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Critique of the Juvenile Justice (Care & Protection of Children)Act, 2000*

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Table of Contents

The Juvenile Justice (Care and protection of children) Act, 2000: A critique

A Introduction

The first central legislation on Juvenile Justice was passed in 1986, by the Union Parliament, thereby providing a uniform law on juvenile justice for the entire country.[1] The law on juvenile justice provoked a lot of concern, in human rights circles, pertaining particularly to the way juveniles were treated in detention centers designated as special homes and juvenile homes.

Following closer international attention to the issue of juvenile justice in the late 1990's, the issue moved to the center stage even in domestic circles with a number of consultations held on juvenile justice both nationally and regionally.[2] The combination of a growing focus on the issue of juvenile justice combined by the pressure faced by the government to submit a Country Report to the Committee on the Rights of the Child outlining concrete achievements, seems to have inspired the Ministry for Social Justice and Empowerment go in for drafting a new law on Juvenile Justice, the final outcome of which was the *Juvenile Justice (Care and Protection of children) Act, 2000.*

This paper will after analyzing the main features of the Act argues that the new Act, though it has a few redeeming features is ill conceived as it fails completely to engage with crucial conceptual questions on the area of juvenile justice. It further refuses to engage with law reform efforts in other parts of the world. Leaving aside the question of a deeper engagement with the issue, the law also fails to comply with existing international human rights standards, which it in its preamble invokes. Specifically the *Convention on the Rights of the Child, 1992,* the *Beijing Rules (1985)* and *UN Rules for Juveniles Deprived of their Liberty (1990)* are invoked, but not internalized within the framework of the Act. Thus it will be argued ensures that the *JJ Act 2000* remains a merely rhetorical gesture in the direction of a more child friendly enactment.

One of the methodological assumptions underlying the critique is a normative commitment to human rights discourse. This methodological assumption can be defended against critiques that human rights discourse is western and not suited to an Indian context on the following three counts:

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[1] The law was passed by the union parliament using the power conferred by Art 254 of the Constitution, under which the union had the legislative competence to enact a law on a state subject if the law was aimed at implementation of an international treaty. The international standard in this case was not a treaty but recommendatory rules passed by the General Assembly called the Beijing Rules (1985) for the administration of juvenile justice.

[2] The National Consultation held by NIPCCD on 'The Juvenile Justice System and the Rights of the Child', 1999, the National Consultation held by CCL on 'better implementation of the juvenile justice system', 1999. There were also regional consultations held in Madras, Hyderabad and Patna. Apart from this UNICEF sponsored a number of studies on the implementation of the juvenile justice system in various states like Maharashtra, Madhya Pradesh, Delhi and Orissa. What was important about this developing body of research that it focused in on the problems faced by children in the implementation of the present JJ Act very powerfully. The human rights violations, which occurred within the system, were put under the spotlight. However the empirical work had not yet stimulated critical thinking on the very conceptual frameworks of juvenile justice.

Firstly, While scholars have pointed out to the origins of the UDHR as being an imposed consensus of western countries.[3] While this is in fact right, the far more important point is how has the UDHR been used in the Indian context. Thus one needs to shift from looking at origins of concepts to histories of concepts. The burgeoning human rights literature produced by various civil society groups, human right organizations and child rights groups only testify to the rich history of human rights concepts and how they have been used by civil society groups to hold power accountable.[4]

Secondly, the critique of human rights as western also needs to be historically grounded. In the west, human rights language has evolved as a specific means of holding the state and the proliferating range of state entities like prisons, police, and juvenile homes, orphanages accountable for their exercise of power. The state is as much a reality in India as it is in the west and human rights discourse is an extremely powerful normative vocabulary to ensure state accountability.[5]

Thirdly, the critique of human rights as western fails to take into account the imaginative ways in which human rights norms can be fused with local struggles. The one clear example is the indigenous peoples struggles, which have mobilized at an international level for a treaty on rights of indigenous people. The draft treaty clearly takes into account collective rights of indigenous people as well as their individual rights [6]

B The Juvenile Justice (Care and Protection) Act 2000[7]

The Act was not based on policy regarding children in conflict with the law or children in need of care and protection. The ad hoc nature of a possible policy can only be gleaned by examining the Act. On examination the following points emerge as articulating the approach of the Act towards juveniles.

- The law provides that any juvenile or child who has not completed the age of eighteen would fall within the jurisdiction of the Act. In the previous enactment the definition of juvenile included boys who had not completed the age of 16 and girls who had not completed the age of 18. With the present change, the CRC[8] standard, which defines a child as anyone under the age of 18, has been complied with.
- The law pertaining to what are now called children in conflict with the law has undergone a few changes. The adjudicating authority has been redesignated as the

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[3] See Makua Matua, A noble cause wrapped in arrogance, Boston Globe, 29.04.2001. He notes, 'There is no doubt that the current human rights corpus is well meaning. But that is beside the point. International human rights falls within the historical continuum of the European colonial view in which whites pose as the savior of a benighted and savage non –European world.'

[4] See A. R. Desai, *Ed.*, Violation of democratic Right in India, Popular Prakashan, Bombay, 1986. This book brings together extracts from human rights reports from around the country pertaining to torture, anti democratic laws, state violence, prison conditions, violence against slum dwellers etc.

[5] See Savitri Goonesekere's arguments in defense of the Convention on the Rights of the Child which broadly mirror the position taken above. Savitri Goonesekere, *Children , Law and Justice*, Sage Publications, New Delhi , 1998, p 17.

[6] *The Draft Declaration on Rights of Indigenous People, Art 4* notes, *The collective right to exist as distinct peoples and to be protected against genocide, as well as the individual right to life, physical integrity, liberty and security of person.*

[7] Henceforth referred to as *JJAct2000*

[8] *Convention on the Rights of the Child* henceforth referred to as CRC

Juvenile Justice Board and the composition has changed from an adjudicating authority which was a Magistrate with a panel of two social workers to assist her as prescribed under the old law to a Bench which is composed of two social workers and one Magistrate. This change in composition of the adjudicating authority is one of the more significant changes in the new law, as now the space exists for bringing about a change in the very nature of the inquiry. The primary inquiry of whether the child did commit the offence as mandated by a magistrate's training could now be displaced by a social workers inquiry, which could focus in on why the child committed the offence, and how does one redress the same. The shift in composition of the Board can bring about a shift in the line of inquiry from intention to motive. Thus what could change has been referred to as the criminal law mindset itself. This is in effect an important step towards decriminalizing the administration of juvenile justice, provided the rules operationalize the same.

- The law provides for separate treatment for children in need of care and protection and juveniles in conflict with the law. Under the old Act the classification of delinquent juveniles and neglected juveniles was meant to separate the two categories of children with the Juvenile Welfare Board and the Juvenile Home meant for the neglected juvenile and the Juvenile Court and Special Home meant for the delinquent juvenile. However the separation was only a partial separation as pending inquiry both categories of children were kept in an Observation Home together. Thus the argument went that often children who had committed serious offences were kept in the same institution as children whose only crime was that they were neglected children as per the Act. Keeping this argument in mind, the state has now ensured a complete separation between the two categories as now juveniles in conflict with the law are kept in the observation home and children in need of care and protection are sent directly to the juvenile home. However this shift itself seems a cursory attempt at really changing the deeply custodial nature of the entire juvenile justice system. If one was serious about decriminalizing at least the child in need of care and protection then, one needed to intervene at every level starting from the police. In fact the police are still empowered to come in contact with both categories of children. The police have more power vis a vis the category of child in need of care and protection as under Sec 33 of the enactment they are now even empowered to inquire into the situation of the child. With regard to the role of the police what has happened is really a deeper level of recriminalization rather than decriminalization. What is also important to keep in mind is that the distinction between the two categories is illusory as the way the law treats both categories is by prescribing custodial care as one of the options.[9]
- The category of children in need of care and protection has been expanded to include victims of armed conflict, natural calamity, civil commotion, child who is found vulnerable and likely to be inducted into drug abuse etc. The expansion of

[9] Focus Group Discussion – 14/01/01 organized by Center for Child and the Law - "If they had searched for my family when I was found, (at 5 years), I would not be an orphan today" said a 20 year old who had been in a state institution from the age of 5.

the category of children in need of care and protection has itself led to serious questions as the system still remains custodial in nature and what one in effect does is bring more children within a criminal justice framework.

