced and it was held that a law which is not "right, just and fair" is arbitrary. The following observations are apposite:-

> "**7**.....The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness

54 (1974) 4 SCC 3

55 (1978) 1 SCC 248

> pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied."

65. This principle was followed in the cases of ***A.L. Kalra*** v. ***Project and Equipment Corpn.***[56], ***Babita Prasad*** v. ***State of Bihar***[57], ***Ajay Hasia*** v. ***Khalid Mujib Sehravardi***[58] and ***Dr. K.R. Lakshmanan*** v. ***State of Tamil Nadu***[59]. In the case of ***Ajay Hasia*** *(*supra), a Constitution Bench of this Court held as follows:

> "**16**.....Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an 'authority' under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."

66. In ***State of A.P.*** v. ***McDowell & Co.***[60], a three-Judge Bench of this Court struck a discordant note and rejected the plea of the Amending Act being arbitrary. The Court held that an enactment could be struck down if it is being challenged as violative of Article 14 only if it is found that it is violative of equality clause, equal protection clause or violative of fundamental rights. The Court went on to hold

56 (1984) 3 SCC 316,

57 1993 Supp (3) SCC 268

58 (1981) 1 SCC 722

59 (1996) 2 SCC 226

60 (1996) 3 SCC 709

that an enactment cannot be stuck down only on the ground that the Court thinks that it is unjustified. This judgment need not detain us for long because in ***Shayara Bano*** v. ***Union of India & Ors.***[61] popularly known as the "Triple Talaq case", this Court held that this judgment did not take note of binding judgments of this Court passed by a Constitution Bench, in the case of ***Ajay Hasia*** (supra) and a three-Judge Bench in the case of ***Dr.K.R. Lakshmanan*** (supra). After discussing the entire law on the subject, Nariman, J., in his judgment held as follows:

> "It is, therefore, clear from a reading of even the aforesaid two Constitution Bench judgments that Article 14 has been referred to in the context of the constitutional invalidity of statutory law to show that such statutory law will be struck down if it is found to be "arbitrary".
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> xxx xxx xxx
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> xxx xxx xxx
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> "**55**.....The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

Therefore, there can be no dispute that a law can be struck down if the Court find it is arbitrary and falls foul of Article 14 and other fundamental rights.

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61 WP(C) No.118/2016 and connected matters [(2017) Vol. 8 SCALE 178]

67. In this case, we are concerned mainly with Article 14 and 21 of the Constitution of India. The legislative history given above clearly indicates that a child has universally been defined as a person below 18 years of age in all the enactments. This has been done for the reason that it is perceived that a person below the age of 18 years is not fully developed and does not know the consequences of his/her actions. Not only is a person below the age of 18 years treated to be a child, but is also not even entitled to deal with his property, enter into a contract or even vote.

68. The fact that child marriage is an abhorrent practice and is violative of human rights of the child is not seriously disputed by the Union of India. The only justification given is that since a large number of child marriages are taking place, it would not be proper to criminalize the consummation of such child marriages. It is urged that, keeping in view age old traditions and evolving social norms, the practice of child marriage cannot be wished away and, therefore, legislature in its wisdom has thought it fit not to criminalize the consummation of such child marriages.

69. I am not impressed with the arguments raised by the Union of India. Merely because something is going on for a long time is no ground to legitimise and legalise an activity which is *per se* illegal and a criminal offence. No doubt, it is totally within the realm of Parliament to decide what should be the age of consent

under clause Sixthly of Section 375 IPC. It is also within the domain of the Parliament to decide what should be the minimum age of marriage. The Parliament has decided in both the enactments that a girl below 18 years is not capable of giving consent to have sex and legally she cannot marry. Parliament has also, in no uncertain terms, prohibited child marriage and come to the conclusion that child marriage is an activity which must come to an end. If that be so, can the practice of child marriage which is admittedly "an evil", and is also a criminal offence be set up as an exception in a case of a girl child, who is subjected to sexual intercourse by her so called husband. Shockingly, even if this sexual intercourse is forcible and without the consent of the girl child, then also the husband is not liable for any offence. This law is definitely not right, just and fair and is, therefore, arbitrary.

70. There can be no dispute that every citizen of this country has the right to get good healthcare. Every citizen can expect that the State shall make best endeavours for ensuring that the health of the citizen is not adversely affected. By now it is well settled by a catena of judgments of this Court that the "right to life" envisaged in Article 21 of the Constitution of India is not merely a right to live an animal existence. This Court has repeatedly held that right to life means a right to live with human dignity. Life should be meaningful and worth living. Life has many shades. Good health is the *raison d'etre* of a good life. Without good health

there cannot be a good life. In the case of a minor girl child good health would mean her right to develop as a healthy woman. This not only requires good physical health but also good mental health. The girl child must be encouraged to bloom into a healthy woman. The girl child must not be deprived of her right of choice. The girl child must not be deprived of her right to study further. When the girl child is deprived of her right to study further, she is actually deprived of her right to develop into a mature woman, who can earn independently and live as a self sufficient independent woman. In the modern age, when we talk of gender equality, the girl child must be given equal opportunity to develop like a male child. In fact, in my view, because of the patriarchal nature of our society, some extra benefit must be showered upon the girl child to ensure that she is not deprived of her right to life, which would include her right to grow and develop physically, mentally and economically as an independent self sufficient female adult.

71. It is true that at times the State, because of paucity of funds, or other reasons beyond its control, cannot live up to the expectations of the people. At the same time, it is not expected that the State should frame a law, which adversely affects the health of a citizen, that too a minor girl child. The State, under Article 15 of the Constitution, is in fact, empowered to make laws favouring women. Reservation for women is envisaged under Article 15 of the Constitution. In

Vishakha v. State of Rajasthan[62], this Court held that sexual harassment of working women amounts to violation of the rights guaranteed by Articles 14, 15 and 23 of the Constitution.

72. When a girl is compelled to marry before she attains the age of 18 years, her health is put in serious jeopardy. As is evident from various reports referred to above, girls who were married before the age of 19 years are likely to suffer medical and psychological problems. A 15 or 16 year old girl, when forcibly subjected to sexual intercourse by her "husband", undergoes a trauma, which her body and mind is not ready to face. The girl child is also twice as more likely to die in child birth than a grown up woman. The least, that one would expect in such a situation, is that the State would not take the defence of tradition and sanctity of marriage in respect of girl child, which would be totally violative of Article 14, 15 and 21 of the Constitution. Therefore, this Court is of the view that Exception 2 to Section 375 IPC is arbitrary since it is violative of the principles enshrined in Article 14, 15 and 21 of the Constitution of India.

73. Approaching this aspect from another angle. As is evident from various reports filed in this case, child marriages are not restricted to girls aged above 15 years. Even as per the National Plan of Action for Children, 2016 prepared by the Ministry of Women and Child Development, Government of India, 30.3%

62 (1997) 6 SCC 241

marriages i.e. almost 1 in every 3 marriage takes place in violation of the PCMA. Many of these relate to child brides aged less than 15 years. A girl may be married when she is 3-4 years or may be 10-11 years old. She may be sent to her matrimonial home on attaining the age of puberty, which may be well before she attains the age of 15 years. In such an eventuality, what is the reason for fixing the magic figure of 15 years. This figure had relevance when under the criminal law and the marriage laws the age was similar. In the year 1940, the age of consent was 16 years, the age of marriage was 15 years and the age under the exception was also 15 years; in 1975, the age of consent was 16 years, the age of marriage was 18 years, but the age under the exception remained 15 years. That may have been there because there was no change in the age of consent under Clause Sixthly. Now when the age of consent is changed to 18 years, the minimum age of marriage is also 18 years and, therefore, fixing a lower age under Exception 2 is totally irrational. It strikes against the concept of equality. It violates the right of fair treatment of the girl child, who is unable to look after herself. The magic figure of 15 years is not based on any scientific evaluation, but is based on the mere fact that it has been existing for a long time. The age of 15 years in Exception 2 was fixed in the year 1940 when the minimum age for marriage was also 15 and the age of consent under clause Sixthly was 16. In the present context when the age for marriage has been fixed at 18 years and when the age of consent

is also fixed at 18 years, keeping the age under Exception 2 at 15 years, cannot be said to be right, just and fair. In fact, it is arbitrary and oppressive to the girl child.

74. Law cannot be hidebound and static. It has to evolve and change with the needs of the society. Recognising these factors, the Parliament increased the minimum age for marriage. The Parliament also increased the minimum age of consent but the inaction in raising the age in Exception 2 is by itself an arbitrary non-exercise of power. When the age was being raised in all other laws, the age under Exception 2 should also have been raised to bring it in line with the evolving laws especially the laws to protect women and the girl child aged below 18 years. Therefore, I have no hesitation in holding that the Exception 2, in so far as it relates to the girl child below eighteen years, is unreasonable, unjust, unfair and violative of the rights of the girl child. To that extent the same is arbitrary and liable to be set aside.

WHETHER EXCEPTION 2 TO SECTION 375 IPC IS DISCRIMINATORY?

75. There can be no dispute that a law can be set aside if it is discriminatory. Some elements of discrimination have already been dealt with while dealing with the issue of arbitrariness. However, there are certain other aspects which make Exception 2 to Section 375 IPC in so far as it deals with the girl child totally discriminatory. The law discriminates between a girl child aged less than 18 years,

who may be educated and has sexual intercourse with her consent and a girl child who may be married even before the age of 15 years, but her marriage has been consummated after 15 years even against her consent. This is invidious discrimination which is writ large. The discrimination is between a consenting girl child, who is almost an adult and non-consenting child bride. To give an example, if a girl aged 15 years is married off by her parents without her consent and the marriage is consummated against her consent, then also this girl child cannot file a criminal case against her husband. The State is talking of the reality of the child marriages. What about the reality of the rights of the girl child? Can this helpless, underprivileged girl be deprived of her rights to say 'yes' or 'no' to marriage? Can she be deprived of her right to say 'yes' or 'no' to having sex with her husband, even if she has consented for the marriage? In my view, there is only one answer to this and the answer must be a resounding "NO". While interpreting such a law the interpretation which must be preferred is the one which protects the human rights of the child, which protects the fundamental rights of the child, the one which ensures the good health of the child and not the one which tries to say that though the practice is "evil" but since it is going on for a long time, such "criminal" acts should be decriminalised.

76. The State is entitled and empowered to fix the age of consent. The State can make reasonable classification but while making any classification it must show

that the classification has been made with the object of achieving a certain end. The classification must have a reasonable nexus with the object sought to be achieved. In this case the justification given by the State is only that it does not want to punish those who consummate their marriage. The stand of the State is that keeping in view the sanctity attached to the institution of marriage, it has decided to make a provision in the nature of Exception 2 to Section 375 IPC. This begs the question as to why in this exception the age has been fixed as 15 years and not 18 years. As pointed out earlier, a girl can legally consent to have sex only after she attains the age of 18 years. She can legally enter into marriage only after attaining the age of 18 years. When a girl gets married below the age of 18 years, the persons who contract such a marriage or abet in contracting such child marriage, commit a criminal offence and are liable for punishment under the PCMA. In view of this position there is no rationale for fixing the age at 15 years. This age has no nexus with the object sought to be achieved viz., maintaining the sanctity of marriage because by law such a marriage is not legal. It may be true that this marriage is voidable and not *void ab initio* (except in the State of Karnataka) but the fact remains that if the girl has got married before the age of 18 years, she has right to get her marriage annulled. Irrespective of the fact that the right of the girl child to get her marriage annulled, it is indisputable that a criminal offence has been committed and other than the girl child, all other persons

including her husband, and those persons who were involved in getting her married are guilty of having committed a criminal act. In my opinion, when the State on the one hand, has, by legislation, laid down that abetting child marriage is a criminal offence, it cannot, on the other hand defend this classification of girls below 18 years on the ground of sanctity of marriage because such classification has no nexus with the object sought to be achieved. Therefore, also Exception 2 in so far as it relates to girls below 18 years is discriminatory and violative of Article 14 of the Constitution.

77. One more ground for holding that Exception 2 to Section 375 IPC is discriminatory is that this is the only provision in various penal laws which gives immunity to the husband. The husband is not immune from prosecution as far as other offences are concerned. Therefore, if the husband beats a girl child and has forcible sexual intercourse with her, he may be charged for offences under Sections 323, 324, 325 IPC etc. but he cannot be charged with rape. This leads to an anomalous and astounding situation where the husband can be charged with lesser offences, but not with the more serious offence of rape. As far as sexual crimes against women are concerned, these are covered by Sections 354, 354A, 354B, 354C, 354D of the IPC. These relate to assault or use of criminal force against a woman with intent to outrage her modesty; sexual harassment and punishment for sexual harassment; assault or use of criminal force to woman with

intent to disrobe; voyeurism; and stalking respectively. There is no exception clause giving immunity to the husband for such offences. The Domestic Violence Act will also apply in such cases and the husband does not get immunity. There are many other offences where the husband is either specifically liable or may be one of the accused. The husband is not given the immunity in any other penal provision except in Exception 2 to Section 375 IPC. It does not stand to reason that only for the offence of rape the husband should be granted such an immunity especially where the "victim wife" is aged below 18 years i.e. below the legal age of marriage and is also not legally capable of giving consent to have sexual intercourse. Exception 2 to Section 375 IPC is, therefore, discriminatory and violative of Article 14 of the Constitution of India, on this count also.

78. The discrimination is absolutely patent and, therefore, in my view, Exception 2, in so far as it relates to the girl child between 15 to 18 years is not only arbitrary but also discriminatory, against the girl child.

LAW IN CONFLICT WITH POCSO

79. Another aspect of the matter is that the POSCO was enacted by Parliament in the year 2012 and it came into force on 14th November, 2012. Certain amendments were made by Criminal Law Amendment Act of 2013, whereby Section 42 and Section 42A, which have been enumerated above, were added. It

would be pertinent to note that these amendments in POCSO were brought by the same Amendment Act by which Section 375, Section 376 and other sections of IPC relating to crimes against women were amended. The definition of rape was enlarged and the punishment under Section 375 IPC was made much more severe. Section 42 of POCSO, as mentioned above, makes it clear that where an offence is punishable, both under POCSO and also under IPC, then the offender, if found guilty of such offence, is liable to be punished under that Act, which provides for more severe punishment. This is against the traditional concept of criminal jurisprudence that if two punishments are provided, then the benefit of the lower punishment should be given to the offender. The legislature knowingly introduced Section 42 of POCSO to protect the interests of the child. As the objects and reasons of the POCSO show, this Act was enacted as a special provision for protection of children, with a view to ensure that children of tender age are not abused during their childhood and youth. These children were to be protected from exploitation and given facilities to develop in a healthy manner. When a girl is married at the age of 15 years, it is not only her human right of choice, which is violated. She is also deprived of having an education; she is deprived of leading a youthful life. Early marriage and consummation of child marriage affects the health of the girl child. All these ill effects of early marriage have been recognised by the Government of India in its own documents, referred to hereinabove.

80. Section 42A of POCSO has two parts. The first part of the Section provides that the Act is in addition to and not in derogation of any other law. Therefore, the provisions of POCSO are in addition to and not above any other law. However, the second part of Section 42A provides that in case of any inconsistency between the provisions of POCSO and any other law, then it is the provisions of POCSO, which will have an overriding effect to the extent of inconsistency. POCSO defines a child to be a person below the age of 18 years. Penetrative sexual assault and aggravated penetrative sexual assault have been defined in Section 3 and Section 5 of POCSO. Provisions of Section 3 and 5 are by and large similar to Section 375 and Section 376 of IPC. Section 3 of the POCSO is identical to the opening portion of Section 375 of IPC whereas Section 5 of POCSO is similar to Section 376(2) of the IPC. Exception 2 to Section 375 of IPC, which makes sexual intercourse or acts of consensual sex of a man with his own "wife" not being under 15 years of age, not an offence, is not found in any provision of POCSO. Therefore, this is a major inconsistency between POCSO and IPC. As provided in Section 42A, in case of such an inconsistency, POCSO will prevail. Moreover, POCSO is a special Act, dealing with the children whereas IPC is the general criminal law. Therefore, POCSO will prevail over IPC and Exception 2 in so far as it relates to children, is inconsistent with POCSO.

IS THE COURT CREATING A NEW OFFENCE?

81. One of the doubts raised was if this Court strikes down, partially or fully, Exception 2 to Section 375 IPC, is the Court creating a new offence. There can be no cavil of doubt that the Courts cannot create an offence. However, there can be no manner of doubt that by partly striking down Section 375 IPC, no new offence is being created. The offence already exists in the main part of Section 375 IPC as well as in Section 3 and 5 of POCSO. What has been done is only to read down Exception 2 to Section 375 IPC to bring it in consonance with the Constitution and POCSO.

82. In this behalf, reference may be made to some English decisions. In England, there was never any such statutory exception granting immunity to the husband from the offence of marital rape. However, Sir Mathew Hale, who was Chief Justice of England for five years prior to his death in 1676, was credited with having laid down the following principle:

> "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract."

83. The aforesaid principle, commonly known as Hale's principle, was recorded in the History of the Pleas of the Crown[63] and was followed in England for many years. Under Hale's principle a husband could not be held guilty of raping his

63 (1736), Vol. 1, Ch. 58, P. 629

wife. This principle was based on the proposition that the wife gives up her body to her husband at the time of marriage. Women, at that time, were considered to be chattel. It was also presumed that on marriage, a woman had given her irrevocable consent to have sexual intercourse with her husband.

84. The aforesaid principle was followed in England for more than two centuries. For the first time in ***Reg*** v. ***Clarence***[64], some doubts were raised by Justice Wills with regard to this proposition. In ***Rex*** v. ***Clarke***[65], Hale's principle was given the burial it deserved and it was held that the husband's immunity as expounded by Hale, no longer exists. Dealing with the creation of new offence, the House of Lords held as follows:

> "The remaining and no less difficult question is whether, despite that view, this is an area where the court should step aside to leave the matter to the Parliamentary process. This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it."

85. In my view, as far as this case is concerned, this Court is not creating any new offence but only removing what was unconstitutional and offensive.

THE PRIVACY DEBATE

86. Ms. Jayna Kothari, learned counsel for the Intervener, had raised the issue of privacy and made reference to the judgment of this Court in the case of ***Justice***

64 (1888) 22 Q.B.D. 23

65 (1949) 2 All E.R. 448

K.S. Puttaswamy (Retd.) & Anr. v. ***Union of India and Ors.***[66] to urge that the right of privacy of the girl child is also violated by Exception 2 to Section 375 IPC. I have purposely not gone into this aspect of the matter because anything said or urged in this behalf would affect any case being argued on "marital rape" even in relation to "women over 18 years of age". In this case, the issue raised is only with regard to the girl child and, therefore, I do not think it proper to deal with this issue which may have wider ramifications especially when the case of girl child can be decided without dealing with the issue of privacy.

RELIEF

87. Since this Court has not dealt with the wider issue of "marital rape", Exception 2 to Section 375 IPC should be read down to bring it within the four corners of law and make it consistent with the Constitution of India.

88. In view of the above discussion, I am clearly of the opinion that Exception 2 to Section 375 IPC in so far as it relates to a girl child below 18 years is liable to be struck down on the following grounds:–

(i) it is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Article 14, 15 and 21 of the Constitution of India;

(ii) it is discriminatory and violative of Article 14 of the Constitution of India and;

66 (2017) 10 SCALE 1

(iii) it is inconsistent with the provisions of POCSO, which must prevail.

Therefore, Exception 2 to Section 375 IPC is read down as follows:

> *"Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape".*

It is, however, made clear that this judgment will have prospective effect.

89. It is also clarified that Section 198(6) of the Code will apply to cases of rape of "wives" below 18 years, and cognizance can be taken only in accordance with the provisions of Section 198(6) of the Code.

90. At the cost of repetition, it is reiterated that nothing said in this judgement shall be taken to be an observation one way or the other with regard to the issue of "marital rape".

91. Extremely valuable assistance was rendered to this Court by Mr. Gaurav Agarwal, learned counsel appearing for the petitioner and Ms. Jayna Kothari, learned counsel appearing for the intervener and I place on record my appreciation and gratitude for the same.

.....J.
(DEEPAK GUPTA)

New Delhi
October 11, 2017

INDEX of Landmark Judgements of Supreme Court and High Courts
Relating to Juvenile Justice (Children in Conflict with Law)

Sr. No.	Case Title	Case No.	Date of Judgement	Citation(s)	Judgment by	Significance of the Judgement
1.	Umesh Chandra Vs. State Of Rajasthan	Criminal Appeal No. 439 of 1976	02/04/1982	(1982) 2 SCC 202 = [1982]3SCR583 = AIR1982SC1057 = 1982(14)UJ426.	A. Vardarajan, D.A. Desai and S. Murtaza Fazal Ali, JJ.	Any person below the age of 16 years should be presumed to be a child and that a delinquent child should be tried by a Children's Court in accordance with the procedure laid down therein.
2.	Bhola Bhagat Vs. State Of Bihar	Criminal Appeal No. 1826 of 1996	24.10.1997	(1997) 8 SCC 720 = AIR1998SC236 = JT1997(8)SC537.	Dr. A.S. Anand and K. Venkataswami, JJ.	when a plea is raised on behalf of an accused that he was a "child" within the meaning of the definition of the expression under the Act, it becomes obligatory for the court, in case it entertains any doubt about the age as claimed by the accused, to hold an inquiry itself for determination of the question of age of the accused or cause an enquiry to be held and seek a report regarding the same, if necessary, by asking the parties to lead evidence in that regard.
3.	Arnit Das Vs. State Of Bihar	Criminal Appeal No. 469 of 2000	09/05/2000	2000(5) SCC 488 = AIR2000SC2264 = JT2000(6) SC 320.	K.T. Thomas and R.C. Lahoti, JJ.	Finding regarding the age of the appellant is concerned it is based on appreciation of evidence and arrived at after taking into consideration of the material available on record
4.	Ram Deo Chauhan @ Raj Nath Vs. State Of Assam	Review Petition (crl.) 1105 of 2000	10.05.2001	(2001) 5 SCC 714 = [2001]3SCR669 = AIR2001SC2231.	K.T. Thomas, R.P. Sethi and S.N. Phukan, JJ	The mandate of the Legislature is clear and unambiguous that no adjournment can be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed upon him.
5.	Pratap Singh Vs.	CRIMINAL APPEAL	02/02/2005	(2005) 3 SCC 551= [2005]1SCR1019 =	N. Santosh Hegde, S.N. Variava, B.P.	The date of occurrence will be the reckoning date for determining the age of the alleged

	State Of Jharkhand	NO. 210 of 2005		AIR2005SC2731 = JT2005(2)SC271.	Singh, H.K. Sema and S.B. Sinha, JJ.	offender as Juvenile offender.
6.	Jitendra Ram @ Jitu Vs. Respondent: State Of Jharkhand	Criminal Appeal No. 489 of 2006	25.04.2006	(2006) 9SCC 428 = JT2006(5)SC138 = AIR2006SC1933 = [2006]Supp(1)SCR286 .	S.B. Sinha and P.K. Balasubramanyan, JJ.	The appellant herein was convicted for commission of an offence punishable under Sections 302 and 201 of the Indian Penal Code (for short, IPC') and sentenced to undergo rigorous imprisonment for life. The determination of the age of the appellant as on the date of the commission of the offence should be done afresh by the learned Sessions Judge.
7.	Babloopasi Vs. State Of Jharkhand	Crime Appeal No. 1572 of 2008	03.10.2008	2008 (13) SCC 133 = AIR2009SC314 = JT2008(11)SC203.	C.K. Thakker and D.K. Jain, JJ.	Obligation of the Juvenile Justice Board (JJB) to make an enquiry as to the age of person brought as a juvenile
8.	Hari Ram Vs. State Of Rajasthan	CRIMINAL APPEAL NO. 907 OF 2009	05/05/2009	(2009) 13 SCC 211= [2009]7SCR623 = JT2009(8)SC47.	Altamas Kabir and Cyriac Joseph, JJ.	Definition of 'juvenile Once the age of a juvenile or child in conflict with law is found to be less than 18 years on the date of offence on the basis of any proof specified in sub-rule (3) the court or the Board or as the case may be the Child Welfare Committee appointed under Chapter IV of the Act, has to pass a written order stating the age of the juvenile or stating the status of the juvenile, and no further inquiry is to be conducted by the court or Board after examining and obtaining any other documentary proof referred to in sub- rule (3) of Rule 12.
9.	Shah Nawaz Vs. State Of U.P	CRIMINAL APPEAL NO. 153	05/08/2011	(2011) 13 SCC 751 = [2011]9SCR859 = AIR2011SC3107.	P. Sathasivam and B.S. Chauhan, JJ.	Preference has been given to school certificate over the medical report.

		OF 2011				
10.	Abuzar Hossain Vs. State Of West Bengal	Criminal Appeal No. 1193 of 2006	10/10/2012	(2012) 10 SCC 489 = [2012] 9 SCR 244 = JT 2012 (10) SC 453 = AIR 2013 SC 1020.	R.M. Lodha, Anil R. Dave and T.S. Thakur, JJ.	In case of absence of Certificate.
11.	Salil Bali Vs. Union Of India And Another	WRIT PETITION (C) NO. 10 OF 2013	17/07/2013	(2013) 7 SCC 705 = AIR2013SC3743 = 2013(6)BomCR503	Altamas Kabir, C.J.I., S.S. Nijjar and JastiChelameswar, JJ.	Amend the Juvenile Justice Act to lower the juvenile age from 18 to 16; and amend the Juvenile Justice Act to allow juveniles who have allegedly committed crimes such as rape and murder to be tried and punished under the laws applicable to adults.
12.	Parag Bhati Vs. State Of Uttar Pradesh	CRIMINAL APPEAL NO. 486 OF 2016	12/05/2016	(2016)12SCC744 = AIR2016SC2418 = 2016(3)UC1701	A.K. Sikri and R.K. Agrawal, JJ.	Accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor
13.	Gopinath Ghosh Vs. The State Of West Bengal	Criminal Appeal No. 623 of 1983	11.11.1983	AIR 1984 SC 237 = [1984]1SCR803 = 1984(Supp)SCC228	A.N. Sen and D.A. Desai, JJ.	The appellant falls within the proviso to Section 24(2), he could not be sentenced to suffer imprisonment. Therefore, the entire trial of the appellant is without jurisdiction and is vitiated.
14.	Arnit Das Vs. State Of Bihar	Criminal Appeal No. 469 of 2000	09/05/2000	2000(5) SCC 488 = AIR2000SC2264 = JT2000(6)SC320	K.T. Thomas and R.C. Lahoti, JJ.	Juvenile Delinquency
15.	Pratap Singh Vs. State Of Jharkhand	CRIMINAL APPEAL NO. 210 of 2005	02/02/2005	(2005) 3 SCC 551= [2005]1SCR1019 = AIR2005SC2731 = JT2005(2)SC271	N. Santosh Hegde, S.N. Variava, B.P. Singh, H.K. Sema and S.B. Sinha, JJ.	Bail and custody of juvenile
16.	Jitendra Ram @ Jitu Vs. State Of	Criminal Appeal No. 489 of 2006	25.04.2006	(2006) 9SCC 428 = JT2006(5)SC138 = AIR2006SC1933 = [2006]Supp(1)SCR286	S.B. Sinha and P.K. Balasubramanyan, JJ.	Grant of bail to the juvenile appellant.

	Jharkhand					
17.	Vikas Chaudhary Vs. State Of Nct Of Delhi And Anr	Special Leave Petition (Crl.) No. 8628 of 2009	11.08.2010,	(2010) 8 SCC 508 = [2010]9SCR1076 = AIR2010SC3380.	Altamas Kabir and Mukundakam Sharma, JJ.	Continuity of offence doesn't lead to the JJ Act benefits
18.	Ashwani Kumar Saxena Vs. State Of M.P	Criminal Appeal No. 1403 of 2012	13.09.2012	(2012) 9 SCC 750 =AIR2013SC553 = [2012]10SCR540	K.S. Panicker Radhakrishnan and Madan B. Lokur, JJ.	the Appellant filed an application before Chief Judicial Magistrate (CJM) Court, Chhatarpur under Sections 6 and 7 of the J.J. Act claiming that he was juvenile on the date of the incident and hence, the criminal court had no jurisdiction to entertain this case and the case be referred to Juvenile Justice Board and he be granted bail.
19.	Subramanian Swamy And Ors. Vs Raju Thr. Member Juvenile Justice Board And Anr	Criminal Appeal No. 695 of 2014 (Arising Out of SLP (Crl.) No. 1953 of 2013) and W.P. (Crl.) No. 204 of 2013	28.03.2014,	AIR 2014 SC 1649 = (2014)8SCC390 = JT2014(4)SC328.	P.Sathasivam, C.J.I., Ranjan Gogoi and Shiva Kirti Singh, JJ.	Petition as to enable the prosecution of the juvenile respondent in a regular criminal court.
20.	Subramanian Swamy And Ors. Vs. Raju Thr. Member	Criminal Appeal No. 695 of 2014	28.03.2014	MANU/SC/0248/2014	P. Sathasivam, C.J.I., Ranjan Gogoi and Shiva Kirti Singh, JJ.	psychological/mental, intellectual and emotional maturity of a person below 18 years cannot be objectively determined on an individual or case to case basis and the fixation of the Minimum Age of Criminal Responsibility (MACR) under the Act is a

	Juvenile Justice Board And Anr					policy decision taken to give effect to the country's international commitments.
21.	Vijay Singh Vs. State Of Delhi	Criminal Appeal No. 1322 of 2012 (Arising out of SLP (Crl.) No. 5503 of 2011)	29.08.2012	(2012)8SCC763 = AIR2012SC3437 = JT2012(8)SC340 = [2012]7SCR434	T.S. Thakur and F.M. Ibrahim Kalifulla, JJ.	having been found to have committed the aforementioned offence, for the purpose of sentencing, he has to be dealt with in accordance with the provisions contained in Section 15 thereof. As per Clause (g) of Sub-section (1) of Section 15 of the Juvenile Justice Act, the maximum period for which the Appellant could be sent to a special home is a period of three years.
22.	Ashish Vs. State Of Haryana	Crl. Revision No.851 of 2017	22/03/2017		SURINDER GUPTA, J.	Juvenile Justice Board is legally bound to conduct a preliminary assessment in 'Heinous Offence" with regard to mental and physical capacity of child in conflict with law to commit an offence if he has completed age of 16 years. Though there are no guidelines regarding preliminary assessment stipulated under Section 15 of the Juvenile Justice Act but Draft Model Rules, 2016, under the Juvenile Justice (Care and Protection of Children) Act, 2015 can be used as light house. Rule 14 of the aforesaid Rules clearly lays down that the objective of the preliminary assessment will be to evaluate the role of the child in conflict with law in the alleged offence as well as his mental condition and background.
23.	Manas Kumar Khuntia Vs.	CRLREV No. 517 of 2016	18.08.2016	MANU/OR/0406/2016	S.K. Sahoo, J.	Section 4 of the POCSO Act prescribes punishment for "penetrative sexual assault" which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

	State Of Orissa					The Juvenile Justice (Care and Protection of Children) Act, 2015 (hereafter "2015 Act") was brought into force on 15.01.2016 vide S.O.110(E) dated 12.01.2016. Section 2(33) of the 2015 Act defines "heinous offence" as follows:- "heinous offences" includes the offences for which the minimum punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force is imprisonment for seven years or more.
24.	Ranjit Singh Vs. State Of Punjab	Criminal Revision No. 2645 of 2013	28.11.2017	MANU/PH/2015/2017 = 2018(1)RCR(Criminal) 672	Amol Rattan Singh, J.	as per Section 15 (1) of the new Act, upon the Board assessing the mental and physical capacity of a child above 16 years of age, to commit the offence alleged to have been committed by him/her, and the circumstances in which it was committed, can pass an order in terms of Section 18 (3) of the new Act, by which, instead of the Juvenile Justice Board, the case of the child would be transferred to the Childrens' Court', which thereafter can proceed under Section 19 of the Act.

LANDMARK JUDGMENTS OF SUPREME COURT OF INDIA

DETERMINATION OF AGE OF CHILDREN IN CONFLICT WITH LAW (CCL)

Claim of Juvenility and Determination of Age (S.9 & 94 of JJA, 2015)

1.	**UMESH CHANDRA vs. STATE OF RAJASTHAN,** Criminal Appeal No. 439 of 1976, Date of Judgment- **02/04/1982**, Citation- (1982) 2 SCC 202 = [1982]3SCR583 = AIR1982SC1057 = 1982(14)UJ426.
	Judgment By: A. Vardarajan, D.A. Desai and S. Murtaza Fazal Ali, JJ.
	Any person below the age of 16 years should be presumed to be a child and that a delinquent child should be tried by a Children's Court in accordance with the procedure laid down therein.
	Held: 1. Another question argued at the Bar was as to what is the material date which is to be seen for the purpose of application of the Act. In view of our finding that at the time of the occurrence the appellant was undoubtedly a child within the provisions of the Act, the further question if he could be tried as a child if he had become more than 16 years by the time the case went up to the court, does not survive because the Act itself takes care of such a contingency. In this connection Sections 3 and 26 of the Act may be extracted thus: 3.Continuation of inquiry in respect of child who has ceased to be child Where an inquiry has been initiated against a child and during the course of such inquiry the child ceases to be such, then, notwithstanding anything contained in this Act or in any other law for the time being in force, the inquiry may be continued and orders may be made in respect of such person as if such person had continued to be a child. x xx 2. Special provision in respect of pending cases. Notwithstanding anything contained in this Act, all proceedings in respect of a child pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the child has committed an offence, it shall record such finding and, instead of passing any sentence in respect of the child, forward the child to the children's court which shall pass orders in respect of that child in accordance with the provision of this Act as if it has been satisfied on inquiry under this Act that the child has committed the offence. 3. A combined reading of these two sections would clearly show that the statute takes care of contingencies where proceedings in respect of

	a child were pending in any court in any area on the date on which the Act came into force. Section 26 in terms lays down that the court should proceed with the case but after having found that the child has committed the offence it is debarred from passing any sentence but would forward the child to the children's court for passing orders in accordance with the Act. 4. As regards the general applicability of the Act, we are clearly of the view that the relevant date for the applicability of the Act is the date on which the offence takes place. Children Act was enacted to protect young children from the consequences of their criminal acts on the footing that their mind at that age could not be said to be mature for imputing *mensrea* as in the case of an adult. This being the intendment of the Act, a clear finding has to be recorded that the relevant date for applicability of the Act is the date on which the offence takes place. It is quite possible that by the time the case comes up for trial, growing in age being an involuntary factor, the child may have ceased to be a child. Therefore, Sections 3 and 26 became necessary. Both the sections clearly point in the direction of the relevant date for the applicability of the Act as. the date of occurrence. We are clearly of the view that the relevant date for applicability of the Act so far as age of the accused, who claims to be a child, is concerned, is the date of the occurrence and not the date of the trial. 5. The High Court has failed to take notice that the Act being a piece of social legislation is meant for the protection of infants who commit criminal offences and, therefore, its provisions should be liberally and meaningfully construed so as to advance the object of the Act. Bearing this in mind we have construed the documents in the instant case. 6. We, therefore, allow the appeal to the extent that while setting aside the judgment of the Sessions Judge, as affirmed by the High Court, we direct the Additional Sessions Judge, Jaipur, to try the accused and if he gives a finding that the accused is guilty, he shall forward the accused to the Children's court for receiving sentence in accordance with the provisions of Section 26 of the Act.
2.	**BHOLA BHAGAT vs. STATE OF BIHAR**, Criminal Appeal No. 1826 of 1996, Decided On: **24.10.1997,** Citation- (1997) 8 SCC 720 = AIR1998SC236 = JT1997(8)SC537.
	Judgment By: Dr. A.S. Anand and K. Venkataswami, JJ.
	when a plea is raised on behalf of an accused that he was a "child" within the meaning of the definition of the expression under the Act, it becomes obligatory for the court, in case it entertains any doubt about the age as claimed by the accused, to hold an inquiry itself for determination of the question of age of the accused or cause an enquiry to be held and seek a report regarding the same, if necessary, by asking the parties to lead evidence in that regard.
	Held: 1. A full Bench of the Patna High Court in the case of Krishna Bhagwan v. State of Bihar , considered the question relating to the determination of the age of the accused and the belated raising of that plea and opined that though the normal rule is that a plea unless it goes to the very root of the jurisdiction should not be allowed to be taken at the appellate stage especially when it requires the investigation into a question of fact but a plea that accused in question was a "child" within the meaning of the Act can be entertained at

the appellate stage also and should not be overlooked on technical grounds. After noticing the provisions of the Bihar Children Act, 1982 and that Juvenile Justice Act, 1986, the Full Bench of the Patna High Court opined, taking into consideration the aim and intention of the two Acts, that the application of the provisions of the Acts should not be denied to an offender where by the time the trial commenced or concluded the accused had ceased to be a juvenile, although when the offence was committed he was a juvenile within the meaning of the Act. The Court then laid down the procedure which should be followed when a plea is raised to the effect that the accused on the date of the offence was a child and held that inquiry into that aspect should be conducted and on the basis of the evidence led at the inquiry, the court should record a finding whether or not on the date of commission of the offence, the accused was a 'child' within the meaning of the Act.

2. The judgment of the two Judge Bench of this Court in the case of State of Haryana v. Balwant Singh [1993] Supp. 1 SCC 409, which has been relied upon by the High Court is clearly distinguishable. The Bench in that case recorded:

   Admittedly, neither before the committal court nor before the trial court, no plea was raised on behalf of the respondent that he was a child and that he should not have been committed by the Magistrate and thereafter tried by the sessions court and that he ought to have been dealt with only by the court of Juveniles. When it is not the case of the respondent that he was a child both before the Committal Court as well as before the Trial Court, it is very surprising that the High Court, based merely on the entry made in Section 313 statement mentioning the age of the respondent as 17 has concluded that the respondent was a 'child' within the definition of the Act on the date of the occurrence.

   In the instant case, however, the plea had been raised both in the Trial Court as well as in the High Court and both the Courts even considered the plea but denied the benefit to the appellants for different reasons which do not bear scrutiny. That apart, the earlier judgments of this Court reported in [1984] Suppl. SCC 228 (supra) and (supra), were not even noticed or considered in Balwant Singh's case (supra) since the view expressed in Gopinath Ghosh's case and Bhoop Ram's case (supra) receive support from the three Judge Bench judgment in the case of Pradeep Kumar v. State of U.P., (supra), the appellants cannot be denied the benefit of the provisions of the Act on the basis of Balwant Singh's case (supra).

