

## JUVENILE JUSTICE LAW AND POCSO – A CHILD LAW IN THE MAKING BY ANIL MALHOTRA\*

***“There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and that they can grow up in peace – KOFI ANNAN”***

### A BACKDROP

The Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act), relating to juveniles and children in conflict with law, besides dealing with children in need of care and protection, has been amended earlier twice in 2006 and 2011. The further demands for amendments to the JJ Act have been in the reckoning again. After the unfortunate Delhi Gang-rape case in 2012, the juvenile, who was the prime accused, was given the maximum three year tenure imprisonment in a correctional home under the JJ Act. A public outcry agitated a more stringent punishment for this principal offender. Moreover, violence witnessed against juveniles themselves, is also emerging as an alarming issue which is required to be redressed on priority by strengthening of existing provisions in a new enactment. Cumbersome, protracted and technical inter-country adoption procedures in the existing JJ Act need urgent legislative resolution for over 12 million orphan children needing homes. Personal laws provide adoptions to its respective communities. Other persons can become only guardians under an archaic 125 year old Guardians and Wards Act, 1890. A secular gender free adoption law for all persons, irrespective of marital status and gender, answering the recent Supreme Court mandates is a clarion call to be heard and implemented. Now is the time to do it.

In *Stephanie Joan Becker 2013(12) SCC 786*, a single 53 year old lady was permitted to adopt a female orphan child aged 10 years by relaxing the rigor of the guidelines of CARA on the totality of the facts of the case that the proposed adoption would be beneficial to the child as the experts were of the view that the adoption process would end in successful blending of the child in the US. Likewise, in *Shabnam Hashmi v. Union of India (2014(4) SCC 1)*, the Apex Court upholding the recognition of the right to adopt and to be adopted as a fundamental right has held that every person, including Muslims, irrespective of the religion they profess is entitled to adopt a child. The latest verdict of the Supreme Court in *National Legal Services Authority Vs. Union of India (2014(5) Scale 1)* recognising transgender as the third gender have held *“that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution.”* The Judgment in *Jan Balaz vs. Anand Municipality (AIR 2010 Gujarat 21)*, is under challenge in the Supreme Court by way of SLP (Civil) No.31639 of 2009, *Union of India Vs. Jan Balaz*, where the twin German children born through surrogacy were granted an exit permit on Supreme Court directions to CARA to permit their adoption by German parents. Yeoman judicial innovation must be legislatively recognised.

Rightly so, the Government of India has now amended the JJ Act by repealing the existing JJ Act, 2000 and re-enacting a new JJ Act, 2015 for which a review committee had been constituted under the Ministry of Women and Child Development (WCD),

Government of India. The call for suggestions and comments in public domain to the draft Juvenile Justice (Care and Protection of Children) Bill, 2014, having sadly gone un-noticed, a brief overview for generating a thought perception ought to have been a must. A major change in child jurisprudence is evolving. All citizens must know of it. An umbrella child law legislation for current needs today must unravel with public participation on meaningful suggestions for Parliamentarians.

The Apex Court in a public interest litigation decided on March 28, 2014, in *Dr. Subramanian Swamy and others vs. Raju and others* reported as JT 2014 (4) SC 328, refused to read down the provisions of Juvenile Justice Act, 2000, in order to account for the mental and intellectual competence of a juvenile offender and refused to interfere with the age of a juvenile accused, in cases where juveniles were found guilty of heinous crimes. It was held by the Court that the provisions of the Act are in compliance with the Constitutional directives and international conventions. The Court further directed that the classification of juveniles as a special class stood the test of Article 14 of the Constitution of India, and that it should restrict itself to the legitimacy and not the certainty of the law. The baton had been passed on to the Parliament to finish the relay race in time by enacting a new law.