- The framework of the law remains within the criminal justice system as the police still have power to contact a child and produce him before the Committee. In fact the powers of the police have been expanded as under the new Act the police have also been empowered to hold an inquiry regarding the child in the prescribed manner. Further if the child is sent to a Juvenile Home, then such home remains a place where the child is deprived of her liberty, thereby reinscribing the custodial nature of the institution.
- The innovation the law makes with respect to children in need of care and protection is the conceptualization of restoration of the child as being the focal point, with restoration being conceptualized as restoration to parents, adopted parents or foster parents. (Sec39). This being the crux, the law then outline four options for children in juvenile homes and special homes which include adoption, foster care, sponsorship and after care. While the aim of minimizing the stay of the child in the juvenile home and special home as conceptualized is laudable, there are serious concerns as to whether restoration can be the only solution. Especially in the case of sexual abuse the solution can be ill conceived. Further in the case of children in difficult circumstances such as children on the street, children in prostitution restoration might not be an immediate solution. The other concern is as to the fact that no safeguards have been built into the procedures regulating adoption.

C The Juvenile Justice (Care and Protection) Act 2000, Conceptual considerations

The discussion on the merits of the present enactment also has to be located in the context of the debates in criminology regarding crime and punishment. One needs to understand the philosophy motivating the JJ 2000 Act itself and locate the critique in a deeper conceptual basis. Any policy prescription necessarily needs to locate itself in a certain kind of criminological understanding. To do so this section will

- Outline the various kinds of criminological theories
- Locate the Juvenile Justice Act within this framework and argue for an integration of other criminological understandings

The various criminological approaches

Criminology is a rich discipline with multifarious approaches. While understanding that no approach stands on its own, and there is a degree of interpenetration between approaches it is still useful to classify approaches at least as ideal types.[10] Cunnen [11]classifies the criminological approaches broadly within the framework outlined below.

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[10] For a more in-depth understanding of the different approaches to criminology see Ronald Akers, *Criminological theories: Introduction and evaluation*, Roxbury, Chicago, 1999. , John Muncie Ed., Criminological *perspectives*, Sage Publications, London, 1996.

[11] Chris Cunnen *et. al., Juvenile Justice –An Australian perspective*, Oxford University Press, Oxford, 1995, pp28-90.

Classical Theory
Positivist approaches
Strain theories
Social Control theories
Youth sub culture theories
Labelling theories
Marxist theories

Classical theory

Classical theory is premised on the notion of free will. If individuals commit crime, it is because they freely choose to do so and have to take responsibility for their action. Since individuals are responsible for their actions this theory advocates that punishment is a way of deterring rational individuals (all individuals are rational) from committing crime. Classical theory is based on a Benthamite calculus of pleasure and pain and believes that if pain is administered by way of imprisonment then wrong doing would be deterred.

Positivist approaches

Positivist approaches advocate that individuals commit crimes either because of biology, environmental factors or sociological factors. Individuals thus commit crimes for reasons often beyond their control and they should be 'cured' of their disposition to commit crimes. Positivist approaches thus recommend an individualized approach where offenders are classified and different kinds of treatments are prescribed. Thus a whole range of expert interventions is recommended to ensure that the individual does not commit crime again as suggested by sociologists, psychologists, doctors, social workers and other 'experts'.

Strain theories

This approach decisively moves responsibility for crime away from the individual person on to the social structure. Crime is not the result of an individual predisposition for crime, but happens because of the way society has structured common goals and ways to achieve them. For example in Merton's analysis, if all individuals share the common American dream of financial success, but the institutional means to achieve success are limited to a few, then one outcome would be crime, which is a non institutional means to achieve the same. Thus crime is seen as an outcome of a social disease be it inequality of opportunity, inability to integrate those considered alien or a socially and culturally discriminatory attitude

Social Control theory

Social Control theory is premised on the idea that it is an individual's bond to society, which makes the difference in terms of whether or not they abide by society's general rules and values. Hirchi theorized that the social bond is made up of four elements

1. Attachment: the ties of affection and respect to significant others in one's life, and more generally a sensitivity to the opinion of others
2. Commitment: the investment of time and energy in activities such as school and various conventional and unconventional means and goals

3. Involvement: the patterns of living which shape immediate and long term opportunities, for example, the idea that keeping busy doing conventional things will reduce the exposure of young people to illegal opportunities
4. Belief: the degree to which young people agree with the rightness of legal rules, which are seen to reflect a general moral consensus in society.[12]

It is the combination of attachment, commitment, involvement and belief which shapes the life world of the young person and which essentially dictates whether they will take advantage of conventional means of social advancement or whether they will pursue illegal pathways to self gratification.

Youth subcultures

Another important theory closely linked to social control theory is the idea of youth subcultures, wherein what society calls criminal behavior is learnt in a group setting. The sub culture sees itself as operating on different value systems, different notions of right and wrong and individuals act in conformity to the norms of the subculture to which they belong. Subcultures are also seen as a response to social and economic marginalization and are a creative mode of coping with or resisting deprivation.

Labelling theory

Labelling theories focus on the fact that deviancy is subjectively made and not objectively given. Deviance is seen to be a product of the juvenile's interaction with the criminal justice system. Once the juvenile commits the act prohibited by law, and he/she is apprehended then the very interface with the criminal justice system produces the identity of the criminal. Society identifies the individual henceforward with only one identity, namely that of the criminal. This kind of societal reaction results in the individual taking on the identity as a response to societal stigma and learning the norms of behavior conferred by the label. The label thus serves to amplify deviance or criminality.

Marxist theories

Traditional Marxist theories locate the cause of crime in the unequal access to material resources, with crime itself being seen as a class response to inequality. Later applications of Marxist thinking to criminology have carried the analysis further and analyze how wrongdoing by the powerful and wrong doing by the powerless is defined. Wrong doing by the powerful, may sometimes not even be defined as a crime, (negligent conduct which causes the death of thousands *i.e.* Bhopal) if so defined then the powerful are able to defend themselves because of their greater resources. By contrast the wrong doing by the less powerful tends to be highly visible and be subjected to wide scale intervention by the police, courts, prisons welfare agencies etc. This approach raises fundamental questions as to the legitimacy of interventions in the lives of poor people while the harm done by the powerful is not taken note of.

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[12] Cunnen *op.cit.* , P 53.

The JJ Act 2000 in the context of criminological theory: an impoverished criminological understanding?

The fundamental premise underlying the JJ Act is that children who commit offences and children who need care and protection would fall within the ambit of the juvenile justice system. While building in certain avenues for release of the child either to parents, guardians, fit persons or adoptive parents and to people who would provide foster care, the systems logic is to provide what the preamble calls 'proper care, protection and treatment by catering to their development needs' within an institutional setting. These institutions designated as observation homes, children's homes and special homes share one feature in common –they are all closed institutions, which completely deprive the child of his or her liberty. However the deprivation of liberty is not conceptualized as punishment, but as a mode through which the juvenile is reintegrated into society. In its conceptualization, the Act along with the rules [13] is based not on punishment, but on how best one can reform the erring individual.

In this respect the moment the individual enters the institution he or she is classified by the Classification Committee which looks into age, physical and mental status, length of stay period, degree of delinquency and his character...(Rule21). After the child is classified then the child is subjected to the daily routine prescribed by the rules. Each institution shall have a well regulated daily routine for the inmates which should be displayed and should provide among other aspects, for regulated disciplined life, physical exercise, educational classes, vocational training, organized recreation and games, moral education, group activities, prayer and community singing. (Rule 14)

For Sunday and holiday the daily routine shall include

a) Washing of clothes and bedding
b) Reading
c) Recreational programmes, games and sports
d) Radio and television programmes and recorded music
e) Properly planned excursions
f) Scouting activities (Rule 14(2))

What is to be noted is that this programme of 'reintegration" is to be carried out with respect to the child in conflict with the law for a period of not less than 2 years with respect to a child who is over 17 and below 18 and for other juveniles till he ceases to be a juvenile. [14] For children in need of care and protection, the child would continue in the children's home if the other measures conceptualized under the Act, like foster care, adoption, sponsorship and after care are not suitable.[15]

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[13] The Rules are framed by individual states and the rules referred to here are the Rules framed for the1986 statute by Karnataka State. However it has to be noted that the Rules across states are broadly uniform.