3. The correctness of the estimate of age as given by the Trial Court was neither doubted nor questioned by the State either in the High Court or in this Court. The parties have, therefore, accepted the correctness of the estimate of age of the three appellants as given by the Trial Court. Therefore, these three appellants should not be denied the benefit of the provisions of a socially progressive statute. In our considered opinion, since the plea had been raised in the High Court and because the correctness of the estimate of their age has not been assailed, it would be fair to assume that on the date of the offence, each one of the appellants surely fell within the definition of the expression 'child'. We are under these circumstances reluctant to ignore and overlook the beneficial provisions of the Acts on the technical ground that there is no other supporting material to support the estimate of ages of the appellants as given by the Trial Court,

	though the correctness of that estimate has not been put in issue before any forum. Following the course adopted in Gopinath Ghosh, Bhoop Ram and Pradeep Kumar's case (supra) while sustaining the conviction of the appellants under all the charges quash the sentences awarded to them. 4. The appellants Chandra Sen Prasad, Mansen Prasad and Bhola Bhagat, shall, therefore, be released from custody forthwith, if not required in any other case. Their appeals succeed to the extent indicated above and are partly allowed. 5. The conviction and sentence of the remaining appellants is maintained and their appeals are hereby dismissed. 6. Before parting with this judgment, we would like to reemphasis that when a plea is raised on behalf of an accused that he was a "child" within the meaning of the definition of the expression under the Act, it becomes obligatory for the court, in case it entertains any doubt about the age as claimed by the accused, to hold an inquiry itself for determination of the question of age of the accused or cause an enquiry to be held and seek a report regarding the same, if necessary, by asking the parties to lead evidence in that regard. Keeping in view the beneficial nature of the socially oriented legislation, it is an obligation of the court where such a plea is raised to examine that plea with care and it cannot fold its hands and without returning a positive finding regarding that plea, deny the benefit of the provisions of an accused. The court must hold an enquiry and return a finding regarding the age, one way or the other. We except the High Courts and subordinate courts to deal with such cases with more sensitivity, as otherwise the object of the Acts would be frustrated and the effort of the Legislature to reform the delinquent child and reclaim him as a useful member of the society would be frustrated. The High Courts may issue administrative directions to the subordinate courts that whenever such a plea is raised before them and they entertain any reasonable doubt about the correctness of the plea, they must as a rule, conduct an inquiry by giving opportunity to the parties to establish their respective claims and return a finding regarding the age of the concerned accused and then deal with the case in the manner provided by law.
3.	**ARNIT DAS vs. STATE OF BIHAR,** Criminal Appeal No. 469 of 2000, Date of Judgment- **09/05/2000**, Citation- 2000(5) SCC 488 = AIR2000SC2264 = JT2000(6) SC 320.
	Judgment By: K.T. Thomas and R.C. Lahoti, JJ.
	Finding regarding the age of the appellant is concerned it is based on appreciation of evidence and arrived at after taking into consideration of the material available on record
	Held : 1. All this exercise would have been avoided if only the Legislature would have taken care not to leave an ambiguity in the definition of juvenile and would have clearly specified the point of time by reference to which the age was to be determined to find a person a juvenile. The ambiguity can be resolved by taking into consideration the Preamble and the Statement of Objects and Reasons.

	2. The Preamble suggests what the Act was intended to deal with. If the language used by Parliament is ambiguous the Court is permitted to look into the preamble for construing the provisions of an Act (M/s. Burrakur Coal Co. Ltd. & M/s. East Indian Coal Co. Ltd. Vs. The Union of India and others, AIR 1961 SC 954). A preamble of a statute has been said to be a good means of finding out its meaning and, as it were, the key of understanding of it, said this Court in A. Thangal Kunju Musaliar Vs. M. Venkatachalam Potti AIR 1958 SC 246. The Preamble is a key to un-lock the legislative intent. If the words employed in an enactment may spell a doubt as to their meaning it would be useful to so interpret the enactment as to harmonise it with the object which the Legislature had in its view. 3. The Legislative aims and objectives set out in the earlier part of this judgment go to show that this Legislation has been made for taking care of the care and custody of a juvenile during investigation, inquiry and trial, i.e., from a point of time when the juvenile is available to the law administration and justice delivery system; it does not make any provision for a person involved in an offence by reference to the date of its commission by him. The long title of the Act too suggests that the content of the Act is the justice aspect relating to juveniles. 4. We make it clear that we have not dealt with the provisions of Chapter VI dealing with special offences in respect of juveniles. Prima facie, we feel that the view which we have taken would create no difficulty even in assigning meaning to the term juvenile as occurring in Chapter VI(Sections 41 to 45) of the Act because a juvenile covered by any of these provisions is likely to fall within the definition of neglected juvenile as defined in clause (l) of Section 2 who shall also have to be dealt with by a Juvenile Board under Chapter III of the Act and the view taken by us would hold the field there as well. 5. However, we express no opinion on the scope of Chapter VI of the Act and leave that aspect to be taken care of in a suitable case. At any rate in the present context we need not vex our mind on that aspect. Section 2 which defines juvenile and neglected juvenile itself begins by saying that the words defined therein would have the assigned meaning unless the context otherwise requires. 6. **So far as the present context is concerned we are clear in our mind that the crucial date for determining the question whether a person is juvenile is the date when he is brought before the competent authority.** 7. So far as the finding regarding the age of the appellant is concerned it is based on appreciation of evidence and arrived at after taking into consideration of the material available on record and valid reasons having been assigned for it.
4.	**Ram Deo Chauhan @ Raj Nath vs State of Assam,**Review Petition (crl.) 1105 of 2000, Decided On: **10.05.2001**, Citation- (2001) 5 SCC 714 = [2001]3SCR669 = AIR2001SC2231.
	Judgment By: K.T. Thomas, R.P. Sethi and S.N. Phukan, JJ.
	The mandate of the Legislature is clear and unambiguous that no adjournment can be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed upon him.
	Held: 1. Relying upon a judgment of this Court in Jaya Mala V. Home Secretary, Government of Jammu & Kashmir &Ors. MANU/SC/0031/1982 : 1982CriLJ1777, the learned defence counsel submitted that the court can take notice that the marginal error in age ascertained by radiological examination is two years at either side. The aforesaid case is of no help to the accused inasmuch as in that case the court was dealing with the age of a detenu taken in preventive custody and was not determining the extent of sentence to be

	awarded upon conviction of an offence. Otherwise also even if the observation made in the aforesaid judgment are taken note of, it does not help the accused in any case. The doctor has opined the age of the accused to be admittedly more than 20 years and less than 25 years. The statement of the doctor is no more than an opinion. the court has to base its conclusions upon all the facts and circumstances disclosed on examining of the physical features of the person whose age is in question, in conjunction with such oral testimony as may be available. An X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert but it can by no means be so infallible and accurate a test as to indicate the exact date of birth of the person concerned. Too much of reliance cannot be placed upon text books, on medical jurisprudence and texicology while determining the age of an accused. In this vast country with varied latitude, heights, environment, vegetation and nutrition, the height and weight cannot be expected to be uniform. 2. From the evidence produced and the material placed before the courts below, there is not an iota of doubt in my mind to hold that the petitioner was a child or near of about the age of being a child within the meaning of the Juvenile justice Act or the Children Act. He is proved to be major at the time of the commission of the offence. No doubt much less a reasonable doubt is created in the mind of the court, for the accused entitling him the benefit of a lesser punishment. It is true that the accused tried to create a smoke screen with respect to his age but such efforts appear to have been made only to hid his real age and not to create any doubt in our mind. The judicial system cannot be allowed to be taken to ransom by having resort to imaginative and concocted grounds by taking advantage of loose sentences appearing in the evidence of some of the witnesses, particularly at the stage of special leave petition. The law insists for finality of judgments and is more concerned with the strengthening of the judicial system. The courts are enjoined upon to perform their duties with the object of strengthening the confidence of the common man in the institution entrusted with the administration of justice. Any effort which weakens the system and shakes the faith of the common man in the justice dispensation system has to be discouraged. **3.** After committing the crime of murder of four innocent persons, the petitioner cannot be permitted to resort to adopt means and tactics or to take measures which, if accepted or condoned, may result in the murder of the judicial system itself. The efforts made by the accused by way of this petition, are not likely to advance the interests of justice but on the contrary frustrate it.
5.	**PRATAP SINGH vs. STATE OF JHARKHAND,** CRIMINAL APPEAL NO. 210 of 2005, Date of Judgment: **02/02/2005**, Citation- (2005) 3 SCC 551= [2005]1SCR1019 = AIR2005SC2731 = JT2005(2)SC271.
	Judgment By:N. Santosh Hegde, S.N. Variava, B.P. Singh, H.K. Sema and S.B. Sinha, JJ.

	The date of occurrence will be the reckoning date for determining the age of the alleged offender as Juvenile offender.
	Held: 1. As per the judgment, (the legislative intendment underlying Sections 3 and 26 read with the preamble, aims and objects of the Act is clearly discernible. A conjoint reading of the Sections, preamble, aims and objects of the Act leaves no matter of doubt that the legislature intended to provide protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication thereof. 2. Interpretation of Sections 3 and 26 of the Act are no more res-integra. Sections 3 and 26 of the 1986 Act as quoted above are in parimateria with Sections 3 and 26 of the Rajasthan Children Act 1970 (Raj. Act 16 of 1970). 3. A three-Judge bench of this Court in **Umesh Chandra** (supra) after considering the preamble, aims and objects and Sections 3 and 26 of the Rajasthan Act, held that the Act being a piece of social legislation is meant for the protection of infants who commit criminal offences and, therefore, such provisions should be liberally and meaningfully construed so as to advance the object of the Act. This Court then said in paragraph 28 at 210 SCC:- "28. As regards the general applicability of the Act, we are clearly of the view that the relevant date for the applicability of the Act is the date on which the offence takes place. Children Act was enacted to protect young children from the consequences of their criminal acts on the footing that their mind at that age could not be said to be mature for imputing mens rea as in the case of an adult. This being the intendment of the Act, a clear finding has to be recorded that the relevant date for applicability of the Act is the date on which the offence takes place. It is quite possible that by the time the case comes up for trial, growing in age being an involuntary factor, the child may have ceased to be a child. therefore, Sections 3 and 26 became necessary. Both the sections clearly point in the direction of the relevant date for the applicability of the Act as the date of occurrence. We are clearly of the view that the relevant date for applicability of the Act so far as age of the accused, who claims to be a child, is concerned, is the date of the occurrence and not the date of the trial." **4.** As already noticed the decision rendered by a three-Judge bench of this Court in Umesh Chandra (supra) was not noticed by a two-Judge bench of this Court in **Arnit Das** (supra). **We are clearly of the view that the law laid down in Umesh Chandra (supra) is the correct law and that the decision rendered by a two-Judge bench of this Court in Arnit Das (supra) cannot be said to have laid down a good law.** 5. We, accordingly, hold that the law laid down by a three-Judge bench of this Court in Umesh Chandra (supra) is the correct law. 6. Furthermore, Section 32 of the Act heavily relied upon by the counsel for the respondent does not envisage the production of a juvenile in the Court.

	7. The field covered by the Act includes a situation leading to juvenile delinquency vis-a-vis commission of an offence. In such an event he is to be provided the post delinquency care and for the said purpose the date when delinquency took place would be the relevant date. . **8. It must, therefore, be held that the relevant date for determining the age of the juvenile would be one on which the offence has been committed and not when he is produced in court.**
6.	**Jitendra Ram @ Jitu Vs. Respondent: State of Jharkhand**, Criminal Appeal No. 489 of 2006, Decided On**: 25.04.2006**, Citation- (2006) 9SCC 428 = JT2006(5)SC138 = AIR2006SC1933 = [2006]Supp(1)SCR286.
	Judgment By:S.B. Sinha and P.K. Balasubramanyan, JJ.
	The appellant herein was convicted for commission of an offence punishable under Sections 302 and 201 of the Indian Penal Code (for short, IPC') and sentenced to undergo rigorous imprisonment for life. The determination of the age of the appellant as on the date of the commission of the offence should be done afresh by the learned Sessions Judge.
	Held: 1. In absence of any plea having been taken by the appellant, it is not disputed, that the court at no stage had gone into the question as regard the age of the appellant. Sub-section (1) of Section 32 of the Act provides for presumption and determination of age in the following terms: 32. Presumption and determination of age.- (1) Where it appears to a competent authority that a person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a child, the competent authority shall make due inquiry as to the age of that person and for that purpose shall take such evidence as may be necessary and shall record a finding whether the person is a child or not stating his age as nearly as may be. The statute, therefore, has imposed a duty upon the competent authority to make an enquiry as to the age of that person who appears to be a child to him. No such enquiry was, however, made presumably because no such plea was raised. At that time, it also might not have occurred to the court that the Appellant was a child. Section 33 of the Act lays down the circumstances which are required to be taken into consideration in making an order under Section 32 of the said Act. In the year 1999, evidently the trial court did not consider the question of estimating his age in terms of the provisions of the Act. 2. The learned Counsel for the appellant has not made any submission on merit of the matter. We have, however, gone through the judgments of the learned trial judge as also the High Court and we do not find any infirmity therein. The provisions of a beneficial legislation should ordinarily be given effect to. However, we may notice that the appellant is literate. Presumably he attended some school. However, no certificate of his date of birth or any other proof as regard his date of birth is available on records. No other material apart

from the estimate of the court has been brought to our notice. In the absence of any material on record, we cannot arrive at a definite conclusion that the appellant as on the date of commission of the offence was a child within the meaning of the said Act.

3. In Krishna Bhagwan v. The State of Bihar MANU/BH/0043/1989 : (1989) PLJR 507, N.P. Singh, J., (as His Lordship then was), speaking for a Full Bench of the Patna High Court, opined:

...Section 32 vests power in the Juvenile Court to make due enquiry in respect of the age of the accused on the date of the commission of the offence and for that purpose such Court has to take evidence as may be necessary and to record a finding whether the accused in question was a juvenile. It need not be pointed out that it is not possible for this Court to determine the age of an accused on the date of the commission of the offence because that has to be determined on the basis of the evidence to be adduced and other materials in support thereof being produced. This determination should not be based merely on written opinion of the doctors produced before this Court. Prosecution has right to cross-examine such medical or forensic experts who have given their opinion about the age of the accused in order to demonstrate that the accused was not a juvenile on the date of the commission of the offence. This is necessary because by the time the plea is taken before the appellate court in almost all the cases the accused concerned must have ceased to be a juvenile due to lapse of time making it more difficult for the appellate court as well as the Juvenile Court to determine as to what was his age at the time of the commission of the offence. In my view, in such a situation, the Courts including Juvenile Court should get the accused held guilty of serious offences, examined by a Medical Board and should determine the age of such accused on basis of the materials on the record including the opinion of the Medical Board. Once the legislature has enacted a law to extend special treatment in respect of trial and conviction to juveniles, the Court should be jealous while administering such law so that the delinquent juveniles derive full benefit of the provisions of such Act but, at the same time, it is the duty of the Courts that the benefit of the provisions meant for juveniles are not derived by unscrupulous persons, who have been convicted and sentenced to imprisonment for having committed heinous and serious offences, by getting themselves declared as children or juveniles on the basis of procured certificates. According to me, if the plea that the accused was a child or juvenile on the date of the commission of the offence is taken for the first time in this Court, then this Court should proceed with the hearing of the appeal, as required by Section 26 of the Juvenile Act and should record a finding in respect of the charge which has been leveled against such an accused. If such an accused is acquitted, there is no question of holding any enquiry in respect of the accused being a child on the relevant date but, if the finding of the guilt recorded by the Court below is affirmed and this Court on the basis of materials on record is prima facie satisfied that the accused may be a child/juvenile within the meaning of the relevant Act on the date of the commission of the offence, it should call for a finding from the Children's Court/Juvenile's Court in accordance with Section 32 of the Act. If the finding so received is accepted by this Court, then this Court in terms of Section 26 of the Juvenile Act should pass an order directing the Juvenile Court to pass orders in accordance with Sections 21 and 22 of the Act.

We with respect agree to the said approach.

4. The said decision has been noticed by this Court in Gopinath Ghosh v. State of West Bengal MANU/SC/0101/1983 : 1984CriLJ168 . We may, however, notice that in Ramdeo Chauhan alias Raj Nath v. State of Assam MANU/SC/0297/2001 : 2001CriLJ2902 , as regards applicability of the provision of Section 35 of the Indian Evidence Act, 1872 vis-à-vis a school register, it was stated:

   It is not disputed that the register of admission of students relied upon by the defence is not maintained under any statutory requirement. The author of the register has also not been examined. The register is not paged (sic) at all. Column 12 of the register deals with "age at the time of admission". Entries 1 to 45 mention the age of the students in terms of years, months and days. Entry 1 is dated 25-1-1988 whereas Entry 45 is dated 31- 3-1989. Thereafter except for Entry 45, the page is totally blank and fresh entries are made w.e.f. 5-1- 1990, apparently by one person up to Entry 32. All entries are dated 5-1-1990. The other entries made on various dates appear to have been made by one person though in different inks. Entries for the years 1990 are up to Entry 64 whereafter entries of 1991 are made again apparently by the same person. Entry 36 relates to Rajnath Chauhan, son of Firato Chauhan. In all the entries except Entry 32, after 5-1-1990 in column 12 instead of age some date is mentioned which, according to the defence is the date of birth of the student concerned. In Entry 32 the age of the student concerned has been recorded. In column 12 again in the entries with effect from 9-1-1992, the age of the students are mentioned and not their dates of birth. The manner in which the register has been maintained does not inspire confidence of the Court to put any reliance on it. Learned defence counsel has also not referred to any provision of law for accepting its authenticity in terms of Section 35 of the Evidence Act. The entries made in such a register cannot be taken as a proof of age of the accused for any purpose.

5. We are, however, not oblivious of the decision of this Court in Bhola Bhagat v. State of Bihar MANU/SC/1361/1997 : 1998CriLJ390 , wherein an obligation has been cast on the court that where such a plea is raised having regard to the beneficial nature of the socially-oriented legislation, the same should be examined with great care. We are, however, of the opinion that the same would not mean that a person who is not entitled to the benefit of the said Act would be dealt with leniently only because such a plea is raised. Each plea must be judged on its own merit. Each case has to be considered on the basis of the materials brought on records.

6. The aforementioned decisions have been noticed by this Court in ZakariusLakra and Ors. v. Union of India and Anr. MANU/SC/0112/2005 : 2005CriLJ1716 , wherein a Bench of this Court while entertaining an application under Article 32 of the Constitution of India opined that although the same was not maintainable, having regard to the decision of this Court in Rupa Ashok Hurra v. Ashok Hurra MANU/SC/0910/2002 : [2002]2SCR1006 , the review petition should be allowed to be converted into a curative petition. [See also Raj Singh v. State of Haryana : (2000)6SCC759]. We, therefore, are of the opinion that the determination of the age of the appellant as on the date of the commission of the offence should be done afresh by the learned Sessions Judge.

7. For the reasons aforementioned, this appeal is allowed and the matter is remitted to the learned Sessions Judge with a direction to consider the matter as regard the age of the appellant as on the date of commission of the offence and in the event, he is found to be a

	child and/or juvenile within the meaning of the Act and the Juvenile Justice Act to deal with the accused accordingly. If he is found not to have been a child as on the date of the commission of the offence, the present conviction will stand.
7.	**BablooPasi Vs. State of Jharkhand**, Crime Appeal No. 1572 of 2008, Decided on Oct 03, 2008, Citation- 2008 (13) SCC 133 = AIR2009SC314 = JT2008(11)SC203.
	Judgment By: C.K. Thakker and D.K. Jain, JJ.
	Obligation of the Juvenile Justice Board(JJB) to make an enquiry as to the age of person brought as a juvenile
	Held: 1. From a bare reading of the provision, it is clear that it merely provides that when it appears to the competent authority viz., the Board, that the person brought before it is a juvenile, the Board is obliged to make an enquiry as to the age of that person. 2. For that purpose it shall take evidence as may be necessary and then record a finding whether the person in question is a juvenile or not. Explaining the scope and purpose of Section 32 of the Juvenile Justice Act, 1986 which is almost parimateria with Section 49 of the Act in **Bhola Bhagat Vs. State of Bihar**, this Court had observed as under:- ".....when a plea is raised on behalf of an accused that he was a "child" within the meaning of the definition of the expression under the Act, it becomes obligatory for the court, in case it entertains any doubt about the age as claimed by the accused, to hold an inquiry itself for determination of the question of age of the accused or cause an enquiry to be held and seek a report regarding the same, if necessary, by asking the parties to lead evidence in that regard. Keeping in view the beneficial nature of the socially. oriented legislation, it is an obligation of the court where such a plea is raised to examine that plea with care and it cannot fold its hands and without returning a positive finding regarding that plea, deny the benefit of the provisions to an accused. The court must hold an enquiry and return a finding regarding the age, one way or the other." 3. Nevertheless, in **Jitendra Ram alias Jitu Vs. State of Jharkhand6**, the Court sounded a note of caution that the aforestated observations in Bhola Bhagat (supra) would not mean that a person who is not entitled to the benefit of the said Act would be dealt with leniently only because such a plea is raised. Each plea must be judged on its own merit and each case has to be considered on the basis of the materials brought on record. At this juncture, it is relevant to note that in exercise of power conferred by Section 68 of the Act, the State Government of Jharkhand has framed the Jharkhand Juvenile Justice (Care and Protection of Children) Rules, 2003. Rule 22 thereof lays down the procedure to be followed by a Board in holding enquiries and the determination of age. Sub-Rule (5) of the said Rule which is material for the present case reads thus:- "22. Procedure to be followed by a Board in holding inquiries and the determination of age.- (1) ..... (5) In every case concerning a juvenile or a child, the Board shall either obtain.-

(i) a birth certificate given by a corporation or a municipal authority; or
(ii) a date of birth certificate from the school first attended; or
(iii)matriculation or equivalent certificates, if available; and
(iv) in the absence of (i) to (iii) above, the medical opinion by a duly constituted Medical Board, subject to a margin of one year, in deserving cases for the reasons to be recorded by such Medical Board, (regarding his age and, when 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)."

4. Thus, as per Rule 22, in the absence of birth or matriculation certificates, in order to record a finding in respect of age of a person, the Board is required to obtain the opinion of a duly constituted Medical Board. It is clear from a bare reading of the Rule that although the Board is bound to obtain the opinion of the Medical Board but the opinion per se is not a conclusive proof of age of the person concerned. It is no more than an opinion. More so, when even the Medico-Legal opinion is that owing to the variation in climatic, dietic, hereditary and other factors, affecting the people of different States in the country, it would be imprudent to formulate a uniform standard for the determination of the age.

5. True, that a Medical Board's opinion based on the radiological examination is a useful guiding factor for determining the age of a person but is not incontrovertible. Commenting on the evidentiary value of the opinion of a doctor, based on x-ray tests, as to the age of a person, **in Ramdeo Chauhan alias Raj Nath Vs. State of Assam7**, R.P. Sethi, J., speaking for the majority in a three-Judge Bench, had observed that:-

"....An X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert but it can by no means be so infallible and accurate a test as to indicate the exact date of birth of the person concerned. Too much of reliance cannot be placed upon textbooks, on medical jurisprudence and toxicology while determining the age of an accused. In this vast country with varied latitudes, heights, environment, vegetation and nutrition, the height and weight cannot be expected to be uniform."

6. It is well settled that it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. The date of birth is to be determined on the basis of material on record and on appreciation of evidence adduced by the parties. The Medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence.

7. It is true that in Arnit Das Vs. State of Bihar8, this Court has, on a review of judicial opinion, observed that while dealing with a question of determination of age of an accused, for the purpose of finding out whether he is a juvenile or not, a hyper- technical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile and if two views may be possible on the same evidence, the Court should lean in favour of holding the accused to be a juvenile in borderline cases.

We are also not oblivious of the fact that being a welfare legislation, the Courts should be zealous to see that a juvenile derives full benefits of the provisions of the Act but (2000) 5 SCC 488 at the same time it is also imperative for the courts to ensure that the protection and privileges under the Act are not misused by unscrupulous persons to escape punishments for having committed serious offences.

8. Bearing in mind these broad principles, we may now advert to the facts at hand. Indubitably, neither a date of birth certificate nor a matriculation or equivalent certificate from a school was produced before the Board and, therefore, the Board was required to obtain a medical opinion of a duly constituted Medical Board, which was done. The Medical Board carried out the ossification tests of the accused and opined that his age was between 17-18 years. Therefore, with a margin of one year, as stipulated in Rule 22(5)(iv), his age could also be 16 years or 19 years. In addition to the said opinion, the prosecution also placed before the Board, a Voters List of the Constituency of Deoghar for the year 2005. In that list, the name of the accused appeared at Sl. No. 317 and his age was recorded as 20 years. Taking into consideration this material and the physical appearance of the accused, the Board opined as under:- "Applicant Rajesh Mahatha is present before the Juvenile Justice Board. By observing his physical built up, it appears that he is an adult. Also in the medical examination report his age has been shown as 17-18 years.
9. His adulthood can be verified from the Voter List 2005 where the applicant age has been shown as 20 years. It is also the opinion of the other Board members that the applicant Rajesh Mahatha appears to be adult and in the background of the date of the incident he was an adult.
10. Therefore, by the concurring opinion of the members of the Board, it is declared that Rajesh Mahatha the accused applicant is an "adult" of more than 18 years of age in the background of the date of the occurrence of the incident."
11. As noted supra, the High Court has reversed the opinion of the Board. The relevant portion of the High Court's order reads thus:- "Having regard to the facts and circumstances of the case, I find that Jharkhand Juvenile Justice (Care and Protection of Children) Rules 2003 has devised Rule 22 being the procedure to be followed by the Juvenile Justice Board in holding enquiry in determination of the age of a Juvenile Rule 22 (5) (iv) provides that the opinion of the Medical Board, duly constituted, would be the guiding factor in determination of the age of a Juvenile, subject to margin of one year in absence of the birth certificate of Juvenile in conflict with law. I find that the said provision of Rule has been ignored by the Juvenile Justice Board as well as by the Session Court"
12. In the circumstance, the order impugned passed by the Juvenile Justice Board on 3.6.2006 whereby and whereunder the age of the petitioner was determined more than 18 years is set aside and the 1st Addl. Sessions Judge, Deoghar is directed to pass appropriate order returning back the records of the Juvenile to the Juvenile Justice Board in accordance with law as early as possible."
13. From the afore-extracted orders of the Board as well as the High Court, it is manifest that the question of determination of age of the accused has been decided by both the Courts in a casual manner, ignoring the principles of law on the subject.
14. Insofar as the Board is concerned, it is evident that it has mechanically accepted the entry in Voters List as conclusive without appreciating its probative value in terms of the provisions of Section 35 of the Indian Evidence Act, 1872. Section 35 of the said Act lays down that an entry in any public or other official book, register, record, stating a fact in issue or relevant fact made by a public servant in the discharge of his official duty especially enjoined by the law of the country is itself a relevant fact. It is trite that to render a document

	admissible under Section 35, three conditions have to be satisfied, namely: (i) entry that is relied on must be one in a public or other official book, register or record; (ii) it must be an entry stating a fact in issue or a relevant fact, and (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially enjoined by law. 15. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded. (See: Birad Mal Singhvi Vs. Anand Purohit9) 16. Therefore, on facts at hand, in the absence of evidence to show on what material the entry in the Voters List in the name of the accused was made, a mere production of a copy of the Voters List, though a public document, in terms of Section 35, was not sufficient to prove the age of the accused. Similarly, though a reference to the report of the Medical Board, showing the age of the accused as 17-18 years, has been made but there is no indication in the order whether 1988 (Supp) SCC 604 the Board had summoned any of the members of the Medical Board and recorded their statement. It also appears that the physical appearance of the accused, has weighed with the Board in coming to the afore-noted conclusion, which again may not be a decisive factor to determine the age of a delinquent. Insofar as the High Court is concerned, there is no indication in its order as to in what manner Rule 22(5)(iv) has been ignored by the Board. The learned Judge seems also to have accepted the opinion of the Medical Board in terms of the said Rule as conclusive. Therefore, the afore- stated ground on which the High Court has set aside the opinion of the Board and holding the accused to be a juvenile, cannot be sustained. 17. In our judgment, apart from the fact that the impugned order suffers from the basic infirmity of being violative of the principles of natural justice, it cannot be sustained on merits as well. At the same time, we are also convinced that the order of the Board falls short of a proper enquiry as envisaged in Section 49 of the Act. 18. For the aforementioned reasons, the appeal is allowed and the matter is remitted to the ChiefJudicial Magistrate, Deoghar, heading the Board, with a direction to re-determine the age of the accused, as on the date of commission of the alleged offences, in accordance with law, enunciated above. In the event he is found to be a juvenile within the meaning of the Act, he shall be dealt with accordingly. However, if he is not found to be a juvenile, he would face trial under the ordinary criminal law. The inquiry shall be completed expeditiously, preferably within six months of receipt of a copy of this judgment.
8.	**HARI RAM vs. STATE OF RAJASTHAN,** CRIMINAL APPEAL NO. 907 OF 2009, Date of Judgment- **05/05/2009**, Citation- (2009) 13 SCC 211= [2009]7SCR623 = JT2009(8)SC47.
	Judgment By: Altamas Kabir and Cyriac Joseph, JJ.
	Definition of juvenile **Once the age of a juvenile or child in conflict with law is found to be less than 18 years on the date of offence on the basis of any proof specified in sub-rule (3) the court or the Board or as the case may be the Child Welfare Committee appointed under Chapter IV of the Act, has to pass a written order stating the age of the juvenile or stating the status of the juvenile, and no further inquiry**

	is to be conducted by the court or Board after examining and obtaining any other documentary proof referred to in sub- rule (3) of Rule 12.
	Held: 1. In the instant case, there is no controversy that the appellant was about sixteen years of age on the date of commission of the alleged offence and had not completed eighteen years of age. In view of Sections 2(k), 2(l) and 7A read with Section 20 of the said Act, the provisions thereof would apply to the appellant's case and on the date of the alleged incident it has to be held that he was a juvenile. 2. The appeal has, therefore, to be allowed on the ground that notwithstanding the definition of "juvenile" under the Juvenile Justice Act, 1986, the appellant is covered by the definition of "juvenile" in Section 2(k) and the definition of "juvenile in conflict with law" in Section 2(l) of the Juvenile Justice Act, 2000, as amended. 3. Therefore, this court allow the appeal and set aside the order passed by the High Court and in keeping with the provisions of Sections 2(k), 2(l),7A and 20 of the Juvenile Justice Act, 2000 and Rules 12 and 98 of the Juvenile Justice Rules, 2007, hold that since the appellant was below 18 years of age at the time of commission of the offence the provisions of the said Act would apply in his case in full force. 4. The matter is accordingly remitted to the Juvenile Justice Board, Ajmer, for disposal in accordance with law, within three months from the date of receipt of a copy of this order, having regard to the fact that the offence is alleged to have been committed more than ten years ago. If, however, the appellant has been in detention for a period which is more than the maximum period for which a juvenile may be confined to a Special Home, the Board shall release the appellant from custody forthwith.
9.	**SHAH NAWAZ vs. STATE OF U.P,** CRIMINAL APPEAL NO. 153 OF 2011, Date of Judgment-**05/08/2011**, Citation- (2011) 13 SCC 751 = [2011]9SCR859 = AIR2011SC3107.
	Judgment By: P. Sathasivam and B.S. Chauhan, JJ.
	Preference has been given to school certificate over the medical report.
	Held: 1. Rule 12 of the Rules categorically envisages that the medical opinion from the medical board should be sought only when the matriculation certificate or school certificate or any birth certificate issued by a corporation or by any Panchayat or municipality is not available. We are of the view that though the Board has correctly accepted the entry relating to the date of birth in the mark sheet and school certificate, the Additional Sessions Judge and the High Court committed a grave error in determining the age of the appellant ignoring the date of birth mentioned in those documents which is illegal, erroneous and contrary to the Rules. 2. We are satisfied that the entry relating to date of birth entered in the mark sheet is one of the valid proof of evidence for determination of

	age of an accused person. The School Leaving Certificate is also a valid proof in determining the age of the accused person. Further, the date of birth mentioned in the High School mark sheet produced by the appellant has duly been corroborated by the School Leaving Certificate of the appellant of Class X and has also been proved by the statement of the clerk of Nehru High School, Dadheru, Khurd-O-Kalan and recorded by the Board. The date of birth of the appellant has also been recorded as 18.06.1989 in School Leaving Certificate issued by the Principal of Nehru Preparatory School, Dadheru, Khurd-O-Kalan, Muzaffarnagar as well as the said date of birth mentioned in the school register of the said school at S. No. 1382 which have been proved by the statement of the Principal of that school recorded before the Board. Apart from the clerk and the Principal of the school, the mother of the appellant has categorically stated on oath that the appellant was born on 18.06.1989 and his date of birth in his academic records from preparatory to Class X is the same, namely, 18.06.1989, hence her statement corroborated his academic records which clearly depose his date of birth as 18.06.1989. Accordingly, the appellant was a juvenile on the date of occurrence that is 04.06.2007 as alleged in the FIR dated 04.06.2007. 3. We are also satisfied that Rule 12 of the Rules which was brought in pursuance of the Act describes four categories of evidence which have been provided in which preference has been given to school certificate over the medical report. 4. In the light of the above discussion, we hold that from the acceptable records, the date of birth of the appellant is 18.06.1989, the Additional Sessions Judge and the High Court committed an error in taking contrary view. While upholding the decision of the Board, we set aside the orders of the Additional Sessions Judge dated 13.01.2009 and the High Court dated 10.12.2010. Accordingly, the appellant is declared to be a juvenile on the date of commission of offence and may be proceeded in accordance with law. The appeal is allowed.
10.	**ABUZAR HOSSAIN vs. STATE OF WEST BENGAL,** Criminal Appeal No. 1193 of 2006, Date Of Judgment - 10/10/2012, Citation- (2012) 10 SCC 489 = [2012] 9 SCR 244 = JT 2012 (10) SC 453 = AIR 2013 SC 1020.
	Judgment By: R.M. Lodha, Anil R. Dave and T.S. Thakur, JJ.
	In case of absence of Certificate.
	Held: 1. I have had the advantage of going through the order proposed by my esteemed brother R.M. Lodha J., which summarises the legal position with remarkable lucidity. While I entirely agree with whatever is enunciated in the judgment proposed by my erudite colleague, I wish to add a few lines of my own confined to the proposition stated in Para 36 (IV) of the judgment. In that paragraph of the order fall cases in which the accused setting up the plea of juvenility is unable to produce any one of the documents referred to in Rule 12(3)(a)(i) to (iii) of the Rules, under the Act, not necessarily because, he is deliberately withholding such documents from the court, but because, he did not have the good fortune of ever going to a school from where he could produce a certificate regarding his date of birth. Para 36 (IV) sounds a note of caution that an affidavit of a parent or a sibling or other relative would not ordinarily suffice, to trigger an enquiry into the question of juvenility of the accused, unless the circumstances of the case are so glaring that the court is left with no option except to record a prima facie satisfaction that a case for directing an enquiry is made out. What would constitute a 'glaring case' in which an affidavit may itself be sufficient to direct an inquiry, is a question that cannot be easily answered leave alone answered by enumerating

exhaustively the situations where an enquiry may be justified even in the absence of documentary support for the claim of juvenility. Two dimensions of that question may all the same be mentioned without in the least confining the sweep of the expression 'glaring case' to a strait-jacket formulation. The first of these factors is the most mundane of the inputs that go into consideration while answering a claim of juvenility like "Physical Appearance" of the accused made relevant by Rule 12(2) of the Rules framed under the Act. The Rule reads:

12. Procedure to be followed in determination of Age. –
(1) xxxx
(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.

Physical appearance of the accused is, therefore, a consideration that ought to permeate every determination under the Rule aforementioned no matter appearances are at times deceptive, and depend so much on the race or the region to which the person concerned belongs. Physical appearance can and ought to give an idea to the Court at the stage of the trial and even in appeal before the High Court, whether the claim made by the accused is so absurd or improbable that nothing short of documents referred to in this Rule 12 can satisfy the court about the need for an enquiry. The advantage of "physical appearance" of the accused may, however, be substantially lost, with passage of time, as longer the interval between the incident and the court's decision on the question of juvenility, the lesser the chances of the court making a correct Assessment of the age of the accused. In cases where the claim is made in this Court for the first time, the advantage is further reduced as there is considerable time lapse between the incident and the hearing of the matter by this Court.

2. The second factor which must ever remain present in the mind of the Court is that the claim of juvenility may at times be made even in cases where the accused does not have any evidence, showing his date of birth, by reference to any public document like the register of births maintained by Municipal Authorities, Panchayats or hospitals nor any certificate from any school, as the accused was never admitted to any school. Even if admitted to a school no record regarding such admission may at times be available for production in the Court. Again there may be cases in which the accused may not be in a position to provide a birth certificate from the Corporation, the municipality or the Panchayat, for we know that registration of births and deaths may not be maintained and if maintained may not be regular and accurate, and at times truthful. Rule 12(3) of the Rules makes only three certificates relevant. These are enumerated in Sub-Rule 3(a)(i) to (iii) of the Rule which reads as under:

(3)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;

	Non-production of the above certificates or any one of them is not, however, fatal to the claim of juvenility, for Sub-rule 3(b) to Rule 12 makes a provision for determination of the question on the basis of the medical examination of the accused in the 'absence' of the certificates. Rule 12(3)(b) runs as under: 12(3) (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. 3. The expression 'absence' appearing in the above provision is not defined under the Act or the Rules. The word shall, therefore, be given its literal dictionary meaning which is provided by Concise Oxford dictionary as under: Being away from a place or person; time of being away; non-existence or lack of; inattention due to thought of other things. 4. Black's Law Dictionary also explains the meaning of 'absence' as under: 1. The state of being away from one's usual place of residence. 2. A failure to appear, or to be available and reachable, when expected. 3. Louisiana Law. The State of being an absent person - Also termed (in sense 3) absentia. 5. The Court would, therefore, in each case weigh the relevant factors, insist upon filing of better affidavits if the need so arises, and even direct, any additional information considered relevant including information regarding the age of the parents, the age of siblings and the like, to be furnished before it decides on a case to case basis whether or not an enquiry under Section 7A ought to be conducted. It will eventually depend on how the court evaluates such material for a prima facie conclusion that the Court may or may not direct an enquiry. With these additions, I respectfully concur with the judgment proposed by my esteemed Brother Lodha J.
11.	**SALIL BALI vs. UNION OF INDIA AND ANOTHER,** WRIT PETITION (C) NO. 10 OF 2013. Date of Judgment- 17/07/2013, Citation- (2013) 7 SCC 705 = AIR2013SC3743 = 2013(6)BomCR503.
	Judgment By: Altamas Kabir, C.J.I., S.S. Nijjar and JastiChelameswar, JJ.
	Amend the Juvenile Justice Act to lower the juvenile age from 18 to 16; and amend the Juvenile Justice Act to allow juveniles who have allegedly committed crimes such as rape and murder to be tried and punished under the laws applicable to adults.