## **THE PROBLEM**

With the repeated string of sexual abuse or rape of children being reported across the nation and a public outcry raging on the streets like molten lava flowing uncontrolled from a bursting volcano, the victimised and abused child suffers in silence. Traumatized, dejected and horrified family members of unfortunate victims find themselves helpless, confused and unable to cope up with the heinous crime. Even though on 22 May 2012, the Parliament passed the Protection of Children against Sexual Offences Act, 2012 (POCSO) and which came into force on 14 November 2012, this special law to protect children from offences of sexual assault, sexual harassment and pornography, remains an unimplemented law, unknown to most and beyond knowledge or information of those who need to apply it. Sadly, the result is that POCSO, an Act, which is a necessity in India where 40 percent of the population is below the age of 18 and where over 53 percent of children reportedly surveyed in 2007 stated that they had experienced one or more forms of sexual abuse, is not complied with despite being on the statute book. Rhetoric demands stiff penalties, expeditious new laws and fast track courts little realising that POCSO, as a wholesome law already says it all.

## **POCSO AND ITS CONTENT**

Until recently, various provisions of the Indian Penal Code (IPC) were used to deal with sexual offences against children as the law did not make a distinction between an adult and a child. POCSO deals with sexual offences against persons below age of 18 years. A child has been defined as a person below the age of 18 years. POCSO defines "Penetrative sexual assault," "sexual assault" and "sexual harassment" making the offence aggravated if it is committed by a police officer, public servant, staff member of jail, remand, protection or observation home, staff of a hospital or an

educational institution or by a member of the armed or security forces. POCSO provides for relief and rehabilitation as soon as the complaint is made to the Special Juvenile Police Unit or the local police who are required to make immediate arrangements for care and protection. The intent to commit an offence defined under POCSO is also punishable besides abetment or aiding the sexual abuse of a child. Special emphasis has been provided for trial in special children's courts with speedy disposal and special procedures to avoid child not seeing accused at time of testifying.

## **AWARENESS OF POCSO**

Despite POCSO laying down that the Central and State Governments shall take measures to give wide publicity through media including television, radio and print media and imparting periodic training to all stake holders on the matters relating to implementation of provisions of POCSO, the Act is relatively unknown. Shockingly, in the present most recent unfortunate rape case, the Delhi Police included the provisions of POCSO to the FIR reportedly after two days of the filing of the FIR on 15 April 2013. In the infamous APNA GHAR Rohtak shelter home case of May 2012, despite rampant allegations of child sexual abuse of over 100 inmates, reportedly, the provisions of POCSO are still not stated to have been invoked against the accused. Most child sex abuse cases are not booked under POCSO. Child sex offenders get away despite a stringent law. The Act is unknown. Indoctrination, training, familiarisation and actual application by police officers and other stake holders still remains a far cry. POCSO remains an Act of law in oblivion.

## **A STEP FORWARD**

The passing of the salutary law is more than significant for a variety of reasons. It defines exclusively the crime of sexual offences against children and fulfils the mandatory obligations of India as a signatory to the United Nations Convention on the Rights of The Child, acceded to on December 11, 1992. For monitoring and implementation of the provisions of POCSO, the Act enjoins that the National Commission and State Commissions for Protection of Child Rights constituted under the Commissions for Protection of Child Rights Act, 2005 shall ensure the effective carrying out of the provisions of POCSO. The Supreme Court in hard hitting directions on 7 February 2013 has directed that all States are to ensure that the regulatory and monitoring bodies are constituted and made functional. However, till date, the fully functional Commissions are non-existent or effectively non-functional.