[14] Sec 15(g) of the JJ Act 2000. However the proviso does give power to the court to having regard to the nature of the offence and circumstance of the case reduce the period of stay.

[15] Sec 33(3)

Thus the philosophy seems to be that by detaining children till they reach the age of 18 and by subjecting them to the daily routine described above, one would produce individuals who can then be reintegrated back into society.[16]

If one places this mode of treating juveniles within the theoretical frames outlined above, the approach bears shades of positivist theory as well as classical theory. Through the process of classification and the space given for intervention by the Probation Officer and the Superintendent, as well as by referring to the objects of the Act it seems that some rudimentary form of specialized intervention is contemplated to 'cure' the child. However the daily reality of life in the Home in terms of the monotonous daily routine and the enforced separation from all forms of life outside is really an adherence to the classical model of punishment. The approach is normatively within positivist frameworks, but in terms of the existential reality of the child really the classical approach, i.e. an imposition of a heavy punishment for a wrongdoing, in the conviction that that will deter wrongdoing. This conclusion is buttressed by the fact that the Rules framed under the JJ Act bear a remarkable similarity to the Prison Rules.

What is shocking that in an age when our knowledge about wrongdoing has increased exponentially wherein the traditional criminological approaches of classical/positivist have long been contested by other explanatory frameworks, which locate the reason for wrongdoing in societal structures, the Act bears no trace of any new thinking. If for example the labeling theory were taken seriously, then the aim of the Act would really have been to minimize the contact of the child with the criminal justice system as being processed by the system contributed to the child becoming criminal. Diversion would have had to be a mandatory part of the juvenile justice system at all levels right from the police officer, to the prosecutor, to the judge. However the Act reflects no such theoretical shift in thinking. If social control theories were even considered then, the juvenile justice would have focused more strongly on ensuring that one concentrated on building the social bonding between the juvenile and society, rather than subjecting the juvenile to a prison regime of limited contact with the outside world which in effect alienates him/her even further from society. Interventions based on the impoverished approaches of classical and positivist understandings simply fail to take into account the nuances of understanding from the point of the child as would be evident if one looked at youth subcultures and the loss that this understanding makes for interventions in the life of children. [17] Similarly the Act has not engaged with the deep structural questions thrown up by strain theories and Marxist theories, which defines crime, why are certain

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[16] The judiciary too has articulated this philosophy. In the Graham Stains murder case, the judges while sentencing a 13 year old accused Chenchu to 14years in detention noted 'if the Hindu mythology is of any help in this case, this is the land where a dreaded dacoit, Ratnakara was transformed into a Saint Valmiki and as such, this court has faith and belief that the Superintendent, Juvenile Home Anugul will nurture and display to the world outside the gradual transformation of Chenchu Hansda to a Valmiki', *Times of India*, (2.10.2000)

[17] See Calvin Morill *et.al.*, 'Telling tales in school: youth culture and conflict narratives' ,Law & Society Review , Vol34 No3 2000 , Morril analyzes how 'our work departs from mainstream criminology to approach youth conflict from the perspectives of cultural studies of young people and the socio legal study of conflict'....the authors note that 'youth narratives of conflict offer glimpses into how young people make sense of conflict in their everyday lives'

crimes the basis of policing as opposed to others? The answers to these questions might seriously destabilize the very ideas of juvenile justice itself[18].

D Juvenile (In)Justice ? Comparative perspectives

One would also imagine that when the law with regard to such a complex area as the interface of children and the criminal law, one would seriously take into account the experiences of other countries around the world. However the law, which has ultimately emerged, shows no such engagement.

One has only to contrast the experience of South Africa where law reform was premised on a close study of what has really happened in other jurisdictions[19] and the law reform proposal was based on such an understanding drawing both from the experiences of other countries as well as the grassroots experience in South Africa. In this section it is proposed to look at experiences pertaining to juvenile justice in the United States, Uganda, South Africa and Scotland to understand how other jurisdictions are dealing with children in conflict with the law.

1) The United States response

The United States has recently celebrated a centenary of the existence of juvenile courts.[20] It is in recent years that the issue of juvenile courts has come under increasing threat with some radical quarters pushing for an abolition of the Juvenile Justice system and others asking for a radical overhaul.[21] Whatever might be the final outcome of these calls for reform, what is apparent is that the trend is increasingly towards recriminalization and a wiping out of the admittedly minimal gains of the past.

The juvenile justice system as established in the US, basically had a more liberal sentencing jurisdiction as compared to the ordinary criminal courts with options such as release on probation and diversion. The aims of the juvenile court were focused on rehabilitation as opposed to punishment. Further the juvenile court did not have the jurisdiction to pass orders, which ran after the person ceases to be a juvenile.

The supposedly more liberal character of the juvenile justice system came under increasing threat in the 1990's with the politicization of juvenile crime. The US media

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[18] See Schur , *cf.* , Cunnen , *op.cit.* ,p60 , He argues for a policy of radical non intervention which goes beyond mere diversion , 'basically radical non intervention implies policies that accommodate society to the widest possible diversity of behaviors and attitudes , rather than forcing as many individuals as possible to adjust to supposedly common societal standards...the basic injunction is for public policy to leave kids alone wherever possible. This partly involves mechanisms to divert children away from the courts , but it goes further to include opposing various kinds of intervention by diverse social control and socializing agencies.'

[19] The South African Law Commission's Issue Paper on Juvenile Justice closely studied the experiences of three countries, New Zealand, Uganda and Scotland before coming up with their own proposals. , www.law.wits.ac.za/salc/salc.html

[20] The first juvenile court was established in Illinois in 1899 and the jurisdiction of the court extended to children who committed offences, children who were status offenders and children who were victims of abuse or neglect.

[21] The Future of children, Vol.6 No3- Winter 1996. , When reformists call for reform or abolition, both reform and abolition work within the policy consensus of recriminalization. Thus reformists call for a juvenile court. which looks more like an adult court, and abolitionists say that adult courts should be used to try children.

portrayed juvenile crime as a result of the liberal juvenile justice system and the calls for getting tough on crime had its effect in three major shifts in the juvenile justice system.

(1) Expansion of waiver provisions

Most of the states enacted waiver provisions, allowing for juveniles who committed crimes to be transferred to adult courts. The three kinds of waiver, which have been used, are legislative, judicial and prosecutorial.

- Legislative Waiver – In legislative waiver the state excludes certain offences from the jurisdiction of the juvenile court. This is generally done in the case of serious offences like homicide, sexual assault, rape or kidnapping. If a juvenile does commit such offences, the juvenile will automatically be tried in an adult criminal court. The thinking behind legislative waiver seems to be that some offences are so serious that no consideration can be shown to the child. What matters in legislative waiver is not the best interest of the child, but the fact that the child has committed a serious offence and a strong message needs to go out that such wrongdoing will not be tolerated.
- *Judicial Waiver-* In judicial waiver, a juvenile court judge can use his or her discretionary authority to waive jurisdiction over a specific juvenile and send him to the adult court system for adjudication. In most states, transfer of the juvenile is undertaken after what is known as a transfer hearing. During the hearing the judge is expected to consider factors such as age of the offender, juvenile's previous record, whether the offence was against a person or property, juvenile's mental or physical maturity etc.[22] In a racist society, there are well grounded fears for supposing that judicial waiver will most often be used against juveniles from Racial and ethnic minorities.[23]
- *Prosecutorial waiver-*The prosecutor has the discretion to file a charge against a minor in either the criminal court or juvenile court. The prosecutor's decision is generally not subject to judicial review and is not subject to any detailed criterion, which restrict discretion. This discretionary power vested in the prosecutor can once again be subject to critique based on the fact that discretion is vested in an authority who does not have the best interest of the child in mind, but rather whose 'primary duty is to secure convictions and who is traditionally more concerned with retribution than rehabilitation'[24]

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[22] See Lisa S Beresford, Is lowering the age at which juveniles can be transferred to adult criminal court the answer to juvenile crime? A state by state assessment, 37 SANDKR 783 (2000)

[23] See Stacy Gurian- Sherman, Back to the future: Returning treatment to juvenile justice, 15 SPG CRIMJUST 30 (2000) The author draws on a wide range of statistics to show how African American children are discriminated by the juvenile justice system. For example 'statistics from the Maryland Department of Juvenile Justice show that in 1995, white males and African American males had virtually identical number of referrals to the department. However once formal proceedings were initiated, the disparity between these two populations became marked. Although more than 65% of white males receive departmental action, not requiring a court referral, less than 50% of African Americans had similar informal action. Indeed, 52% of the black males were involved in court proceedings compared to 33% of the white males. An alarming 66% of the black males were detained as compared to 24% for white males.