Held:

1. The Juvenile Justice (Care and Protection of Children) Act, 2000, is in tune with the provisions of the Constitution and the various Declarations and Conventions adopted by the world community represented by the United Nations. The basis of fixing of the age till when a person could be treated as a child at eighteen years in the Juvenile Justice (Care and Protection of Children) Act, 2000, was Article 1 of the Convention of the Rights of the Child, as was brought to our notice during the hearing. Of course, it has been submitted by Dr. Kishor that the description in Article 1 of the Convention was a contradiction in terms. While generally treating eighteen to be the age till which a person could be treated to be a child, it also indicates that the same was variable where national laws recognize the age of majority earlier. In this regard, one of the other considerations which weighed with the legislation in fixing the age of understanding at eighteen years is on account of the scientific data that indicates that the brain continues to develop and the growth of a child continues till he reaches at least the age of eighteen years and that it is at that point of time that he can be held fully responsible for his actions. Along with physical growth, mental growth is equally important, in assessing the maturity of a person below the age of eighteen years. In this connection, reference may be made to the chart provided by Mr. Kanth, wherein the various laws relating to children generally recognize eighteen years to be the age for reckoning a person as a juvenile/ child including criminal offences.

2. In any event, in the absence of any proper data, it would not be wise on our part to deviate from the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000, which represent the collective wisdom of Parliament. It may not be out of place to mention that in the Juvenile Justice Act, 1986, male children above the age of sixteen years were considered to be adults, whereas girl children were treated as adults on attaining the age of eighteen years. In the Juvenile Justice (Care and Protection of Children) Act, 2000, a conscious decision was taken by Parliament to raise the age of male juveniles/children to eighteen years.

3. In recent years, there has been a spurt in criminal activities by adults, but not so by juveniles, as the materials produced before us show. The age limit which was raised from sixteen to eighteen years in the Juvenile Justice (Care and Protection of Children) Act, 2000, is a decision which was taken by the Government, which is strongly in favour of retaining Sections 2(k) and 2(l) in the manner in which it exists in the Statute Book.

4. One misunderstanding of the law relating to the sentencing of juveniles, needs to be corrected. The general understanding of a sentence that can be awarded to a juvenile under Section 15(1)(g) of the Juvenile Justice (Care and Protection of Children) Act, 2000, prior to its amendment in 2006, is that after attaining the age of eighteen years, a juvenile who is found guilty of a heinous offence is allowed to go free. Section 15(1)(g), as it stood before the amendment came into effect from 22nd August, 2006, reads as follows:

   "15(1)(g) make an order directing the juvenile to be sent to a special home for a period of three years:
   in case of juvenile, over seventeen years but less than eighteen years of age, for a period of not less than two years;
   in case of any other juvenile for the period until he ceases to be a juvenile:

Provided that the Board may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case, it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit."

5. It was generally perceived that a juvenile was free to go, even if he had committed a heinous crime, when he ceased to be a juvenile.

6. The said understanding needs to be clarified on account of the amendment which came into force with effect from 22.8.2006, as a result whereof Section 15(1)(g) now reads as follows:

"Make an order directing the juvenile to be sent to a special home for a period of three years: Provided that the Board may if it is satisfied that having regard to the nature of the offence and the circumstances of the case, it is expedient so to do, for reasons to be recorded reduce the period of stay to such period as it thinks fit."

7. The aforesaid amendment now makes it clear that even if a juvenile attains the age of eighteen years within a period of one year he would still have to undergo a sentence of three years, which could spill beyond the period of one year when he attained majority.

8. There is yet another consideration which appears to have weighed with the worldwide community, including India, to retain eighteen as the upper limit to which persons could be treated as children. In the Bill brought in Parliament for enactment of the Juvenile Justice (Care and Protection of Children) Act of 2000, it has been indicated that the same was being introduced to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of certain matters relating to and disposition of delinquent juveniles. The essence of the Juvenile Justice (Care and Protection of Children) Act, 2000, and the Rules framed thereunder in 2007, is restorative and not retributive, providing for rehabilitation and re-integration of children in conflict with law into mainstream society. The age of eighteen has been fixed on account of the understanding of experts in child psychology and behavioral patterns that till such an age the children in conflict with law could still be redeemed and restored to mainstream society, instead of becoming hardened criminals in future. There are, of course, exceptions where a child in the age group of sixteen to eighteen may have developed criminal propensities, which would make it virtually impossible for him/her to be reintegrated into mainstream society, but such examples are not of such proportions as to warrant any change in thinking, since it is probably better to try and re-integrate children with criminal propensities into mainstream society, rather than to allow them to develop into hardened criminals, which does not augur well for the future.

9. This being the understanding of the Government behind the enactment of the Juvenile Justice (Care and Protection of Children) Act, 2000, and the amendments effected thereto in 2006, together with the Rules framed thereunder in 2007, and the data available with regard to the commission of heinous offences by children, within the meaning of Sections 2(k) and 2(l) of the Juvenile Justice (Care and

	Protection of Children) Act, 2000, we do not think that any interference is necessary with the provisions of the Statute till such time as sufficient data is available to warrant any change in the provisions of the aforesaid Act and the Rules. On the other hand, the implementation of the various enactments relating to children, would possibly yield better results. The Writ Petitions and the Transferred Case are, therefore, dismissed, with the aforesaid observations. There shall, however, be no order as to costs.
12.	**PARAG BHATI vs. STATE OF UTTAR PRADESH,** CRIMINAL APPEAL NO. 486 OF 2016, Date of Judgment- 12/05/2016, Citation- (2016)12SCC744 = AIR2016SC2418 = 2016(3)UC1701
	Judgment By:A.K. Sikri and R.K. Agrawal, JJ.
	Accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor
	Held: 1. While considering a similar question, this Court in Ashwani Kumar (supra) held as under:- "32. "Age determination inquiry" contemplated under Section 7-A of the Act read with Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court needs to obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court needs to obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the abovementioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year. 33. Once the court, following the above mentioned procedures, passes an order, that order shall be the conclusive proof of the age as regards such child or juvenile in conflict with law. It has been made clear in sub-rule (5) of Rule 12 that no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof after referring to sub-rule (3) of Rule 12. Further, Section 49 of the JJ Act also draws a presumption of the age of the juvenility on its determination. 34. Age determination inquiry contemplated under the JJ Act and the 2007 Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion, etc. There may be situations where the entry 22 made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a corporation or a municipal authority or a panchayat may not be correct. But court, Juvenile Justice Board or a committee functioning under the JJ Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the court, the Juvenile Justice Board or the committee need to go for medical report for age determination." 2. In Abuzar Hossain (supra), wherein a three-Judge Bench of this Court has already summarized the position regarding what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as

	to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rules 12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry under Rule 12. The credibility and/or acceptability of the documents would depend on the facts and circumstances of each case and no hard-and-fast rule can be prescribed that they must be prima 23 facie accepted or rejected and if such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes of Section 7-A and order an enquiry for determination of the age of the appellant. 3. It is no doubt true that if there is a clear and unambiguous case in favour of the juvenile accused that he was a minor below the age of 18 years on the date of the incident and the documentary evidence at least prima facie proves the same, he would be entitled to the special protection under the JJ Act. But when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording as to whether an accused is a juvenile or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of protecting the confidence of common man in the institution entrusted with the administration of justice. 4. The benefit of the principle of benevolent legislation attached to the JJ Act would thus apply to only such cases wherein the accused is held to be a juvenile on the basis of at least prima facie evidence regarding his minority as the benefit of the possibilities of two views in regard to the age of the alleged accused who is involved in grave and serious offence which he committed and gave effect to it in a well-planned manner reflecting his maturity of mind rather than innocence indicating that his plea of juvenility is more in the nature of a shield to dodge or dupe the arms of law, cannot be allowed to come to his rescue. 5. It is settled position of law that if the matriculation or equivalent certificates are available and there is no other material to prove the correctness, the date of birth mentioned in the matriculation certificate has to be treated as a conclusive proof of the date of birth of the accused. However, if there is any doubt or a contradictory stand is being taken by the accused which raises a doubt on the correctness of the date of birth then as laid down by this Court in Abuzar Hossain (supra), an enquiry for determination of the age of the accused is permissible which has been done in the present case. 6. In view of the foregoing discussion, we do not find any illegality in the orders passed by the Board and the Court of Sessions and also of the High Court which requires our interference

Bail

13.	**Gopinath Ghosh Vs. The State of West Bengal,** Criminal Appeal No. 623 of 1983 Decided On: **11.11.1983**, Citation-AIR 1984 SC 237 = [1984]1SCR803 = 1984(Supp)SCC228.
	Judgment By: A.N. Sen and D.A. Desai, JJ.

The appellant falls within the proviso to Section 24(2), he could not be sentenced to suffer imprisonment. Therefore, the entire trial of the appellant is without jurisdiction and is vitiated.

Held:

1. It clearly transpires from a combined reading of the sections hereinbefore extracted that where a juvenile delinquent is arrested, he/she has to be produced before a juvenile court and if no juvenile court is established for the area amongst others, the Court of Session will have produces of a juvenile court. Such a juvenile delinquent ordinarily has to be released on bail irrespective of the nature of the offence alleged to have been committed unless it is shown that there appears reasonable grounds for believing that the release is likely to bring him under the influence of any criminal or expose him to moral danger or defeat the ends of justice. Section 25 forbids any trial of a juvenile delinquent and only an inquiry can be held in accordance with the provisions of the CrPC for the trial of a summons case and the bur of Section 24 which has been given an overriding effect as it opens with the non obstante clause likes away the power of the Court to impose a sentence of imprisonment unless the case falls under the proviso.

2. Unfortunately, in this case, appellant Gopinath Ghosh never questioned the jurisdiction of the Sessions Court which tried him for the offence of murder. Even the appellant had given his age as 20 years when questioned by the learned Additional Sessions Judge. Neither the appellant nor his learned Counsel appearing before the learned Additional Sessions Judge as well as at the hearing of his appeal in the High Court ever questioned the jurisdiction of the trial court to hold the trial of the appellant, nor was it ever contended that he was a juvenile delinquent within the meaning of the Act and therefore, the Court had no jurisdiction to try him, as well as the Court had no jurisdiction to sentence him to suffer imprisonment for life. It was for the first time that this contention was raised before this Court. However, in view of the underlying intendment and beneficial provisions of the Act read with Clause (f) of Article 39 of the Constitution which provides that the State shall direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment, we consider it proper not to allow a technical contention that this contention is being raised in this Court for the first time to thwart the benefit of the provisions being extended to the appellant, if he was otherwise entitled to it.

3. The report of the learned Additional Sessions Judge is self evident . It is unquestionably established on unassailable evidence that on August 19, 1974, the date of the offence, appellant was aged between 16 and 17 years. He was therefore, a juvenile delinquent, Obviously, the learned Magistrate could not have committed his case to the Court of Session. Only an inquiry could have been held against him as provided in Section 25 of the Act and unless the case of the appellant falls within the proviso to Section 24(2), he could not be sentenced to suffer imprisonment. Therefore, the entire trial of the appellant is without jurisdiction and is vitiated. Therefore, the conviction of the appellant for having committed an offence Under Section 302 IPC and sentence for imprisonment for life imposed by the learned Additional Sessions Judge and confirmed by the High Court are unsustainable and they must be set aside.

4. The next question is what should be the sequel to our decision ? The appellant has been in prison for some years. But neither his

	antecedents nor the background of his family are before us. It is difficult for us to gauge how the juvenile court would have dealt with him. Therefore, we direct that the appellant be released on bail forthwith by the learned Additional Sessions Judge, Nadia. The case is remitted to the learned Magistrate for proceeding further in accordance with law keeping in view the provisions of the Act. 5. Before we part with this judgment, we must take notice of a developing situation in recent months in this Court that the contention about age of a convict and claiming the benefit of the relevant provisions of the Act dealing with juvenile delinquents prevalent in various States is raised for the first time in this Court and this Court is required to start the inquiry afresh. Ordinarily this 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 socially progressive statute by taking shield behind the technicality of the contention being raised for the first time in this Court. A way has therefore, to be found from this situation not conducive to speedy disposal of cases and yet giving effect to the letter and the spirit of such socially beneficial legislation. We are of the opinion that whenever a case is brought before the Magistrate and the accused appears to be aged 21 years as below, before proceeding with the trial or undertaking an inquiry, an inquiry must be made about the age of the accused on the date of the occurrence. This ought to be more so where special acts dealing with juvenile delinquent are in force. If necessary, the Magistrate may refer the accused to the Medical Board or the Civil Surgeon, as the case may be, for obtaining credit worthy evidence about age. The Magistrate may as well call upon accused also to lead evidence about his age. Thereafter, the learned Magistrate may proceed in accordance with law. This procedure, if properly followed, would avoid a journey upto the Apex Court and the; return journey to the grass-root court. If necessary and found expedient, the High Court may on its administrative side issue necessary instructions to cope with the situation herein indicated. 6. The appeal for the reasons herein indicated is allowed and the conviction of the appellant for an offence Under Section 302 IPC and sentence imprisonment for life imposed by the learned Additional Sessions Judge and confirmed by the High Court are set aside and the case is remitted to learned Magistrate for disposal according to law.
14.	**ARNIT DAS vs. STATE OF BIHAR,** Criminal Appeal No. 469 of 2000, Date of Judgment- 09/05/2000, Citation- 2000(5) SCC 488 = AIR2000SC2264 = JT2000(6)SC320.
	Judgment By:K.T. Thomas and R.C. Lahoti, JJ.
	Juvenile Delinquency
	Held: Under Section 18, when any person accused of a bailable or non-bailable offence and apparently a juvenile is arrested or detained or appears or is brought before a Juvenile Court, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, or in any other law for the time being in force, be released on bail with or without surety unless there appears reasonable grounds for believing that the release is likely to bring him in association with any known criminal or expose him to moral danger or that his release would defeat the ends of justice. In the latter case, the person has to be kept in an observation home or a place of safety until he can be brought before a Juvenile Court. The Juvenile Court if not releasing the person on bail must not commit him to prison but send him to an observation home or a place of safety

	during the pendency of the enquiry before him. Under Section 20, where a juvenile charged with an offence appears or is produced before a Juvenile Court, the Juvenile Court shall hold an enquiry in accordance with the provisions of Section 39. A reading of all these provisions referred to herein above makes it very clear that an enquiry as to the age of the juvenile has to be made only when he is brought or appears before the competent authority. A Police Officer or a Magistrate who is not empowered to act or cannot act as a competent authority has to merely form an opinion guided by the apparent age of the person and in the event of forming an opinion that he is a juvenile, he has to forward him to the competent authority at the earliest subject to arrangements for keeping in custody and safety of the person having been made for the duration of time elapsing in between. The competent authority shall proceed to hold enquiry as to the age of that person for determining the same by reference to the date of the appearance of the person before it or by reference to the date when person was brought before it under any of the provisions of the Act. It is irrelevant what was the age of the person on the date of commission of the offence. Any other interpretation would not fit in the scheme and phraseology employed by the Parliament in drafting the Act.
15.	**PRATAP SINGH vs. STATE OF JHARKHAND,** CRIMINAL APPEAL NO. 210 of 2005, Date of Judgment: **02/02/2005**, Citation- (2005) 3 SCC 551= [2005]1SCR1019 = AIR2005SC2731 = JT2005(2)SC271.
	Judgment By:N. Santosh Hegde, S.N. Variava, B.P. Singh, H.K. Sema and S.B. Sinha, JJ.
	Bail and custody of juvenile
	Held: 1. Section 18 provides for bail and custody of juveniles. It reads:- 18. BAIL AND CUSTODY OF JUVENILES. (1) When any person accused of a bailable or non-bailable offence and apparently a juvenile is arrested or detained or appears or is brought before a Juvenile Court, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law for the time being in force, be released on bail with or without surety but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral danger or that his release would defeat the ends of justice. (2) When such person having been arrested is not released on bail under Sub-section (1) by the officer-in-charge of the police station, such officer shall cause him to be kept in an observation home or a place of safety in the prescribed manner (but not in a police station or jail) until he can be brought before a Juvenile Court. (3) When such person is not released on bail under Sub-section (1) by the Juvenile Court it shall, instead of committing him to prison, make an order sending him to an observation home or a place of safety for such period during the pendency of the inquiry regarding him as may be specified in the order."

	2. It will be noticed that the word is has been used in more than one place in this Section also. Often than not, an offender is arrested immediately after an offence is alleged to have been committed or some time even arrested on the spot. 3. This would also show that the arrest and release on bail and custody of juveniles, the reckoning date of a juvenile is the date of an offence and not the date of production.
16.	**Jitendra Ram @ Jitu Vs. Respondent: State of Jharkhand**, Criminal Appeal No. 489 of 2006, Decided On**: 25.04.2006**, Citation- (2006) 9SCC 428 = JT2006(5)SC138 = AIR2006SC1933 = [2006]Supp(1)SCR286.
	Judgment By:S.B. Sinha and P.K. Balasubramanyan, JJ.
	Grant of bail to the juvenile appellant.
	Held: 1. The sole contention raised by Mr. ShekharPrit Jha, the learned Counsel for the appellant, is that the appellant on the date of commission of the said offence was a minor within the meaning of the provisions of the Bihar Children Act, 1982 (for short, 'the Act'). The learned Counsel would contend that the appellant had disclosed his age at the first opportunity, namely, when the bail petition was moved before the Patna High Court and, inter alia, relying on or on the basis of the said statement he was released on bail by an order dated 09.05.1986. It was further submitted that even while the appellant was examined by the learned trial judge under Section 313 of the Code of Criminal Procedure (Cr.P.C.) his age was estimated as 28 years. The High Court also in its impugned judgment noticed the submissions made to the effect that having regard to the said estimate of age being 28 years by the trial court on 17.12.1998 while the appellant was being examined under Section 313 Cr.P.C. he was a juvenile as on the date of commission of the offence i.e. 18.11.1985. The said question has, however, not been gone into by the High Court. 2. According to the learned Counsel if once it is found that the appellant was a juvenile within the meaning of Section 2(h) of the Juvenile Justice Act, 1986 or a child under the provisions of the Act, he was entitled to the protection thereunder and in that view of the matter, he could have also been sent to the Juvenile Home in terms of Section 9, or Special Home in terms of Section 10, or Observation Home in terms of Section 11 of the Act and in any event could not have been sentenced to imprisonment for life. Furthermore, it was the Juvenile Court alone, which was competent to pass an order against him and in that view of the matter the entire judgment of conviction and sentence passed against the appellant would be vitiated in law. It was furthermore submitted that the estimate of age by the court is final and binding and in that view of the matter, the appellant could not have been sentenced to undergo imprisonment for life. 3. When the offence was committed, since the Juvenile Justice Act, 1986 had not come into force, the provisions thereof would have no application; the Bihar Children Act, 1982 was, however, applicable in this case. In terms of the provisions of the said Act, a child means a boy who has not attained the age of 16 years. The Children's Court was to be constituted under Section 5 of the Act, but it is not in dispute that such court had not been constituted at the relevant time. The provisions of Juvenile Justice (Care and Protection of Children) Act, 2000, it appears, have been given effect to in the State of Jharkhand only in or about July 2005. Before the trial court, the appellant

	did not raise any plea that he was a juvenile. It is true that such a plea was raised while moving an application for bail for the first time; but from a perusal of the order passed by the Patna High Court dated 06.05.1986, it would appear that the ground that the appellant was a child itself was not the only one on which the order granting bail to the appellant was passed. The said order dated 06.05.1986 reads as under: Heard learned Counsel for the petitioner and the State. It has been submitted that there is no evidence except the extra judicial confession made by the petitioner and that the petitioner had pointed out the place from where the dead body was recovered. It is further submitted that the petitioner is below 16 years of age. In the circumstances, the petitioner is directed to be enlarged on bail on furnishing bail bond of Rs. 8,000/- with two sureties of the like amount each to the satisfaction of Sri D.D. Guru, Judicial Magistrate, Lohardaga, in Bhandra P.S. Case No. 33/85 (G.R.294/85). The appellant was examined under Section 313 Cr. P.C. where his age was estimated to be 28 years. The said estimated age was recorded by the trial court again on 09.04.1999 being 28 years. In the judgment of the trial court again the aforementioned age was mentioned. **4.** In absence of any plea having been taken by the appellant, it is not disputed, that the court at no stage had gone into the question as regard the age of the appellant.
17.	**Vikas Chaudhary vs. State of NCT of Delhi and Anr.,** Special Leave Petition (Crl.) No. 8628 of 2009, Decided On: **11.08.2010**, Citation- (2010) 8 SCC 508 = [2010]9SCR1076 = AIR2010SC3380.
	Judgment By: Altamas Kabir and Mukundakam Sharma, JJ.
	Continuity of offence doesn't lead to the JJ Act benefits
	Held: 1. The learned Additional 'Sessions Judge, by his order dated 29th July, 2008, was of the view that the proper authority to consider the matter on remand, was the Court of Sessions and not the Juvenile Justice Board and consequently, it ordered for the production of the Petitioner before it. On 6th October, 2008, the Petitioner, who was on bail, surrendered before the Additional Sessions Judge and was taken into custody and is in custody since then. By its judgment dated 2nd January, 2009, the Additional Sessions Judge held that the offence of murder coupled with abduction could be considered to be a continuing offence and in such circumstances, the dates when the ransom calls were made were significant. It was held that the last date on which the ransom call had been made, namely, 11th March, 2003, would have to be taken as the relevant date from which the age of the petitioner was to be counted to determine as to whether he was a minor within the meaning of the Juvenile Justice (Care and Protection of Children) Act, 2000 hereinafter referred to as "the Juvenile Justice Act".

2. Aggrieved by the aforesaid order of the learned Additional Sessions Judge, the Petitioner filed Criminal Revision P. 61 of 2009 before the Delhi High Court along with an application for grant of bail under Section 439 Cr.P.C. The High Court, by its judgment dated 13th March, 2009, dismissed the Revision Petition and the accompanying applications upon holding that the making of ransom calls on 19thJanuary, 2003, 10th March, 2003 and 11th March, 2003, even after the murder of the victim, clearly constitutes an offence under Section 364A. It also held that if there was any error in framing of the charges, the same could be cured under Section 464 Cr.P.C. The trial Court, therefore, amended the charges on 16th April, 2009. The 4 witnesses who had been examined earlier in the absence of the Petitioner, were recalled on 5th May, 2009, and their statements were recorded in the presence of the Petitioner accused.

3. The instant Special Leave Petition has been filed against the said judgment and order dated 13thMarch, 2009 of the Delhi High Court in Crl.R.P. No. 61/09.

4. The main thrust of the arguments advanced on behalf of the Petitioner was that no case had been made out against the Petitioner on the basis of Missing Report made by the complainant on 18thJanuary, 2003. A point of equal importance was also urged by Mr. K.B. Sinha, learned Senior Advocate, appearing for the Petitioner, to the effect that a ransom call could not have been made in respect of a dead person. He urged that a ransom call could certainly follow after an abduction, but once the victim of the abduction had been eliminated, the very question of an offence under Section 364A I.P.C. relating to ransom calls was no longer maintainable and at best, the offence could be said to have been committed under Section 364 I.P.C. On reference to the various definitions of the expression "demand of ransom", a, further submission was made that in all cases the expression had been used in respect of a living person since the object of the ransom was release of the abducted person after payment of such ransom. Reliance was placed on the decision of this Court in State of Bihar v. DeokaranNenshi and Anr. MANU/SC/0469/1972: AIR 1973 SC 908 in support of the contention that once the very object of an offence under.. Section 364A I.P.C. ceased to exist, it could not be contended that an offence under Section 364A continued to survive. In the said decision, it was observed that continuing offence is distinguishable from an offence which is committed once and for all. It is one of those offences which arise out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs. and recurs, an offence is committed. Accordingly, the offence as contemplated under Section 364A I.P.C. came to an end upon the death of the victim and could not be said to be a continuing offence. It was urged that in view of the amendments effected to the definition of "juvenile" in Section 2(k) of the Juvenile Justice Act, which has been clearly considered and explained in Hari Ram v. State of Uttar Pradesh MANU/SC/0744/2009 : (2009) 13 SCC 211 the petitioner was entitled to the benefit of Sections 12 and 15 thereof.

5. On behalf of the State it was submitted by Mr. Mohan Jain, learned Additional Solicitor General, that what would be the date of an offence in a given case has to be decided in regard to the fact situation thereof. He urged that Section 472 Cr.P.C. contemplates a

continuing offence and a fresh period of limitation is to run at every moment of time during which the offence continues and, although, an argument had been advanced that the entire offence had been committed on 18thJanuary, 2003, there is no escape from the fact that it has also been established on evidence that the father of the deceased continued to receive calls for payment of ransom, despite the fact that the victim had been killed in the meantime. Mr. Jain urged that not only was the offence extremely grave, but it was further compounded by the conduct of the accused, in continuing to make ransom calls even after he was alleged to have killed the victim.

6. Mr. Jain submitted that this is one of those rare cases where the offence initially committed must be held to be continuing on account of the nature of the offence and the manner in which it was committed. The learned Additional Solicitor General urged that no interference was, therefore, called for with the judgment of the High Court and the Special Leave Petition was liable to be dismissed.

7. Mr. Sushil Kumar, learned Senior Advocate, appearing for the complainant Mr. Vimal Chadha, submitted that the courts below had rightly held that the making of ransom calls after the death of the victim has to be treated as a part of the same transaction, since one was consequentially dependent on the other. He submitted that once ransom calls were made even after the death of the victim, the offence became a continuous offence and the age of the petitioner would have to be computed from the date on which part of the offence was committed. Accordingly, while the Petitioner was found to have participated in the abduction of the deceased, which resulted in the ransom calls and the death of the victim was very much a part of the initial abduction and was, therefore, a continuing offence which attracted the provisions of Section 472 Cr.P.C, which would have to be read with the principal offence allegedly committed under Section 364A I.P.C.

8. The question which, therefore, calls for an answer is whether the High Court was right in holding that the making of ransom calls, even after the death of the victim was a continuing offence so as to attract the provisions of Section 364A I.P.C.

9. There is little doubt that the main object of the offence committed by the accused was to extort money from the parents of the deceased victim by way of ransom, even after the death of the victim, as will be evident from the subsequent phone calls made right upto 11th March, 2003, asking for, ransom. The offence under Section 364A did not come to an end only on account of the death of the victim since ransom calls had been made even though the victim had been killed. It is no doubt true that if the initial date of abduction, namely, 18thJanuary, 2003, is taken to be the date on which the offence under Section 364A had been committed, as an isolated event, the Petitioner would have been a minor within the meaning of the Juvenile Justice Act, 2000. However, if 11th March, 2003, being the date on which the last ransom call was made, is taken as the date on which the aforesaid offence was committed, then the Petitioner would have ceased to be a minor and the above-mentioned Act would not apply to him.

10. Section 472 Cr.P.C., supports the submissions made both by Mr. Mohan Jain, learned Additional Solicitor General and Mr. Sushil Kumar. We are unable to accept Mr. Sinha's submission that the offence under Section 364A I.P.C. stood abrogated upon the death of the victim.

	On the other hand, the continuation of ransom calls being made, even after the death of the victim, converts the offence into a continuing offence within the meaning of Section 472 Cr.P.C. The provisions of Section 364A I.P.C. which are extracted hereinbelow, will make the position clear: 364A. Kidnapping for ransom, etc- Whoever kidnaps or abducts any person or keeps a person in detention of the such kidnapping or abduction and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organization or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine. 11. Section 364A I.P.C. states that apart from keeping a person in detention after kidnapping or abducting him or threatening to cause death or hurt to such person or by his conduct giving rise to a reasonable apprehension that such person may be put to death or hurt, and also that if the person involved in the kidnapping or abduction, actually causes hurt or death to such person for a ransom, he shall be punishable with death or imprisonment for life and shall also be liable to fine. 12. Section 364A, therefore, contemplates even the death of the abducted person for the purpose of demanding ransom. Section 472 Cr.P.C, which defines continuing offence, reads as follows: 472. Continuing offence.- In the case of a continuing offence, a fresh period of limitation shall begin to run at every moment of the time during which the offence continues. 13. If Section 364A I.P.C. and Section 472 Cr.P.C. are to be read together, it has to be held that even after the death of the victim every time a ransom call was made a fresh period of limitation commenced. Accordingly, it would be the date on which the last ransom call was made, i.e., 11thMarch, 2003, which has to be taken to be the date of commission of the offence and, accordingly, the Juvenile Justice Act was no longer applicable to the Petitioner, who had attained the age of 18 years by then. 14. We, therefore, see no reason to interfere with the order of the High Court impugned in this Special Leave Petition, which is accordingly dismissed.
18.	**ASHWANI KUMAR SAXENA VS STATE OF M.P,** Criminal Appeal No. 1403 of 2012, Decided On: **13.09.2012**, Citation- (2012) 9 SCC 750 =AIR2013SC553 = [2012]10SCR540
	Judgment By:K.S. Panicker Radhakrishnan and Madan B. Lokur, JJ.
	the Appellant filed an application before Chief Judicial Magistrate (CJM) Court, Chhatarpur under Sections 6 and 7 of the J.J. Act claiming that he was juvenile on the date of the incident and hence, the criminal court had no jurisdiction to entertain this case

	and the case be referred to Juvenile Justice Board and he be granted bail.
	Held: 1. We notice that the accused is also involved in few other criminal cases as well. Since we have found that the Appellant was a juvenile on the date of the incident, in this case, we are inclined to set aside the sentence awarded in sessions case No. 28/2009 by Sessions Court and direct the High Court to place the records before J.J. Board for awarding appropriate sentence in accordance with the provisions of Act, 2000, and if the Appellant has already undergone the maximum sentence of three years as prescribed in the Act, needless to say he has to be let free, provided he is not in custody in any other criminal case. We are informed that the Appellant is involved in few other criminal cases as well, those cases will proceed in accordance with law. 2. The appeal is allowed. Sentence awarded by the court below is accordingly set aside and the case records be placed before the concerned J.J. Board for awarding appropriate sentence.
19.	**Subramanian Swamy and Ors. Vs Raju Thr. Member Juvenile Justice Board and Anr**, Criminal Appeal No. 695 of 2014 (Arising Out of SLP (Crl.) No. 1953 of 2013) and W.P. (Crl.) No. 204 of 2013,Decided On: **28.03.2014**, Citation**-** AIR 2014 SC 1649 = (2014)8SCC390 = JT2014(4)SC328.
	Judgment By:P. Sathasivam, C.J.I., Ranjan Gogoi and Shiva Kirti Singh, JJ.
	Petition as to enable the prosecution of the juvenile respondent in a regular criminal court.
	1. A juvenile who is accused of a bailable or non-bailable offence "shall" be released on bail or placed under the care of a suitable person/institution. This is subject to three exceptions: (i) where his release would bring him into association with a known criminal, (ii) where his release would expose him to moral, physical or psychological danger, or (iii) where his release would defeat the ends of justice. Even where bail is refused, the juvenile is to be kept in an observation home or a place of safety (and not jail). Differences between JJ System and Criminal Justice System: 1. FIR and charge-sheet in respect of juvenile offenders is filed only in 'serious cases', where adult punishment exceeds 7 years. 2. A juvenile in conflict with the law is not "arrested", but "apprehended", and only in case of allegations of a serious crime. 3. 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. 4. Under no circumstances is the juvenile to be detained in a jail or police lock-up, whether before, during or after the Board inquiry. 5. Grant of Bail to juveniles in conflict with the law is the Rule. 6. 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 nature of the proceedings acquires a child-friendly colour. 7. 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.

8. The adult criminal system does not regulate the activities of the offender once she 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.

2. In the earlier paragraphs of this report we have analyzed in detail the difference between the criminal justice system and the system for dealing with offenders under the JJ Act. The Act does not do away or obliterate the enforcement of the law insofar as juvenile offenders are concerned. The same penal law i.e. Indian Penal Code apply 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 Indian Penal Code. The above situation is vastly different from what was before the Court in Mithu (supra) and also in Dadu (supra). In Mithu (supra) a separate treatment of the accused found guilty of a second incident of murder during the currency of the sentence for an earlier offence of murder was held to be impermissible Under Article 14. Besides the absence of any judicial discretion, whatsoever, in the matter of imposition of sentence for a second Act of murder was held to be "out of tune" with the constitutional philosophy of a fair, just and reasonable law. On the other hand in Dadu (supra), Section 32A of the NDPS Act which had ousted the jurisdiction of the Court to suspend a sentence awarded under the Act was read down to mean that the power of suspension, notwithstanding Section 32A of the NDPS Act, can still be exercised by the appellate court but subject to the conditions stipulated in Section 37 namely (i) there are reasonable grounds for believing that the accused is not guilty of such offence; and (ii) that he is not likely to commit any offence while on bail are satisfied. Nothing as sweeping and as drastic in Mithu (supra) and Dadu (supra) has been introduced by the provisions of the Act so as to enable us to share the view expressed by Dr.Hingorani that the Act sets at naught all the essential features of the criminal justice system and introduces a scheme which is abhorrent to our constitutional values. Having taken the above view, we do not consider it necessary to enter in the consequential arena, namely, the applicability of the provisions of Article 20(3) of the Constitution and Section 300 of the Code of Criminal Procedure to the facts of the present case as on the view that we have taken no question of sending the juvenile-Raju to face a regular trial can and does arise.

3. Before parting, we would like to observe that elaborate statistics have been laid before us to show the extent of serious crimes committed by juveniles and the increase in the rate of such crimes, of late. We refuse to be tempted to enter into the said arena which is primarily for the legislature to consider. Courts must take care not to express opinions on the sufficiency or adequacy of such figures and should confine its scrutiny to the legality and not the necessity of the law to be made or continued. We would be justified to recall the observations of Justice Krishna Iyer in Murthy March Works (supra) as the present issues seem to be adequately taken care of by the same:

Right at the threshold we must warn ourselves of the limitations of judicial power in this jurisdiction. Mr Justice Stone of the Supreme Court of the United States has delineated these limitations in United States v. Butler MANU/USSC/0159/1936 : (1936) 297 US 1 thus:

The power of Courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent

	from judicial consciousness. One is that Courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our exercise of power is our own sense of self-restraint For the removal of unwise laws from the statute books appeal lies not to the Courts but to the ballot and to the processes of democratic Government. 4. In short, unconstitutionality and not unwisdom of a legislation is the narrow area of judicial review. In the present case unconstitutionality is alleged as springing from lugging together two dissimilar categories of match manufacturers into one compartment for like treatment. 5. Certain principles which bear upon classification may be mentioned here. It is true that a State may classify persons and objects for the purpose of legislation and pass laws for the purpose of obtaining revenue or other objects. Every differentiation is not a discrimination. But classification can be sustained only if it is founded on pertinent and real differences as distinguished from irrelevant and artificial ones. The constitutional standard by which the sufficiency of the differentia which form a valid basis for classification may be measured, has been repeatedly stated by the Courts. If it rests on a difference which bears a fair and just relation to the object for which it is proposed, it is constitutional. To put it differently, the means must have nexus with the ends. Even so, a large latitude is allowed to the State for classification upon a reasonable basis and what is reasonable is a question of practical details and a variety of factors which the Court will be reluctant and perhaps ill-equipped to investigate. In this imperfect world perfection even in grouping is an ambition hardly ever accomplished. In this context, we have to remember the relationship between the legislative and judicial departments of Government in the determination of the validity of classification. of course, in the last analysis Courts possess the power to pronounce on the constitutionality of the acts of the other branches whether a classification is based upon substantial differences or is arbitrary, fanciful and consequently illegal. At the same time, the question of classification is primarily for legislative judgment and ordinarily does not become a judicial question. A power to classify being extremely broad and based on diverse considerations of executive pragmatism, the Judicature cannot rush in where even the Legislature warily treads. All these operational restraints on judicial power must weigh more emphatically where the subject is taxation. (Emphasis is ours) 6. On the above note we deem it appropriate to part with the cases by dismissing the appeal filed by Dr. Subramanian Swamy and Others as well as the writ petition filed by the parents of the unfortunate victim of the crime.