## **A LANDMARK JUDGMENT**

Upon the National Commission for Protection of Child Rights (NCPCR) petitioning the High Court, in a path breaking judgment rendered on 9 April 2013, it has been directed that the States of Punjab and Haryana as well as Union Territory of Chandigarh shall ensure, that, State Commissions for Protection of Child Rights headed by a Chair person who should be a person who has been a Judge of the High Court, shall become fully functional by appointing Chairpersons and six members appointed through a transparent selection process. The High Court has further directed

mandatory registration of all children homes, constitution and notification of children's courts and appointment of special public prosecutors besides constituting a proper selection committee to make further selections of various committees to be set up for child welfare. Hence, the entire machinery of monitoring child rights has been galvanised. A further direction has been issued that the National Commissions and State Commissions shall start discharging their functions under POCSO for implementing its provisions and modules/ training programmes for sensitizing all stake holders on child rights and for dealing with cases in Children's Court be also initiated in the Chandigarh Judicial Academy. It is now for the State Governments to implement this beneficial mandate and create an effective machinery to check heinous crimes of gross sexual abuse against children by enlightening all concerned about it. It is the duty of the State to now perform its obligations for the welfare of society.

## **THE NEW LAW**

The JJ Act, 2015 seeks to enact a law to consolidate and amend the law relating to children in need of care and protection by catering to their developmental needs through proper care, protection and treatment, and by adopting a child friendly approach in the adjudication and disposal of matters in the best interest of children and for their ultimate rehabilitation through processes provided, and institutions established, under the proposed new enactment. The Rajya Sabha approved the legislation with a voice vote on 22 December, 2015 and the Lok Sabha had already passed the JJ Bill in May, 2015. It has thus now become the JJ Act, 2015.

The WCD Ministry had earlier posted on its website a proposed draft of The Juvenile Justice (Care and Protection of Children) Bill, 2014 suggesting broad amendments and enacting fresh better provisions for the welfare of the children in the following areas needing urgent legislative action:

- a) Increase in reported incidents of abuse of children in institutions, families and communities;
- b) Inadequate facilities, quality of care and rehabilitation measures in private and Government run children Homes;
- c) Delays in various processes under the JJ Act, such as decisions by Child Welfare Committees (CWCs) and Juvenile Justice Boards (JJBs) leading to high pendency of cases relating to juveniles;
- d) Delay in inter country adoption process under Central Adoption Resource Agency (CARA);
- e) Inadequate provisions to deal with offences against children;
- f) Provisions related to juveniles in conflict with law, in the age group of 16 to 18 years etc.
- g) The JJ Act incorporates the principles of the Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption (1993) which was absent in the original JJ Act, 2000.

The new JJ Act, 2015 provides for application of the proposed Act in the following cases and matters:

- (i) cases involving detention, prosecution or penalty of imprisonment;

- (ii) matters or processes relating to apprehension, production before court, disposal orders and restoration, and
- (iii) procedures and decisions related to adoption of children and rehabilitation and reintegration of children, in conflict with law or, as the case may be, in need of care and protection, under such other law.

## **A FLEETING GLIMPSE**

The word 'juvenile' is replaced with the word 'child' and the expression 'juvenile in conflict with the law' has been changed to 'child in conflict with law'. The responsibility affixed on the 'child' differs to the extent, that while the JJ Act, 2000 defines juveniles in conflict with law as the 'accused', the JJ Act, 2015 identifies a 'child in conflict with law' to be a child who is found by the Juvenile Justice Board to have actually committed an offence. It also defines an "abandoned child" as well as "aftercare", unlike the present enactment. According to the Act, an "abandoned child" means a child deserted by his biological or adoptive parents or guardians, who has been declared as abandoned by the Committee after due inquiry. Further, "aftercare" means provision of support, financial or otherwise, to young adults, who have completed the age of eighteen years but have not completed the age of twenty-one years, and have left institutional care, to help them to join mainstream society. Chapter II is the most noteworthy characteristic of the proposed Bill which provides for "Fundamental Principles for Care, Protection, Rehabilitation and Justice for Children". It incorporates internationally accepted principles of presumption of innocence, dignity and worth, participation, best interest, family responsibility, safety (no harm, no abuse, no neglect, no exploitation and no maltreatment), positive measures, non-stigmatizing semantics, non-waiver of rights, equality and non-discrimination, privacy and confidentiality, repatriation and restoration, fresh start, diversion and natural justice. Institutionalization as a measure of last resort is suggested if no other family based care option is possible or available.