[24] Lisa S Beresford, *op.cit.* , 817.

(2) Sentencing Authority

One of the problems faced by those advocating a policy based on zero tolerance for crime was that the juvenile court had a jurisdiction, which was limited by the age of majority. To circumvent this problem, many states have expanded sentencing options available to juvenile courts. 'Through extended jurisdiction mechanisms, legislatures enable the court to provide sanctions and services for a duration of time that is in the best interests of the juvenile even past the period of original jurisdiction. In some states that have recently changed the jurisdictional aspects of the juvenile court, 'blended sentencing' has been used to maintain control over juveniles who have aged out of the system. This empowers juvenile courts to impose adult sentences on juveniles that result in confinement beyond the maximum age jurisdiction of the juvenile court.'[25]

3 Confidentiality

One of the essential tenets of the Juvenile Justice system throughout the world [26] has been the notion that offences committed in childhood do not follow the child into adulthood. The child who has been sentenced by the juvenile court has his record expunged, so that the child can start life out on a clean slate.[27] This fundamental premise of the juvenile justice system has been subject to increasing contestation. 'Recent state legislation in forty seven states resulted in changes in confidentiality provisions, including expungement, making records and proceedings more open.'[28]

The US response- Juvenile in(justice)?

The United States response points to a move towards an adult oriented criminal law jurisprudence, which is in violation of agreed international standards[29]. The United States in one of the two countries in the world, which has not ratified the Convention on the Rights of the Child. The legal environment is thus unfavorable to compelling the United States to comply with the Convention. Thus major shifts vies a vis the human rights of children are occurring without any debate within a human rights framework. The very basic rights of children to have an inquiry which is separate from adults, the right to be detained only as a measure of the last resort and for the shortest possible period of time[30] are being whittled away by the enactment of waiver provisions and the enactment of extended jurisdictional options. What is shocking is that this progressive whittling away of core protections is being done in an environment of legal silence. Debates in the United States on issues of juvenile justice do not even mention the existence of

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[25] Sacha. M. Coupet, What to do with sheep in wolves clothing: The role of rhetoric and reality about Youth Offenders in the constructive dismantling of the juvenile justice system, 148 UPALR 1303(2000)

[26] See the Juvenile Justice (Care and Protection) Act, 2000, various state statutes in Australia and New Zealand. See also the Report of the Secretary-General pursuant to Commission on Human Rights resolution 1996/32 on Children and juveniles in detention. This Report notes that confidentiality provisions are present in the juvenile justice statute of Chile et.al.

[27] Labeling theories with their emphasis on how contact with the criminal justice system produces criminality, would lend support to measures such as expungement of the criminal record of the juvenile.

[28] Sacha. M. Coupet, *op.cit.*

[29] The standards would be the CRC, Beijing Rules and the UN Rules for Juveniles Deprived of their liberty.

[30] See Art 37, CRC

international standards vis a vis children, [31] let alone make out a case for why the CRC is a persuasive authority which should be taken into account by US law makers.[32]
The United States experience points to the dangers which juvenile justice reform can run into in an environment where crime is politicized. This points to the more happy position in India where crime by young people has not yet become a politicized issue. As such the policy climate is more attuned to the framework offered by the Convention on the Rights of the Child and reform could mean a greater compliance with the CRC.

2 The Ugandan response
Uganda enacted its legislation on the care of children in 1995 post Ratification of the Convention in 1990. The legislation reflects how a developing country with limited resources can move towards compliance with existing International Standards. The South African Law Commission observed that 'The Ugandan legislation consequently provides an example of the enactment of principles found in international instruments thus elevating the status of the principles to binding local law.'[33] The child-centered approach reflected in the Ugandan legislation can be analyzed under three heads:

(1) The Human Rights Framework
The statute shows a clear commitment to human rights norms found in the three international instruments concerning children. Many of these fundamental principles are actually reflected in the statute. This commitment to translating international instruments into local law is reflected in Sec 4 read with the 1st schedule which balances the welfare of the child with the rights of the child and places them in the position of principles which guide the implementation of the statute itself.[34]It is within this rights based context, that various other child friendly measures have been enacted.

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[31] Sacha. M. Coupet, *op.cit.* , Lisa S Beresford, *op.cit.* , David Mears, Assessing the effectiveness of juvenile justice reforms: A closer look at the criteria and the impacts on diverse stakeholders, Law and Policy, Vol 22. No 2(2000) All three of the above authors are deeply concerned about the nature of juvenile justice reforms in the USA, but strangely enough none of them even take into account the International Human Rights framework concerning the Rights of the Child, let alone haul up the United States for not respecting standards which every other country in the world apart from Somalia acknowledge as the normative standard. However this basic silence turns to vociferous speech when it comes to examining if other countries measure up to the international standards with respect to the child. See Andrea Geiger, International law-Juvenile Justice in Pakistan, 23 SFKTLR 713(2000) in which the author strongly chides Pakistan for not complying with the CRC, Beijing Rules and UN Rules for Juveniles Deprived of their Liberty.

[32] Judges in two cases have cited the CRC even though the United Nations has not ratified the Convention. See *Sadegi* v *I.N.S* ,40 F.3d 1139(10th Cir. 1994) ; *Batista* v. *Batista* ,1992 Conn. Super. The author notes that Batista is noteworthy for its use of the CRC as a persuasive authority , even though the United States is not a State Party. *cf.* Jonathon Todres , Emerging Limitations on the Rights of the Child : The UN Convention on the Rights of the Child and its early case law , Colum.H.R.L.R (1998)

[33] www.law.wits.ac.za/salc/salc.html

[34] Guiding principles in the implementation of the statute
1 Whenever the state , a court , a local authority or any person determines and question with respect to –
(a) the upbringing of a child or :
(b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be of paramount consideration.
2 In all matters relating to a child, whether before a court of law or before any other person, regard shall be had to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child.

(2) Diversion

One of the important principles to which close attention has been paid by the Statute is the principle of diversion.[35]

Open the apprehension of the juvenile himself or herself, the police have been empowered to deliver a caution at the point of arrest and let the child go. The police may also dispose of the case themselves without recourse to formal proceedings.[36] Thus the statute implements the principle of diversion at the point of first contact itself in line with the mandate of the Beijing Rules. If the police are convinced that the case is not a fit case for diversion and the child cannot be immediately taken before the court, there is even a provision for the release of the child on a personal bond or bond entered into by his or her parent or guardian.[37]

If the first tier of diversion does not work then the child goes through an adjudicatory process, which is an innovative attempt at limiting the power of the criminal court. In the first instance the child in a limited number of criminal cases [38] goes before a local village level authority which has limited criminal powers, namely the Village Resistance Committee Court. The VRCC's sentencing jurisdiction vis a vis juveniles is limited to reconciliation, compensation, restitution, apology or caution and these reliefs may be

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3 In determining any question relating to circumstances set out in paragraphs (a) and (b) of paragraph(1), the court or any other person shall have regard in particular to –

(a) the ascertainable wishes and feelings of the child concerned in the light of his or her age and understanding ;
(b) the child's physical , emotional and educational needs;
(c) the likely effects of any changes in the child's circumstances;
(d) the child's age, sex, background and any other circumstances relevant in the matter;
(e) any harm that the child has suffered or is at the risk of suffering;
(f) where relevant ,the capacity of the child's parents ,guardians, others involved in the care of the child in meeting his or her needs.

4 A child shall have the right-

(a) to leisure which is not morally harmful and the right to participate in sports and positive cultural and artistic activities.
(b) to a just call on any social amenities or other resources available in any situation of armed conflict or natural or man made disaster.
(c) to exercise , in addition to all the rights stated in this Schedule , and this Statute , all the rights set out in the UN Convention on the rights of the child and the OAU Charter on the rights and welfare of the African child with appropriate modifications to suit the circumstances in Uganda , that are not specifically mentioned in this Statute.

[35] See Art 40(3) b of the CRC and Rule 11 of the Beijing Rules.