PRELIMINARY ASSESSMENT
SUPREME COURT

20.	**Subramanian Swamy and Ors. vs. Raju Thr. Member Juvenile Justice Board and Anr.**Criminal Appeal No. 695 of 2014, (28.03.2014 - SC), Citation - MANU/SC/0248/2014

	Judgment by- P. Sathasivam, C.J.I., Ranjan Gogoi and Shiva Kirti Singh, JJ.
	psychological/mental, intellectual and emotional maturity of a person below 18 years cannot be objectively determined on an individual or case to case basis and the fixation of the Minimum Age of Criminal Responsibility (MACR) under the Act is a policy decision taken to give effect to the country's international commitments.
	Held: 1. By referring to the provisions of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (Beijing Rules); the Convention of the Rights of the Child, 1990 (CRC) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990 (Havana Rules), Dr. Swamy has contended that the international commitments entered into by India obliges it to set up a particular framework to deal with juvenile offenders and such obligations can be more comprehensively met and effectuated by understanding the Act in the aforesaid manner. The practice in vogue in several foreign jurisdictions, particularly, in the U.K., USA and Canada for adjudicating criminal liability of young offenders has also been placed before the Court. Specifically, it is pointed out that the practice of statutory exclusion which ensures that perpetrators of certain grave offences are prosecuted as adults; 'judicial waiver', granting discretion to special juvenile courts to waive jurisdiction and transfer the juvenile's case to an ordinary court of law and also the policy of concurrent jurisdiction of both the ordinary and juvenile courts giving discretion to the prosecutor to initiate proceedings in the more suitable court are followed in such jurisdictions. Shri Swamy has also suggested that Section 28 of the Act be read together with Section 15 to enable the alternatively higher punishment under other State/Central enactments, such as the Indian Penal Code to be awarded to a juvenile offender. It is argued that this would incorporate the policy of concurrent jurisdiction of both ordinary criminal courts and JJ Boards. 2. Legislative overreach in enacting the Act is the core argument advanced on behalf of the Petitioners in Writ Petition (Crl.) No. 204 of 2013. Dr. Aman Hingorani, learned Counsel urges that the ban on jurisdiction of criminal courts by Section 7 of the Act is unconstitutional inasmuch as it virtually ousts the criminal justice system from dealing with any offence committed by a juvenile. Parliament cannot make a law to oust the judicial function of the courts or even judicial discretion in a matter which falls within the jurisdiction of the courts. Reliance in this regard is placed on the judgments of this Court in the case of Mithu v. State of Punjab MANU/SC/0065/1983 : (1983) 2 SCC 277 and Dadu v. State of Maharashtra MANU/SC/0637/2000 : (2000) 8 SCC 437. It is argued that what the Act contemplates in place of a regular criminal trial is a non-adversarial inquiry against the juvenile where the prime focus is not on the crime committed but on the reasons that had led the juvenile to such conduct. The maximum power of 'punishment', on proof of guilt, is to send the juvenile to a special home for three years. The entire scheme under the Act being substantially different from what is provided by the Code of Criminal Procedure for investigation of offences and for trial and punishment of offenders, it is submitted that the Act offends a core constitutional value namely, the existence of a criminal justice system. The proceedings against the juvenile Raju held by the JJ Board are, therefore, null and void and the said juvenile is liable to be tried by a competent criminal court in accordance with the procedure prescribed. In this regard, it is also submitted that the concept of double jeopardy Under Article 20(3) of the Constitution and Section 300 of Penal Code will have no application inasmuch as the proceedings before the JJ Board did/does not amount to a trial.

Contentions somewhat similar to what has been advanced by Dr. Swamy to explain the degree of constitutional flexibility that the Act would enjoy has also been urged by Dr.Hingorani who however goes a step forward to contend that the decision in Salil Bali v. Union of India MANU/SC/0718/2013 : (2013) 4 SCC 705 will not be an inhibition for the Court to answer the question(s) raised as not only the issues arising in Salil Bali (supra) are different but the said decision is founded on an entirely different legal perspective.

3. Shri Anoop G. Chaudhary, learned senior counsel appearing for the intervenor Smt. June Chaudhari and Dr.Madhuker Sharma, intervenor, appearing in person have supported the case projected by Dr. Swamy and Dr. Aman Hingorani, noticed above.

4. The arguments advanced on behalf of the Appellants as well as the writ Petitioners are hotly contested. Shri Sidharth Luthra, learned Additional Solicitor General submits that what is contemplated by the Act is in furtherance of the country's obligations arising from a series of international conventions to which India is a signatory. The Act is an expression of legislative wisdom to treat all persons below 18 as juveniles and to have an alternate system of dealing with such juveniles who come into conflict with law. Shri Luthra has submitted that the constitutional validity of the Act has been upheld by a Coordinate Bench in Salil Bali (supra). Shri Luthra has also submitted that psychological/mental, intellectual and emotional maturity of a person below 18 years cannot be objectively determined on an individual or case to case basis and the fixation of the Minimum Age of Criminal Responsibility (MACR) under the Act is a policy decision taken to give effect to the country's international commitments. In so far as the specific contentions advanced on behalf of the writ Petitioners in W.P. (Crl.) No. 204 of 2013 is concerned, Shri Luthra has submitted that the Act does not provide a blanket immunity to juvenile offenders, as contended. What the Act contemplates is a different procedure to deal with such offenders. If found guilty, they are subjected to a different scheme of punishment. The learned Counsel appearing on behalf of the juvenile Raju, while supporting the contentions advanced by Shri Luthra, has further submitted that the United Nations Convention on the Rights of the Child, 1990 read with the concluding Resolution of the Committee on Child Rights (constituted under the UN Convention) of the year 2000 qua India and the General Resolution of the year 2007 clearly contemplate the MACR as 18 years and mandates member States to act accordingly. Learned Counsel on the strength of the elaborate academic and research work placed on record has tried to persuade the Court to take the view that:

(1) Countries like U.K. Canada and USA have departed from the obligations under the UN Convention and are in breach of their international commitments. The incidence of crime by juveniles in those countries is very high which is not so in India. It is submitted that, of late, a re-thinking on the issue is discernible to demonstrate which reliance is placed on some recent pronouncements of the US Supreme Court, details of which will be noticed hereinafter.

(2) That the level of mental/intellectual maturity in any given case cannot be determined with any degree of accuracy and precision and the results vary from case to case and from individual to individual. A system which provides for an option to refer a juvenile to a regular court, therefore, ought not to be accepted as no objective basis for such reference exists.

1. Shri AmodKanth, representing Prayas Juveniles Aid Centre and learned Counsel for the intervener Centre for Child and the Law, National Law School of India University and Ors. have supported the stand taken by the learned Additional Solicitor General. Elaborate written submissions have been filed to substantiate the argument that having regard to expert/psychological/medical opinion available the MACR cannot be determined, with any acceptable degree of precision, on the basis of a case to case study for which reason the legislative wisdom inherent in the Act must be accepted and respected. Statistics of the crimes (Crime rate) committed by juvenile offenders have also been brought on record to contend that the beneficial nature of the legislation does not call for any relook, even on the touchstone of Constitutional permissibility.

2. At the very outset, two initial hurdles to the present adjudication, set up by the Respondents, may be conveniently dealt with. The first is that the constitutional validity of the Act has been upheld in Salil Bali (supra) and it is not necessary to revisit the said decision even if it be by way of a reference to a larger Bench. The second is with regard to the recommendations of the Justice J.S. Verma Committee following which recommendations, the Criminal Law Amendment Act, 2013 has been enacted by the legislature fundamentally altering the jurisprudential norms so far as offences against women/sexual offences are concerned.

3. In Salil Bali (supra) the constitutional validity of the Act, particularly, Section 2(k) and 2(l) thereof was under challenge, inter alia, on the very same grounds as have now been advanced before us to contend that the Act had to be read down. In Salil Bali (supra) a coordinate Bench did not consider it necessary to answer the specific issues raised before it and had based its conclusion on the principle of judicial restraint that must be exercised while examining conscious decisions that emanate from collective legislative wisdom like the age of a juvenile. Notwithstanding the decision of this Court in Kesho Ram and Ors. v. Union of India and Ors. MANU/SC/0334/1989 : (1989) 3 SCC 151 holding that, "the binding effect of a decision of this Court does not depend upon whether a particular argument was considered or not, provided the point with reference to which the argument is advanced subsequently was actually decided in the earlier decision..." (para 10) the issue of res judicata was not even remotely raised before us. In the field of public law and particularly when constitutional issues or matters of high public interest are involved, the said principle would operate in a somewhat limited manner; in any case, the Petitioners in the present proceeding were not parties to the decision rendered in Salil Bali (supra). Therefore, we deem it proper to proceed, not to determine the correctness of the decision in Salil Bali (supra) but to consider the arguments raised on the point of law arising. While doing so we shall certainly keep in mind the course of action that judicial discipline would require us to adopt, if need be. Though expressed in a somewhat different context we may remind ourselves of the observations of the Constitution Bench of this Court in Natural Resources Allocation, In Re, Special Reference No. 1 of 2012 : MANU/SC/0793/2012 : (2012) 10 SCC 1 extracted below:

   48.2. The second limitation, a self-imposed rule of judicial discipline, was that overruling the opinion of the Court on a legal issue does not constitute sitting in appeal, but is done only in exceptional circumstances, such as when the earlier decision is per incuriam or is delivered in the absence of relevant or material facts or if it is manifestly wrong and capable of causing public mischief. For this proposition, the

Court relied upon the judgment in Bengal Immunity case (MANU/SC/0083/1955 : AIR 1955 SC 661) wherein it was held that when Article 141 lays down that the law declared by this Court shall be binding on all courts within the territory of India, it quite obviously refers to courts other than this Court; and that the Court would normally follow past precedents save and except where it was necessary to reconsider the correctness of law laid down in that judgment. In fact, the overruling of a principle of law is not an outcome of appellate jurisdiction but a consequence of its inherent power. This inherent power can be exercised as long as a previous decree vis-à-vis a lisinter partes is not affected. It is the attempt to overturn the decision of a previous case that is problematic, which is why the Court observed that: [Cauvery (2) case (1993 Supp (1) SCC 96 (2), SCC 145, para 85]

85...Under the Constitution such appellate jurisdiction does not vest in this Court, nor can it be vested in it by the President Under Article 143.

4. The issues arising and the contentions advanced therefore will have to be examined from the aforesaid limited perspective which we are inclined to do in view of the importance of the questions raised.

5. Both sides have laboured to assist the Court with elaborate and detailed scientific and medical literature in support of their respective stands. The scientific and medical opinion on the issue is not at variance and it cannot be. The difference lies in the respective perceptions as we will presently see. The works and opinions placed goes to show that studies of adolescent brain anatomy clearly indicate that regions of the brain that regulate such things as foresight, impulse control and resistance to peer pressure are in a developing stage upto the age of 18. These are normative phenomenon that a teenager cannot control and not a pathological illness or defect. An article by Laurence Steinberg & Laura H. Carnell titled "Should the Science of Adolescent Brain Development inform Public Policy" is relied upon. On the basis of the above it is contended that there is no answer to the question when an adolescent brain becomes an adult brain because the structural and conventional changes do not take place on a uniform time scale. It is further argued that intellectual maturity of an adolescent is different from emotional or social maturity which makes an adolescent mature for some decisions but not for others, a position also highlighted by the Act which pre-supposes the capacity of a child under 18 to consent for his adoption Under Section 41(5) of the Act. On the said materials while the Petitioners argue that the lack of uniformity of mental growth upto the relevant age i.e. 18 years would justify individualized decisions rather than treating adolescent as a class the opposite view advanced is that between the lower and the upper age, the age of 18 provides a good mid point of focus which may result in some amount of over-classification but that would be inevitable in any situation and a mid point reduces the chances of over-classification to the minimum. These are the varying perceptions alluded to earlier.

6. It may be advantageous to now take note of the Juvenile Justice System working in other jurisdictions.

A-CANADA

In Canada, the Youth Criminal Justice Act, 2002 provides for criminal justice to young persons aged between 12 to 18 years. The Preamble expressly states that the Act was enacted pursuant to Canada's obligations under the CRC. The Preamble also declares that "Canadian society should have a youth criminal justice system that commands respect, takes into account the interests of victims, fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration, and that reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-violent young persons.

(Emphasis added)

While a 'child' is a person aged less than 12 years, a 'young person' is one aged between 12 and 18 years. Section 13 establishes "youth justice courts" which have exclusive jurisdiction to try offences committed by a young person. The Act makes special provisions where a young person commits a "serious offence" (indictable offence punishable with more than 5 years' imprisonment) and "serious violent offence" (first and second degree murder, manslaughter, aggravated sexual assault, attempted murder). Custody sentences are reserved for violent and serious crimes, but cannot exceed the maximum punishment that can be awarded to adults for the same offence (Section 38(2)(a)). One sentencing option is the "Intensive Rehabilitative Custody and Supervision Order", which is reserved for serious violent offenders including for aggravated sexual assault. When the offender attains 18 years, the Court may place him in an adult correctional centre if this is in his best interest or in public interest.

Section 34 permits the Youth Justice Court to order for the mental and psychological assessment of the young person for the following reasons only:

a. Considering an application for release from or detention in custody;

b. Deciding on an application for hearing the offender on adult sentence;

c. Making or reviewing a youth sentence;

d. Considering an application relating to continuation of custody;

e. Making an order for conditional supervision;

f. Authorizing disclosure of information about a young person.

	Further, assessment may be ordered only where (i) the offender has committed a serious violent crime, or (ii) the Court suspects he is suffering from a mental illness or disorder, or (iii) the offender has a criminal history with repeated findings of guilt. Thus, an assessment Under Section 34 cannot be ordered for determining whether the offender lacks sufficient "maturity" to be classified as a "juvenile/young person" (and thus qualify for the benefits of the Act). This Act, like the JJ Act uses the chronological test for determining its beneficiaries. However, in cases of serious and serious violent crimes, the offender may be punished by the Youth Justice Court with equivalent years of imprisonment as in the case of an adult (Sections 38 & 39). 7. In its concluding remarks on Canada (dt.05.10.2012), the Committee on Rights of the Child expressed concern that the State had taken no steps to raise the MACR and continued to try children under 18 as adults (in relation to the circumstances or gravity of the offence). Besides recommending the increase in MACR, the Committee also recommended that the State i.e. Canada to ensure that no person under 18 is tried as an adult irrespective of the circumstances or the gravity of the offence.
21.	**Vijay singh vs state of delhi,** Criminal Appeal No. 1322 of 2012 (Arising out of SLP (Crl.) No. 5503 of 2011), Decided On: 29.08.2012, Citation- (2012)8SCC763 = AIR2012SC3437 = JT2012(8)SC340 = [2012]7SCR434
	Judgment- T.S. Thakur and F.M. Ibrahim Kalifulla, JJ.
	having been found to have committed the aforementioned offence, for the purpose of sentencing, he has to be dealt with in accordance with the provisions contained in Section 15 thereof. As per Clause (g) of Sub-section (1) of Section 15 of the Juvenile Justice Act, the maximum period for which the Appellant could be sent to a special home is a period of three years.
	Held: this Court observed: 1. The inquiry report, which inspires confidence, unquestionably establishes that as on the date of occurrence, the Appellant was below the age of eighteen years; was thus, a "juvenile" in terms of the Juvenile Justice Act and cannot be denied the benefit of the provisions of the said Act. Therefore, having been found to have committed the aforementioned offence, for the purpose of sentencing, he has to be dealt with in accordance with the provisions contained in Section 15 thereof. As per Clause (g) of Sub-section (1) of Section 15 of the Juvenile Justice Act, the maximum period for which the Appellant could be sent to a special home is a period of three years. 2. Under the given circumstances, the question is what relief should be granted to the Appellant at this juncture. Indisputably, the Appellant has been in prison for the last many years and, therefore, at this distant time, it will neither be desirable nor proper to refer him to the Juvenile Justice Board. Accordingly, we follow the course adopted in Bhola Bhagat v. State of Bihar; sustain the conviction of the Appellant for the offence for which he has been found guilty by the Sessions Court, as affirmed by the High Court and at the same time quash the sentence awarded to him. 3. Resultantly, the appeal is partly allowed to the extent indicated above. We direct that the Appellant shall be released forthwith, if not

	required in any other case. 4. Having regard to such a course adopted by this Court in the above reported decisions, and in the case on hand based on the report of the District and Sessions Judge, we are also convinced that the Appellant was below 18 years of age on the date of commission of offence and the Juvenile Justice Act would apply in full force in his case also. While upholding the conviction imposed on the Appellant, we set aside the sentence imposed on him and direct that he be released forthwith, if not required in any other case. The appeal is partly allowed to the extent indicated above.

HIGH COURT

	CASES
22.	**Ashish vs. state of Haryana,**Crl. Revision No.851 of 2017 (O&M), Date of Decision: March 22, 2017, Citation-
	Judgment By:SURINDER GUPTA, J.
	Juvenile Justice Board is legally bound to conduct a preliminary assessment in 'Heinous Offence" with regard to mental and physical capacity of child in conflict with law to commit an offence if he has completed age of 16 years. Though there are no guidelines regarding preliminary assessment stipulated under Section 15 of the Juvenile Justice Act but Draft Model Rules, 2016, under the Juvenile Justice (Care and Protection of Children) Act, 2015 can be used as light house. Rule 14 of the aforesaid Rules clearly lays down that the objective of the preliminary assessment will be to evaluate the role of the child in conflict with law in the alleged offence as well as his mental condition and background.
	Held: 1. As per provisions of Section 15 of Juvenile Justice Act, if a heinous offence is alleged to be committed by a child, the Board after committing preliminary assessment with regard to the mental and physical capacity of the child, may pass order under the provisions of Sub Section 3 of Section 18 of Juvenile Justice (Care and Protection of Children) Act, 2015 ((later referred to as 'the Act'), which provides as follows:- "(3) Where the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order 1 of 4 transfer of the trial of the case to the Children's Court having jurisdiction to try such offences." Admittedly, the offence in this case is a heinous offence. 2. Learned counsel for the petitioner has argued that the inquiry conducted by the Juvenile Justice Board before passing the order as required under Sub Section (3) of Section 18 of the Act, was not as per the spirit of Section 15(1) of the Act. The questions, which were put to the

petitioner by the Board, were general questions and no question regarding the offence in this case and the consequences of the offence were put to the petitioner.

3. Section 15(1) of the Act reads as follows:-

"15. (1) In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of subsection (3) of section 18:

Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho- social workers or other experts.

Explanation.--For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence." The Juvenile Justice Board before passing the order had examined the petitioner to know as to whether he knows about the offence 2 of 4 and its consequences and his physical capacity. A question was also put to him about consequences of offence committed by a person. No doubt, the Board has not put any specific question with regard to the offence committed in this case and rightly so because the Board was not required to confront the petitioner with version of the prosecution in this case as it is a subject matter of trial and the Board to its wisdom rightly skipped to put any question with regard to the facts of the case in hand. On confronting the petitioner with various questions, which find mentioned in Annexure A-3, the Board concluded as follows:-

"Section 15 of Juvenile Justice Act clearly lays down that a Juvenile Justice Board is legally bound to conduct a preliminary assessment in 'Heinous Offence" with regard to mental and physical capacity of child in conflict with law to commit an offence if he has completed age of 16 years. Though there are no guidelines regarding preliminary assessment stipulated under Section 15 of the Juvenile Justice Act but Draft Model Rules, 2016, under the Juvenile Justice (Care and Protection of Children) Act, 2015 can be used as light house. Rule 14 of the aforesaid Rules clearly lays down that the objective of the preliminary assessment will be to evaluate the role of the child in conflict with law in the alleged offence as well as his mental condition and background. A careful perusal of the final report clearly reveals that the child in conflict with law actively participated in the commission of offence and a danda was also recovered from him. A careful perusal of Social Investigation Report qua the child in conflict with law clearly show that the child in conflict with law was fully mature to understand the consequences of his acts. Aforesaid report also reveal that the child in conflict with law was physically capable to 3 of 4 commit the offence. A careful perusal of personal examination report of the child in conflict with law clearly reveals that he is fully mature to understand the consequences of a criminal act and his acts. He was found physically fit to commit an offence. Aforesaid facts are sufficient to dispel the

	presumption of innocence of the child in conflict with law. At this juncture, it is desirable t mention that the age of child in conflict with law was 17 years and 6 months. It means, he was just going to touch age of 18 years. It is not version of the child in conflict with law that he is a drug addict or he has suicidal tendency or he has been exposed to media, internet including to pornography and media depicting violence or he committed the offences under extreme mental trauma or he has a history of abuse and exploitation or he had done the offence for his survival or he had been himself remained as a victim of any offence or he suffered from any mental illness. It is again pertinent to be mentioned here that the child in conflict with law or his counsel failed to pin point anything during preliminary assessment that the child in conflict with law was not physically and mentally fit to commit the offences and he had no idea of his consequences." 4. On perusal of the order passed by Juvenile Justice Board, Bhiwani and affirmed by the Appellate Court below, I find no legal or factual infirmity therein calling for any interference. This revision petition has no merits.
23.	**Manas Kumar Khuntia Vs. State of Orissa,**CRLREV No. 517 of 2016, Decided On: 18.08.2016, Citation-MANU/OR/0406/2016
	JUDGMENT- S.K. Sahoo, J.
	Section 4 of the POCSO Act prescribes punishment for "penetrative sexual assault" which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine. **The Juvenile Justice (Care and Protection of Children) Act, 2015 (hereafter "2015 Act") was brought into force on 15.01.2016 vide S.O.110(E) dated 12.01.2016. Section 2(33) of the 2015 Act defines "heinous offence" as follows:-** **"heinous offences" includes the offences for which the minimum punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force is imprisonment for seven years or more.**
	Held- 1. This revision petition has been filed to set aside the order dated 24.6.2016 passed by the learned Sessions Judge, Jajpur in Criminal Appeal No. 47 of 2016 in confirming the order passed by the learned C.J.M. -cum- Principal Magistrate, Juvenile Justice Board, Jajpur in J.G.R. Case No. 21 of 2016 and for a direction that the petitioner should be released on bail. 2. On perusal of the L.C.R., it appears that the date of birth of the petitioner as per the School Admission Register is 06.03.1999 and the occurrence in question stated to have taken place on 05.06.2016 and therefore, as on the date of occurrence, the petitioner was aged about 17 years 3 months. 3. The FIR was registered as Korai P.S. Case No. 92 dated 12.06.2016 under sections 363/366 of the Indian Penal Code. Subsequently, the case turned to also one under section 376 of the Indian Penal Code read with section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereafter "POCSO Act") and the investigation is under progress.

4. Section 376 of the Indian Penal Code prescribes punishment for rape with rigorous imprisonment which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

5. Section 4 of the POCSO Act prescribes punishment for "penetrative sexual assault" which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

6. The Juvenile Justice (Care and Protection of Children) Act, 2015 (hereafter "2015 Act") was brought into force on 15.01.2016 vide S.O.110(E) dated 12.01.2016. Section 2(33) of the 2015 Act defines "heinous offence" as follows:-

   "heinous offences" includes the offences for which the minimum punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force is imprisonment for seven years or more.

7. In view of the definition of "heinous offence" in 2015 Act and looking at the punishment prescribed under section 376 of the Indian Penal Code and section 4 of the POCSO Act, it is apparent that both these offences which are stated to have been committed in this case after 2015 Act was brought into force, come within the definition of "heinous offence".

8. Section 15 of the 2015 Act reads as follows:-

   "15. Preliminary assessment into heinous offences by Board- (1) In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of sub-section (3) of section 18:

   Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts.

   Explanation.--For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence.

   (2) Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that the order of the Board to dispose of the matter shall be appealable under sub-section (2) of section 101.

Provided further that the assessment under this section shall be completed within the period specified in section 14."

9. Section 14 of 2015 Act deals with inquiry by Board regarding child in conflict with law. Sub-section 5 (f) of section 14 reads as follows:-

"(5) (f) inquiry of heinous offences:-

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

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

10. In view of section 15 read with section 14 (5) (f) of the 2015 Act, it is clear that once the child is above the age of sixteen years as on the date of commission of "heinous offence", he shall be dealt with in the manner prescribed under section 15 of the 2015 Act. The Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of sub-section (3) of section 18. For making such an assessment, the Board may take into the assistance of experienced psychologists or psycho-social workers or other experts.

11. In view of the purpose of amendment for which the Juvenile Justice (Care and Protection of Children) Act, 2015 was enacted after repealing the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) by virtue of section 111 of 2015 Act, it is the requirement of law that in case of a child who has completed or above the age of sixteen years as on the date of commission of "heinous offence", the Juvenile Justice Board constituted under section 4 of 2015 Act has to make a preliminary assessment in terms of section 15 of 2015 Act. Though in the proviso to subsection (1) of section 15 of 2015 Act, the word "may" has been used, but in the context of the provision, when the power is coupled with an obligation and duty, the word "may" which denotes discretion should be construed to mean a "command" and it becomes mandatory otherwise it would defeat the very purpose of the amended Act.

12. The L.C.R. does not indicate that any such assessment has been made and therefore, before adjudicating the bail application, it is felt necessary that a preliminary assessment report in terms of section 15 of the 2015 Act should be called for from the learned C.J.M.-cum-Principal Magistrate, Juvenile Justice Board, Jajpur in J.G.R. Case No. 21 of 2016.

13. The L.C.R. which has been received in this Court be sent back to the concerned Juvenile Justice Board to make preliminary assessment in

	terms of section 15 of 2015 Act keeping in view the observation made in this order and report be submitted by the Board within two weeks from the date of receipt of the L.C.R. which should indicate as to whether the petitioner had the required mental and physical capacity to commit the "heinous offence" as alleged against him and the ability to understand the consequences of such offence and the circumstances in which he allegedly committed the offence. 14. List this matter immediately after receipt of the preliminary assessment report from the concerned Board. 15. L.C.R. be returned back by the Board immediately to this Court after the preliminary assessment. 16. Let a copy of the order be sent to the learned Registrar General of this Court for onward communication to all the Juvenile Justice Board of the State for their information and necessary action at their end with reference to the observation made.
24.	**Ranjit Singh vs. State of Punjab**, Criminal Revision No. 2645 of 2013, Decided On: 28.11.2017, Citation- MANU/PH/2015/2017 = 2018(1)RCR(Criminal)672
	Judgment By:- Amol Rattan Singh, J.
	as per Section 15 (1) of the new Act, upon the Board assessing the mental and physical capacity of a child above 16 years of age, to commit the offence alleged to have been committed by him/her, and the circumstances in which it was committed, can pass an order in terms of Section 18 (3) of the new Act, by which, instead of the Juvenile Justice Board, the case of the child would be transferred to the Childrens' Court', which thereafter can proceed under Section 19 of the Act.
	Held: 1. Before parting with the judgment, it however needs to be stated that this order has been passed in view of the fact that as per Section 25 of the Juvenile Justice (Care and Protection of Children) Act, 2015, all proceedings pending as regards a child (as defined in that Act), in conflict with law, on the date that the said Act came into force (January 15, 2016), would proceed as if the Act of 2015 had not been passed, i.e. all such cases are to be dealt with under the Act of 2000 itself. Therefore, despite the petitioner, even as per his own contention in his application before the Judicial Magistrate, was admittedly above 16 years of age at least, he cannot be dealt with in terms of Sections 15 to 21 of the Act of 2015. The said provisions are reproduced hereinunder:- "15. **Preliminary assessment into heinous offences by Board** (1) In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly

	committed the offence, and may pass an order in accordance with the provisions of subsection (3) of section 18: Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psychosocial workers or other experts. Explanation.-For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence. (2) Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973: Provided that the order of the Board to dispose of the matter shall be appealable under sub-section (2) of section 101: Provided further that the assessment under this section shall be completed within the period specified in section 14. 16. **Review of pendency of inquiry** (1) The Chief Judicial Magistrate or the Chief Metropolitan Magistrate shall review the pendency of cases of the Board once in every three months, and shall direct the Board to increase the frequency of its sittings or may recommend the constitution of additional Boards. (2) The number of cases pending before the Board, duration of such pendency, nature of pendency and reasons thereof shall be reviewed in every six months by a high level committee consisting of the Executive Chairperson of the State Legal Services Authority, who shall be the Chairperson, the Home Secretary, the Secretary responsible for the implementation of this Act in the State and a representative from a voluntary or nongovernmental organisation to be nominated by the Chairperson. (3) The information of such pendency shall also be furnished by the Board to the Chief Judicial Magistrate or the Chief Metropolitan Magistrate and the District Magistrate on quarterly basis in such form as may be prescribed by the State Government. 17. **Orders regarding a child not found to be in conflict with law** (1) Where a Board is satisfied on inquiry that the child brought before it has not committed any offence, then notwithstanding anything contrary contained in any other law for the time being in force, the Board shall pass order to that effect. (2) In case it appears to the Board that the child referred to in sub-section (1) is in need of care and protection, it may refer the child to the Committee with appropriate directions. Orders regarding a child not found to be in conflict with law

	18. **Orders regarding child found to be in conflict with law** (1) Where a Board is satisfied on inquiry that a child irrespective of age has committed a petty offence, or a serious offence, or a child below the age of sixteen years has committed a heinous offence, then, notwithstanding anything contrary contained in any other law for the time being in force, and based on the nature of offence, specific need for supervision or intervention, circumstances as brought out in the social investigation report and past conduct of the child, the Board may, if it so thinks fit- (a) allow the child to go home after advice or admonition by following appropriate inquiry and counselling to such child and to his parents or the guardian; (b) direct the child to participate in group counselling and similar activities; (c) order the child to perform community service under the supervision of an organisation or institution, or a specified person, persons or group of persons identified by the Board; (d) order the child or parents or the guardian of the child to pay fine: Provided that, in case the child is working, it may be ensured that the provisions of any labour law for the time being in force are not violated; (e) direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or fit person, on such parent, guardian or fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and child's well-being for any period not exceeding three years; (f) direct the child to be released on probation of good conduct and placed under the care and supervision of any fit facility for ensuring the good behaviour and child's well-being for any period not exceeding three years; (g) direct the child to be sent to a special home, for such period, not exceeding three years, as it thinks fit, for providing reformative services including education, skill development, counselling, behaviour modification therapy, and psychiatric support during the period of stay in the special home: Provided that if the conduct and behaviour of the child has been such that, it would not be in the child's interest, or in the interest of other children housed in a special home, the Board may send such child to the place of safety. (2) If an order is passed under clauses

	(a) to (g) of sub-section (1), the Board may, in addition pass orders to- (i) attend school; or (ii) attend a vocational training centre; or (iii) attend a therapeutic centre; or (iv) prohibit the child from visiting, frequenting or appearing at a specified place; or (v) undergo a de-addiction programme. (3) Where the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences. 19. **Power of Children's Court** (1) After the receipt of preliminary assessment from the Board under section 15, the Children's Court may decide that- (i) there is a need for trial of the child as an adult as per the provisions of the Code of Criminal Procedure, 1973 and pass appropriate orders after trial subject to the provisions of this section and section 21, considering the special needs of the child, the tenets of fair trial and maintaining a child friendly atmosphere; (ii) there is no need for trial of the child as an adult and may conduct an inquiry as a Board and pass appropriate orders in accordance with the provisions of section 18. (2) The Children's Court shall ensure that the final order, with regard to a child in conflict with law, shall include an individual care plan for the rehabilitation of child, including follow up by the probation officer or the District Child Protection Unit or a social worker. (3) The Children's Court shall ensure that the child who is found to be in conflict with law is sent to a place of safety till he attains the age of twenty-one years and thereafter, the person shall be transferred to a jail: Provided that the reformative services including educational services, skill development, alternative therapy such as counselling, behaviour modification therapy, and psychiatric support shall be provided to the child during the period of his stay in the place of safety. (4) The Children's Court shall ensure that there is a periodic follow up report every year by the probation officer or the District Child Protection Unit or a social worker, as required, to evaluate the progress of the child in the place of safety and to ensure that there is no ill-treatment to the child in any form.

(5) The reports under sub-section (4) shall be forwarded to the Children's Court for record and follow up, as may be required.

20. **Child attained age of twenty-one years and yet to complete prescribed term of stay in place of safety** (1) When the child in conflict with the law attains the age of twenty-one years and is yet to complete the term of stay, the Children's Court shall provide for a follow up by the probation officer or the District Child Protection Unit or a social worker or by itself, as required, to evaluate if such child has undergone reformative changes and if the child can be a contributing member of the society and for this purpose the progress records of the child under sub-section (4) of section 19, along with evaluation of relevant experts are to be taken into consideration.

(2) After the completion of the procedure specified under sub-section (1), the Children's Court may-

(i) decide to release the child on such conditions as it deems fit which includes appointment of a monitoring authority for the remainder of the prescribed term of stay;

(ii) decide that the child shall complete the remainder of his term in a jail:

Provided that each State Government shall maintain a list of monitoring authorities and monitoring procedures as may be prescribed.

21. **Order that may not be passed against a child in conflict with law** No child in conflict with law shall be sentenced to death or for life imprisonment without the possibility of release, for any such offence, either under the provisions of this Act or under the provisions of the Indian Penal Code or any other law for the time being in force.

2. Thus, as per Section 15 (1) of the new Act, upon the Board assessing the mental and physical capacity of a child above 16 years of age, to commit the offence alleged to have been committed by him/her, and the circumstances in which it was committed, can pass an order in terms of Section 18 (3) of the new Act, by which, instead of the Juvenile Justice Board, the case of the child would be transferred to the Childrens' Court', which thereafter can proceed under Section 19 of the Act.

3. Thus, a very clear distinction has been drawn between how an alleged offender who is below 16 years of age is to be treated, as against one that is above 16 years of age, also, naturally, dependant upon the nature of the crime alleged to have been committed.

4. Hence, at the cost of repetition yet again, this Court needs to state that actually allowing even a 16 year old, if he is eventually found guilty of having committed two murders of elderly people, after having entered their house at night and allegedly having robbed them, to escape with a punishment of 3 years incarceration in a special home, (or the period that he has already undergone beyond that period), actually strikes against the conscience of the Court, but with the provisions of the Act of 2015 specifically made not applicable to any pending

	cases against juveniles, there is no choice with this Court but to obviously to decide the matter in terms of the Act of 2000 only. 5. Naturally, nothing stated hereinabove shall be construed, in any manner, to be any observation with regard to the guilt or innocence of the petitioner in the actual commission of the crime, which conclusion would be wholly dependent on the evidence led before the competent Court.

Right to Food

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Basic Right to Survival

Right to Survival:

- Right to be born
- Right to minimum standards of food, shelter and clothing
- Right to live with dignity
- Right to health care, to safe drinking water, nutritious food, a clean and safe environment, and information to help them stay healthy

- **The Right to Food is a human, legal and clearly defined right which gives obligations of states to reduce both chronic undernourishment and malnutrition.**

Constitution of India

- Article 21 of the Constitution of India protects for every citizen a right to live with human dignity. Would the very existence of life of those families which are below poverty line not come under danger for want of appropriate schemes and implementation thereof, to provide requisite aid to such families?
- Article 47 which inter alia provides that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties.

Supreme Court of India
WP(C) no. 196 of 2001

People's Union for Civil Liberties

vs

Union of India

(popularly known as the Right to Food case)

Vital Directives/ Judgements 28/11/2001

- TARGETED PUBLIC DISTRIBUTION SCHEME (TPDS)
- ANTYODAYA ANNA YOJANA
- MID DAY MEAL SCHEME (MDMS)
- NATIONAL OLD AGE PENSION SCHEME (NOAPS)
- ANNAPURNA SCHEME@
- INTEGRATED CHILD DEVELOPMENT SCHEME (ICDS)
- NATIONAL MATERNITY BENEFIT SCHEME
- NATIONAL FAMILY BENEFIT SCHEME

MIDDAY MEAL SCHEME

- **We direct the State Governments/ Union Territories to implement the Mid-Day Meal Scheme by providing every child in every Government and Government assisted Primary Schools with a prepared mid day meal with a minimum content of 300 calories and 8-12 grams of protein each day of school for a minimum of 200 days. Those Governments providing dry rations instead of cooked meals must within three months start providing cooked meals in all Govt. and Govt. aided Primary Schools in all half the Districts of the State (in order of poverty) and must within a further period of three months extend the provision of cooked meals to the remaining parts of the State.**

INTEGRATED CHILD DEVELOPMENT SCHEME (ICDS)

- We direct the State Govts./ Union Territories to implement the Integrated Child Development Scheme (ICDS) in full and to ensure that every ICDS disbursing centre in the country shall provide as under:
- (a) Each child up to 6 years of age to get 300 calories and 8-10 grams of protein;
- (b) Each adolescent girl to get 500 calories and 20-25 grams of protein;
- (c) Each pregnant woman and each nursing mother to get 500 calories and 20-25 grams of protein;
- (d) Each malnourished child to get 600 calories and 16-20 grams of protein;
- (e) Have a disbursement centre in every settlement.

Order dated 20.04.2004

- All such States and Union Territories who have not fully complied with the order dated 28th November, 2001 shall comply with the said directions fully in respect of the entire State/Union Territory, not later than 1st September, 2004.
- The conversion costs for a cooked meal, under no circumstances, shall be recovered from the children or their parents.
- In appointment of cooks and helpers, preference shall be given to Dalits, Scheduled Castes and Scheduled Tribes.
- The Central Government shall make provisions for construction of kitchen sheds and shall also allocate funds to meet with the conversion costs of food-grains into cooked mid-day meals. It shall also periodically monitor the low take off of the food-grains.
- Attempts shall be made for better infrastructure, improved facilities (safe drinking water etc.), closer monitoring (regular inspection etc.) and other quality safeguards as also the improvement of the contents of the meal so as to provide nutritious meal to the children of the primary schools.

Order dated 07.10.2004

The efforts shall be made that all SC/ST hamlets/habitations in the country have Anganwadi Centres as early as possible.

- The contractors shall not be used for supply of nutrition in Anganwadis and preferably ICDS funds shall be spent by making use of village communities, self-help groups and Mahila Mandals for buying of grains and preparation of meals.
- All State Governments/Union Territories shall put on their website full data for the ICDS schemes including where AWCS are operational, the number of beneficiaries category-wise, the funds allocated and used and other related matters.
- All the State Governments/Union Territories shall allocate funds for ICDS on the basis of norm of one rupee per child per day, 100 beneficiaries per AWC and 300 days feeding in a year, i .e., on the same basis on which the Centre make the allocation.

07.10.2004(contd.)

- BPL shall not be used as an eligibility criteria for ICDS.
- All sanctioned projects shall be operationalised and provided food as per these norms.
- All the State Governments/Union Territories shall utilise the entire State and Central allocation under ICDS/PMGY and under no circumstances, the same shall be diverted and preferably also not returned to the Centre and, if returned, a detailed explanation for non-utilisation shall be filed in this Court.
- All State/Union Territories shall make earnest effort to cover the slums under ICDS.
- The Central Government and the States/Union Territories shall ensure that all amounts allocated are sanctioned in time so that there is no disruption whatsoever in the feeding of children.

Judgement dated 13.12.2006

- Government of India shall sanction and operationalize minimum of 14 lakh AWCs before December 2008. In doing so, the Central Government shall identify SC and ST hamlets/habitations for AWCs on a priority basis.
- Government of India shall ensure that population norms for opening of AWCs must not be revised upward under any circumstances. Further, rural communities and slum dwellers should be entitled to an "Anganwadi on demand" (not later than three months) form the date of demand in cases where a settlement has at least 40 children under six but no anganwadi.
- The universalisation of the ICDS involves extending all ICDS services (Supplementary nutrition, growth monitoring, nutrition and health education, immunization, referral an pre-school education) to every child under the age of 6, and all adolescent girls.
- Chief Secretaries of all State Governments/UTs are directed to submit affidavits giving details of the steps that have been taken with regards to the order of this Court of October 7th, 2004 directing that "contractors shall not be used for supply of nutrition in Anganwadis and preferably ICDS funds shall be spent by making use of village communities, self-help groups and Mahila Mandals for buying of grains and preparation of meals". Chief Secretaries of all State Governments/UTs. must indicate a time-frame within which the decentralisation of the supply of SNP through local community shall be done.