## **NEW ADDITIONS**

A new procedure for handling children in conflict with law and orders to be passed is proposed. A revamped Child Welfare Committee is identified, empowered and given statutory functions for orders to be passed for children in need of care and protection beside rehabilitation and social integration. Mandatory registration of child care institutions is provided with strict penalty for non-registration. Observation, shelter and special homes may be established by State Governments.

CARA has been made a statutory body vested with functions of in-country and inter-country adoptions besides issuing guidelines on adoption as also carrying out the functions under the Hague Convention on protection of children. Section 58 of the JJ Act, 2015 lays down special emphasis on inter-country adoptions. It states that all applications for adoption by prospective adoptive parents shall be filed before a Principal Magistrate of the concerned jurisdiction where the specialised and registered adoption agency is located. However, the proposed provision for adoption orders to be passed by the Principal Magistrate on the first date of hearing itself or within a period of two weeks, failing which it will be construed by the higher authority of the Principal Magistrate, "as dereliction of duty" does not seem to be practical, realistic and possible for actual implementation. Judicial proceedings have to be regulated by the Code of

Civil Procedure and hence, no short circuit fast track procedure by-passing rules of evidence can be proposed in contravention of law. Like wise, transgenders need adoption rights as much as parents having children born through surrogacy, till suitable independent laws vest appropriate rights.

The JJ Act prohibits the media from disclosing the identity of children or propagating any such information which would lead to the same. All reports relating to the child are also provided to be treated as confidential. The JJ Act provides punishment for cruelty to a child, as also prescribes punishment for employment of child for begging. Corporal punishment and ragging is also made punishable under the JJ Act besides providing for punitive measures for adoption without following the proper procedure, as well as sale or procurement of children for any purpose.

The JJ Act provides a comprehensive mechanism to deal with children in conflict with law as well as children who are in need of care and protection. Private unregistered child care homes abusing, exploiting and selling children will be in the net. The issue of inter country adoption and the role of CARA has been simplified and made very comprehensive. The JJ Act, 2000 had been amended twice, in 2006 and 2011, but the amendments have never been these transparent or non cumbersome. The JJ Act, 2015 is an excellent comprehensive law which is the need of the day. Rights of children of all categories need urgent attention, simplification and expeditious disposal. Any delay or insensitive handling of the rights of children must be remedied. The JJ Act is a positive step in that direction. The framers of the law have done well. However, only if enacted, a stringent implementation can provide a meaningful disposition to make it a true letter of law. As of now, the dire need for legislative intervention is required. Any delay or insensitive handling of rights of children must be remedied. The JJ Act is a positive step in that direction. Its framers have done well. Children deserve it.

## **THE NET EFFECT**

The Justice Verma Committee Report in one of its conclusion on child sexual abuse holds *“there is an urgent need to audit the performance of all institutions of governance and law and order. It is indeed necessary that we must now have external social audit for the sake of transparency. We also wish to make it clear that every case of a missing child must be registered as FIR”*. The Committee further make suggestions of constituting *“an oversight mechanism”* through the High Court, special training needs programmes, sensitizing officials on sexual abuse of children and strict implementation of provisions of various enactments of child laws. Summing up, we need to consolidate our efforts and focus our energies on existing laws and not look to amending more laws and making still further newer laws, alien to our culture, society, habits, life styles and harsh realities of the common man. In so far child sex abuse is concerned, POCSO is a wholesome law. The Government must create the machinery to implement it and educate its officers besides all stake holders on what it contains. The remedy to handle the public outcry is by implementing POCSO. All child offenders must be charged, tried and punished in accordance with POCSO expeditiously. Speedy, stringent and relentless pursuit of POCSO is the remedy and a possible cure. The State must not waste its time in exploring alternatives when the answers exists in a law made by Parliament for these special offences against children, the most

vulnerable section of society. Today's children are tomorrow's future. Let us protect them. The laudable endeavours of Late Justice Verma must find implementation.

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