[36] See Sec 90(1) which states 'Where a child is arrested ,the police shall under justifiable circumstances caution and release the child.

(2) The police shall be empowered to dispose of cases at their discretion without recourse to formal court hearings in accordance with criteria to be laid down by the Inspector General of Police.

[37] See Sec 90(6) which states 'Where a child is arrested with or without warrant and cannot be immediately taken before a court , the police officer to whom the child is brought shall inquire into the case and unless the charge is a serious one , or it in necessary in the child's interest to remove him or her from association with any person , or the officer has reason to believe that the release of the child will defeat the ends of justice, shall release the child on bond on his or her own recognizance or on a recognizance entered into by his or her parent or other responsible person.

[28] See Sec 93 with Schedule 3 of the Ugandan Children's Statute 1996, which list out assault , affray , actual bodily harm , theft and criminal trespass.

provided regardless of how the offence is treated by the criminal law[39]. In the case of all other offences committed by children below the age of 18, apart from offences punishable by death and offences committed jointly by adults and children go before the Family and Children's Court as the court of first instance. [40] The Family Court has the power to make the following orders, namely absolute discharge, caution, conditional discharge for not more than twelve months, binding the child over to be of good behavior for a maximum of twelve months and compensation, restitution or fine taking and detention as a measure of the last resort and for the shortest possible period of time.[41] It is only in cases in which both adults and children are charged and in cases in which the death is the penalty that go in the first instance before the Magistrate.
Thus the way the hierarchy of the courts is structured implements the principle of diversion to the greatest extent possible into community structures at the first instance and into a non-criminal jurisdiction in the second instance.

(3) Deprivation of Liberty
The statute also incorporates the notion of detention in any facility as a serious measure, which is violative of the basic human rights of children.[42] Thus since deprivation of liberty is seen as a serious punishment it can be inflicted only in limited circumstances. Thus the first level, the VRCC is not competent to deprive an individual of his liberty. It is only the Family and Children's Court and the courts of second instance, which have that particular power. Further the Family and Children's Court is authorized to order detention only 'as a matter of the last resort and shall only be made after careful consideration and after all other reasonable alternatives have been tried and where the gravity of the offence warrants the order'[43] Finally the maximum period of remand has been fixed as six months in the case of an offence punishable by death and three months in the case of any other offence.[44]

(4)The Ugandan experience: Pointers to India
What is most interesting about the Ugandan experience is that a developing country with limited resources has been able to develop a child friendly code to deal with children in conflict with the law. What the statute indicates is a close attention to international commitments and translation of them into binding local law
When one reflects that the Ugandan law was a post ratification enactment and so was the Indian law, it is clear the points, which Uganda has taken seriously, India has ignored. All three of the heads indicated above viz, a human right framework, diversion and

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[39] See Sec 93(4) which states 'A Village Resistance Committee Court may notwithstanding any penalty prescribed by the Penal Code in respect of the offences in subsection (2) (see F. 32) , of this section , make an order for any of t he following reliefs , in respect of a child against whom an offence is proved-
(1) Reconciliation
(2) Compensation
(3) Restitution
(4) Apology; or
(5) Caution'
[40] See Sec 94
[41] See Sec 95
[42] See UN Rules for Juveniles Deprived of their Liberty
[43] Sec 95(4)
[44] Sec 95(5)

deprivation of liberty have not been attended to in the Indian statute. The Ugandan experience is thus a pointer to how a child friendly jurisprudence as mandated by international commitments could be incorporated taking into account the existing societal mechanisms and cultural context.

3 The South African Response

South Africa ratified the CRC in 1995 and has since then carried out an intense process of deliberations to arrive at a suitable policy and law on juvenile justice. Prior to this process of reform South Africa did not have any policy or law to deal with children in conflict with the law as they were dealt with by the ordinary criminal law. The South African draft bill is an attempt at taking the best out of experiences around the world and arriving a at a policy suited to the South African context. The South African juvenile justice reform efforts can be analyzed under the following heads:

(1) The process of Law Reform

The process of law reform in South Africa has been particularly rich, as law reform has been conceptualized as a consultative process building on existing experiential knowledges and on experiences of comparative jurisdictions.[45]

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[45]The process of law reform as laid down by the South African Law Commissions involves the following steps

(1) Initiation of law reform proposals
The process of law reform begins with the submission to the Commission of a law reform proposal.
(2) Inclusion of a proposal in the Commission's programme
(3) Appointment of project committee and researcher
After the inclusion of an investigation in the Commission's programme, the Commission determines whether a project committee should be established in respect of the investigation.

(4) Issue papers
In order to secure community participation at an early stage, the Commission has decided to introduce, in appropriate circumstances, the publication of an issue paper as the first step in the consultative process. The purpose of such a paper is to announce a particular investigation (already included in the Commission's programme), to elucidate the problems that have given rise to the investigation, to point to possible options available for solving those problems and to initiate and stimulate debate on identified issues. The Australian Law Commission has used this procedure in the past with very good results. An issue paper precedes the publication of any other document in the law reform process. It ensures direct involvement at the beginning of an investigation and broadens the consultation base.

Draft issue papers are submitted upon completion to the project leader of the investigation concerned and, if one has been appointed, to the project committee to consider and approve their submission to the Commission. The Commission or its working committee then considers and approves the issue paper for publication and distribution among interested persons, bodies and institutions for purposes of eliciting comment on the issues that have been raised.

These comments are usually received in written form. Workshops, however, are considered to be more appropriate to some projects. In either event, the responses are carefully collated by the researcher, and then analyzed by him or her as well as the whole project committee.

(5) Discussion papers

After considering the comment received on an issue paper and further research conducted under the direction and guidance of the project leader or, if applicable, the project committee, the researcher responsible for the investigation prepares a draft discussion paper, which usually contains the following:

* A definition of the problems requiring solutions;

* the existing state of the law in relation to the problems;

* a comparative legal study;

* possible preliminary solutions to rectify the problems identified;

* a summary of the preliminary proposals; and

- if it is considered to be appropriate, a proposed draft Bill in which the proposals are embodied.
- A draft discussion paper follows the same route as that indicated in respect of draft issue papers above. Thus upon completion, it is submitted to the project leader and; if one has been appointed, the project committee to consider and approve its submission to the Commission.. It is made clear that the opinions expressed in discussion papers do not represent the Commission's final views and that such documents are merely a further step in the consultation process.

The publication of the discussion paper is al so made known by a notice in the *Government Gazette* and by media statements. Both the notice and the media statements contain a brief summary of the Commission's provisional recommendations and an invitation to all members of the general public to request a copy of the discussion paper free of charge from the Commission so as to enable them to submit substantiated comments or to give oral evidence on the proposals to the Commission. This notice-and-comment procedure has been devised to give interested organizations, both governmental and non-governmental, as well as members of the general public the opportunity to participate in and contribute to the law reform process. In the Commission's view, it also ensures that its final recommendations are the product of debate, discussion and community involvement.

(6) Workshops and seminars

As already indicated, a further method used to elicit comments and to stimulate debate on discussion papers is the holding of workshops and seminars. The Commission has successfully employed this method in a number of its investigations. It is important that the Commission be viewed by the public as an institution that is working with and for the

The two key points at which consultation in built into the law reform process is at the point of circulation of issue papers and discussion papers. In the process of law reform the opinions of interested parties, such as judges, probation officers, NGO's and children is taken on Board and policy is formulated keeping in mind these concerns as well as the experiences of other countries. This shows the rigorous nature of a process, which is committed to democratizing law making. Law is thus only an end product of a process in which there is fundamental clarity on conceptual issues like minimal age of criminal responsibility, expungement of records etc.

(2) The Vision of Child Justice

South Africa as mentioned earlier did not have any law to deal with children in conflict with the law. It is only through this process of law reform that a conceptual framework to deal with children in conflict with the law has evolved The core features of this system as outlined by the Commission is 'a comprehensive system for children in conflict with the law, striving at all times to prevent children from being drawn into criminal justice processes...Much emphasis is placed on a proposed new procedure called the preliminary inquiry, which aims to ensure that the case of each child is carefully considered and that each child is given maximum opportunity of being diverted out of the system. Those proceeding to trial will be better protected from the risk of pre-trial detention...The envisaged system is balanced in such a way that the majority of children will be afforded the opportunity to be held accountable outside the criminal justice system. It is recognized however that when children are accused of serious violent crimes and are assessed to be a danger to others, provision must be made for their secure containment.'[46] What is clear is that the vision of child justice is clearly based on a commitment to existing international standards and the South African constitutional mandate[47] as is suited to the local conditions. It is this sensitivity to local context, which has meant that the Commission in terms of its policy recommendations decided to opt for a harsher regime vis a vis juveniles who commit serious offences.[48] Thus for juveniles who commit

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community and not against it... Laws rooted in effective public consultation are more likely to function effectively, and to enjoy public respect.