Judgement dated 22.04.2009

- The letter dated 24.02.2009 No.5-9/2005/ND/Tech (Vol.II) has been annexed to the affidavit dated 2nd March 2009 filed by the Union of India. It is directed that norms indicated in the said letter addressed to all the State Governments and Union Territories have to be implemented forthwith and the respective States/UTs would make requisite financial allocation and undertake necessary arrangements to comply with the stipulations contained in the said letter.
- Supplementary Nutrition Food (SNP) in the form of THR shall be provided to all children in the age group of 6 months to 3 years, an additional 300 calories to severely underweight children in the age group of 3 to 6 years, pregnant women and lactating mothers as per paras 5(c), 5(d) and 5(e) of the letter dated 24th February 2009.

22.04.2009(contd.)

- As far as adolescent girls are concerned, they would continue to be covered by the entitlements of the Nutritional Programme for Adolescent Girls (hereinafter referred to as 'NPAG') and Kishori Shakti Yojana (hereinafter referred to as 'KSY') till such time as a comprehensive universal scheme for the empowerment of adolescent girls called 'The Rajiv Gandhi Scheme for the Empowerment of Adolescent girls' is implemented within six months from the date of the order.
    - SABLA
    - Kishori Shakti Yojana

Final Order
10.02.2017

- **In view of the passage of the National Food Security Act, 2013, nothing further survives in this petition. It is accordingly disposed of.**
- **In case the petitioner has any grievance with regard to the implementation or otherwise of the National Food Security act, 2013, he may file a fresh petition.**

National Food Security Act, 2013
10.09.2013, w.e.f 05.07.2013

- 2(9)- meal means hot cooked or pre-cooked and heated before its service meal or take home ration, as may be prescribed by central govt.
- 5- Nutritional Support to Children
- 6- Prevention and management of child nutrition
- 7- Implementation of schemes for realization of entitlements.
- 8- Right to receive food security allowance
- 14- Internal grievance Redressal Mechanism
- 15- District Redressal Officer
- 16- State Food Commission

Schedule II of NFSA, 2013

Serial number	Category	Type of meal	Calories (Kcal)	Protein (g)
1	Children (6 months to 3 years)	Take Home Ration	500	12-15
2	Children (3 to 6 years)	Morning Snack and Hot Cooked Meal	500	12-15
3	Children (6 months to 6 years) who are malnourished	Take Home Ration	800	20-25
4	Lower primary classes	Hot Cooked Meal	450	12
5	Upper primary classes	Hot Cooked Meal	700	20
6	Pregnant women and Lactating mothers	Take Home Ration	600	18-20

The Midday Meal Rules, 2015 30.09.2015

- 2 (d)-Meal means hot cooked meal
- 3- Entitlement for nutritional meal
- 4- Place of serving meal- school only
- 5-Preparation of meals and maintenance of standard and quality.
- 9- Food Security Allowance

The Supplementary Nutrition(under the ICDS Scheme) Rules, 2017-20/02/2017

- 3- Nature of Entitlements
- 4- Place of serving meal
- 5- Supplementary Nutrition under ICDS- chart next page
- 6- Nutritional Standards
- 7- Preparation of meal and maintenance of its standard and quality
- 8- Food Security Allowance
- 9- Responsibility to monitor and review

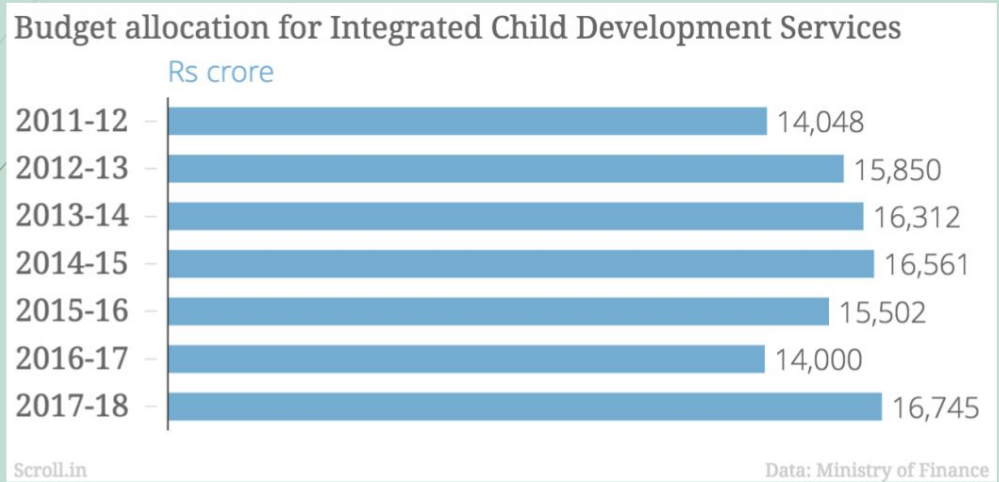
5- Supplementary Nutrition under ICDS

S. No.	Categories	Type of meal or food as per the nutritional standards specified in Schedule II of the Act
1.	Children (Between 6 to 36 months)	Take home ration as per Anganwadi Services (Integrated Child Development Services) guidelines in conformity with the provisions of the Act.
2.	Malnourished children (Between 6 to 36 months)	The same type of take home ration as above with food supplement of 800 calories and 20-25 grams of protein.
3.	Children (Between 3 to 6 years)	Morning snacks and hot cooked meal as per Anganwadi Services (Integrated Child Development Services) norms.
4.	Malnourished children (Between 3 to 6 years)	Additional 300 calories of energy and 8-10 grams of protein in addition to the meal or food provided to children between three to six years.
5.	Pregnant women and lactating or nursing mothers	Take home ration as per Anganwadi Services (Integrated Child Development Services) guidelines in conformity with the provisions of the Act.

Challenges

- Privatisation
- Allocation
- Corruption
- Pilferages

Budget Cuts



Litigation Core Areas

- Midday Meal Scheme
- ICDS
- Privatisation
- Aadhar Linkages

Thank You

Dipika Sahani

dipika@hrln.org

Dropbox link:
https://www.dropbox.com/sh/dm7d8cfoptfvgc9/AACg_R8h_saVG_IuHHZZBGvha?dl=0

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W.P(C)No. 196 OF 2001

ITEM No.6 Court No. 2 SECTION PIL
A/N MATTER

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

WRIT PETITION (CIVIL) NO. 196 OF 2001@@
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PEOPLE'S UNION FOR CIVIL LIBERTIES Petitioner (s)

VERSUS

UNION OF INDIA & ORS. Respondent (s)
(With appln. for interim relief and office report)

Date : 28/11/2001 This Petition was called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE B.N. KIRPAL
HON'BLE MR. JUSTICE K.G. BALAKRISHNAN

For Petitioner (s) Ms. Aparna Bhat,Adv.
Mr. Yug Choudhary, Adv.
Ms. Tashi D. Bhutia, Adv.

For Respondent (s)
Mr. Soli J. Sorabjee, A.G.
Mr. Manish Singhvi, Adv.
Mr. B V B Das, Adv.

State of Karnataka Mr. Sanjay R. Hegde, Adv.
Mr. Satya Mitra, Adv.

State of A.P. Mr. T V Ratnam, Adv.

State of Goa Ms. A Subhashini, Adv.

State of U.P. Mr. Prakash Kumar Singh, Adv.
Mr. Ashok Srivastava, Adv.

State of Bihar Mr. Kumar Rajesh Singh, Adv.
Mr. B B Singh, Adv.

State of Haryana Mr. J P Dhanda, Adv.

State of Assam Ms. Krishna Sarma, Adv.
Ms. Asha G. Nair, Adv.
Mr. V K Sidharthan, Adv.
for M/s. Corporate Law Group.

State of Gujarat & Mizoram Ms. H Wahi, Adv.
Ms. Sumita Hazarika, Adv.

....2/-

State of Arunachal Pradesh	Mr. Anil Shrivastav, Adv.
State of Kerala	Mr. Ramesh Babu M.R., Adv.
State of Nagaland	Mr. Sanjay K. Shandilya, Adv. Ms. V D Khanna, Adv.
State of Punjab	Ms. Jayshree Anand, AAG Mr. G Sivabalamurugan, Adv. Mr. R S Suri, Adv.
State of Sikkim	Mr. A Mariarputham, Adv. Ms. Aruna Mathur, Adv. Mr. Anurag D. Mathur, Adv.
Govt. of Pondicherry	Mr. V G Pragasam, Adv.
State of Chhattisgarh	Mr. Ashwani Kumar, Sr. Adv. Mr. Prakash Shrivastava, Adv. Mr. J R Das, Adv. M/s. Sinha & Das, Advs. Mr. K C Kaushik, Adv. Ms. Sunita Sharma, Adv. Mr. D S Mehra, Adv. Mr. Prashant Kumar, Adv. Ms. Triveni Potekker, Adv. Mr. K H Nobin Singh, Adv. Mr. P N Ramalingam, Adv. Mr. V Balaji, Adv. Mr. Jana Kalyan Das,Adv. Mr. Naresh K. Sharma,Adv. Ms. Indra Sawhney,Adv. Ms. Sandhya Goswami,Adv. Ms. Rachana Srivastava,Adv. Mr. S.V. Deshpande,Adv. Mr. Mahabir Singh,Adv. Ms. Kamini Jaiswal,Adv. Mr. Ranjan Mukherjee,Adv. Mr. Gopal Singh,Adv. Mr. Tara Chandra Sharma,Adv.

....3/-

Mr. B.S. Banthia,Adv.

Mr. Ashok Mathur,Adv.

Mr. Anis Suhrawardy, Adv.

UPON hearing counsel the Court made the following

O R D E R

.....L.....I.....T.....T.....T.....T.....T....J
.SP2

A number of directions are issued with regard to implementation of various Schemes in terms of the signed order.

List the matter for further orders on 11th February, 2002.

.SP1

(S.L. Goyal) (Kanchan Jain)
Court Master AR-cum-PS

Signed order is placed on the file.
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IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO. 196 OF 2001@@
CCCCCCCCCCCCCCCCCCCCCCCCCCCCCCCCC

People’s Union for Civil Liberties ....Petitioner

VS.

Union of India & Ors. ....Respondents

O R D E R@@
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After hearing learned counsel for the parties, we issue, as an interim measure, the following directions:

1. TARGETED PUBLIC DISTRIBUTION SCHEME (TPDS)@@
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(i) It is the case of the Union of India that there has been full compliance with regard to the allotment of foodgrain in relation to the TPDS. However, if any of the States gives a specific instance of non-compliance, the Union of India will do the needful within the framework of the Scheme.

(ii) The States are directed to complete the identification of BPL families, issuing of cards and commencement of distribution of 25 kgs. grain per family per month latest by 1st January, 2002.

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(iii) The Delhi Govt. will ensure that TPDS application forms are freely available and are given and received free of charge and there is an effective mechanism in place to ensure speedy and effective redressal of grievances.

2. ANTYODAYA ANNA YOJANA@@
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(i) It is the case of the Union of India that there has been full compliance with regard to the allotment of foodgrain in relation to Antyodaya Anna Yojana. However, if any of the States gives a specific instance of non-compliance, the Union of India will do the needful within the framework of the Scheme.

(ii) We direct the States and the Union Territories to complete identification of beneficiaries, issuing of cards and distribution of grain under this Scheme latest by 1st January, 2002.

(iii) It appears that some Antyodaya beneficiaries may be unable to lift grain because of penury. In such cases, the Centre, the States and the Union Territories are requested to consider giving the quota free after satisfying itself in this behalf.

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MID DAY MEAL SCHEME (MDMS)@@
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(i) It is the case of the Union of India that there has been full compliance with regard to the Mid Day Meal Scheme (MDMS). However, if any of the States gives a specific instance of non-compliance, the Union of India will do the needful within the framework of the Scheme.

(ii) We direct the State Governments/ Union Territories to implement the Mid-Day Meal Scheme by providing every child in every Government and Government assisted Primary Schools with a prepared mid day meal with a minimum content of 300 calories and 8-12 grams of protein each day of school for a minimum of 200 days. Those Governments providing dry rations instead of cooked meals must within three months start providing cooked meals in all Govt. and Govt. aided Primary Schools in all half the Districts of the State (in order of poverty) and must within a further period of three months extend the provision of cooked meals to the remaining parts of the State.

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(iii) We direct the Union of India and the FCI to ensure provision of fair average quality grain for the Scheme on time. The States/ Union Territories and the FCI are directed to do joint inspection of food grains. If the food grain is found, on joint inspection, not to be of fair average quality, it will be replaced by the FCI prior to lifting.

4. NATIONAL OLD AGE PENSION SCHEME (NOAPS)@@
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(i) It is the case of the Union of India that there has been full compliance with regard to the National Old Age Pension Scheme. However, if any of the States gives a specific instance of non-compliance, the Union of India will do the needful within the framework of the Scheme.

(ii) The States are directed to identify the beneficiaries and to start making payments latest by 1st January, 2002.

(iii) We direct the State Govts./ Union Territories to make payments promptly by the 7th of each month.

...5/-

5. ANNAPURNA SCHEME@@
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The States/ Union Territories are directed to identify the beneficiaries and distribute the grain latest by 1st January, 2002.

6. INTEGRATED CHILD DEVELOPMENT SCHEME (ICDS)@@
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(i) We direct the State Govts./ Union Territories to implement the Integrated Child Development Scheme (ICDS) in full and to ensure that every ICDS disbursing centre in the country shall provide as under:

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(a) Each child up to 6 years of age to get 300 calories and 8-10 grams of protein;

(b) Each adolescent girl to get 500 calories and 20-25 grams of proetin;

(c) Each pregnant woman and each nursing mother to get 500 calories and 20-25 grams of protein;

(d) Each malnourished child to get 600 calories and 16-20 grams of protein;

(e) Have a disbursement centre in every settlement.

.....L.....I.....T.....T.....T.....T.....T....J

(ii) It is the case of the Union of India that there has been full compliance of its obligations, if any, under the Scheme. However, if any of the States gives a specific instance of non-compliance, the Union of India will do the needful within the framework of the Scheme.

7. NATIONAL MATERNITY BENEFIT SCHEME (NMBS)@@
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(i) We direct the State Govts./ Union Territories to implement the National Maternity Benefit Scheme (NMBS) by paying all BPL pregnant women Rs. 500/- through the Sarpanch 8-12 weeks prior to delivery for each of the first two births.

(ii) It is the case of the Union of India that there has been full compliance of its obligations under the Scheme. However, if any of the States gives a specific instance of non-compliance, the Union of India will do the needful within the framework of the Scheme.

8. NATIONAL FAMILY BENEFIT SCHEME@@
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(i) We direct the State Govts./ Union Territories to implement the National Family Benefit Scheme and pay a BPL family Rs. 10,000/- within four

...7/-

weeks through a local Sarpanch, whenever the primary bread winner of the family dies.

9. We direct that a copy of this order be translated in regional languages and in English by the respective States/ Union Territories and prominently displayed in all Gram Panchayats, Govt. School Buildings and Fair Price Shops.

10. In order to ensure transparency in selection of beneficiaries and their access to these Schemes, the Gram Panchayats will also display a list of all beneficiaries under the various Schemes. Copies of the Schemes and the list of beneficiaries shall be made available by the Gram Panchayats to members of public for inspection.

11. We direct Doordarshan and AIR to adequately publicise various Schemes and this order.

We direct the Chief Secretaries of each of the States and Union Territories to ensure compliance of this order. They will report compliance by filing affidavits in this Court within 8 weeks from today

with copies to the Attorney General and counsel for the petitioner.

We grant liberty to the Union of India to file affidavit pursuant to the order of this Court dated 21st November, 2001.

List the matter for further orders on 11th February, 2002. In the meanwhile, liberty is granted to the parties to apply for further directions, if any.

.SP1

.....J.
(B. N. KIRPAL)

.....J.
(K. G. BALAKRISHNAN)

New Delhi
November 28, 2001.

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W.P(C)No. 196 OF 2001
ITEM No.1 Court No. 6 SECTION PIL
A/N MATTER

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Writ Petition(Civil) No.196/2001

PEOPLE'S UNION FOR CIVIL LIBERTIES Petitioner (s)

VERSUS

UNION OF INDIA & ORS. Respondent (s)
(With appln. (s) for interim relief and directions and
permission to submit addl. documents and office report)
(FOR FURTHER CONSIDERATION)

Date : 20/04/2004 This Petition was called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE Y.K. SABHARWAL
HON'BLE MR. JUSTICE B.N. AGRAWAL

For Petitioner (s)Mr. Colin Gonsalves, Sr.Adv.
Mr. P. Ramesh Kumar, Adv.
Ms. Aparna Bhat,Adv.

For UOI:Mr. Raju Ramachandran, Sr.Adv.
Ms. Meenakshi Arora, Adv.
Ms. Varuna Bhandari Gugnani, Adv.
for Mr. D.S. Mahra, Adv.

For Intervenor-Search: Mr. Prashant Kumar, Adv.

For Intervenor-
Health India:Mr. ML. Verma, Sr.Adv.
Mr. Vishwajit Singh, Adv.

For Bihar:Mr. B.B. Singh, Adv.

For Haryana:Mr. Satinder S. Gulati, Adv.
Ms.Kamaldeep Gulati, Adv.
Ms. Kavita Wadia, Adv.
Mr. Vinay K. Garg, Adv.

For NCT, Delhi:Mr. Ashok Bhan, Adv.
Mr. A.K. Raina, Adv.
Mrs. Anil Katiyar, Adv.

For Punjab:Mr. R.K. Rathore, AAG
Mr.R.S.Suri, Adv. (NP)

For A.P.:Mr. T.V. Ratnam,Adv.
Ms. OSG. Prasana, Adv.
Mr. K. Subba Rao, Adv.

For Arl.Pradesh:Mr. Anil Shrivastava, Adv.

For Pondicherry:Mr. V.G. Pragasam, Adv.

For Manipur:Mr. KH. Nobin Singh, Adv.

For Assam:Ms. Krishna Sarma, Adv.
Mr. Sanjay V.S. Chaudhary, Adv.
Mr. Niraj Kumar, Adv.
for Corporate Law Group, Advs.

For Jharkhand:Mr. Ashok Mathur, Adv.
Mr. Rajesh Pathak, Adv.

For Uttaranchal:Ms. Rachana Srivastava, Adv.

For Chhattisgarh:Ms. Suparna Srivastava, Adv.
Mr. Rajesh Srivastava, Adv.

For U.P.:Mr. Pramod Dayal, Adv.

For Sikkim:Mr. A.Mariarputham, Adv.
Ms. Aruna Mathur, Adv.for
M/s Arputham Aruna & Co., Advs.

For West Bengal:Mr. Rakesh Dwivedi, Sr.Adv.
Mr. Tara Chandra Sharma, Adv.
Ms. Neelam Sharma, Adv.
Mr. Tarun Sharma, Adv.

For Tripura:Mr. Anurag Sharma, Adv.
Mr. Navin Prakash, Adv.
Mr. Gopal Singh, Adv.

For Nagaland:Mr. U. Hazarika, Adv.
Ms. Madhvi Sharma, Adv.
Ms. Sumita Hazarika, Adv.

For Rajasthan:Mr. Aruneshwar Gupta, Addl.Adv.Gen. (NP)
Ms. Sandhya Goswami, Adv.
Mr. Jog Singh, Adv.
Mr. Amarjit Singh Bedi, Adv.

For J & K:Mr. Anis Suhrawardy, Adv.

For Goa:Ms. A. Subhashini, Adv.

For Tamil Nadu:Mr. S. Prasad, Adv.
Mr. Gopalakrishnan R., Adv.
Mr. Rahul Kumar, Adv.

For Gujarat:Ms. Hemantika Wahi, Adv.
Ms. Sadhna Sanghu, Adv.

For M.P.:Mr. BS. Banthia, Adv.
Ms. Pragati Nikhra, Adv.
Mr. Naveen Sharma, Adv.

For H.P.:Mr. J.S.Attri, Adv.

For Maharashtra:Mr. Mukesh K. Giri, Adv.

For Chandigarh:Ms. Kamini Jaiswal, Adv.

For other parties:
Mr. Jana Kalyan Das,Adv.

Mr. B.V. Balaram Das,Adv.

Ms. Indra Sawhney,Adv.

Mr. S.V. Deshpande,Adv.

Mr. J.P. Dhanda,Adv. (NP)

Mr. Ranjan Mukherjee,Adv.

Mr. Ashok K. Srivastava,Adv.

Mr. Prakash Shrivastava,Adv.

Mr. Ramesh Babu M.R.,Adv.

Mr. Sanjay R. Hegde,Adv.

Mr. R.K. Maheshwari,Adv.

Mr. Kuldip Singh, Adv.

Mr. MKD. Namboodiri, Adv.

UPON hearing counsel the Court made the following

O R D E R

List on 27th April, 2004 for further consideration.

(N. Annapurna)
Court Master

(V.P. Tyagi)
Court Master

(Signed order is placed on the file.)

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO.196 OF 2001

People’s Union for Civil Liberties
...Petitioner

Versus

Union of India & Ors.
...Respondents

O R D E R

MID-DAY MEAL SCHEME:

We have heard Mr. Colin Gonsalves, learned senior counsel appearing for the petitioner, Mr. Raju Ramachandran, learned Additional Solicitor General appearing for Union of India, Mr. M.L.Verma, learned senior counsel appearing for intervenor-Health India, and learned counsel representing various States. We have also perused the special report of the Committee dated 28th November, 2003 and report dated 28th January, 2004 and other relevant material on record. In one of the orders earlier passed, this Court had observed about the impact of this public interest litigation on the very existence of large section of poor people, their right to life and right to food to those who can ill-afford to provide to their families two meals a day and their misfortune becoming further grave during famine and drought.

On 28th November, 2001, this Court directed the State Governments/Union Territories to implement mid-day meal scheme by providing every child in every government and government aided primary school with a prepared mid-day meal with a minimum content of 300 calories and 8-12 grams of protein each day of school for a minimum of 200 days. The said order further directed that those governments which provide dry rations instead of cooked meals, within three months, sho

uld start providing cooked meals in all government and government aided primary schools in hal f of the districts of the State (in order of poverty) and must, within further period of three months, extend the provision of cooked meals to the remaining parts of the State.

By an order dated 29th October, 2002, it was made clear that in case of persistent default in compliance of the orders of this Court, the concerned Chief Secretaries/Administrators of the States/Union Territories shall be held responsible. It was brought to the notice of the Cour t that despite orders having been passed, some of the States had not even made a beginning. I n the order dated 2nd May, 2003, this Court observed the manner in which the directions were b eing flouted in some of the States. In that order, specific reference was made to the States of Bihar, Jharkhand and Uttar Pradesh. The type of the affidavit that was filed has also been commented upon since it was not stated in the affidavit as to when the State of Bihar propose d to start the supply of mid-day meal, in how many districts they proposed to start it and wha t scheme had been formulated. The order noticed that every conceivable detail had been missin g. Ultimately, the State of Bihar was directed to make a beginning by supplying cooked mid-da y meal and implement the said scheme in at least ten districts which might be most poor accord ing to the State's perception. Similarly, the States of Uttar Pradesh, Jharkhand and other St ates were also directed to make a meaningful beginning of the scheme in at least 25% of the di stricts which might be most poor.

After the orders were made on 2nd May, 2003, various reports have been filed in regard to the implementation of the directions for supply of the cooked mid-day meal in schools in terms of directions contained in the order dated 28th November, 2001.

We have perused the affidavits and heard learned counsel representing the States of Bihar, Utt ar Pradesh, Maharashtra, Delhi, West Bengal, Himachal Pradesh, Uttaranchal, Jharkhand, Madhya Pradesh and Haryana. There are other States and Union Territories as well in respect whereof the aforesaid Reports of the Commissioners have commented upon. Some of the States/Union Terri tories have not made even a beginning despite lapse of so many years; some have only made a pa rtial beginning; some have made a token beginning and only few of the States have fully implem ented the order in respect of cooked mid-day meals that was passed on 28th November, 2001.

Some of the States which claim that they have made a beginning and are partially implementing the scheme have also not given the full and complete details so that this Court could know the extent of the implementation. Most of the affidavits only set out the number of schools an d the students where the scheme was being implemented. What was required to be done was to si mply state as to how many schools in a particular State/Union Territory would be covered under the directions for supply of cooked mid-day meal, how many students in the said school would be eligible for the benefit and then give the number of the schools and the students who are b eing supplied cooked meals. The affidavits provide only a part of information without specify ing the number of eligible schools and students.

Be that as it may, Table-1 to the second Report of the Commissioners sets out broadly the Stat es which have implemented it fully or partially or have not responded to the queries of the Co mmissioners. We may, however, note that after the said Report, there has been some improvemen t by a token beginning having been made by some of the States. The Report of the Commissioner s, on the basis of their earlier experience, states that nutritious mid-day meal at schools ca n be a highly effective way of protecting children from hunger and can also boost school atten dance among girls. It also notices some of the areas where such meals are supplied even durin g the school vacations, especially in drought affected areas. None can question the desirabil ity of extension of this facility even during vacations in drought affected areas where childr en are deprived of even one day meal.

It is a matter of anguish that despite lapse of nearly three and half years, the order dated 2 8th November, 2001 has not been fully implemented by all the States and Union Territories. As already stated earlier, many of the States have given only half-baked information and figures . Further, we wish to make it clear that the fact that some of the States were permitted to a t least make a start in some of the districts in terms of the order dated 2nd May, 2003 does n ot mean that this Court has modified or varied the earlier order dated 28th November, 2001. I t is a constitutional duty of every State and Union Territory to implement in letter and spiri t the directions contained in the order dated 28th November, 2001. We may also note that the suggestions given by Health India would be considered at an appropriate stage.

The petitioner has also made a reference to the announcement made by the Prime Minister extend ing the mid-day meal scheme upto 10th Standard during his address to the Nation on 15th August , 2003. The suggestion is that extension should be made operational at the earliest. In repl y, it has been contended that once the mid-day meal scheme at primary level is consolidated, t he question of extension of the scheme upto 10th Standard can be taken up in a phased manner. In this connection, it has been pointed out that the views of various States have been asked in regard to the cost and logistic requirements for the extension of the scheme upto 10th Stan dard.

Further, the petitioner, referring to the recommendations of the Abhijit Sen Committee appoint ed by Government of India regarding sharing of conversion cost of implementing the cooked mid- day meal scheme, suggests that the Government should implement that scheme. The Government is stated to be presently discussing the modalities with the concerned Ministries and Planning C ommission to provide assistance for meeting with a part of conversion costs towards effective

implementation of the said scheme.
Having regard to the aforesaid, in respect of cooked mid-day meal scheme, we issue the followi ng directions:
1.All such States and Union Territories who have not fully complied with the order dated 28th November, 2001 shall comply with the said directions fully in respect of the entire State/Unio n Territory, preferably, on the re-opening of the primary schools after a long vacation of 200 4 and, in any case, not later than 1st September, 2004.
2.All Chief Secretaries/Administrators are directed to file compliance report in regard to dir ections No.1 on or before 15th September, 2004.
3.The conversion costs for a cooked meal, under no circumstances, shall be recovered from the children or their parents.
4.In appointment of cooks and helpers, preference shall be given to Dalits, Scheduled Castes a nd Scheduled Tribes.
5.The Central Government shall make provisions for construction of kitchen sheds and shall als o allocate funds to meet with the conversion costs of food-grains into cooked mid-day meals. It shall also periodically monitor the low take off of the food-grains.
6.In respect of the State of Uttaranchal, it has been represented that the scheme is being imp lemented in all the schools. It would be open to the Commissioners to inspect and bring it to the notice of the Court, if it is otherwise.
7.In drought affected areas, mid-day meal shall be supplied even during summer vacations.
8.An affidavit shall be filed by the Government of India, within three months, stating as to w hen it is possible to extend the scheme upto 10th Standard in compliance with the announcement made by the Prime Minister. The affidavit shall also state the time frame within which the G overnment proposes to implement the recommendations of Abhijit Sen Committee in respect whereo f the modalities have been discussed with the concerned Ministries and Planning Commission.
9.Attempts shall be made for better infrastructure, improved facilities (safe drinking water e tc.), closer monitoring (regular inspection etc.) and other quality safeguards as also the imp rovement of the contents of the meal so as to provide nutritious meal to the children of the p rimary schools.
The issue as to the implementation of this scheme will be considered in the month of September , 2004.
SGR YOJANA - EMPLOYMENT GUARANTEE:
In respect of this Scheme, the following directions are issued:
1.The directions for doubling the food-grains as also cash in terms of the order dated 2nd May , 2003 shall be applicable this year also.
2.The State Governments/Union Territories are directed to pay minimum wages to the workers und er the scheme and shall stop use of labour displacement machines.
3.Access to all public documents including muster rolls shall be allowed to such persons who s eek such access and the cost of supplying documents shall not be more than the costs of provid ing copies of the documents.
4.The allocation of funds and food-grains shall be timely made by the Central Government to th e State Governments.
5.The State Governments are directed to utilise the entire allocation, as aforesaid, so that t he allotted funds and food-grains neither lapse nor result in reduction in subsequent years.
6.In case, some of the State Governments, as a result of financial constraints, wish to pay 10 0% wages in shape of food-grains and not partly food-grains and partly cash, it would be open to them to approach the Central Government. On examination of each case, the Central Governme nt may permit payment of 100% wages in the shape of food-grains.
ANTYODAYA ANNA YOJANA:
In regard to this scheme, the following directions are issued:
1.The Government of India shall issue, within two months, guidelines so that the existing cond ition of possession of a BPL card for inclusion in AAY category is dispensed with.
2.The State Governments should be directed by the Central Government to accelerate the issue o f Antyodaya cards especially to primitive tribes. The guidelines issued to State Governments shall be implemented in letter and spirit.
List the Writ Petition on 27th April, 2004 for consideration of other Schemes.

.....J.
(Y.K. SABHARWAL)

.....J.
(B.N. AGRAWAL)
New Delhi,
April 20, 2004.

:v
W.P(C)No. 196 OF 2001
ITEM No.2 Court No. 3 SECTION PIL
A/N MATTER

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Writ Petition(Civil) No.196/2001

PEOPLE'S UNION FOR CIVIL LIBERTIES Petitioner (s)

VERSUS

UNION OF INDIA & ORS. Respondent (s)

(With Appln(s). for interim Relief and interim directions, permission to submit addl. documents and for permission to modify the National Maternity Benefit Scheme and Office Report)
(For further consideration)
With I.A.No.40-41/2004 (For extension of time and interim directions.)

Date : 07/10/2004 This Petition was called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE Y.K. SABHARWAL
HON'BLE MR. JUSTICE TARUN CHATTERJEE

For Petitioner (s)Mr. Colin Gonsalves, Sr.Adv.
Ms. Aparna Bhat,Adv.
Mr. Vipin M. Benjamin, Adv.

For the UOI (MinistryMr. Mohan Parasaran, ASG
of Health and H.R.D.)Mr. Hemant Sharma, Adv.
Mrs. Sushma Suri, Adv.

For Respondent (s)Mr. Ashok Bhan, Adv.
(Ministry of Food,UOI)Mr. S.N. Terdal, Adv.
Ms. Suresh Sharma, Adv.

For NCT of DelhiMr. Ashok Bhan, Adv.
Mr. S.Wasim A.Qadri, Adv.
Mrs. Anil Katiyar, Adv.

State of Gujarat/Mizoram Mrs. H. Wahi, Adv.

State of HaryanaMr. Satinder S.Gulati, Adv.
Mr. Vinay Kumar Garg, Adv.
Mr. Praveen Kr. Rai, Adv.
Ms. Kavita Wadia, Adv.

State of U.P.Mr. Sunil Gupta, AAG
Mr. Ravi P.Mehrotra, Adv.
Mr. Garvesh Kabra, Adv.

State of Pb.Ms. Harvinder Kaur, AAG
Mr. Vivek Acharya, Adv.

State of Arun.PradeshMr. Anil Shrivastav, Adv.

State of MeghalayaMr. Ranjan Mukherjee, Adv.

State of ManipurMr. Kh.Nobin Singh, Adv.

State of JharkhandMr. Ashok Mathur, Adv.

State of NagalandMr. U.Hazarika, Adv.
Ms. Sumita Hazarika, Adv.

State of TripuraMr. Anurag Sharma, Adv.
Mr. Rituraj Biswas, Adv.
Mr. Gopal Singh, Adv.

State of West BengalMr. Tara Chandra Sharma, Adv.
Miss Neelam Sharma, Adv.
Mr. Rajeev Sharma, Adv.
Mr. Tarun Sharma, Adv.

State of UttaranchalMs. Rachna Srivastava, Adv.
Mr. Govind Kaushik, Adv.

State of Tamil NaduMr. Subramonium Prasad, Adv.
Mr. S.N. Jha, Adv.
Mr. Gopala Krishnan, Adv.
Mr. Abhay Kumar, Adv.
Mr. Rahul, Adv.

State of SikkimMr. A.Mariarputham, Adv.
Ms. Aruna Mathur, Adv.
for M/s.Arputham,Aruna & Co.

U.T. ChandigarhMs. Kamini Jaiswal, Adv.
Ms. Inklee Barooah, Adv.

State of ChhattisgarhMr. Rajesh Srivastava, Adv.
Ms. Suparna Srivastava, Adv.
Ms. Deepti Singh, Adv.

State of M.P.Mr. B.S. Banthia, Adv.

State of AssamMs. Krishna Sarma, Adv.
Mr. Atul Kumar, Adv.or Corporate Law Group.

State of GoaMs. A.Subhashni, Adv.

UT of Andaman & Nicobar, Mr.D.S. Mahra, Adv.

Dadra & Nagar Haveli,Ms. Sunita Sharma, Adv.
Daman & Diu

PondicherryMr.V.G. Pragasam, Adv.

State of RajasthanMr. Aruneshwar Gupta, AAG.

State of BiharMr. B.B.Singh, Adv.

Mr. Jana Kalyan Das, Adv.

Mr. B.V. Balram Das, Adv.

Mr. J.S. Attri, Adv.

Ms. Indra Sawhney, Adv.

Mr. S.V.Deshpande, Adv.

Mr. R.S. Suri, Adv.

Mr. Prakash Shrivastava, Adv.

Mr. Ramesh Babu M.R., Adv.

Mr. T.V.Ratnam, Adv.

Mr. Sanjay R. Hegde, Adv.

Mr. R.K. Mqaheshwari, Adv.

Mr. Kuldip Singh, Adv.

Mr. Mukesh K. Giri, Adv.

Mr. Prashant Kumar, Adv.

Mr. Vishwajit Singh, Adv.

Mr. Anis Suhrawardy, Adv.

UPON hearing counsel the Court made the following

O R D E R

We have gone through the 5th (August, 2004) Report of the Commissioners S/Shri Dr.N.C.Saxena a nd N.R. Sankaran. First of all, we wish to place on record our compliments and appreciation f or the enormous work done by the learned Commissioners and presenting the Report under conside ration.

The Report is in three parts. First part is divided into 14 sections covering different schem es. Under Section 1, Integrated Child Development Services (ICDS) has been considered. Part I I sets out summary of findings and Part III sets out recommendations. We would first consider the aspect of ICDS. In order to fully appreciate the problem, it would be useful to notice t he background briefly.

ICDS, as noticed in the Order dated 29.4.2004 is perhaps the largest of all the food and suppl ementation programmes in the world that was initiated in the year 1975 with the following obje ctions as per the document prepared by Planning Commission:

1.To improve the health and nutrition sttus of children 0-6 years by providing supplementary f ood and by coordinating with state health departments to ensure delivery of required health in puts;

2.To provide conditions necessary for pre-school children’s psycholgical and social developmen t through early stimiulation and education;

3.To provide pregnant and lactating women with food supplements;

4.To enhance the mother’s ability to provide proper child care through health and nutrition ed ucaiton;

5. To achieve effective coordination of policy and implementation among the various department s to promote child development.

The scheme intends to cover all the children under age group of 0-6 years. The food is supplie d to the children through Anganwadi Centres (For short, ‘AWCS’). The norms of Government of India provide for one Centre for a population of one thousand (700 in case of tribal area). I t is not in serious dispute, as contended by Mr. Mohan Parasaran, learned Additional Solicitor General that according to norms, there should be approxomately 14 lakhs ACWS. Admittedly, n early 6 lakh Centres have been sanctioned. Many of the sanctioned Centres are also not operat ional as is evident from the Report under consideration. The problem seems to be more acute i n States like Bihar, Uttar Pradesh and Jharkhand. It deserves to be noticed that the directio

ns in respect of ICDS were issued as far back in 28.11.2001. The order dated 27.4.2004 notices that most of those covered by the Order dated 28.11.2001 are not getting the benefit under ICDS. That observation was made on the basis of figures which were provided under National Family Benefit Health Scheme on conducting survey. The result was that a large number of children between the age group of 0-6 years were malnourished. That Order also noticed that the position was alarming in the aforesaid three States as well as the State of Uttaranchal. By Order dated 29.4.2004, the Government of India was directed to file within three months an affidavit stating the period within which it proposed to sanction the remaining number of AWCS. The Government of India was also directed to consider the revision of norms of supply of nutritious food worth rupee one to every child in the Centres as norm of rupee one was fixed way back in the year 1991 and incorporate its suggestion in the affidavit.

It is most unfortunate that instead of three months, nearly six months have expired, the Government of India has still not filed the affidavit and instead an oral application has been made by learned Additional Solicitor General for grant of further time to file an affidavit in terms of the Order dated 29.4.2004. We are shocked at the attitude of the Central Government which is in respect of giving nutritious food to all children though in practice it concerns those unfortunate section of the society who can ill-afford to provide nutritious food to the children of the aforesaid age group. In absence of the affidavit, we could have straightway issued directions for the sanction of the remaining AWCS and for increase of norm of rupee one to rupees two but having regard to the totality of the circumstances, we grant one final opportunity to the Central Government to file affidavit within a period of two weeks whereafter we would consider these two aspects, namely, (i) sanction of 14 lakh AWCS; (ii) increase of norm of rupee one to rupees two.