7) Draft reports

After the comments on a discussion paper have been received and analyzed, a draft report is prepared by the researcher under the direction and guidance of the project leader and project committee if applicable. The comprehensive report contains the Commission's final recommendations and, where applicable, draft legislation to give effect to its recommendations

(8) Submission of reports to the Minister of Justice

Copies of the report are submitted to the Minister of Justice for consideration.

[46] Discussion Paper 79, Juvenile Justice, http://www.law.wits.ac.za/salc/salc.html

[47] See Sec 28, which delineates the rights of children.

[48] The South African law Commission, Report, Juvenile Justice, notes the public attitude towards crime and the emergence of crime control approaches such as the zero tolerance for crime as indicating the public's need for a 'system of justice which deals effectively with serious violent criminals' The Report cites a study which shows that these concerns may be more linked to perceptions than reality. The author demonstrates a steady drop in the rate of convictions and imprisonment of offenders below 18 of age over

serious offences imprisonment is a sentencing option. Further those who commit serious offences also are not eligible to have their criminal record expunged. However for children who have committed 'non serious offences it undoubtedly is an advance as the vision of child justice emphasizes certain important principles such as diversion, preliminary inquiry, incorporation of international principles into domestic legislation and accountability of the youth offender.

(3)Lessons for India

The most important lesson for law reform processes in India would be the rigour and systematic nature of the law reform efforts in South Africa. The entire process right from circulation of the Issue Paper to the formulation of the policy document which was submitted to the Ministry of Justice spanned a period of almost three years, workshops and seminars regarding themes in the discussion paper, comments and feedback from interested parties and the production of voluminous research material of over 800 pages.

The contrast in India was disappointing in terms of the rigour of the work undertaken. There was no systematic collection of data, comparative experiences, experiential learnings that could inform the thinking on juvenile justice. The few research efforts were disappointing in terms of the ability to produce policy papers, which could stimulate debate and discussion. Most importantly, the Ministry of Social Justice and Empowerment did not seem to have taken the process of law reform seriously and was seemingly adamant on producing a new law in the shortest possible period of time without any vision of child justice.[49]

While South African experience does in significant ways enact a more child friendly system, the very classification of children into those who commit violent crime and others seriously stigmatizes the latter category. These children are stigmatized and labeled by the criminal justice system and.are the ones who lose out in the attempt to humanize the system. Thus humanizing the system for some means producing a more inhuman system for others. It is this experience which India should avoid and instead produce a just system for all.

4 The Scottish response

The Scottish treatment of juveniles has evolved independently of the Convention on the Rights of the Child and has been seen a progressive way of treating children who offend and neglected children. In fact it can even be seen to go beyond the CRC in the far reaching nature of reforms suggested. The following can be seen as the key features of the system:

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the past decade. However The Law Commission choose to go by public perception in its harsh recommendations for those children who did commit violent and serious crimes. *Ibid.*

[49] One can conjecture that the law reform attempt in India was really meant to showcase India's attempts at fulfilling the mandate of the Convention on the Rights of the Child. Many countries see enacting legislation as the easiest way to fulfill the mandate of the Convention. See the Draft Second Country Report, Feb 2001, Convention on the Rights of the Child. 'In a landmark step, the Government has repealed the Juvenile Justice Act ,1986 and introduced the Juvenile Justice(Care and Protection of Children) Act. 2000...The relevant international principles applicable besides the CRC itself, ...are the ..UN Rules for juveniles deprived of their liberty , Riyadh rules.....These universally accepted principles have been incorporated in various provisions of the Juvenile Justice Act'

have traditionally determined the best interest of the child using their value frameworks and normative belief systems. How to determine what the best interest of the child has been a matter of sustained controversy, especially when it comes to practices, which enjoy cultural legitimacy such as inflicting corporal punishment on a child. The content of the best interest principle either depends on the belief systems of the society in which it is sought to be applied or can be understood in the light of what the child perceives to be in his or her best interest [58]

One interesting attempt has been to reconcile two principles, which seemingly conflict with each other, the right to participation, and the best interest principle. Can one read down the protectionism inherent in the best interest principle by reference to the right to participate? Can the child determine her own best interest as opposed to having an adult standard imposed on her? John Ekeelar essays an imaginative attempt at interpreting best interest through the lens of participation. Best interest is determined by the child using the principle of dynamic self-determination. This would mean that the best interest principle must be read along with Art 12 (right to participation) This is particularly important in the case of children who are institutionalized as the very fact of institutionalization is often justified by reference to the fact that institutionalization is in the child's best interest.

b) Art 12(right to participation)

The child under Art 12 has the right to *express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child* This is one of the central provisions in the CRC which puts forward a new vision of what children's rights means. If one traces the history of child rights what is clear is that the original impulse of international child rights law is protectionism. Both the League of Nations Charter on Children's Rights and the 1959 Declaration on the Rights the Child saw the child as a subject to be protected. Hence the stress was on protection from abuse and neglect, protection from homelessness etc. It is only the Convention that first introduced the notion of the child as rights holder in her own right entitled to participate in decision that affect her.

This fundamental principle has completely been ignored in the JJ Act 2000. If an enactment were to implement Art 12, it would mean a radical overhaul of existing ways of interacting with children. At every stage in the interface between the child and the juvenile justice system space should be created for expression of the child's opinion. So right from the point of arrest, to adjudication before the competent authority to assessment by the authority to placement to everyday living within the institutions set up under the juvenile justice system, the child's opinion should not only be heard, but given due weight in accordance with the age and maturity of the child. In particular the protectionist understanding implicit in the philosophy of best interest underlying the juvenile justice administration should be subject to a radical shift in the light of this principle.

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[58]The argument put forward is that to determine what the best interest is one need to take into account the belief systems on what constitutes the best interest of the child as well as through allowing the child's deeper feelings as to what he or she wants to do with his or her life to play a role as to determining what is in his or her best interest. John Eekelaar , *The interest of the child and the child's wishes: the role of dynamic self-determination* , *cf.* Philip Alston , *op. cit.* , p.42.

c) Art 2 (non discrimination)

Art 2 mandates ,*State parties shall respect and ensure the rights set forth in the present Convention.without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.* This principle would strengthen the protection given under the constitution [59] as it includes other categories of prohibited discrimination such as discrimination on the basis of disability ,property , birth ,language ,political or other opinion ,colour and the open ended category of other status. However a non-discrimination clause has not been enacted into the JJ Act 2000.

d) Art 6(Right to life)

Art 6 mandates that *every child has the inherent right to life* This principle has once again not been explicitly or implicitly invoked by the JJ Act 2000. The Constitution does guarantee the right to life under Art 21 to all persons and children would definitely be entitled to protection under the same.

2 Specific protections in the CRC with respect to children coming in contact with the juvenile justice system

Apart from the general principles, *Art 37* and *Art 40* are specifically aimed at protecting the rights of the child who comes in conflict with the law. The principle that capital punishment and imprisonment cannot be imposed for offences committed by children[60] and the principle that every child deprived of liberty shall be separated from adults. [61] have been incorporated within the *JJ Act 2000*[62]

However some of the other principles enunciated in the above-mentioned articles have simply not been incorporated.