We make it clear that if the affidavit is not filed, this Court will be left with no option but to issue directions for implementation of the two aspects.

Now, we would deal with the aspect of sanctioned AWCS and their working. In the Order dated 29.4.2004, it was directed that the sanctioned AWCS shall be made fully operational by 30th June, 2004. Further direction issued was that the sanctioned AWCS shall supply nutritious food/supplement to the children, adolescent girls and to pregnant and lactating women under the scheme for 300 days in a year. The Report presents a glooming picture both in regard to the operation of the sanctioned AWCS in some of the States like Uttar Pradesh, Bihar and Jharkhand and the position in those which are operational. Instances have been given in the Report where for months the supplies were not made to the children. For example, in the State of Jharkhand, the sanctioned AWCS were not working from May to December, 2003. No satisfactory reply is forthcoming from that State. Further, there are material discrepancies in two affidavits filed by the said State one in September and the one handed over in the Court today. In the September affidavit, it was deposed on oath that 16689 AWCS were operational. In the affidavit filed today, the figure of operational AWCS is stated to be 7429. According to the Report, on an average, 42 paisa as against the norm of rupee one was being allocated per beneficiary per day by the State of Jharkhand. The position in Bihar and Uttar Pradesh is also no better. Out of 394 sanctioned ICDS projects, only 249 were operational in the State of Bihar. As per the affidavit dated 30th September, 2004, all the projects were being made operational from 4th October, 2004. Whether that has happened or not, Mr. B.B. Singh, learned counsel appearing for the State is unable to state for want of instructions. Be that as it made, if all have not been made operational since 4th October, 2004 has already passed and gone we direct that the same shall be made operational in period not later than one week from today.

In the State of Uttar Pradesh, though percentage of non-functional/non-operational AWCS is more as per the Report but according to the State, admittedly 24 per cent are not operational. In the affidavit, it has been claimed that the remaining will be operational by 30th November, 2004. We direct the State Government to make operational all sanctioned AWCS by 30th November, 2004. After that, we would not entertain any application for extension of time.

The Report also mentions that some of AWCS are operating from private houses including those of grain dealers which it is suggested is not a healthy way of working as it is likely to increase the chances of pilferage of the grain etc. We are happy to note that as stated in the affidavit of State of Uttar Pradesh, it has made efforts to shift AWCS to primary schools. It is a good example for other States to follow. The Report also mentions about the attempt to centralise the procurements in some of the States which has many fallouts. It has been explained in one of the affidavit that the procurements is at district level and not at the State level. Further, the problem of using contractors for procurement has also been mentioned in the Report suggesting that it should be done by agencies and officers at the Government level. These are only by way of illustrations as to facts and figures given in Section 1 of the Report relating to Integrated Child Development Services.

Having heard Mr. Colin Gonsalves, learned Senior Counsel appearing for the petitioner and lear

ned Additional Solicitor General appearing for the Central Government and learned counsel appe aring for the State Governments in particular, the States of Bihar, Jharkhand and Uttar Prades h, for present, we issue following directions :-

1.The aspect of sanctioning 14 lakhs AWCS and increase of norm of rupee one to rupees 2 per ch ild per day would be considered by this Court after two weeks.

2.The efforts shall be made that all SC/ST hamlets/habitations in the country have Anganwadi C entres as early as possible.

3.The contractors shall not be used for supply of nutrition in Anganwadis and preferably ICDS funds shall be spent by making use of village communities, self-help groups and Mahila Mandal s for buying of grains and preparation of meals.

4.All State Governments/Union Territories shall put on their website full data for the ICDS sc hemes including where AWCS are operational, the number of beneficiaries category-wise, the fun ds allocated and used and other related matters.

5.All State Governments/Union Territories shall use the Pradhanmantri Gramodaya Yojna fund (P MGY) in addition to the state allocation and not as a substitute for state funding.

6.As far as possible, the children under PMGY shall be provided with good food at the Centre i tself.

7.All the State Governments/Union Territories shall allocate funds for ICDS on the basis of no rm of one rupee per child per day, 100 beneficiaries per AWC and 300 days feeding in a year, i .e., on the same basis on which the Centre make the allocation.

8.BPL shall not be used as an eligibility criteria for ICDS.

9.All sanctioned projects shall be operationalised and provided food as per these norms and wh erever utensils have not been provided, the same shall be provided (Instance of Jharkhand Stat e ha*s been noticed in the Report where utensils have not been provided). The vacancies for t he operational ICDS shall be filled forthwith. (Instance of Uttar Pradesh where vacancies ha ve not been filled up is quite alarming though in the affidavit it has been stated that a dri ve has been initiated to fill up the vacancies).

10.All the State Governments/Union Territories shall utilise the entire State and Central allo cation under ICDS/PMGY and under no circumstances, the same shall be diverted and preferably a lso not returned to the Centre and, if returned, a detailed explanation for non-utilisation sh all be filed in this Court.

11.All State/Union Territories shall make earnest effort to cover the slums under ICDS.

12.The Central Government and the States/Union Territories shall ensure that all amounts alloc ated are sanctioned in time so that there is no disruption whatsoever in the feeding of childr en.

Our attention has been drawn to what is stated at page 20 in box 2 regarding failure of author ities to take appropriate action despite Commissioner’s intervention in the case of Madhya Pr adesh pertaining to the area mentioned therein and the non-payment to the work force. We dire ct the State Government to either make payment of wages to the labourers or file an affidavit giving detailed explanation within two weeks.

List the matter after two weeks.

(Satish K. Yadav) (V.P. Tyagi)
Court Master Court Master

CASE NO.:
Writ Petition (civil) 196 of 2001

PETITIONER:
People's Union for Civil Liberties

RESPONDENT:
Union of India and Ors.

DATE OF JUDGMENT: 13/12/2006

BENCH:
Dr. Arijit Pasayat & S.H. Kapadia

JUDGMENT:
JUDGMENT

IN

I.A. Nos. 34, 35, 40, 49, 58, 59, 60, 61 and 62

Dr. ARIJIT PASAYAT. J.

Grievance is made by he petitioner about the non-implementation of he directions given by this Court to the Central Government and the State Government relating to Integrating Child Development Scheme (in short the 'ICDS'). The scheme is meant for children of the age group of 0-6, Pregnant women, lacetating mothers and adolescent girls. Undisputedly, funds are released by the Central Government to the State Governments who are required to implement the scheme. State Governments, it is alleged, have failed to match the grants given by the Central Government.

We shall deal with this aspect a little later in detail.

Dr. N.C. Saxena, Commissioner, and Sh. Harsh Mander, the Special Commissioner were appointed pursuant to the orders passed by this Court for giving their reports on the question whether the Scheme has been implemented in the manner desired by this Court by various orders.

A bare reading of the reports shows the grim realities and apparent lethargy of some of the States in implementing the Scheme.

By report dated 19th July 2006 following recommendations are made by the Committee.

(1) Reassert the figure of 14 lakhs AWCs as a benchmark estimate of the minimum number of AWCs required for universalization of ICDS, based on existing norms.

(2) Direct the Government of India to raise the number of AWCs to 14 lakhs within three years.

(3) Direct the government of India to formulate improved norms for the creation and placement of AWCs, in the light of this report, and in consultation with the Commissioners. The improved norms should be consistent with universalization in the sense that implementation of these norms would ensure convenient access to an Anganwadi (or mini-Anganwadi, as the case may be) to all children and eligible women.

(4) Clarify that universalizatiion of ICDS involves extending all ICDS, services (not just supplementary nutrition) to all children below the age of six, all pregnant or lacetating women and all adolescent girls.

(5) Direct chief secretaries of all State Government/UTs to submit

affidavits to the Honorable Supreme Court with details of all habitations with a majority of SC/ST households, the availability of AWCs in these habitations, and the plan of action fro ensuring that all these habitations have functioning AWCs within two years.

(6) Direct Chief Secretaries of all State Governments/UTs to submit affidavits to the Honorable Supreme Court on the steps that have been taken with regard to the interim order of this Court of October 7th, 2004 directing that "contractors shall not be used for supply of nutrition in Anganwadis and preferably ICDS funds shall be spent by making use of village communities, self-help groups and Mahila Mandals for buying of grains and preparation of meals". Chief Secretaries of all State Governments/UTs must also commit to a time-frame within which the decentralization of the supply of SNP through local community efforts will be made.

Under the Chapter 1.4 "Will India meet the Nutrition MDG?" The Report indicates as follows:

"The Millennium Development Goals (MDGs) are a set of internationally agreed goals that countries and institutions have committed to reach by 2015. The second MDG target, which we refer to as the nutrition MDC, is to halve between 1990 and 2015:

(i) the prevalence of underweight children (under five years of age)

(ii) the proportion of population below a minimum level of dietary energy consumption.

A few studies, using different assumptions, have considered the likelihood that India will attain the second nutrition MDG. Although their projections differ, in sum it seems unlikely that the prevalence of malnutrition in India will fall from its level of 54% in 1990 to 27W by 201 568, NFHS data shows that in 1998/99, even the wealthiest quintile had a prevalence of malnutrition (33%) that far exceeded the MDG goal. Our projections indicate that economic growth alone is unlikely to be sufficient to lower the prevalence of malnutrition. When combined with policy interventions, the projections are rosier, but a rapid scaling-up of health, nutrition, education and infrastructure interventions is needed if the MDG is to be met".

In the earlier report, i.e. 6th report, dated 21st November 2005 the following observations of the Commissioner are relevant:

"Compliance with the 28 November 2001 order and coverage of ICDS beneficiaries-significant orders of this court were passed regarding the implementation of the ICDS on 28.11.2001 stating that the services of the ICDS must be made available to every child up to 6 years of age, every adolescent girl, every pregnant woman and nursing mother, that every malnourished child must get an enhanced ration and that there must be an ICDS disbursement centre in every settlement. The order was the first amongst many regarding the implementation of the ICDS.

The State-wise coverage of beneficiaries under the ICDS as it currently stands as per the Department of Women and child Development, Go!5 is given in Table 1..1 The number of children in the 0-6 year age group being provided supplementary nutrition services under the ICDS stands at 403 lakhs. In comparison, as per the 2001 Census of India the 0-6 year population in India stands at 1578 lakhs. Thus, as many as 1201 lakhs or 74% of children entitled to the ICDS are currently left out of its net.

The coverage of adolescent girls in the 11-18 year age group is

worse than that of children in the 0-6 year age group .The Kishori Shakti Yojana (KSY), under which adolescent girls are covered remains limited to 2000 TCDS Projects. The total coverage of adolescent girls stands at a mere 2.4 lakhs. In comparison, as per the census of 2001, the total female population in the 11-18 years age group stands at approximately 844 lakhs. The coverage of adolescent girls has therefore virtually no taken off with a mere 0.3% of adolescent girls being covered under the scheme. It is important to note that of the 35 states and Uts only Chattisgarh, Gujrat, Haryana, Meghalaya, Rajasthan, Uttar Pradesh and Andaman and Nicobar Islands have reported to the Commissioner that adolescent girls are being covered under the ICDS. Other States such as Bihar, Goa,, Jharkand and Orissa have pointedly stated that adolescent girls are not being covered under the ICDS, although Blocks were identified for the implementation of the project as far back as 1991-92. Thus an entire section of beneficiaries. Remain completely ignored in the implementation of the scheme.

The number of pregnant women and nursing mothers is estimated to be 4% of the total population at any point in time as per ICDS Scheme guidelines. The current coverage of 81.05 lakh beneficiaries in this category therefore, is less than 20% of the estimated number of persons who should be covered by the scheme."

The essence of the previous orders dated 28.11.2001, 29.4.2004 and 7.10.2004 of this Court can be summed up as follows:

(1) Almost five years ago (on 28th November 2001), the Hon'ble Supreme Court issued an interim order calling for the universalization of ICDS, in the sense that (1) every habitation should have a functional ICDS centre (Anganwadi), and (2) ICDS services should be extended to all children upto the age of six years, all pregnant or nursing mothers and all adolescent girls. This order was reiterated and extended on 29th April, 2004 and 7the October, 2004, along with further directions on ICDS.

(2) We are concerned that very little progress has been made towards the implementation of these orders. In the 2004-05 financial year, the Government of India sanctioned the opening of 1.88 lakh new Anganwadi Centres towards implementation of the above quoted orders. It is a matter of concern that these Anganwadi Centers have not so far been operationalised. The Hon'ble Court may seek an explanation from the Ministry of women and Child Development, government of India, in this regard.

(3) In fact, the Government of India has not only failed to implement aforementioned orders of the Hon'ble Court, but challenged the basic principle of universalization outlined in these orders. The aim of this note is to clarify some key issues and present recommendations for further orders.

Anganwadi Centers are hereinafter referred to as AWCs.

As noted above, the reports of the Commissioner present a grim picture. Though directions were given by this Court in relation to universalisation of coverage under ICDS, immediate operationalisation of all sanctioned projects/centers without delay, utilization of all funds allocated, the implementation by the Central Government and the State Governments is more in breach than observance. In the earlier orders dated 29.4.2004, 7.10.2004 the submissions made by the petitioner regarding universalisation was accepted to the effect that about 14 lakhs AWCs should be made functional. As the data available indicates till now only 9,52,764 centers have been sanctioned (including 1.8 lakhs new AWCs)under the first phase of expansion that was sanctioned in 2005. It appears that the Central Government has announced sanction of 1.07 lakhs in the last week of August, 2006, which means the total number of sanctioned centers would be around

10.5 lakhs leaving a deficit of 3.5 lakhs centers. It appears that event the earlier expansion of 1.88 lakhs centers, which were sanctioned have not yet become operational.

In its letter dated 23.1.2006, the Central Government in its letter addressed to the Commissioners rejected the figure of 14 lakhs suggested by the petitioner on the ground that it was based on a survey of drinking water facilities whereby any population cluster of at least 250 persons counts as a separate "habitation". According to norms suggested by the petitioner, one AWC was intended "for every 1,000 population". This was suggested on a practical basis because one Awc cannot serve more than 1000 persons i.e. about 200 households. Since many of the AWCs have a single worker even 1000 persons appear to be a high cut off.

The suggestions presently given are that a full-fledged AWC should be made operational for a population of 300 persons or above. This is stated to be on the basis of 7th All Indian Educational Survey (in short "AIES"). Though the Central Government has accepted the need foe revision of the norms for creation or placement for AWCs , very little appears to have been done. An Inter-Ministerial Task Force (in short "IMTF") was constituted for this purpose. It has submitted its report some times earlier his year.

Whatever be the norms suggested, immediate steps should be taken to make all the sanctioned centers functional and operational without further delay. Petitioner has placed on record various materials to contend that the benchmark needs to be substantially reduced to provide a rational base. As the data available goes to show about 79% of the sanctioned centers have been made operational. As the data placed by the petitioner goes to show only about 69.4% of the sanctioned centers are providing supplementary nutrition.

According to the data provided regarding the funds allocation and utilization, following is the position:

"Till the 2004-05 financial year, norms for per beneficiary per day' allocation of funds to be made by State/UT government were those set in 1991. In the last financial year (in December 2004), the DoWCD took the long overdue step of revising the financial norms for money to be spent per beneficiary per day for the provision of supplementary nutrition. The cost norms have been changed to the following:

Table 1.3:Norms for per beneficiary per day allocation of funds under State/UT plans

Beneficiary	Old Rates*	New Rates**
Children (6-72 months) per day	Re. 0.95 per child	Rs 2/- per child per day
Severely malnourished children (6-72 months)	Rs.1.35 per child per day	Rs 270 per child per day
Pregnant women and nursing mothers/adolescent girls(KSY)	Rs.1.15 per beneficiary per day	Rs.2.30 per beneficiary per day

*Rates set by the DoWCE, GOI in 1991

**Rates set by the DoWCD, GOI in December 2004"

This is based on DoWCD letter No. F.No.19-5/2003-CD-I (pt) dated 19th October 2004.

As mentioned in the Sixth Report of the Commissioners to this Court, over the years the funds allocated by the State Governments for Supplementary Nutrition Programme (in short 'SNP') has been low and the utilisation of allocated funds has also been poor. According to data from the DoWCD, the following is the position of allocation and expenditure by States and GOI for SNP In 2005-06:

Statement indicating Budget allocation by States, Releases made by GOI and Expenditure reported during 2005-06 for Supplementary Nutrition Programmee (SNP) under Integrated Child Development Services (ICDS) Scheme.

Rs. In Lakh

Budget allocation for SNP by the States in the year 2005-06		Releases made by GOI		Total Allocation including State share	Expenditure	% Utilisation
Plan	Non Plan	During 2005-06		Reported by the States during 2005-06		
1	2	3	4	5	6	
197512.08		84351.13		97458.55	379321.76	218801.73 57.7

*expenditure upto 15/2/06

This is based in DoWCED, GOI's letter to Commissioners (letter no. 19-5/2003-CD-I (Vol.111) dated 28.08.06)

It is thus seen that the extent of utilization of funds allocated for SNP is on an average only 57.7% for the country as a whole. Despite allocations made by the States and a corresponding grant given by the Centre, huge amounts of money is being left unspent and rightful beneficiaries are being denied critically needed supplementary nutrition.

Further, shortfall in allocation required to cover all the children under 6 in the country under the SNP programme is about 60%.

Total Allocation	Total no. of Chidren under-6 (according to Census 2001)	Required Allocation*	Shortfall	% Shortfall
379321.76	1578.6	947178.87	567857.11	59.95%

The figures are in lakhs.

The calculation is at the rate of Rs. 2 per child per day for 300 days. The calculations above have been made only taking into account children under 6 years of age in the country. However, the allocations are for the entire SNP programme of the ICDS which is to also cover pregnant women, lactating mothers and adolescent girls taking this into account the shortfall in allocation would be even larger.

Certain States have been performing particularly badly in respect to most of the indicators seen above. The following is the data in relation to these states.

State	No. of AWCs sanctioned	No. of AWCs providing SNP	% providing service
Punjab	17421	14730	84.6
Haryana	16359	13546	82.8
Uttar Pradesh	137557	102881	74.8
Jharkand	30854	19571	63.4
Bihar	80415	50503	62.8
West Bengal	74640	45285	60.7
Madhya Pradesh	59324	35549	59.9
Assam	32.75	4330	13.5
Manipur	4501	0	0.0

Further even though the other States have a higher number of centers that are providing SNP, in terms of the utilization and allocation of funds they are performing badly.

State	Total Allocation (Center + State)	Expenditure (upto to 15/0206)	% Utilisation
Manipur	133424	1329.16	99.6
Jharkhand	16473.84	12711.01	77.2
Uttar Pradesh	67569.73	45916.19	68.0
Assam	9666.67	5337.64	55.2
Madhya Pradesh	20877.53	9457.82	45.3
Bihar	43040.62	18989.12	44.1
Haryana	13628.80	4046.03	29.7
West Bengal	45345.67	11845.38	26.1
Punjab	14814.55	3599.65	24.3

The basis for working out the above details is DoWCD, GOI’s letter to

Commissioners (letter no. NO. 19-5/2003-CD-1 (Vol. III), 28.08.2006).

While none of the States are utilizing the funds allocated to them for the purpose of SNP, percent of utilization isles than even 30% in the States of Haryana, West Bengal and Punjab. In the case of Manipur it is suspicious as to where the funds have been spent as according to the data given by the Department of Women and Child Development, number of beneficiaries under SNP in Manipur is nil.

In the following table the funds required for SNP to cover all the children under the age of six (based on the norm of Rs. 2 per child per day for 300 days) has been calculated. As can be seen in the table below, in states like Assam, Uttar Pradesh, Madhya Pradesh, Punjab, West Bengal and Haryana there is a shortfall of more than 60% of funds that are actually required to cover all children under -6. This combined with the fact that these states to not fully utilize even what is currently being allocated to them shows that many deserving beneficiaries are being left out of the supplementary nutrition programme of the ICDS.

State	Total Allocation (Centre + States)	0-6 population as per 2001 Census	Amount required to be allocated for the 0-6 population (in Rs. Corores)#	% Shortfall
Manipur	1334.24	3.1	1876.146	28.88
Jharkhand	16473.84	48.0	28777.128	42.75
Bihar	43040.62	162.3	97407.234	55.81
Assam	9666.67	43.5	26101.488	62.97
Uttar Pradesh	67569.73	304.7	182832.252	63.04
Madhya Pradesh	20877.53	106.2	63709.938	68.23
Punjab	14814.55	30.6	18332.952	67.53
West Bengal	45345.67	111.3	66796.944	70.69
Haryana	13628.80	32.6	19554.48	75.11

The above details ar culled out from DoWCD, GOI’s Letter to Commissioners, letter no. No. 19-5/2003-CD-1(Vol. III) 28.08.06 which has been referred to in detail above.

Keeping in view the submissions made and considering the materials placed on record we direct as follows:

(1) Government of India shall sanction and operationalize minimum of 14 lakh AWCs in a phased and even manner starting forthwith and ending December 2008. In doing so, the Central Government shall identify SC and ST hamlets/habitations for AWCs on a priority basis.

(2) Government of India shall ensure that population norms for opening of AWCs must not be revised upward under any circumstances. While maintaining the upper limit of one AWC per 1000 population, the minimum limit for opening of a new AWC is a population of 300 may be kept in view. Further, rural communities and slum dwellers should be entitled to an "Anganwadi on demand" (not later than three months) form he date of demand in cases where a settlement has at least 40 children under six but no anganwadi.

(3) The universalisation of the ICDS involves extending all ICDS services (Supplementary nutrition, growth monitoring, nutrition and health education, immunization, referral an pre-school education) to every child under the age of 6, all pregnant women an lactating mothers and all adolescent girls.

(4) All the State Governments and union Territories shall fully implement the ICD scheme by, inter alia,

(i) allocating and spending at least Rs. 2 per child per day for supplementary nutrition out of which the Central Government shall contribute Rs. 1 per child per day.

(ii) allocating and spending at least Rs. 2.70 for every severely malnourished child per day for supplementary nutrition out of which the Central Government shall contribute Rs. 1.35 per child per day.

(iii) allocating and spending at least Rs. 2.30 for every pregnant women, nursing mother/adolescent girl per day for supplementary nutrition out of which the Central Government shall contribute Rs. 1.15.

(5) The Chief Secretaries of the State of Bihar, Jharkhand, Madhya Pradesh, Manipur, Punjab, West Bengal, Assam, Haryana and Uttar Pradesh shall appear personally to explain why the orders of this Court requiring the full implementation of the ICDS scheme were not obeyed.

(6) Chief Secretaries of all State Governments/UT are directed to submit affidavits giving details of all habitations with a majority of SC/ST households, the availability of AWCs in these habitations, and the plan of action for ensuring that all these habitations have functioning AWCs within two years.

(7) Chief Secretaries of all State Governments/UTs are directed to submit affidavits giving details of the steps that have been taken with regards to the order of this Court of October 7th, 2004 directing that "contractors shall not be used for supply of nutrition in Anganwadis and preferably ICDS funds shall be spent by making use of village communities, self-help groups and Mahila Mandals for buying of grains and preparation of meals". Chief Secretaries of all State Governments/UTs. must indicate a time-frame within which the decentralisation of the supply of SNP through local community shall be done.

(8) It is matter of concern that 15 States and Union Terrioties have not submitted any affidavit in compliance with the order dated 7.10.2004. They are the State of Orissa, Uttar Pradesh, Sikkim Arunachal Pradesh, Nagaland, Goa, Punjab Manipur, Tamil Nadu, Andhra Pradesh, Mizoram, Haryana, Bihar and the National Capital of Delhi and the Union Terrioty of Lakshadweep. Within four weeks reply shall be filed through the concerned Chief Secretary as to why action for contempt shall not be initaited for the lapse.

The matters shall be listed after three months. Upto date statistic report shall be filed by the different States, Union Territories and the Central Government.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

WRIT PETITION (C) NO. 196 OF 2001

People's Union for Civil Liberties ...Appellant

Versus

Union of India & Ors. ....Respondents

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Heard learned counsel for the parties. It has been submitted by learned counsel for the Union of India that keeping in view the orders passed by this Court on several dates, several actions have been taken, which substantially comply with the directions given by this Court.

2. Colin Gonsalves, Sr. counsel on the other hand stated that though there has been substantial compliance of the directions given by this court yet there is some reservation about the revised nutritional and feeding norms for supplementary nutrition in ICDS Scheme. It is submitted that there is scope of involving contractors in the supplies which was prohibited by that Court.

3. By affidavit dated 2nd March, 2009, the Union of India has highlighted several factors which create serious dent against malnutrition. It is stated that same can be made to achieve a significant reduction in the rate of malnutrition. The said affidavit clarifies that these interventions include universalization of ICDS (by sanctioning 13.80 lakh Anganwadi/ Mini Anganwadi Centres and 20,000 Anganwadis-on-Demand making a total of 14 lakh Anganwadis/Mini Anganwadi Centres as mandated by this Court) and, most importantly, reduction in the gap between Recommended Dietary Allowance (hereinafter referred to as "RDA") and Actual Dietary Intake (hereinafter referred to as "ADI"). On a careful consideration of the matter, the Central Government has revised both the nutritional and feeding norms as well as thee financial norms of supplementary nutrition under the ICDS Scheme.

4. It is noted that the nutritional norms have remain unchanged since inception of the Scheme (in 1975) until a recent comprehensive review by a Task Force constituted by the Central Government. On the basis of the recommendations of this Task Force, the calorific and feeding norms for supplementary nutrition in ICDS Scheme in respect of children of all categories below 6 years of age and pregnant women and nursing mothers have been revised. The Table below shows the old and revised norms:

	Old Norms			**Revised Norms**		
Category	**Rate Rs./ per benefici-ary per**	**Calories (Cal)**	**Protein (g)**	**Rate Rs./ per benefici ary per**	**Calories (Cal)**	**Protein (g),**
(i) Children below 3 years	2.00	300	8-10	4.00	500	12-15
(ii)Children 3-6 years	2.00	300	8-10	4.00	500	12-15
(iii)Severely malnourished children	2.70	600	20	6.00	800	20-25
(iv)Pregnant & Lactating (P&L) mothers	2.30	500	20-25	5.00	600	18-20

The above revised norms are incorporated in para 8.2(b) of the affidavit.

5. The Revised Nutritional and Feeding Norms for SNP in ICDS Scheme circulated vide letter no.5-9/2005/ND/Tech (Vol. II) dated 24.02.2009 states that children in the age group of 6 months to 3 years must be entitled to food supplement of 500 calorie of energy and 12-15 gm of protein per child per day in the form of take home ration (THR). For the age group of 3-6 years, food supplement of 500 calories of energy and 12-15 gm of protein per child must be made available at the Anganwadi Centres in the form of a hot cooked meal and **a** morning snack. For severely underweight children in the age group of 6 months to 6 years, an additional 300 calories of energy and 8-10 gm of protein would be given as THR. For pregnant and lactating mothers, a food supplement of 600 calories of energy and 18-20 gm of protein per beneficiary per day would be provided as THR.

6. The letter dated 24.02.2009 No.5-9/2005/ND/Tech (Vol.II) has been annexed to the affidavit dated 2nd March 2009 filed by the Union of India. It is directed that norms indicated in the said letter addressed to all the State Governments and Union Territories have to be implemented forthwith and the respective States/UTs would make requisite financial allocation and undertake necessary arrangements to comply with the stipulations contained in the said letter.

7. It is further stated by the Ld. Additional Solicitor General that Supplementary Nutrition Food (SNP) in the form of THR shall be provided to all children in the age group of 6 months to 3 years, an additional 300 calories to severely underweight children in the age group of 3 to 6 years, pregnant women and lactating mothers as per paras 5(c), 5(d) and 5(e) of the letter dated 24th February 2009. Accordingly all Union Territories and State Governments are directed to ensure compliance with the aforementioned stipulations without fail.

8. Further, all the States and Union Territories are directed to provide supplementary nutrition- in the form of a morning snack and a hot cooked meal to the children in the age group of 3 to 6 years as per Para 5(d) of the guidelines contained in the letter dated 24th February 2009 preferably by 31st December 2009.

9. As far as adolescent girls are concerned, they would continue to be covered by the entitlements of the Nutritional Programme for Adolescent Girls (hereinafter referred to as 'NPAG') and Kishori Shakti Yojana (hereinafter referred to as 'KSY') till such time as a comprehensive

universal scheme for the empowerment of adolescent girls called 'The Rajiv Gandhi Scheme for the Empowerment of Adolescent girls' is implemented within six months from the date of the order.

10. It shall however be ensured that the following direction by order dated 7th October, 2006 which was reiterated by order dated 13.6.2006 shall continue to be operative.

11. It is pointed out that several States like Andhra Pradesh, Gujarat, Uttar Pradesh and Nagaland have not met the requisite norms. These States are directed to take steps as required to be taken.

12. Compliance reports filed by all the States and Union Territories by 15th January, 2010.

13. Put up thereafter.

……

….....J.

(Dr. ARIJIT PASAYAT)

…….....J.

(S.H. KAPADIA)

New Delhi
April 22, 2009

ITEM NO.53 COURT NO.5 SECTION PIL(W)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Writ Petition(s)(Civil) No(s).196/2001

PEOPLE'S UNION FOR CIVIL LIBERTIES Petitioner(s)

VERSUS

UNION OF INDIA & ORS. Respondent(s)

(With appln.(s) for impleadment and directions and exemption from filing O.T. and permission to file an application for clarification/modification of court's order and intervention and permission to appear and argue in person and extension of time and office report)

WITH
SLP(C) No. 17453/2006

SLP(C) No. 1538/2009

W.P.(C) No. 277/2010

SLP(C) No. 10654/2012

SLP(C) No. 142/2013

W.P.(C) No. 277/2015
(With appln.(s) for exemption from filing O.T.)

CONMT.PET.(C) No. 99/2009 In W.P.(C) No. 196/2001
(With appln.(s) for exemption from filing O.T.)

Date : 10/02/2017 These matters were called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE PRAFULLA C. PANT

For Petitioner(s) Mr. Colin Gonsalves, Sr. Adv.
Ms. Olivia Bang, Adv.
Mr. Aditya Srivastva, Adv.
Ms. Jyoti Mendiratta, AOR

	Dr. Kailash Chand, AOR
	Dr. Aman Hingorani, Adv. **Ms. Priya Hingorani, Adv.** **Ms. Ankita Narang, Adv.** **for M/s. Hingorani & Associates**
	Mr. D. M. Nargolkar, AOR
	Mr. K. L. Janjani, AOR **Mr. Pankaj Kumar Singh, Adv.** **Ms. Varsha Rana, Adv.**
	Mr. Satya Mitra, AOR
	Mr. Debasis Misra, AOR
For Respondent(s)/ applicant(s) UOI	**Mr. A.N.S. Nadkarni, ASG** **Ms. V. Mohana, Sr. Adv.** **Mr. S. Wasim A. Qadri, Adv.** **Ms. Sunita Sharma, Adv.** **Mr. Gaurav Sharma, Adv.** **Mr. S.S. Rawat, Adv.** **Mr. Vikas Bansal, Adv.** **Mr. Arun Kumar Yadav, Adv.** **Ms. Rashmi Malhotra, Adv.** **Mr. R.K. Rathore, Adv.** **Ms. Sushma Suri, AOR** **Mrs. Anil Katiyar, AOR** **Mr. D.S. Mahra, Adv.** **Mr. Gurmeet Singh Makker, Adv.** **Mr. P.K. Mullick, Adv.** **Ms. Aishwarya Bhati, Adv.** **Mr. Raj Bahadur, Adv.** **Mr. Mukesh Kumar Maroria, AOR**
	Applicant-in-person (not present)
For States of Andhra Pradesh	**Mr. Guntur Prabhakar, AOR** **Ms. Prerna Singh, Adv.**
Arunachal Pradesh	**Mr. Anil Shrivastav, AOR** **Mr. Rituraj Biswas, Adv.**

Assam	**Mr. Debojit Borkakati, Adv.** **Mr. M. Bala Shivudu, Adv.**
Bihar	**Mr. Gopal Singh, AOR** **Mr. Manish Kumar, Adv.** **Ms. Varsha Poddar, Adv.** Mr. Chandan Kumar, Adv.
Chhattisgarh	**Mr. Atul Jha, Adv.** **Mr. Sandeep Jha, Adv.** **Mr. Dharmendra Kumar Sinha, AOR**
Goa	**Mr. Anshuman Srivastava, Adv.** **Mr. S.S. Rebello, Adv.** **Apoorva Bhumesh, AOR**
Gujarat	**Ms. Hemantika Wahi, AOR** **Ms. Jesal Wahi, Adv.** **Ms. Puja Singh, Adv.**
H.P.	**Mr. D.K. Thakur, AAG** **Mr. Shariq Ahmed, Adv.** **Mr. Williams Vinod, Adv.** **Mr. Varinder Kumar Sharma, Adv.** **Ms. Pragati Neekhra, AOR**
Haryana	**Mr. Ajay Bansal, AAG** **Mr. Gaurav Yadava, Adv.** **Mr. Sanjay Kumar Visen, AOR**
Karnataka	**Mr. Prakash Jadhav, Adv.** **Mr. Lagnesh Mishra, Adv.** **Mr. V.N. Raghupathy, AOR** **Mr. Parikshit P. Angadi, Adv.**
Kerala	**Mr. G. Prakash, AOR** **Mr. Jishnu M.L., Adv.** **Mrs. Priyanka Prakash, Adv.** **Mrs. Beena Prakash, Adv.** **Mr. Manu Srinath, Adv.**
M.P.	**Mr. Purushaindra Kaurav, AAG** **Mr. Arjun Garg, AOR** **Mr. Manish Yadav, Adv.** **Mr. Ishan Nagar, Adv.** **Mr. Mishra Saurabh, AOR** **Mr. Ankit Kr. Lal, Adv.**

	Ms. Vanshaja Shukla, Adv.
Maharashtra	**Mr. Kunal A. Cheema, Adv.** **Mr. Yogesh K. Ahirrao, Adv.** **Mr. Nishant Ramakantrao Katneshwarkar, AOR**
Manipur	**Mr. U. Hazarika, Sr. Adv.** **Mr. Sapam Biswajit Meitei, Adv.** **Mr. Ashok Kumar Singh, AOR** **Ms. B. Khusbansi, Adv.**
Meghalaya	**Mr. Ranjan Mukherjee, AOR** **Mr. Danial Stone Lyngdoh, Adv.**
Mizoram	**Mr. Pragyan Pradip Sharma, Adv.** **Mr. Ganesh Bapu TR, Adv.** **Mr. Shikhar Garg, Adv.** **Mr. P. V. Yogeswaran, AOR** **Mr. T.G. Narayanan Nair, AOR**
Nagaland	**Ms. K. Enatoli Sema, AOR** **Mr. Edward Belho, Adv.** **Mr. Amit Kumar Singh, Adv.** **Mr. K. Luikang Michael, Adv.** **Mr. Z.H. Isaac Haiding, Adv.**
Odisha	**Mr. Pawan Upadhyay, Adv.** **Mr. Sarvjit Pratap Singh, Adv.** **Ms. Sharmila Upadhyay, AOR**
Punjab	**Mr. Ashok Aggarwal, Adv. Gen.** **Mr. Ajay Bansal, AAG** **Mr. Gaurav Yadava, Adv.** **Mr. Kuldip Singh, AOR**
Rajasthan	**Mr. P.S. Narsimha, ASG** **Mr. S.S. Shamshery, Adv.** **Mr. Amit Sharma, Adv.** **Mr. Ankit Raj, Adv.** **Ms. Ruchi Kohli, Adv.** **Mr. Ajay Kapur, AAG** **Mr. Anirudh Singh, Adv.** **Mr. Milind Kumar, AOR**
Sikkim	**Ms. Aruna Mathur, Adv.** **Mr. Avneesh Arputham, Adv.** **Mr. Yusuf Khan, Adv.**

	Ms. Anuradha Arputham, Adv. **Mr. Amit Arora, Adv.** **for M/s Arputham Aruna & Co.**
Tamil Nadu	**Mr. B. Balaji, AOR** **Mr. S. Kumar, Adv.** **Mr. Muthuvel Palani, Adv.**
Telangana	**Mr. S. Udaya Kumar Sagar, AOR** **Mr. Mrityunjai Singh, Adv.**
Tripura	**Mr. Gopal Singh, AOR** **Mr. Rituraj Biswas, Adv.** **Ms. Varsha Poddar, Adv.**
Uttar Pradesh	**Mr. Irshad Ahmad, AAG** **Mr. Vikas Bansal, Adv.** **Mr. Vinay Garg, Adv.** **Mr. Gaurav Dhingra, Adv.** **Mr. Sandeep Singh, Adv.**
Uttarakhand	**Ms. Bhuvneshwari Pathak Kaushik, Adv.** **Ms. Shilpi Satya Priya Satyam, Adv.** **Mr. Rahul Kaushik, AOR**
West Bengal	**Mr. Joydeep Mazumdar, Adv.** **Mr. Parijat Sinha, AOR** **Mr. Rohit Dutta, Adv.** **Mr. Soumitra G. Chaudhuri, Adv.**
A&N Islands	**Mr. Bhupesh Narula, Adv.** **Mr. K.V. Jagdishvaran, Adv.** **Mrs. G. Indira, AOR**
Puducherry	**Mr. V.G. Pragasam, AOR** **Mr. Prabu Ramasubramanian, Adv.**
Lakshdweep	**Ms. Aishwarya Bhati, Adv.** **Mr. W.A. Qadri, Adv.** **Mr. P.K. Mullick, Adv.** **Dr. Nupur Bhati, Adv.**
	Mr. Pratap Venugopal, Adv. **Ms. Surekha Raman, Adv.** **Ms. Niharika, Adv.** **Mr. Aman Shukla, Adv.** **Ms. Kanika Kalayarsnya, Adv.**

for M/s. K.J. John & Co.

Mr. Ajay Choudhary, AOR

Mr. Anil Kumar Jha, AOR

Mr. Anil Kumar Tandale, AOR

Mr. C. K. Sasi, AOR

Mr. Pankaj Bhatia, Adv.
Mr. Jatinder Kumar Bhatia, AOR

Mr. T. Mahipal, AOR

Mr. Shuvodeep Roy, AOR

Mr. Ashok Mathur, AOR

Mr. Gaurav Dhingra, AOR

Mr. Subramonium Prasad, Sr. Adv.
Mr. Bhakti Vardhan Singh, Adv.
Mr. Nachiketa Joshi, AOR

Mr. Satya Mitra, AOR

Mr. Apoorv Kurup, AOR

Mr. Venkateswara Rao Anumolu, AOR

Mr. Ranjit Singh Rana, AOR

Mr. Khwairakpam Nobin Singh, AOR

Ms. Asha Gopalan Nair, AOR

Mr. Chandra Prakash, AOR

Mr. Chirag M. Shroff, AOR
Ms. Neha Sangwan, Adv.

Ms. Kiran Bhardwaj, AOR

Ms. A. Subhashini, Adv.

UPON hearing the counsel the Court made the following

O R D E R

W.P.(C) No.196/2001

In view of the passage of the National Food Security Act, 2013, nothing further survives in this petition. It is accordingly disposed of.

In case the petitioner has any grievance with regard to the implementation or otherwise of the National Food Security act, 2013, he may file a fresh petition.

In view of the disposal of the writ petition, all pending applications including applications for impleadment/intervention are disposed of.

W.P.(C) No. 277/2015

This writ petition is confined only to prayer (j) which reads as follows:

> **"j. For an order directing all States and UTs to pay the maternity benefit of not less than Rs.6000 to all pregnant women and lactating mothers with effect from 5.7.13 in accordance with Section 4(b) of the National Food Security Act."**

Learned Additional Solicitor General says that though counter affidavits were filed in 2015, there have been some further developments which he would like to place on record. Accordingly, additional affidavit be filed by the Union of India within a period of four weeks.

List the matter on 22nd March, 2017.

The Registry will presently not accept any affidavit filed by any of the State Government/Union Territory.

W.P.(C) No. 277/2010

We are not inclined to further continue with this matter.

The writ petition is dismissed.

SLP(C) No. 17453/2006, SLP(C) No. 1538/2009, SLP(C) No. 10654/2012, SLP(C) No. 142/2013 and CONMT.PET.(C) No. 99/2009 In W.P.(C) No. 196/2001

We are not inclined to further continue with these matters.

The special leave petitions and the contempt petition are dismissed.

(SANJAY KUMAR-I)
AR-CUM-PS

(JASWINDER KAUR)
COURT MASTER

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO. 857 OF 2015

Swaraj Abhiyan (V) ….Petitioner

versus

Union of India & Ors. …Respondents

J U D G M E N T

Madan B. Lokur, J.

1. Our Constitution provides a simple answer to one disturbing question that has arisen in this case: What can the Government of India do to require the State Governments and Union Territories to make functional those bodies and authorities that are mandated by a law passed by Parliament (such as the National Food Security Act, 2013)? The answer to this is provided in Article 256 of our Constitution – perhaps a forgotten provision – which reads as follows:

> "256. **Obligation of States and the Union** – The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose."

In other words, the Government of India cannot plead helplessness in requiring State Governments to implement parliamentary laws.

Another question that arises is : What remedy does a citizen of India have if the Government of India does not issue such a direction and the State Government or the Union Territory does not implement a law passed by Parliament?

2. These two questions arise in the context of the seriousness with which the National Food Security Act, 2016 - a welfare legislation – is and should be implemented.

3. Initially the National Food Security Ordinance, 2013 was promulgated by the President on 5th July, 2013. Thereafter, the National Food Security Bill, 2013 was introduced in Parliament with, amongst others, the following objectives:

> "(k) impose obligation upon the State Governments to put in place an internal grievance redressal mechanism which may include call centers, help lines, designation of nodal officers, or such other mechanism as may be prescribed by the respective Governments; and for expeditious and effective redressal of grievances of the aggrieved person in matters relating

to distribution of entitled foodgrains or meals under Chapter II of the proposed legislation, a District Grievance Redressal Officer, with requisite staff, to be appointed by the State Government for each District, to enforce these entitlements and investigate and redress grievances;

(l) make provision for State Food Commission to be constituted by every State Government for the purpose of monitoring and review of implementation of the proposed legislation;

(o) conduct or cause to be conducted by every local authority, or any other authority or body, as may be authorized by the State Government, periodic social audits on the functioning of fair price shops. Targeted Public Distribution System and other welfare schemes, and cause to publicise its findings and take necessary action, in such manner as may be prescribed by the State Government;"

4. The National Food Security Bill was passed by both Houses of Parliament and received the assent of the President on 10th September, 2013. Almost four years have gone by but the authorities and bodies mandated to be set up under the National Food Security Act, 2013 (for short 'the NFS Act') have not yet been made functional in some States. This is despite the fact that Section 14 of the NFS Act requires that "Every State Government **shall** put in place an internal grievance redressal mechanism…."

5. Similarly, Section 15 of the NFS Act provides that "The State Government **shall** appoint or designate, for each district, an officer to be the District Grievance Redressal Officer….."

6. Section 16 of the NFS Act provides that "Every State Government **shall**, by notification, constitute a State Food Commission……..."

7. Section 28 of the NFS Act provides that "Every local authority, or any other authority or body, as may be authorized by the State Government, **shall** conduct or cause to be conducted periodic social audits……"

8. Similarly Section 29 of the NFS Act provides that "For ensuring transparency and proper functioning of the Targeted Public Distribution System and accountability of the functionaries in such system, every State Government **shall** set up Vigilance Committees……"

9. The provisions in the NFS Act mentioned above are mandatory and yet almost four years down the line they have not been fully implemented by some States.

10. Food security is undoubtedly extremely important and as observed by this Court in ***People's Union for Civil Liberties (PDS Matters) v. Union of India and ors.***[1] "Mere schemes without any implementation are of no use." Similarly, one may ask what use is a law passed by Parliament if State Governments and Union Territories do not implement it at all, let alone implement it in letter and spirit.

1 (2013) 2 SCC 688

11. These questions have been troubling us since this matter was listed on 24th October, 2016 subsequent to our order dated 13th May, 2016 in Swaraj Abhiyan (II). We had expected the concerned State Governments to implement the provisions of the NFS Act with all due seriousness since it is a social welfare legislation enacted by Parliament.

12. Unfortunately, during the hearing we were informed by learned counsel for the petitioner that Section 15 and Section 16 of the NFS Act were not being complied with by the State Governments in letter and spirit.

13. In so far as Section 15 of the NFS Act is concerned this mandates the State Government to appoint or designate, for each district, an officer to be the District Grievance Redressal Officer for expeditious and effective redressal of grievances of aggrieved persons in matters relating to the distribution of entitled foodgrains or meals under Chapter II of the NFS Act and to enforce the entitlements under the said Act.

14. We were informed that no rules had been framed as required by Section 15 of the NFS Act for the appointment or designation of the District Grievance Redressal Officer nor had any qualifications been prescribed for the appointment of such officers. All that had been done by the State Governments was that some officials were given additional responsibility as

a District Grievance Redressal Officer. However, since those very officers were in charge of implementation of the NFS Act, designating them as District Grievance Redressal Officers to whom grievances could be addressed against them did not serve any purpose at all. We suggested to the learned Attorney General that since the States before us did not seem to be fully on board with regard to the implementation of a law enacted by Parliament, an extremely unfortunate situation had arisen. To get over this stalemate created by the State Governments it might be appropriate for the Central Government to consider framing Model Rules under Section 15 of the NFS Act so that it would make things easier for the State Governments and also give some teeth to the law enacted by Parliament.

15. In so far as Section 16 of the NFS Act is concerned this mandates the State Government to constitute a State Food Commission for the purpose of monitoring and review of implementation of the NFS Act.

16. We were informed that some of the State Governments had appointed the Consumer Disputes Redressal Commission constituted under the provisions of the Consumer Protection Act, 1986 as the State Food Commission under Section 16 of the NFS Act. We were of the view that this was unsatisfactory and not in consonance with the provisions of the law

particularly the letter and spirit of the NFS Act. We therefore suggested to the learned Attorney General to frame Model Rules under Section 16 of the NFS Act also for the reasons mentioned above.

17. On 1st December, 2016 the learned Attorney General informed us that the Secretary in the Ministry of Food and Public Distribution pursuant to an order passed by us on 28th October, 2016 held a meeting on 9th November, 2016. The Minutes of that meeting were placed before us. Paragraph 6 of the Minutes state, *inter alia*, as follows:

> "..... As regards SFC [State Food Commission], she stated that ideally State Governments should set up independent Commission as per provisions of the Act and make Rules prescribing method and terms & conditions of appointment of Chairperson and Members of the Commission, its powers, procedures and periodicity of its meeting (at least once in six months), procedure for hearing appeals and timelines for their disposal. However, the Act also provides flexibility to State Governments for designating some existing Commission to act as SFC and many States have opted for this flexibility. In such scenario also, State Government should frame Rules to be followed by the designated Commissions in its role as SFC. Further, Chairman and such Member (s) of the designated Commission who will specifically perform the functions of SFC should be clearly indicated, and such Commission should be provided additional staff to handle the additional work."

18. It was noted that the NFS Act provides some flexibility to the State Governments in designating an existing Commission to act as the State Food Commission. It was noted that many of the State Governments had

opted for this flexibility. We expressed the view that while flexibility was certainly provided by the NFS Act, the constitution of the State Food Commission must nevertheless meet the requirements of the law and its members must meet the eligibility criteria. In other words it is not as if any statutory body or authority could be given additional charge as a State Food Commission even though the members of that statutory body or authority did not meet the requirements of Section 16 of the NFS Act.

19. We also expressed the view that it would be more appropriate if a State Food Commission is constituted under Section 16 of the Act with the necessary expertise and qualifications to function as such. We expressed the view that it would be appropriate if the State Food Commission is constituted at the earliest.

20. Unfortunately, our expectations were belied in as much as when this matter was taken up on 22nd March, 2017 we noted with regret that generally speaking the provisions of the NFS Act had not been faithfully and sincerely implemented by the State Governments before us. With regard to the implementation of Section 16 of the NFS Act we were informed that the State Food Commission had not yet been appointed. We noted that on an earlier occasion we were informed that many State

Governments had appointed the Consumer Redressal Commission constituted under the Consumer Protection Act, 1986 as the State Food Commission under Section 16 of the NFS Act. We had heard the learned Attorney General in this regard and had expressed the view that giving "additional charge" to the Consumer Disputes Redressal Commission to function as the State Food Commission under Section 16 of the NFS Act appeared incongruous. This is because the qualifications required for both the bodies were quite different but that apart we found it odd that the Consumer Disputes Redressal Commission which performs judicial or quasi-judicial functions should be asked to perform administrative and quasi-judicial functions as a State Food Commission under the NFS Act.

21. We drew attention to our order dated 24th October, 2016 and the fact that we had heard the learned Attorney General and the learned Additional Solicitor General and learned counsel for the States before we had passed the order on 24th October, 2016.

22. We were informed during the course of hearing on 22nd March, 2017 that many of the State Governments have in fact framed the necessary rules and that the Central Government had also prepared Model Rules and circulated them to the State Governments. Notwithstanding this and even

though considerable time had elapsed a State Food Commission has not yet been constituted in the following States:

1. Madhya Pradesh
2. Karnataka
3. Andhra Pradesh
4. Telangana
5. Maharashtra
6. Gujarat
7. Jharkhand
8. Bihar
9. Haryana
10. Chhattisgarh

23. As far as the State of Haryana is concerned we were informed that although the State Food Commission had been constituted, it had not been provided with any infrastructure, office space or budget and it was apparently requested not to perform any function with the result that it was compelled to approach the Punjab and Haryana High Court for relief.

24. Since it appeared that the State Governments were not at all inclined to implement the provisions of a law enacted by Parliament for the benefit

of the people of the country, we were compelled and constrained to require the presence of the Chief Secretaries of the above mentioned States to inform us whether the law passed by Parliament is intended to be implemented by the State Governments or not. We also required the concerned Chief Secretaries to ensure the appointment of the State Food Commission in accordance with the provisions of the Act, assuming the State Governments would be willing to implement the law enacted by Parliament. We also required details of the appointment of independent District Grievance Redressal Officers under Section 15 of the NFS Act, that is to say persons independent of those against whom complaints are made and persons who are not subordinate to the officers against whom complaints are made. We further required the concerned Chief Secretaries to inform us whether any social audit had been conducted under the provisions of Section 28 of the Act which reads as follows:

> "**Conduct of social audit** – (1) Every local authority, or any other authority or body, as may be authorized by the State Government, shall conduct or cause to be conducted, periodic social audits on the functioning or fair price shops, Targeted Public Distribution System and other welfare schemes, and cause to publicise its findings and take necessary action, in such manner as may be prescribed by the State Government.
>
> (2) The Central Government may, if it considers necessary, conduct or cause to be conducted social audit through independent agencies having experience in conduct of such audits."

25. On 26th April, 2017 most of the Chief Secretaries appeared in Court and some had genuine reasons for not appearing. On our asking, we were informed about the constitution, establishment and appointment of the State Food Commission as follows:

1. Madhya Pradesh – Appointments not made.
2. Andhra Pradesh – Appointments not made.
3. Telangana – Appointments made.

4. Maharashtra – Appointments made but no member belonging to any Scheduled Caste or Scheduled Tribe has been appointed.

5. Gujarat - Appointments made.
6. Jharkhand – Appointments made.
7. Bihar - Appointments made but there are still two vacancies.
8. Chhattisgarh – Appointments made.
9. Karnataka (informed on 27th April, 2017) – Constituted and established. However, the affidavit of the Chief Secretary states that appointments have not yet been made.

10. Haryana – Matter is pending in the Punjab and Haryana High Court.

26. This compliance with the NFS Act is pathetic to say the least and it is in this background that we are required to consider this case.

27. It was submitted by learned counsel for the petitioner that in so far as the appointment of a District Grievance Redressal Officer is concerned, an independent person should be appointed and not the District Collector or the Deputy Commissioner of the district. The reason advanced by learned

counsel was that these officers are already extremely busy, they may not be able to address the grievance of the people within their district and are directly concerned with the implementation of the NFS Act. As such, they might not be independent enough to deal with the grievances.

28. In this context, our attention was drawn to a letter dated 14th March, 2017 sent by the Economic Advisor in the Ministry of Consumer Affairs, Food and Public Distribution addressed to the Principal Secretary/ Secretary, Department of Food and Civil Supplies of all the States and Union Territories. In this letter, attention was drawn to the necessity of establishing a Grievance Redressal Mechanism under the NFS Act and the draft Model Rules circulated on 21st November, 2016. A request was made to keep the directions issued by this Court in mind while framing the rules which could differ from the draft Model Rules prepared by the Central Government. For guidance a copy of the rules notified by the State Government of Tripura were enclosed.

29. In the letter, it was stated inter alia as follows:-

> "4. While taking further action to (i) notify rules on GRM (ii) appoint DGRO and (iii) constitute State Food Commission, following may be kept in view:
>
> (a) In order to maintain transparency and independence of the grievance redressal machinery, it must be ensured that no officer of the

Government dealing with delivery of entitlements under the Act is designated/appointed as DGRO.

(b) The States/UTs which have already designated an existing statutory commission to function as State Food Commission should review the matter to ensure that its constitution is in accordance with the provisions of Section 16 of the Act.

(c) The States/UTs intending to designate any existing statutory commission to function as State Food Commission should ensure that as mandated by Hon'ble Supreme Court, the constitution of existing commission is in accordance with the provisions of Section 16 of the Act.

(d) Keeping in view the State specific requirements and the broad provisions of Model Rules on GRM, the State Governments/UT Administrations may finalize their own Rules and notify the same in consultation with the State Legal Department, and in accordance with the provisions of Section 40 of the Act."

30. In our view, the draft Model Rules circulated by the Central Government need serious consideration by the State Governments before us as well as by other State Governments and Union Territories. As advised by the Central Government, the grievance redressal machinery should be independent and its functioning should be transparent. As long as this is achieved, it hardly matters that some officer of the government is appointed as the District Grievance Redressal Officer. However, as emphasized in the letter dated 14th March, 2017 it would be appropriate if an officer dealing with delivery of entitlements under the NFS Act is not appointed or designated as the District Grievance Redressal Officer since he or she might not be able to entertain a complaint against his or her own functioning. In

view of the circulation of the draft Model Rules, it is now really up to the Central Government and the Governments of the States and Union Territories to ensure that a transparent and accountable Grievance Redressal Mechanism is put in place through notified rules so that the advantages of the NFS Act can be passed on to those who need the benefit of this social welfare legislation.

31. With regard to the constitution and establishment of the State Food Commission, it was submitted by learned counsel for the petitioner that it is unfortunate that even though the NFS Act has been in force for about four years, only a few of the State Governments before us had taken its provisions seriously. It is a pity that legislation enacted by Parliament for the benefit of the people should be kept on the backburner by some of the State Governments before us. It was submitted that this apathy is all pervasive and there are other State Governments and Union Territories that have not taken the provisions of the NFS Act seriously enough for their implementation.

32. We are in general agreement with learned counsel for the petitioner and the fact that even after prodding by the Central Government and our prodding, many of the State Governments have not yet established a

working State Food Commission, this is a clear indication that there is hardly any commitment to the implementation of the NFS Act.

33. In the letter dated 14th March, 2017 referred to above, it has been mentioned that the States and Union Territories intending to designate any existing statutory commission to function as the State Food Commission should ensure that the provisions of Section 16 of the NFS Act are complied with. In our opinion, while it is theoretically possible to have a statutory commission or body function as a State Food Commission, provided that statutory commission or body is constituted and established in accordance with the provisions of Section 16 of the NFS Act, there might be several practical difficulties in the actual working of one statutory commission performing two disparate functions under two different statutes. This is more than likely to compromise the efficiency of that statutory commission or body with the result that the beneficiaries of the multifarious functions of the statutory commission or body would suffer at both ends. This is hardly conducive to good administration and reduces the importance of a basic right to wholesome and nutritious food particularly for women and children which is really the objective of the NFS Act.

34. The importance of the State Food Commission cannot be minimized by the State Government if the NFS Act is to be faithfully implemented. In this regard, we are pained to read in the affidavit filed by the State of Haryana that there is hardly any work for the State Food Commission. With such an attitude, it is very unlikely that any progress will ever be made either by the State of Haryana or the State Food Commission in Haryana in the matter of food security. One can only feel sorry for the people in Haryana.

35. In so far as conducting a social audit is concerned, this is provided for in Section 28 of the NFS Act and was strongly recommended by learned counsel for the petitioner.

36. It was pointed out by learned counsel and there was general agreement with his submission on behalf of the Central Government that the draft Report of the Working Group on Developing Social Audit Standards, which has been accepted by the Central Government, should be implemented with necessary modifications in so far as the NFS Act is concerned. The reason for the modifications is that the Working Group had prepared its Report and developed the protocol for conducting a social audit in consultation with the Comptroller and Auditor General of India in the

context of the Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (for short 'the MGNREG Act'). In terms of the draft Report the overall arrangement is as follows:-

> "1. Social audit is to be conducted every 6 months by Gram Sabhas.
>
> 2. Financial audit of accounts of panchayats and State Employment Guarantee Fund is to be conducted annually by Directors of Local Fund Audit/chartered accountants who send account together with audit certificates to State Governments.
>
> 3. The accounts of MGNREG Act Schemes, as certified, together with the audit report on them are sent to the Central Government which causes them to be tabled in each House of Parliament.
>
> 4. A copy is also sent by State Governments to CAG who audits the schemes periodically as per his independent judgment and powers under CAG's (DPC) Act, 1971 read with provisions of Section 24 of the MGNREG Act, 2005."

37. The social audit standards have been framed with the support of certain fundamental principles as is apparent from paragraph 1.6 of the draft Report which reads as follows:-

> "These social audit standards have been framed with the support provided by the fundamental principles of Public Sector Auditing (ISSAI 100) and the operational guidelines for coordination and cooperation between SAIs and internal auditors in the public sector (ISSAI 9150), issued by INTOSAI. The national legal framework has been borne in mind, especially taking into account provisions of MGNREG Act 2005, MGNREG Audit of Scheme Rules 2011, Local Fund Audit Acts of the State Governments and CAG's (DPC) Act, 1971 along with the Regulations, 2007 notified by CAG."

38. The draft Report is exhaustive and we were informed that it has been accepted by the Central Government and social audits under the MGNREG Act are being conducted in accordance with the guidelines laid down as well as the statutory rules framed under the provisions of the MGNREG Act. The requirement of a social audit is undoubtedly salutary and since it has been accepted by the Central Government as well as by the Comptroller and Auditor General of India, we see no reason why it should not be put in place in so far as the NFS Act is concerned, particularly since a social audit is mandated under Section 28 of the NFS Act.

39. It was brought to our notice by learned counsel for the petitioner that Section 29 of the NFS Act requires setting up of Vigilance Committees for ensuring transparency and proper functioning of the Targeted Public Distribution System and accountability of the functionaries in such system. Section 29 of the NFS Act reads as follows:-

> "**Setting up of Vigilance Committees** – (1) For ensuring transparency and proper functioning of the Targeted Public Distribution System and accountability of the functionaries in such system, every State Government shall set-up Vigilance Committees as specified in the Public Distribution System (Control) Order, 2001 made under the Essential Commodities Act, 1955 (10 of 1955), as amended from time to time, at the State, District, Block and fair price shop levels consisting of such persons, as may be prescribed by the State Government giving due representation to the local authorities, the Scheduled Castes, the Scheduled Tribes, women and destitute persons or persons with disability.

(2) The Vigilance Committees shall perform the following functions, namely:-

(a) regularly supervise the implementation of all schemes under this Act;

(b) inform the District Grievance Redressal Officer, in writing, of any violation of the provisions of this Act; and

(c) inform the District Grievance Redressal Officer, in writing, of any malpractice or misappropriation of funds found by it."

40. There can hardly be any doubt that there is a necessity to set up Vigilance Committees under the NFS Act and the fact that they have not been set up in spite of the passage of four years after the enactment of the NFS Act is yet another indication of the lack of the concern shown by the State Governments and the Union Territories to respect a law enacted by Parliament.

41. Learned counsel for the petitioner insisted that we appoint Food Commissioners or Ombudsman who would oversee the functioning and implementation of the NFS Act since the State Governments before us and indeed other State Governments and Union Territories were not implementing the provisions of the NFS Act. For the present, we are not inclined to appoint any Food Commissioner or Ombudsman to oversee the functioning and implementation of the NFS Act. In our opinion, it is more important that each State Government and Union Territory realizes and

appreciates their statutory and constitutional obligations and ensures that the will of Parliament which enacted the National Food Security Act, 2013 is given full effect to in letter and spirit. If the State Governments and Union Territories decide that they do not wish to abide by a law enacted by Parliament for the benefit of the people, perhaps some other solution may have to be found but we hope that no State Government or Union Territory disregards the will of Parliament.

42. In view of our discussion above, it is quite clear that the NFS Act, a social justice and social welfare legislation, is not being implemented as it should be. That is the bane of our society and therefore, in keeping with our constitutional obligation we are of opinion that the following directions need to be issued for the effective implementation of the National Food Security Act, 2013:

1. The Secretary in the Ministry of Consumer Affairs, Food and Public Distribution of the Government of India should convene one or more meetings on or before 31st August, 2017 of the concerned Secretaries of all the State Governments and Union Territories to take stock of the implementation of the NFS Act and brainstorm over finding ways and means to effectively implement the provisions of the NFS Act in letter

and spirit. A law enacted by Parliament as a part of its social justice obligation must be given its due respect and must be implemented faithfully and sincerely and positively before the end of this year.

2. The Secretary in the Ministry of Consumer Affairs, Food and Public Distribution of the Government of India should emphatically request and commend to every State Government and Union Territory to notify appropriate rules for a Grievance Redressal Mechanism under the provisions of the NFS Act and designate appropriate and independent officials as the District Grievance Redressal Officer within a fixed time frame and in any case within this year. Adequate publicity should be given to the appointment and designation of District Grievance Redressal Officers so that any aggrieved person can approach them without any fear and with the expectation that the grievance will be redressed.

3. The Secretary in the Ministry of Consumer Affairs, Food and Public Distribution of the Government of India will emphatically request and commend to the State Governments and Union Territories to constitute, establish and make fully functional a State Food Commission under the provisions of the NFS Act before the end of the year. The NFS Act specifies a very large number of functions that a State Food Commission

is required to perform - there is no dearth of work for the State Food Commission. Therefore the said Secretary should require the Chief Secretary to ensure that adequate arrangements are made by each State Government and Union Territory to provide adequate infrastructure, staff and other facilities for the meaningful functioning of the State Food Commission including preparation of annual reports required to be laid before the State Legislature. In our opinion, it would not be appropriate for reasons that we have already indicated to appoint another statutory commission or body to function as the State Food Commission unless it is absolutely necessary and completely unavoidable and only as a last resort.

4. The Secretary in the Ministry of Consumer Affairs, Food and Public Distribution of the Government of India will emphatically commend and request every State Government and Union Territory to constitute and establish a functioning Vigilance Committee in terms of Section 29 of the NFS Act before the end of the year for the purposes of carrying out the duties and responsibilities mentioned in that Section.

5. The Secretary in the Ministry of Consumer Affairs, Food and Public Distribution of the Government of India will ensure that the social audit machinery postulated by Section 28 of the NFS Act and which is already

in place in so far as the MGNREGA Act is concerned is established at the earliest with appropriate modifications to enable every State Government and Union Territory so that a periodic social audit is conducted and the NFS Act is purposefully implemented for the benefit of the people.

……J
(Madan B. Lokur)

July 21, 2017
New Delhi;

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C.) No. 857 OF 2015

SWARAJ ABHIYAN (V) ...PETITIONER

VERSUS

UNION OF INDIA & ORS. ... RESPONDENTS

J U D G M E N T

N. V. RAMANA, J.

1. I have had the privilege of going through the judgment of my learned brother, Justice Madan B. Lokur. In the facts and circumstances of this case, I agree with the conclusions and directions. However considering the larger constitutional question relating to non-compliance of laws by the States, I

feel it necessary to add on certain aspects which are involved in this case.

2. As enforcement determines the distance between the law in text and law in action, therefore what concerns us, in this case, is the implementation of National Food Security Act, 2013 [*hereinafter* '**Act**' *for brevity*] by various State Governments.

3. Broadly we are concerned with five areas in which certain State Governments have been found deficient in implementing the Act, they are-

1. Formulation of Rules under Section 40 of the Act for effective implementation.
2. Constitution of District Grievance Redressal Officer [*hereinafter* '**DGRO**' *for brevity*] under Section 15 of the Act.
3. Constitution of Food Commission under Section 16 of the Act.
4. Conducting 'Social Audit' under Section 28 of the Act.
5. Constitution of Vigilance Committee under Section 29 of the Act.

4. Before we deal with various aspects it would be necessary to notice the status of implementation by some of the States in the above mentioned areas. The table given below indicates

the status of implementation of the Act as revealed from the record-

Table No. 1 –*Table indicating the implementation of the Act*

State	Date of Implementation of the Act	Status of Rules	Status concerning Section 15 (DGRO)	Status concerning Section 16 (State Food Commission)	Status concerning Section 28 (Social Audit)	Status concerning Section 29 (Vigilance Committee)
Andhra Pradesh	Not available on record	Formulated from 18.04.2017	Joint Collector-II and Additional District magistrate of the District	Not appointed. A notification has been issued constituting the State Food Commission under Section 16 of the National Food Security Act, 2013, *vide* G.O.MS No. 6, Consumer Affairs, Food & Civil Supplies	Social audit of Fair Price shops and targeted PDS has been entrusted to SSAAT, Department	Needs to be reconstituted in terms of Rule 9 of the Andhra Pradesh Food Security Rules, 2017

			is designated as the District Grievance Redressal Officer (DGRO) under Rule 6 of the Andhra Pradesh Food Security Rules, 2017	Department dated:- 12.04.2017.	of Rural Development.	
BIHAR	Not available on record	Formulated in 2014	*Vide* order 432 dt.23.01.2014, a separate DGRO (above the	Constituted State Food Commission as a separate entity *vide* notification no. 386 dt. 21.02.2014. Currently post of Chairman is vacant.	Not in place.	Not available on record

			level of Addl. Collector) is in places			
CHHATTISGARH	Not available on record	Not framed	Appointed Chief Executive Officers, Panchayat in 27 districts on 22.03.2017.	Constituted Commission *vide* notification dt.13.12.2016. Chairman and five members were appointed on 31.03.2017.	No rules are notified or social audit in terms of Section 28 is being carried out.	Not available on record
GUJARAT	01.04.2016	Not framed	Earlier had appointed District Supply Officer as DGRO *vide* GTH-2016/1/PDS/10.2016/1	Constituted Commission *vide* Notification No. GTH/2017/PDS/10.2016/1667/C1 dt.21.03.2017 and appointed the Chairman and members.	That the Government has decided to give the social audit to Gujarat Social Audit Society.	Not available on record

			51/C1 dt.27.01.2016. Further revised and appointed Residential Additional Collector (Additional District magistrate) as DGRO			
HARYANA	Not available on record	Not framed	That the State Government has already designated all the deputy Commission	*Sub judice* before the High Court. Earlier additional charge was given to Right to Service Commission.	None conducted so far	Not constituted

			ers as District Grievance Redressal Officer vide Notification dated 03.10.2013.			
JHARKHAND	August, 2015	Formulated on December, 2015	Addl. Collector is designated as District Grievance Redressal Officer (DGRO)	State Food Commission under Section 16 of the Act was constituted vide Memo No.kha.pra.-1/ja.wi.pra(ra.kha.su/ra.kha.aa.)7-5/2014-1632/1633 dt.13.04.2017. Further the Government has appointed Chairman and other five members.	Gram Sabha for rural areas and Nagar Palika (Urban Local Body) for urban areas have been entrusted for Social	Not available on record

					Audit	
MADHYA PRADESH	Not available on record	Draft Rules Formulated from 07.04.2017	Not constituted	Not constituted. Notification bearing No. F-7-35-2013-XXIX-1calling for appointment of the Commission on 11.04.2017.	A notification (Notification bearing No. F-6-2017-XXIX-1) to implement Social Audit in terms of Section 28 of the Act was issued on 03.04.2017.	Not Constituted
MAHARASHTRA	Not available on	Not framed	Additional Collectors	Separate commission is constituted vide Notification dt.11.04.2017,	Vide Government Resolution	Not available on record

	record		who are not concerned with PDS have been appointed as DGRO vide Notification dt.07.04.2017	wherein earlier State Consumer Commission was designated. Appointment are to be done.	dt.30.07.2016, Social audit is in place.	
TELANGANA	Oct., 2015	Formulated from 25.02.2016	Joint Collector of district under Rule 4 of Telangana Food Security Rules, 2015	State Food Commission under Section 16 of the Act was constituted vide G.O.Ms. No.2, (CS.I-CCS) dt.10.04.2017 and subsequently constituted. Further the Government has appointed Chairman, five members and Smt. G. Jamuna, Addl. Secretary to Government (Non-	Social audit of Fair Price shops and targeted PDS has been entrusted to SSAAT-TS under the MGNERGA platform.	Vigilance committee set-up under Rule 10 of Telangana Food Security Rules, 2015, wherein the District collector is to be the Chairman, Chairperson, Zilla Parishad to be Co-Chairman, Joint-collector to be the Vice-Chairman. District Supply

				cadre), PR& RD Dept. as member secretary for period of two years.		Officer shall be the convener and other existing members there shall be other members as per the National Food Security Act.

5. It is apparent from the above tabulated data that various State Governments seem to be not so prompt in implementing the Act in its true letter and spirit. Therefore the question for adjudication is, what is the remedy for Union Government as well as the citizens against non-implementing States?

6. The Act was made in furtherance of India's commitment to multilateral treaties and this Court's persistence to alleviate the condition of rampant malnutrition prevalent in the country. In ***Swaraj Abhiyan (II)***[2] this Court explained the need and importance of this enactment for India. The unique feature of this Act is that the Center has de-centralized the regulatory aspects within the Act by empowering the institutions at the bottom of the pyramid. It would be important to reproduce Section 38 of the Act which gives power to the Central Government to give binding directions to the State Governments in the following manner-

> The Central Government may, from time to time, give such directions, as it may consider necessary, to the State Governments for the

2 Swaraj Abhiyan (II) v. Union of India and otr., AIR 2016 SC 2953

effective implementation of the provisions of this Act and the State Governments shall comply with such directions.

7. One thing which stands out from a plain reading of the Act is that for its success it requires co-operation at three levels. It is to be noted that at every stage of decision making the Central Government has a very important role to play and has been envisaged as a check on the working of the State Governments. This Act elaborates on the nature of federalism as a functional arrangement for co-operative action. In order to ensure uniformity for enforcement of such an Act, consultation needs to be carried out between various State Governments, individually as well as collectively, with the Union for effective implementation of the Act.

8. It is to be noted that State enforcement of Union laws usually gives rise to difficult questions concerning the sustainability of co-operative federalism, which we have accepted as our core constitutional ethos. In ***Jindal Stainless Steel v. State of Haryana***[3], a nine judge bench

3 AIR 2016 SC 5617

of this Court has reiterated the principles of co-operative federalism in India in the following manner-

> '185. **The Union and the States are co-equal in the Indian Federal structure. Our framers created a unique federal structure which cannot be abridged in a sentence or two. The nature of our federalism can only be studied having a thorough understanding of all the provisions of the Constitution. Confirmation that the Union and States are co-equals in the Indian federal structure. can be found in the speeches of Hon'ble P.S. Deshmukh, Shri T. T. Krishnamachari and Hon'ble Dr. B. R. Ambedkar** before the Constituent Assembly. Common philosophy which runs through our Constitution is that both Center and States have been vested with the substantial powers which are necessary to preserve our unique federation with clear demarcation of power. Calling India as quasi-federal might not be advisable as our features are unique and quite different from other Countries like United States of America etc. Courts in India should strive to preserve this unique balance which our framers envisaged, any interference into this balancing act would be detrimental for grand vision proscribed by our makers. Amphibious nature of our federalism has been even noted by the Sarkaria Commission Report on Center-State relationship**. Co-operative federalism envisaged under our Constitution is a result**

of pick and choose policy which our framers abstracted from the wisdom of working experience of other Constitutions'

(**emphasis supplied**)

9. The principle of federalism as present in India cannot be explained in a sentence or two; rather a detailed study of the each and every provision of the Constitution would inevitably point that India has divided sovereignty in the form of Center on one hand and States on the other. Each power house is independent in its own terms. The constitutional scheme invariably leads to the conclusion that at times these institutions meet and interact at various levels to achieve the cherished constitutional goal of co-operative federalism.

10. It is to be noted that our Constitutional set-up mandates that Center is not powerless which is apparent from various Articles of the Constitution. Further, it is not proper on the part of the States to ignore the plight of the common man in enforcing such important legislations, more so when such legislation is a welfare legislation. From the table provided above we have seen more breaches than compliance which

compelled us to call the Chief Secretaries of all the States to appear before us. I am of the opinion that for now a meaningful dialogue between the Center and the State should resolve the issues which have emerged in this case in the spirit of co-operative federalism. Record indicates that a combined effort, both by Center and States, needs to be taken for effective implementation of the Act especially in the draught affected areas so as to save people from abject poverty and poor quality of life. States should take up this matter with much more seriousness and implement the Act in its true letter and spirit.