- Art 37 (a) notes that *No child shall be subject to torture or cruel, inhuman or degrading treatment.* This provision has not been incorporated.. Given the reality, which some international human rights groups have pointed out to *i.e.* children being subject to torture, cruel, inhuman and degrading treatment, it remains a striking omission. Since human rights organizations have quite strongly indicted the state for these kinds of abuses it was imperative that this provision be incorporated into the legislation.[63]

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[59] *Art 14* 'The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India' and *Art 15* of the Constitution 'The state shall not discriminate against any citizen on grounds only of religion ,race ,caste, sex, place of birth or any of them'

[60] *Art 37 (a)*

[61] *Art 37 (c)*

[62] *Sec 16*

[63] See Human Rights Watch , *Police abuse and killing of street children in India, New York, 1996.* P 25. The report documents cases of torture within the juvenile institutions. To cite just one case, that of twelve year old Habib a unlicensed porter at Bangalore Central Railway Station , 'at the observation home , I was stripped and a guard with crippled hand was there. He told us to call him "Daddy". He made us face a pool of water , then he told us to look at all the pictures of

- Art 37(b) notes that *No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of the last resort and for the shortest appropriate period of time.* This article points to the most serious and systematic abuse of children who come in conflict with the juvenile justice system. As noted earlier, the present Act prescribes a minimum period of detention for those between 17and 18 and detention till they reach the age of 18 for all others.[64] Further even children in need of care and protection are deprived of their liberty without mandating a maximum period of detention.[65] This serious abuse of the human right to liberty and freedom continues to be violated in the name of the need to provide 'proper care, protection and treatment by catering to their development needs' This provision also violates the explicit provision under Art 37(b) that detention shall be used only *as a measure of the last resort and for the shortest appropriate period of time.*
- Art 37(c) *Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner, which takes into account the needs of a person of his or her age....* The two principles embodied above are extremely important in the light of the nature of the juvenile justice system. The law in fact needs to not only incorporate the general principle but in its rules mandate how the child should be treated so as to safeguard his or her dignity and how his or her special needs should be catered to. The Act should have incorporated the general standard and the rules should have operationalized them.
- *Art 37(c)* reads *...the child shall have the right to maintain contact with his or her family through correspondence and visits save in exceptional circumstances.* This rule should have been mandatory in the light of the custodial nature of the institution. However this rule has been left to the discretion of the States leaving scope for enormous violation. To take one example, the *Karnataka Rules* under *Rule 23(1) 'the parents and near relatives of the inmates shall be allowed to visit an inmate once a month or in special cases more frequently at the discretion of the Superintendent. Rule 23(2)* notes, *The receipt of letter by the inmates of the*

Nehru , Gandhi on the wall. While we were doing that , he would walk behind us and kick us into the pool of cold water to make us clean. Later he would just make us stand while he kicked us and we could not move. When "Daddy" was tired of beating us he gave the younger boys to the older boys-they get the boys of their choice. The older boys are called monitors and they beat and molest the younger boys. I was in the remand home for about three months and then let go.'

[64] Sec 15(g) of the JJ Act 2000

[65] Sec 33(3) This section does provide that if the 'said child has no family or ostensible support ,it may allow the child to remain in the children's home or shelter home till suitable rehabilitation is found for him or still he attains the age of 18 years.' While there is a shift from the old Act insofar as the Act graciously allows the child to remain in the home only when there is no family or ostensible support or when there is on other suitable rehabilitation possible , the Act still violates the clear mandate that for all children(regardless of whether other options have been found for them) detention shall be used only *as a measure of the last resort and for the shortest appropriate period of time.* It in fact legitimizes detention till the age of 18 , leaving it entirely in the hands of the Child Welfare Committee to decide which children may be released earlier.

institution shall not be restricted and they shall have freedom to write as many letters as they like at all reasonable times. However the institution shall ensure that where parents, guardians or relatives are known at least one letter is written by the inmate every week for which postage shall be provided. Rule 23(3) notes, *The Superintendent may peruse any letter written by or to any inmate, and may having regard to the inmate's health or well being, if he considers it necessary to refuse to deliver or issue the letter, destroy the same after recording his reasons in a book maintained for the purpose.* The *Karnataka Rules* restrict access of the family to meet the child to only once a month. The arbitrary nature of this rule violates the institutionalized child's right to maintain contact with his or her family. Further when it comes to correspondence and the power of the Superintendent to not only peruse, but also destroy correspondence it not only violates Art 37(c). Art 37(c) gives the power to restrict access only in exceptional circumstances, however the restricted access of once a month and power to peruse and destroy letters the superintendent finds objectionable makes exceptional circumstances the rule in Karnataka. Further these rules are also violative of the child's right to privacy as embodied in *Art 16* of the Convention.[66]

- *Art 37(d)* reads, *Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.* This broad ranging nature of this provision and its application to all children deprived of their liberty be it children in conflict with the law or children in need of care and protection needs to be noted. The seriousness with which deprivation of liberty for whatever reason is treated and the safeguards built in also needs to be noted. Though the Act prescribes a maximum period of four months for the completion of inquiry [67] this mandate is often violated in practice.[68]
- Art 40 obliges the state to incorporate basic safeguards of all those who come in contact with the criminal justice system.[69] None of these safeguards have been

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[66] Art 16 notes 'No child shall be subjected to arbitrary or unlawful interference with his or her privacy ,family, home ,or correspondence , nor to unlawful attacks on his or her honor or reputation.

[67] Sec 14 and Sec 33(2) of the *JJ 2000 Act*

[68] Meghna Abraham, *A study of the implementation of the Juvenile Justice Act in Bangalore*, 1999 (on file with the Centre for Child and the Law)

[69] *Art 40 2 (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:*

(i) To be presumed innocent until proven guilty by law

(ii) To be informed promptly and directly of the charges against him or her, and if appropriate through his or her parents or legal guardian , and to have legal or other appropriate assistance in the preparation or presentation of his or her defense

(iii) To have the matter determined without delay by a competent , independent and impartial authority...

(iv) Not to be compelled to give testimony or confess guilt..

(v) If considered to have infringed the penal law , t o have this decision ....by a higher competent body..

explicitly incorporated into the JJ Act 2000. It has been argued that these protections do apply to the child as they form both part of the Criminal Procedure Code and the Constitution of India. [70] However it has to be noted that the JJ Act 2000 does not incorporate the procedure as envisaged in the Cr. P.C, instead leaving the procedure to be determined by rules made by State governments.[71] There is scope for doing away with the protections guaranteed by the Cr. P.C by different states as they make rules under the present Act. In this context it is useful to note the South African experience as in their system the rights of children who come in conflict with the penal system form a part of both the Constitution as well as the proposed Juvenile Justice Bill. [72]The fact that rights of children who come in conflict with the system have not been specifically incorporated is a serious omission.

- Art 40(3) (a) mandates *the establishment of a minimum age below which children shall be presumed not to have the capacity to violate the penal law.* This provision exists in the notion of doli incapax under *Sec 82* of the *IPC*[73]However it has not been incorporated under the *JJAct2000.*If *Art 40(3)* is read along with the principle of best interests of the child (*Art3*) and the principle enunciated in the *Beijing Rules*[74] then not only should the minimum age have been fixed, but also it should have been fixed at a much higher level than 7 years.
- *Art 40 3 (b)* notes, *Whenever appropriate and desirable measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.* This provision operationalizes a limited understanding of diversion, applying the concept to judicial proceedings only. The constitution of a Juvenile Justice Board with two social workers having coequal powers though significant would still not comply with this provision as the Board would still inquire into the situation instead of diverting the child away from the system itself and completely avoiding the possibility of the child being stigmatized.
- *Art 40 (4)* mandates *a variety of dispositions such as care, guidance and supervision orders...and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well being and proportionate both to the circumstances and to the offence.* Though *Sec 15* of the *JJAct2000* does provide a variety of dispositional options these options do not

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(vi) To have the free assistance of an interpreter , if the child cannot understand or speak the language used

(vii) To have his or her privacy fully respected at all stages of the proceedings.

[70]See *Art 20* and *Art 22* of the *Constitution* and *Sec 57*(prescribes maximum period of detention as 24 hours),*Sec 304* (legal aid) , *Sec318 (*procedure when accused does not understand proceedings)of the Cr.P.C

[71] *Sec 14* of the *JJ2000 Act*

[72] South African Law Commission , *Juvenile Justice* , discussion paper 79 , www.law.wits.ac.za

[73] *Nothing is an offence, which is done by a child under seven years of age.*

[74] Rule 4.1 which notes , 'In those legal systems recognizing the concept of the age of criminal responsibility for juveniles , the beginning of that age shall not be fixed at too low an age level , bearing in mind the facts of emotional , mental and intellectual maturity.

operate within the CRC framework wherein detention is regarded as a deprivation of liberty and such detention is mandated only as a measure of the last resort and for the shortest possible period of time. Instead the discretion lies with the authority to decide on any of the dispositional options.