.....J.
(N. V. RAMANA)

NEW DELHI

DATED – JULY 21, 2017

रजिस्ट्री सं० डी० एल०-33004/99 REGD. NO. D. L.-33004/99

भारत का राजपत्र
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मानव संसाधन विकास मंत्रालय

(स्कूल शिक्षा और साक्षरता विभाग)

अधिसूचना

नई दिल्ली, 30 सितंबर, 2015

सा. का.नि. 743(अ).- केंद्रीय सरकार राष्ट्रीय खाद्य सुरक्षा अधिनियम, 2013 (2013 का 20) की धारा 39 की उप-धारा (2) के उपबंध (ख) के साथ पठनीय उप-धारा (1) के द्वारा प्रदत्त शक्तियों का प्रयोग करते हुए निम्नलिखित नियम बनाती है, अर्थात्:-

1. **संक्षिप्त नाम और प्रारंभ-** (1) इन नियमों का संक्षिप्त नाम मध्याह्न भोजन नियम, 2015 है।

(2) ये नियम राजपत्र में प्रकाशन की तारीख को प्रवृत्त होंगे।

2. **परिभाषाएं-** इन नियमों में, जब तक अन्यथा संदर्भ से अपेक्षित न हो-

(क) **"अधिनियम"** राष्ट्रीय खाद्य सुरक्षा अधिनियम, 2013 (2013 का 20) से अभिप्रेत है;

(ख) **"खाद्यान्न" से चावल, गेहूं, मोटे अनाज अथवा इनके मिश्रण से अभिप्रेत है,** जो केंद्रीय सरकार द्वारा समय-समय पर जारी आदेशों के द्वारा अवधारित क्वालिटी सन्ननियमों के अनुरूप होंगे;

(ग) **"खाद्य सुरक्षा भत्ता"** से संबंधित राज्य सरकार द्वारा पात्र व्यक्तियों को इस अधिनियम की धारा 8 के अधीन दिया गया खाद्यान्न और धनराशि से अभिप्रेत है;

(घ) **"भोजन"** से पके-पकाये गर्म भोजन से अभिप्रेत है;

(ड.) **"स्कूल"** सर्व शिक्षा अभियान के अधीन समर्थित मदरसों और मकतबों सहित स्थानीय निकाय, सरकार या सरकार की सहायता द्वारा चल रहे कोई स्कूल सम्मिलित हैं।

(च) **"धारा"** से इस अधिनियम की धारा अभिप्रेत है; और

(छ) उन शब्दों और पदों के, जो इसमें प्रयुक्त हैं और परिभाषित नहीं हैं किंतु वही अर्थ होंगे जो उस अधिनियम में हैं।

3. **पोषक भोजन के लिए पात्रता-** कक्षा I से VIII में अध्ययन वाले छह से चौदह वर्ष की आयु समूह के भीतर प्रत्येक बालक, जो स्कूल में अभ्यावेशन करता है और उपस्थित होता है, को स्कूल अवकाश के दिनों को छोड़कर प्रत्येक दिन, अधिनियम की अनुसूची 2 में यथा-विनिर्दिष्ट पोषक मानकों वाला भोजन मुफ्त दिया जाएगा।

4. **भोजन परोसने का स्थान-** भोजन केवल स्कूल में परोसा जाएगा।

5. **भोजन तैयार करना और मानकों तथा क्वालिटी का अनुरक्षण-** (1) भोजन केंद्रीय सरकार द्वारा समय-समय पर जारी मध्याह्न भोजन मार्गदर्शक सिद्धांतों और इस अधिनियम की अनुसूची 2 में विनिर्दिष्ट उपबंधों के अनुसार तैयार किया जाएगा।

(2) प्रत्येक स्कूल में स्वच्छ रीति से भोजन पकाने की सुविधा होगी। शहरी क्षेत्र में स्थित स्कूल जहां कहीं अपेक्षित हो, केंद्रीय सरकार द्वारा जारी मार्गदर्शक सिद्धांतों के अनुसार भोजन पकाने के लिए केंद्रीकृत पाकशाला संबंधी सुविधाओं का उपयोग कर सकते हैं लेकिन बालकों को भोजन केवल स्कूल में ही परोसा जाएगा।

6. **मध्याह्न भोजन स्कीम के लिए राज्य संचालन-सह निगरानी समिति-** मध्याह्न भोजन स्कीम के लिए राज्य संचालन-सह-निगरानी समिति (एसएसएमसी) अधिनियम का कार्यान्वयन सुनिश्चित करने के आशय से स्कीम के कार्यान्वयन तथा भोजन के पोषक मानकों और क्वालिटी को बनाए रखने के लिए तंत्र की स्थापना की निगरानी करेगी।

7. **मध्याह्न भोजन योजना में स्कूल प्रबंधन समिति (एसएमसी) की भूमिका-** (1) नि:शुल्क और अनिवार्य बाल शिक्षा का अधिकार अधिनियम, 2009 के अधीन स्कूल प्रबंधन समिति को यह दायित्व सौंपा गया है कि वह मध्याह्न भोजन स्कीम के कार्यान्वयन की निगरानी करेगी और मध्याह्न भोजन स्कीम के कार्यान्वयन में, बालकों को दिए जाने वाले भोजन की क्वालिटी, खाने पकाने के स्थान की साफ-सफाई और स्वच्छता बनाए रखने पर निरीक्षण रखेगी।

(2) स्कूल का प्रधानाध्यापक अथवा प्रधानाध्यापिका को सशक्त अधिकार होगा कि वह स्कूल में खाद्यान्न, पकाने की लागत आदि अस्थायी तौर पर उपलब्ध न होने के मामले में मध्याह्न भोजन स्कीम जारी रखने के प्रयोजन के लिए स्कूल में उपलब्ध निधि का उपयोग करे। मध्याह्न भोजन के लिए निधियां प्राप्ति होते ही तत्काल स्कूल के खाते में उपयोग की गई धनराशि की प्रतिपूर्ति कर दी जाएगी।

8. **प्रत्यायित प्रयोगशालाओं द्वारा भोजन का परीक्षण-** (1) सरकारी खाद्य अनुसंधान प्रयोगशालाएं अथवा विधि द्वारा प्रत्यायित या मान्यता प्राप्त कोई भी प्रयोगशाला बालकों को दिए जाने वाले पके-पकाये गर्म भोजन का मूल्यांकन करेगी और इसे प्रमाणित करेगी, ताकि यह सुनिश्चित किया जा सके कि यह भोजन अधिनियम की अनुसूची 2 में विनिर्दिष्ट पोषक मानकों और क्वालिटी के अनुरूप हो। राज्य के खाद्य और औषधि प्रशासन विभाग भोजन का पोषक मूल्य और क्वालिटी सुनिश्चित करने के लिए इसके नमूने लेंगे।

(2) उप-नियम (1) में निर्दिष्ट विभाग **यादृच्छिक रूप से चुने गए स्कूलों और केंद्रीकृत पाकशालाओं से** हर माह कम से कम एक बार नमूने एकत्र करेंगे और इन्हें उप-नियम (1) में निर्दिष्ट प्रयोगशालाओं को परीक्षण के लिए भेजेंगे।

9. **खाद्य सुरक्षा भत्ता-** (1) यदि खाद्यान्न, पकाने की लागत, ईंधन उपलब्ध न होने या रसोईया-सह-हेल्पर के अनुपस्थित रहने अथवा किसी अन्य कारण से किसी भी स्कूल दिन के स्कूल में मध्याह्न भोजन उपलब्ध नहीं कराया जाता है तो नियम 3 में निर्दिष्ट प्रत्येक बच्चे को राज्य सरकार नियम 2 के उपबंध (ग) में यथा-परिभाषित खाद्य सुरक्षा भत्ता नीचे दिए गए रीति से आगामी मास की 15 तारीख तक उपलब्ध कराएगी:-

(क) बालक की पात्रता के अनुसार खाद्यान्न की मात्रा; और

(ख) राज्य में उस समय अभिभावी खाना पकाने की लागत।

(2) केंद्रीकृत पाकशाला द्वारा भोजन की आपूर्ति न करने के मामले में, केंद्रीकृत पाकशाला से उप-नियम (1) के अनुसार खाद्य सुरक्षा भत्ता वसूला जाएगा:

परंतु यदि कोई बालक उसे दिया गया भोजन किसी भी कारण से नहीं लेता है, तो राज्य सरकार अथवा केंद्रीकृत पाकशालाओं से खाद्य सुरक्षा भत्ते का कोई दावा नहीं किया जाएगा:

परंतु यह और कि खाद्यान्न और भोजन की क्वालिटी के कारणों के लिए राज्य सरकार अथवा केंद्रीकृत पाकशालाओं से कोई दावा नहीं किया जाएगा:

(3) यदि स्कूल दिनों में लगातार तीन दिन तक अथवा एक मास में कम से कम पांच दिन तक मध्याहन भोजन उपलब्ध नहीं कराया जाता है, तो राज्य सरकार अभिकथित प्रक्रियाओं के अनुसार व्यक्ति अथवा अभिकरण पर जिम्मेदारी नियत करने के लिए कारवाई करेगी।

(4) जहां कहीं भी केंद्रीय सरकार की कोई अभिकरण अंतर्वतित हो, राज्य सरकार इस मामले को केंद्रीय सरकार के साथ उठाएगी जो एक मास के अंदर इस मामले का समाधान करेगी।

10. **व्यावृत्ति-** इन नियमों में निहित बात, इसके पक्ष से जारी मार्गदर्शक सिद्धांतों अथवा मध्याह्न भोजन स्कीम से संबंधित कार्यकलापों के बारे में केंद्रीय सरकार द्वारा जारी किए जाने वाले संभाव्यत: को प्रभावित नहीं करेगी।

[फा. सं. 1-6/2009-डेस्क (एमडीएम)]

गया प्रसाद, निदेशक (मध्याह्न भोजन)

MINISTRY OF HUMAN RESOURCE DEVELOPMENT

(Department of School Education and Literacy)

NOTIFICATION

New Delhi, the 30th September, 2015

G.S.R.743(E).–In exercise of the powers conferred by sub-section (1) read with clause (b) of sub-section (2) of section 39 of the National Food Security Act, 2013 (20 of 2013), the Central Government hereby makes the following rules, namely:-

1. **Short title and commencement**. – (1) These rules may be called the Mid-Day Meal Rules, 2015.
   (2) They shall come into force on the date of their publication in the official Gazette.
2. **Definitions.** – In these rules, unless the context otherwise requires, -
   (a) "Act" means the National Food Security Act, 2013 (20 of 2013);
   (b) "foodgrains" means rice, wheat, coarse grains or any combination thereof conforming to such quality norms as may be determined, by order, by the Central Government from time to time;
   (c) "food security allowance" means the food grain and money to be paid by the concerned State Government to the entitled person under section 8 of the Act;
   (d) "meal" means hot cooked meal;
   (e) "School" includes any school run by Local Bodies, Government or aided by the Government including madrasas and maqtabs supported under Sarva Shiksha Abhiyan;
   (f) "section" means the section of the Act; and
   (g) words and expressions used herein and not defined but defined in the Act shall have the meanings respectively assigned to them in the Act.
3. **Entitlement for nutritional meal.** – Every child within the age group of six to fourteen years studying in classes I to VIII who enroll and attend the school, shall be provided meal having nutritional standards as specified in Schedule II of the Act, free of charge every day except on school holidays.
4. **Place of serving meal.** – The meal shall be served to children at school only.
5. **Preparation of meals and maintenance of standards and quality.** – (1) The meal shall be prepared in accordance with the Mid Day Meal guidelines issued by the Central Government from time to time and in accordance with the provisions of Schedule II of the Act.
   (2) Every school shall have the facility for cooking meal in hygienic manner. Schools in urban area may use the facility of centralised kitchens for cooking meals wherever required in accordance with the guidelines issued by the Central Government and the meal shall be served to children at respective school only.
6. **State Steering-cum-Monitoring Committee for Mid-Day Meal Scheme. –** The State Steering-cum-Monitoring Committee (SSMC) shall oversee the implementation of the scheme with a view to ensure implementation of the Act including establishment of a mechanism for maintenance of nutritional standards and quality of meals.
7. **Role of School Management Committee (SMC) for monitoring Mid-day meals scheme. –** (1) The School Management Committee mandated under Right to Free and Compulsory Education Act, 2009 shall also monitor implementation of the Mid-day meal Scheme and shall oversee quality of meals provided to the children, cleanliness of the place of cooking and maintenance of hygiene in implementation of mid day meal scheme.

   (2) The Headmaster or Headmistress of the school shall be empowered to utilise any fund available in school for the purpose of continuation of Mid Day Meal Scheme in the school in case of temporary unavailability of

food grains, cooking cost etc. in the school. The utilised fund shall be reimbursed to the school account immediately after receipt of mid day meal funds.

8. Testing of Meals by accredited Laboratories – (1) Hot cooked meal provided to children shall be evaluated and certified by the Government Food Research Laboratory or any laboratory accredited or recognized by law, so as to ensure that the meal meets with the nutritional standards and quality specified in Schedule II to the Act. The Food and Drugs Administration Department of the State may collect samples to ensure the nutritive value and quality of the meals.

(2) The Department referred to in sub-rule (1) shall collect the samples at least once in a month ***from randomly selected schools or centralised kitchens*** and send such samples for examination to the laboratories referred to in sub-rule (1).

9. **Food Security Allowance. -** (1) If the Mid-Day Meal is not provided in school on any school day due to non-availability of food grains, cooking cost, fuel or absence of cook-cum-helper or any other reason, the State Government shall pay food security allowance as defined in clause (c) of rule 2 to every child referred to in rule 3 by 15th of the succeeding month in the manner provided herein below:-

(a) Quantity of Food grains as per entitlement of the child; and

(b) Cooking cost prevailing in the State.

(2) In case of non-supply of meal by the Centralised Kitchen, the Food Security Allowance shall be realised from the Centralised Kitchen as per sub-rule (1):

Provided that in case a child has not taken food on offer for whatever reasons, no claim of food security allowance shall lie with the State Government or Centralised Kitchens:

Provided further that no claim shall lie with State Government or Centralised Kitchen for reasons of quality of food grains and meal:

(3) The State Government shall take action to fix responsibility on the person or agency in accordance with the procedure laid down, if mid day meal is not provided in school on school days continuously for three days or at least for five days in a month.

(4) Wherever an agency of Central Government is involved, the State Government shall take up the matter with Central Government which shall resolve the matter within a month.

10. **Saving. -** Nothing in these rules shall affect the guidelines issued in this behalf or likely to be issued by the Central Government regarding the activities relating to Mid Day Meal Scheme.

[F. No. 1-6/2009-Desk(MDM)]

GAYA PRASAD, Director (Mid Day Meal)

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The Supplementary Nutrition (under the Integrated Child Development Services Scheme) Rules, 2017

Published vide Notifications No. G.S.R. 149(E), dated 20th February, 2017

act2996

Ministry of Women and Child Development

G.S.R. 149(E). - In exercise of the powers conferred by sub-section (1) read with clause (b) and clause (c) of subsection (2) of section 39 of the National Food Security Act, 2013 (20 of 2013), and in supersession of the Supplementary Nutrition (under the Integrated Child Development Services Scheme) Rules, 2015, except as respects things done or omitted to be done before such supersession, the Central Government, in consultation with the State Governments and Union territory Administrations, hereby makes the following rules to regulate the entitlements specified under the provisions of the said Act for every pregnant woman and lactating mother till six months after child birth, and every child in the age group of six months to six years (including those suffering from malnutrition) for three hundred days in a year, as per the nutritional standards specified in Schedule II to the said Act, namely: -

Part I

Preliminary

1. Short title and commencement. - (1) These rules may be called the Supplementary Nutrition (under the Integrated Child Development Services Scheme) Rules, 2017.

(2) They shall come into force on the date of their publication in the *Official Gazette*.

2. Definitions. - In these rules, unless the context otherwise requires, -

(a) **"Act"** means the National Food Security Act, 2013 (20 of 2013);

(b) **"Board"** means Food and Nutrition Board;

(c) **"meal"** means the meal as defined in clause (9) of section 2 of the Act;

(d) **"food security allowance"** means the food security allowance as defined in clause (7) of section 2 of the Act;

(e) **"section"** means section of the Act;

(f) words and expressions used herein and not defined but defined in the Act shall have the meanings respectively assigned to them in the Act.

Part II

Entitlement and Nutritional Standards

3. Nature of entitlements. - (1) The entitlements referred to in sections 4, 5 and section 6 of the Act shall be provided under the Supplementary Nutrition Programme of Anganwadi Services (Integrated Child Development Services Scheme) of the Central Government to every pregnant woman and lactating mother till six months after child birth, and every child in the age group of six months to six years (including those suffering from malnutrition).

(2) The Supplementary Nutrition under the Anganwadi Services (Integrated Child Development Services) is primarily designed to bridge the gap between the Recommended Dietary Allowance and the Average Daily Intake.

4. Place of serving meal. - (1) The Anganwadi Services (Integrated Child Development Services) is a self-selecting scheme and the entitlements, as mentioned in clause (a) of section 4, clause (a) of sub-section (1) of section 5 and section 6 shall be available to those who enroll themselves and visit the nearest anganwadi centre during its working hours, as notified by the State Government or the Union territory Administration from time to time.

(2) The meal shall be served at the nearest anganwadi centres where the beneficiary is registered or enrolled.

5. Supplementary Nutrition under ICDS - The Supplementary Nutrition under the Anganwadi Services (Integrated Child Development Services) for different categories of beneficiaries shall be as under:-

S. No.	Categories	Type of meal or food as per the nutritional standards specified in Schedule II of the Act
(1)	(2)	(3)
1.	Children (Between 6 to 36 months)	Take home ration as per Anganwadi Services (Integrated Child Development Services) guidelines in conformity with the provisions of the Act.
2.	Malnourished children (Between 6 to 36 months)	The same type of take home ration as above with food supplement of 800 calories and 20-25 grams of protein.
3.	Children (Between 3 to 6 years)	Morning snacks and hot cooked meal as per Anganwadi Services (Integrated Child Development Services) norms.
4.	Malnourished children (Between 3 to 6 years)	Additional 300 calories of energy and 8-10 grams of protein in addition to the meal or food provided to children between three to six years.
5.	Pregnant women and lactating or nursing mothers	Take home ration as per Anganwadi Services (Integrated Child Development Services) guidelines in conformity with the provisions of the Act.

Note. *- Early initiation and exclusive breast feeding shall be promoted for children up to the age of six months. Adequate age-appropriate complementary feeding (cereal based) shall be ensured for children from six months to twelve months of age and balanced food shall be provided from twelve months to twenty-four months along with continued breast feeding.*

6. Nutritional standards. - The nutritional standards shall be the same as provided in Schedule II of the Act and the Nutritional and Feeding norms issued by the Central Government in the Ministry of Women and Child Development from time to time.

Part III

Maintenance of Standard and Quality of Meal, their Enforcement and Monitoring

7. Preparation of meal and maintenance of its standard and quality. - (1) The procurement of food items and preparation of meals by the State Governments and the Union territory Administrations shall be in accordance with the guidelines, instructions or orders issued by the Central Government from time to time in conformity with various directions issued by Supreme Court of India, the provisions of Schedule II to the Act and any other law for the time being in force.

(2) The State Governments and the Union territory Administrations, with the support of Food and Nutrition Board (hereinafter referred to as the Board) shall ensure the quality of supplementary nutrition with reference to the norms of food safety, as well as food composition.

(3) The Supplementary Nutrition shall conform to the standards laid down under the provisions of the Food Safety and Standards Act, 2006 (34 of 2006) to ensure consistent quality and nutritive value of the intervention per serving and it shall also be ensured that the meal is prepared in kitchen having adequate sanitation and safe drinking water to maintain hygienic conditions.

(4) It shall be the responsibility of the concerned District Programme Officer and the Child Development Project Officer under the Anganwadi Services (Integrated Child Development Services) to ensure the quality of supplementary nutrition with reference to the norms of food safety, as well as food composition.

(5) The Board, in collaboration with the State Governments and the Union territory Administrations, shall carry out periodic checks and test the meal or get it tested through the Government Food Research Laboratories accredited or recognized by any law for the time being in force, so as to ensure that the meal meets with the nutritional standards and quality specified in Schedule II of the Act.

(6) Similarly, the officers, as authorized by the State Governments or the Union territory Administrations, shall also conduct surprise checks and draw samples and get them tested through the above laboratories to ensure quality and nutrient value of the meal.

(7) The food should be tasted by the anganwadi worker or helper before it is served to the beneficiaries at anganwadi centre.

8. Food Security Allowance. - (1) In case of non-supply of meal to the beneficiaries in anganwadi centre on any day due to non-availability of food grains or any other reason, the State Governments or Union territory Administrations shall pay food security allowance as defined in clause (d) of rule 2 to every beneficiary referred to in rule 3 as per rates specified in rule 11:

Provided that in case the beneficiaries have not taken food on offer for whatever reasons, no claim of food security allowance shall lie with the State Government or Union territory Administration or anganwadi centre:

Provided further that subject to the provisions of rule 7, no claim shall lie with State Government or Union territory Administration for reasons of quality of food grains and meal.

(2) On receipt of a complaint from beneficiary for non-supply of foodgrains, the concerned State Government or Union territory Administration shall enquire the issue, and in case it is decided to pay food security allowance to the beneficiary, the same shall be paid to the beneficiary, as per the entitlement, within one month of decision on the complaint.

(3) The State Government or Union territory Administration shall take action to fix responsibility on the person or agency in accordance with the procedure laid down, if meal is not provided in anganwadi centre continuously for three days or at least for five days in a month.

9. Responsibility to monitor and review arrangement for supplementary nutrition. - The respective State Governments and Union territory Administrations, and the

Monitoring and Review Committees at the National, State, District, Block and anganwadi levels, constituted by the Central Government in the Ministry of Women and Child Development from time to time, shall be responsible to monitor and review the status of arrangement for Supplementary Nutrition, convergence with the line departments to ensure water and sanitation facilities, ensure regular functioning of anganwadi centres, ensure regular supply of Supplementary Nutrition at anganwadi centres without disruptions and use of iodised or iron fortified iodised salts, ensure monitoring and supervision visits by officials at different levels as per norms, method of delivery of supplementary food at anganwadi centres, engagement of Self Help Groups, ensure supply and quality of Supplementary Nutrition through them and all other issues relating to the above, as per their roles defined in the guidelines issued by the Central Government in the Ministry of Women and Child Development from time to time:

Provided that till the engagement of Self Help Groups, the supply of Supplementary Nutrition shall be ensured from such other sources or approved agencies in terms of the existing rules and regulations notified by the Central Government and the State Governments or Union territory Administrations.

Part IV

Cost Norms and Cost Sharing

10. Supplementary Nutrition norms. - The Supplementary Nutrition shall be in conformity with the Revised Nutritional and Feeding norms issued by the Central Government in the Ministry of Women and Child Development from time to time.

11. Cost norms for Supplementary Nutrition. - The cost norms for the Supplementary Nutrition for various categories of beneficiaries shall be as under or as may be revised by the Central Government:

S. No.	Categories	Present rates (per beneficiary per day)
(1)	(2)	(3)
1.	Children (Between 6 to 72 months)	Rs.6.00
2.	Malnourished children (Between 6 to 72 months)	Rs.9.00
3.	Pregnant women and lactating or nursing mothers	Rs.7.00

12. Proportion of cost sharing of Supplementary Nutrition. - (1) The cost of supplementary nutrition under the Anganwadi Services (Integrated Child Development Services), as per these rules, shall be shared by the Central Government and the State Governments or Union territory Administrations with Legislatures, namely, Delhi and Puducherry, in equal proportion except the States of Assam, Arunachal Pradesh, Mizoram, Manipur, Meghalaya, Nagaland, Tripura, Sikkim, Himachal Pradesh, Jammu and Kashmir and Uttarakhand where the Central Government shall bear ninety per cent. of the cost and the remaining ten per cent. shall be borne by such State Governments or as revised by the Central Government from time to time.

(2) For the Union territories, namely, the Andaman and Nicobar Islands, Chandigarh, Dadra and Nagar Haveli, Daman and Diu and Lakshadweep, the Central Government shall bear entire cost of providing supplementary nutrition under Anganwadi Services (Integrated Child Development Services Scheme) or as revised by the Central Government from time to time.

13. Rules not in derogation of any Scheme. - The provisions of these rules shall be in addition to and not in derogation of any existing Scheme implemented by the Central Government.

1.Children with Special Needs

2. Drug and Substance Abuse

Relevant Government Plans

NATIONAL ACTION PLAN, 2016

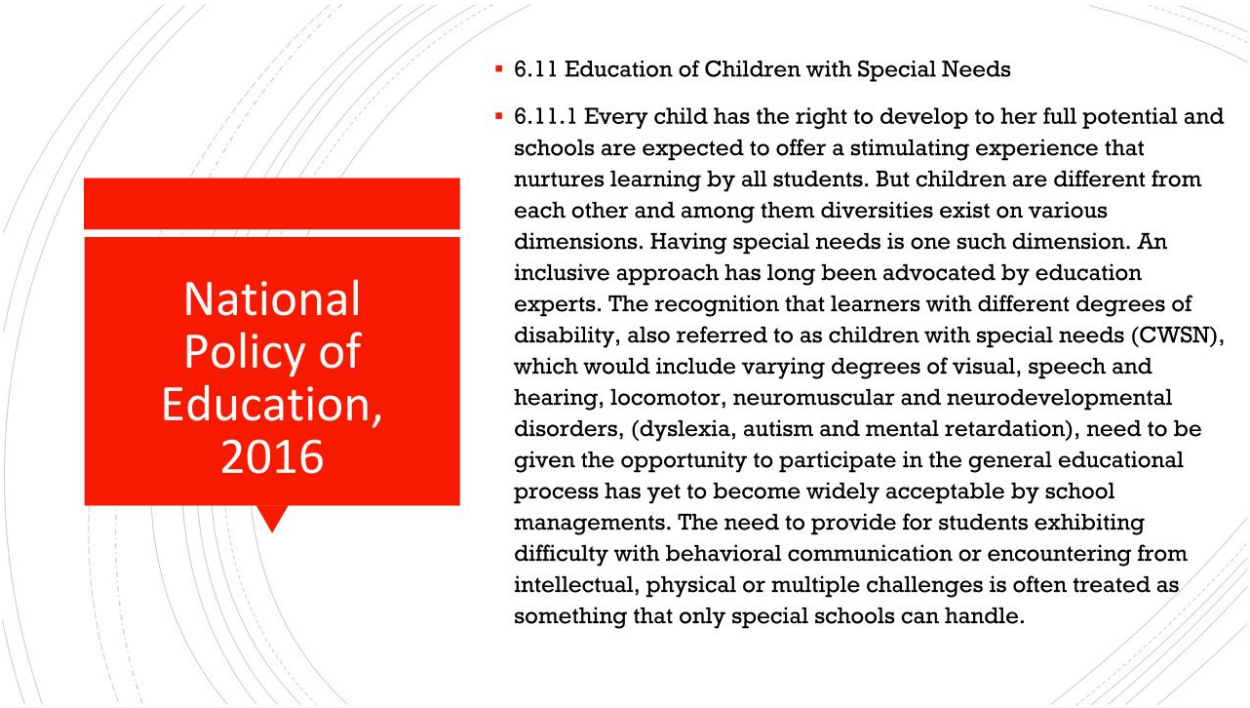
NATIONAL POLICY OF EDUCATION, 2016

NATIONAL POLICY FOR CHILDREN, 2013

CBSE NOTIFICATIONS, 2009, 2013, 2017

National Policy for Children, 2013

- "(v) Ensure that all out of school children such as child labourers, migrant children, trafficked children, children of migrant labour, street children, child victims of alcohol and substance abuse, children in areas of civil unrest, orphans, children with disability (mental and physical), children with chronic ailments, married children, children of manual scavengers, children of sex workers, children of prisoners, etc. are tracked, rescued, rehabilitated and have access to their right to education
- (vi) Address discrimination of all forms in schools and foster equal opportunity, treatment and participation irrespective of place of birth, sex, religion, disability, language, region, caste, health, social, economic or any other status
- (vii) Priorities education for disadvantaged groups by creating enabling environment through necessary legislative measures, policy and provisions"



6.11.2 There is a marked difference between what was earlier envisaged and the prevailing situation on the ground. The National Policy for Persons with Disabilities, 2006 (PWD) voiced the need for mainstreaming of persons with disabilities in the general education system through inclusive education, identification of children with disabilities through regular surveys, enrolment in appropriate and disabled friendly schools till successful completion of education. More recently the *RTE Amendment Act (2012)* stated that "disadvantaged groups" includes children with disabilities and thus all the rights provided to children belonging to disadvantaged group shall apply to children with disabilities also. According to another important provision of the RTE Amendment Act, certain specific excluded categories of disabled children namely children with "multiple" or "severe" disabilities were to be provided with the choice of attaining home based education.

6.11.3 The importance of preparing teachers who can teach in inclusive classrooms following an inclusive pedagogy has been referred to in the National Curriculum Framework for teacher education (NCFTE), 2009. NCERT in various position papers has underscored the need for developing a positive attitude among teachers, administrators, and other students in their attitudes to children with special needs.

6.11.4 Providing special training to every teacher will neither be feasible nor cost-effective. There is a need for a mechanism which can respond to the school Principal or teacher who seeks special training to be imparted to handle children with specific kinds of learning difficulties. Sometimes all that may be needed is professional advice for a limited duration; sometimes it may need more training.

Court Orders and Act RPWD ACT, 2016

RPWD ACT, 2016

- Sec 3: Equality and non-discrimination:
- Sec 4. Women and children with disabilities:
- (Sec 6: Protection from cruelty and inhuman treatment:
- (*1*) The appropriate Government shall take measures to protect persons with disabilities from being subjected to torture, cruel, inhuman or degrading treatment.
- (*2*) No person with disability shall be a subject of any research without,—
- (*i*) his or her free and informed consent obtained through accessible modes, means and formats of communication; and
- Sec 17. Specific measures to promote and facilitate inclusive education:

Action Should be taken

Discussion

2 min Movie

Drug and Substance Abuse

Relevant court orders: Delhi High Court has directed the police to enforce Section 77 of Juvenile Justice Act which provides for punishment to anyone giving intoxicating liquor/drugs to children by treating thinners, whiteners, correction fluid, vulcanizing solutions as "intoxicating liquor"

This was

Drug and Substance Abuse

1. Who are using drugs and Substances ?
2. What's the reason behind this?
3. How we treat these children?
4. What should be done ?

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(CRL) 2401/2017

AASHA

..... Petitioner

Through: Mr. Habibur Rehman, Advocate

versus

STATE GOVT OF NCT OF DELHI & ANR

..... Respondent

Through: Mr. Rahul Mehra, learned Standing Counsel (Crl.) with Mr. Surender Gulia, ACP AHTU Crime, Inspector Rajeev Ranjan, Investigating Officer, Mr. Harender Singh, SHO and Sub-Inspector Sonu Ram, Police Station Aman Vihar, Delhi
Mr. Manish Srivastava, Advocate for Tata Power Delhi Distribution Ltd.
Ms. Nikita Salwan, Advocate for respondent/DSIIDC.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE P.S.TEJI

O R D E R

% 15.02.2018

1. A copy of the status report dated 09.02.2018-stated to have been filed on 12.02.2018, has been tendered in court and taken on record. This status report is prepared by Dr. Joy Tirkey, DCP (Crime). The status report discloses the efforts made to locate the missing daughters of the petitioner –Preeti and Durga, aged 10 years and 8

years. From the status report it appears that a child trafficking racket is in operation. The status report discloses several persons who are suspected of indulging in the said activity, and who have been interrogated.

2. We were informed on 4th December 2017, that a Special Investigating Team (SIT) was in the process of being constituted, which would look into the aspect of large number of children going missing from Aman Vihar area. The steps taken thus far needs to be re-doubled. The problem of minor children going missing is a very serious one. Since some of the suspects have been identified, who are engaged in human trafficking, we expect the SIT to undertake more rigorous exercise and recover the missing children-not just in the present case, but even in others reported to have gone missing, in other cases.

3. Further status report in this regard be filed before the next date.

4. Mr. Mehra has also tendered in court the compliance report in pursuance to our order dated 06.02.2018. On 06.02.2018, we had interacted with, inter-alia, Mr. R.P. Upadhyay, Special Commisisoner of Police (Crime), Mr. Alok Kumar (Joint Commissioner) and Mr. Rajesh Deo, Deputy Commissioner of Police (Narcotics) in our chamber in the presence of Mr. Mehra.

5. In pursuance to the assurance given to the court in the said meeting, the compliance report signed by Shri Rajesh Deo, Deputy Commissioner of Police, Legal Cell, PHQ, Delhi sets out the steps

that are contemplated to be taken to deal with the menace of Drug abuse in Delhi. The said compliance report enlist the following steps, which are required to be taken by Delhi police in this regard:

> ***"4. <u>CONTOL OVER SUPPLY CHAIN</u>***
>
> *4.1* ***Setting up Narcotics Squad in each district:*** *The Commissioner of Police, Delhi has approved to constitute a Narcotics Squad in each district, which shall be supervised by an Inspector rank officer, who in turn shall work under the supervision of ACP/Operation.*
>
> *Each Squad shall have manpower of two Upper (S.Insp/ASI) and eight lower subordinates(H.Ct/Ct). Once the man-power proposal pending with MHA is cleared, the strength of these squads will be increased appropriately.*
>
> *The Narcotics Squad and the local police shall immediately undertake the following work:*
>
> ***a.*** ***Identification of hot spot of drugs sale:*** *Each Squad shall identify such area in the district in which there are complaints of sale of drugs or where the drugs addicts are found operating. Based on these information, the local police shall immediately take necessary steps to bust/apprehend such peddlers who are active in drugs trafficking.*
>
> ***b.*** ***Identification of potential suppliers:*** *As a further action, such potential suppliers shall also be identified by Narcotics Squad as*

well as local police and action as per law will be taken against them.

4.2 ***Action u/s 29 of NDPS Act against abettors & conspirators:*** *Action u/s 29 of NDPS Act for taking legal action against the abettors and conspirators, aiding the sale of drugs shall also be stepped up.*

4.3 ***Identification of persons with previous convictions or pending cases for taking substantive as well as preventive actions:*** *Each Police Station shall prepare database/record of all individuals, who were previously involved in NDPS Act cases or have pending cases registered against them under NDPS Act and requisite surveillance will be undertaken qua on them so that substantive as well as preventive actions can be taken against them.*

4.4 ***Enhanced action under section 77 JJ Act:*** *Section 77 of Juvenile Justice Act prescribes punishment to offenders also for selling narcotics material to the juveniles. Action under this section shall be stepped up.*

4.5 ***Regular visits to vulnerable schools identified by GNCT Agency to identify the peddlers:*** *State Project Director5-SSA, Department of Education, GNCT of Delhi provides the list of vulnerable schools for monitoring and curbing availability and peddling the drugs and narcotics substances among school going children. Local police shall take proactive and ensure Zero Tolerance on this issue. All out efforts shall be made to identify such elements and in case any peddler is identified, immediate action against him will be taken.*

4.6 ***Help from Drug Dept./GNCT by getting a Nodal Officers appointed at district level:*** *Use of*

Pharmaceutical drugs specially the Habit Forming drugs (schedule H1) drugs are a real menace. Liaison with the Drug Dept. Is required to be for initiating action under the Drugs & Cosmetics and NDPS Act against the unscrupulous elements, who are involved in sale of Pharmaceutical product without prescription which is to be used as a narcotics substance.

4.7 ***Training session for police officers for capacity building and improving the investigation skills:*** *Regular training is required to be conducted for capacity building and improving the investigating as well as intelligence collection skills of the investigating officers with regard to detection and investigation of NDPS Act related cases. This is likely to have a deterrent impact on supply chain. Dy. Commissioner of Police/Narcotics Branch will hold regular training sessions in this regard.*

4.8 Dy. Commissioner of Police/C.R.O. shall collate information on drug dealers to prepare a booklet which shall be circulated among all concerned for taking preventive as well as substantive action.

5. ***REDUCTION OF DEMAND***

5.1 ***Regular visits to vulnerable schools identified by GNCT Agency to identify potential users:*** *State Project Director-SSA, Department of Education, GNCT of Delhi provides the list of vulnerable schools for monitoring and curbing availability and peddling the drugs and narcotics substances among school going children. Delhi Police will make efforts to coordinate with the government agencies and NGOs to educate and publicise the dangers and evil consequences of drugs.*

5.2 Partnership and co-ordination with Health Services/NGOs to ensure effective publicity of the

evil effects of drugs.

Holding of sessions by Health Services/NGOs to assure victims of drug addiction of the positive possibility of returning to normal life, by giving up drugs and their consequent acceptance in the society. Delhi Police shall provide co-operation and support in all such programmes.

6. *That a multi pronged strategy is required to curb the menace of drugs. In view of increased action on drugs, it would be imperative that there is concomitant increase in the de-addiction facilities. That concerned department of GNCT may be issued necessary directions."*

6. Mr. Mehra submits that in-so-far as enhanced action under Section 77 of the Juvenile Justice (Care and Protection of Children) Act, 2015 is concerned, the Delhi Police shall take action keeping in view the order passed by the Juvenile Justice Board – III on 20.03.2017, wherein the said Board has widely interpreted the expression "intoxicating liquor" to include substances such as whitener, thinners and vulcanising solutions/sulochans. Mr. Mehra submits that the expression 'intoxicating liquor' used in Section 77 of the JJ Act needs to be interpreted widely to include not just the traditionally understood liquors-which are consumed as alcoholic beverages, but also other liquids/fluids, which have the effect of intoxication and which may not be beverages *per se*. As at present, advised, we agree with the submission of Mr. Mehra. Keeping in view the purpose and object with which Section 77 of the JJ Act has been inacted, and considering the fact that the consumption of such like substances/intoxicating liquors by the children is with the object of

deriving the effect of intoxication, and the children are not likely to be aware of harmful effects of the liquid/fluids that they may consume, and also the fact that the same may not actually be a beverages, we are, *prima facie*, of the opinion that such like substances should be treated as "intoxicating liquor" within the meaning of Section 77 of the JJ Act.

7. Mr Mehra stated that in terms of order passed by the Juvenile Justice Board III dated 20.03.2017, the Government of NCT of Delhi has issued a notification dated 28th July 2017 which, *inter-alia*, directs that a "*mandatory warning should be made on the application devise (pens or otherwise) of correcting fluids/thinners and vulcanized solutions/sulochans regarding the effects on health on inhalation of vapour/consumption of the chemicals contained therein*". The Government of NCT of Delhi, though the Chief Secretary was directed to issue appropriate instructions by way of notification, circular or otherwise, banning the sale of correction fluids/whiteners, thinners/diluters and vulcanised solutions/sulochans to children below the age of 18 years unless the child is accompanied by parents/guardians, or has a letter from the school authorities signifying their assent to purchase of the same.

8. The order passed by the Juvenile Justice Board III also directs that the copy of the said order be sent to the Commissioner of Police to conduct awareness and training programmes regarding initiation of proceedings and investigation under Section 77 of the Juvenile Justice (Care and Protection of Children) Act, 2015 in order to give full effect

to the spirit of the Statute and to inform the Board in that regard.

9. Mr. Mehra also points out that the Delhi Police has already issued a Circular dated 01.01.2018 to comply with the order passed by the Juvenile Justice Board III.

10. In view of the aforesaid, we direct the Delhi Police to forthwith take the steps in terms of the suggestions incorporated in the compliance report which we have extracted herein above. We also direct the Delhi Police to issue appropriate Standing Orders in that respect. The enforcement of section 77 of the Juvenile Justice (Care and Protection of Children) Act, 2015 shall be undertaken keeping in view the order passed by Juvenile Justice Board III dated 20.03.2017, wherein the expression 'intoxicating liquor' has been widely considered.

11. To ensure implementation of the steps set out in clause 4.6 herein above, we direct that a copy of this order be communicated to the Drug Controller Regulatory Department, Department of Health, Government of NCT of Delhi, and the Centers for de-addiction which may be run by the Government, and the NGOs engaged in this task. The Social Welfare Department of GNCT shall also file a status report disclosing the number of De-Addiction Centres presently operational in the NCT of Delhi. It shall also be disclosed as to what further steps the Government plans to take for setting up such De-Addiction Centres for juveniles and grown up addicts.

12. List on 7th March 2018.

13. A copy of this order be given dasti under signatures of the court master.

VIPIN SANGHI, J

P.S. TEJI, J

FEBRUARY 15, 2018
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About HRLN

The Human Rights Law Network (HRLN) is an organisation of lawyers and social activists dedicated to the protection of the human rights of the poor through the use of the legal system. Registered as a Public Trust in 1994, it has three divisions: **HRLN**, which does litigation; the **Institute of the Global South for Public Interest Litigation**, which does trainings; and the **Indian People's Tribunal on Environment and Human Rights** which conducts fact-finding missions, research and publications.

HUMAN RIGHTS LAW NETWORK
C/O SOCIO-LEGAL INFORMATION CENTER
576, MASJID ROAD, JUNGPURA
NEW DELHI - 110014
+91-11-24374501
+91-11-24379855
+91-11-24374502(FAX)
CONTACT@HRLN.ORG

HRLN

HUMAN RIGHTS LAW NETWORK