What is clear from the above analysis is that the CRC has not been complied with, either in terms of general principles or in terms of specific protections given to children who come in conflict with the juvenile justice system. It is almost as if the JJ Act2000 was a pre CRC enactment in terms of its grasp of CRC principles.

The Beijing Rules (1985)

The *JJ Act 1986* was supposedly enacted in pursuance of the *Beijing Rules*. The enactment utterly failed to reflect the spirit underlying the *Beijing Rules*. In 2000 the State had a chance to move its invocation of the Beijing Rules from rhetoric to reality, needless to say, the commitment remained rhetorical.

The Beijing Rules were enacted prior to the CRC coming into force. Therefore when the CRC came into force, some of the non-binding and recommendatory standard minimum rules were incorporated into the treaty. [75] However some fundamental concepts have not yet been incorporated into the CRC and would have served as useful guidelines for any government enacting legislation on Juvenile Justice.

The guidelines lay out general principles, and specific rules for Investigation and prosecution, adjudication and disposition, non-institutional treatment and institutional treatment. Without getting into a detailed analysis of how each of the rules stands violated in the *JJ2000 Act*, we will go into two crucial concepts which underpin the Beijing Rules and which have been ignored in the enactment.

1) The concept of diversion.

This is operationalized through Rule 11. [76]The fundamental premise behind diversion is that if children are processed through the criminal justice system, it results in the stigma of criminality and this in fact amplifies criminality of the child. Hence any intervention must aim at minimizing the contact with the criminal justice system.

This is conceptualized in Rule 11.2, which empowers police, prosecution and other authorities to divert the child away from the system.[77]

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[75] Art37 and Art 40 incorporate many of the protections embodied in the Beijing Rules.

[76] *11.1 Consideration should be given , wherever appropriate , to dealing with juvenile offenders without resorting to formal trial by the competent authority..*

11.2 The police , the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion , without recourse to formal hearings ....in accordance with the principles laid down in these rules

11.3 Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile , or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority upon application

11.4 In order to facilitate the discretionary disposition of juvenile cases , efforts shall be made to provide for community programmes such as temporary supervision and guidance restitution and compensation of victims.

[77] Diversion as a concept has been operationalized in other jurisdictions like New Zealand , South Africa , UK and Australia. The earliest stage of diversion is by the police officer who delivers either a formal caution(in the police station in the presence of parents or guardians) or and

2) The concept of detention as a serious punishment

The philosophy underlying the rules is that detention is a serious punishment, which is inflicted upon juveniles, and therefore it should be imposed only as a measure of the last resort and for the shortest possible period of time.[78] This philosophy, which is influenced by a human rights framework, does not find any place in the new Act, as there is no structuring of the discretion of the authorities so as to ensure that deprivation of liberty is viewed as a serious infringement rather than as a necessary measure in the care of the child.

UN Rules for Juveniles Deprived of their Liberty (1990)

The JDL Rules are applicable to all persons under the age of 18 who have been deprived of their liberty. These Rules are non-binding and recommendatory in nature .It is important to note that this would include children who are deprived of their liberty even due to health or welfare reasons. Thus the Rules recognize that the philosophical notion of best interest cannot be interpreted to mean deprivation of liberty in most circumstances. It is also important to note that the Rules in effect provide detailed and elaborate human rights standards to be conformed to both on arrest and within the institution.[79] These detailed human rights standards are to be made available to juvenile justice personnel in their national languages.[80]The Rules also mandate the State to incorporate the rules into their legislation or amend it accordingly and provide effective remedies for their breach, including compensation when injuries are inflicted on juveniles.[81]

The JDL Rules are seriously violated both under the present enactment and the Karnataka Rules. To take just a few key examples,

- When individuals enter the Juvenile home as per *Rule 11(3)* of the Karnataka Rules, *On a juvenile being received in the institution the money, valuables and other articles found with him or on his person on search and inspection*

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informal caution(at the scene of the offence by the officer investigating the crime. The guidelines governing caution are either laid down in the statutory framework(South Africa) or are issued by the Police(National Cautioning Guidelines , UK). After this, the prosecution and the magistrate are also empowered to divert the child.

[78] See Rule17.1(b) *Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be imposed only after careful consideration and shall be limited to the possible minimum.*

Rule17.1(c) *Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences unless there is no other appropriate response*

Rule 19.1 *The placement of a juvenile in an institution shall always be a disposition of the last resort and for the minimum necessary period*

[79]JDL is a detailed human rights standards pertaining to Juveniles Deprived of their Liberty and includes Rules on Admission Registration, Movement etc, Classification and Placement, Physical Environment and Accommodation, Education, Vocational Training and Work, Recreation, Religion, Medical Care, Notification of Illness and Death, Contact with the wider community, Limitations of physical restraint and the use of force, Disciplinary procedures, Inspection and Complaints, Return to the Community and Personnel.

[80] Rule 6

[81] Rule 7

and taken possession shall be entered in the Register. By contrast the *JDL* clearly notes *the possession of personal effects is a basic element of the right to privacy and essential to the psychological well being of the juvenile. The right of every juvenile to possess personal effects and to have adequate storage facilities for them should be fully recognized and totally respected.*

- In one of the most important areas of violation, [82] namely the subjection of the juveniles to disciplinary proceedings, both the Act and the Karnataka Rules are curiously silent. The JDL Rules by contrast provided detailed guidelines. *Rule 67* notes *'All disciplinary measures constituting cruel, inhuman and degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned. The reduction in diet and the restriction or denial of contact with the family members should also be prohibited for any purpose. Labour should always be viewed as an educational tool and a means of promoting the self-respect of the juvenile in preparing him or her for return to the community and should not be imposed as a disciplinary sanction. No juvenile should be sanctioned more than once for the same disciplinary infraction. Collective sanctions should be prohibited.* Rule 70 goes on to note *'No juvenile should be disciplinarily sanctioned except in strict accordance with the terms of the law and regulations in force. No juvenile shall be sanctioned unless he or she has been informed of the alleged infraction in a manner appropriate to the full understanding of the juvenile, and given a proper opportunity of presenting his or her defense including the right of appeal to a competent impartial authority.*

The above two examples of non-conformity touch upon certain aspects of the JDL Rules. What is clear is that the If the State was serious about ensuring conformity to the JDL Rules, then they should have been incorporated directly into the JJ Act 2000.

F Conclusion

The questions which are thrown up by the present critique of the Act are numerous and troubling. One can focus on two sets of questions for further research:

Firstly, there are a whole series of questions as to the impact of international law. At one level the normative assumption of the value of human rights language is present in the use of international instruments to critique the Act. The value of these instruments is seen

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[82] The Center for Child and the Law's interactions with children who have been discharged from state institutions, as part of the Participatory Action Research amply indicate these abuses.
Focus Group Discussion – 15/07/2000 with children revealed that they were often made to kneel on salt, roll chapattis the whole day, cut grass in the sun (even where there is no grass), beating, kept back from school and locked in a room.
Focus Group Discussion – 14/01/01 – In a session of sharing, one of the girls recalled.
"My friend and I were put in the lock up because we were asked not to go to school but work in the superintendents house...and we refused. We were there for a whole week and were locked up with girls / women who had committed crimes or were mentally ill"

in the enormous pressure being brought to bear upon even powerful countries such as the USA to ratify the CRC. It thus provides a language for advocacy groups. But on the other hand it is the very human rights instrument, *i.e.* the *CRC* and the pressure of the Reporting Procedure, which has brought about the present flawed and ill conceived Act.

Secondly, the process of Law Reform needs to be subjected to serious interrogation. We must institutionalize a far more rigorous process wherein local learnings, comparative experiences and human rights standards are taken far more seriously before law reform is proposed. There should be no law, which should be framed without policy clarity. As Prof, Upendra Baxi noted, 'law reform is necessarily an ad hoc rather than a sustained or systematic affair: it is a good illustration of what Sir Karl Popper called 'piecemeal social engineering' (when it is a symbolic exercise it is not even such an engineering but a ritual)...The process of Law Reform is deprived of any comprehensive grasp of social reality. There is a lack of any philosophical ideological base.'[83] The JJ Act, 2000 is emblematic of this process of ad hoc law reform. It is a clear example of a law, which in Baxi's words is not even piecemeal social engineering but merely a symbolic exercise undertaken without any grasp of social reality and without any philosophical or ideological base.

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