CHAPTER-6

ROLE OF THE HIGHER COURTS

The importance of the role of the higher judiciary can be seen in the recent Report of Justice Verma Committee\(^1\) (infra). The Committee recommended that it is time for the judiciary to step in to discharge the constitutional mandate of enforcing fundamental rights and implementation of the rule of law. It recommended that the monitoring of 'homes' should be taken into the hands of judiciary and for that purpose the Chief Justice of the High Court in every state could devise the appropriate machinery for administration and supervision of these homes.\(^{187}\)

It is submitted that some of the judges of the High Courts and Supreme Court interpret the municipal law in terms of international law in an unbridled manner without taking care of the fact that the municipal law is international law but international law is not municipal law. The binding international conventions or covenants whether ratified with or without reservations by the States under the auspices of United Nation Organisation contains general humanitarian principles keeping in mind the sovereignty of the State and the technicalities involved in the practical enforcement and implementation of municipal law leaving sufficient scope of option to the Member States as to the methods and manners of enforcement and implementation of the provisions of those hard law.
It is submitted that the Apex Court or the High Courts before interpreting municipal law in terms of international law, they should first ensure that the municipal law has been legislated strictly in terms of the relevant binding international law.

Article 40 (3) of the Beijing Rules 1985 provides that in respect of children alleged as, accused of, or recognised as having infringed the penal law, specific laws, procedures, authorities, and institutions are to be established by the member states.

Article 6 of the Convention on the Rights of the Child 1989 obliges the member states to implement the children's rights in the present convention by establishing appropriate legislative, administrative and other measures.

Article 40(3) of the Convention provides that in respect of children alleged as, accused of, or recognised as having infringed the penal laws, specific laws, procedures, authorities and institutions are to be established.

The repealed Children Act 1986 provided provisions for handling juvenile delinquent and neglected juveniles both in it. It can be seen that Act 1986 was not a specific legislation in respect of children alleged as, accused of, or recognised as having infringed the penal laws. Thus, the Act 1986 was violative of Rule 40 (3) and Article 40(3) of the Beijing Rules and the Convention respectively.

The Juvenile Justice (Care and Protection of Children) Act 2000 as amended in 2006 met with the same fate by including juvenile in conflict with law and children in need of care and protection both in it, hence violative of Rule 40(3) and Article 40(3) of Beijing Rules and the Convention respectively.
With due respect it is submitted that though *Arnit Das* has been overruled in *Pratap Singh's case*, it laid down the correct meaning, nature and scope of juvenile justice as the same was in consonance with the Rule 40(3) and Article 40(3) of the Beijing Rules and the Convention on the Rights of the Child respectively.

The preamble to the Juvenile Justice (Care and Protection of Children) Act 2000 as amended in 2006 clearly reveals the fact that the act was passed to provide a new law relating to juvenile in conflict with law and children in need of care and protection. The act professes to provide special provisions for proper care, protection and treatment by catering to the developmental needs of children in need of care and protection. Thus, the preamble itself speaks of justice to juveniles and care, protection and treatment by catering to developmental needs to children in need of care and protection. It will not be out of place to mention here that all the provisions of the enactment are in the direction of justice to juvenile and care, protection and treatment to children in need of care and protection, though separately under different sections, chapters and by different methods.

The Supreme Court in *Arnit Das* held that the term juvenile justice before the onset of delinquency may refer to social justice; after the onset of delinquency, it refers to justice in its normal juridical sense. The Juvenile Justice Act provides for justice after the onset of delinquency. The societal factors leading to birth of delinquency legitimately fall within the scope of social justice. Once a boy or a girl has assumed delinquency, his or her treatment and trial at the hands of justice delivery system is taken care of by the provisions of the Juvenile Justice Act.188

Therefore, the term juvenile justice is concerned with the administration of justice and it should be dealt with separate legislations in compliance of Rule 40(3) and Article 40(3) of the Beijing Rules and the Convention respectively. There are plethoras of social welfare legislations in the direction of providing care and protection to the category of children in need of care and protection, important among those being Right to Education Act and recently enacted legislation on sexual offences protecting the children.

The above suggestions also find support from the definition of juvenile justice for the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offender. The Congress defines it as the juvenile justice after the onset of delinquency referred to justice in its normal juridical sense and that juvenile justice before the onset of delinquency referred to social justice. Thus, the concept of social justice was to be seen as relevant to the development of children and young persons generally and to endangered or adjudicated young offenders. The two were closely related but could be separated for purposes of discussion and training. 189

This problem can be understood in the light of the fact that the 3rd and 4th Combined Periodic Report 2011 on Convention on the Rights of the Child has been prepared in consultation with 33 agencies including 18 ministries by the Government of India.

It would not be out of place to mention that in the whole periodic report, the subject administration of justice consist of two or three pages showing

progress on Articles 37 and 40 of the Convention. Therefore, the term juvenile justice and children rights are two different things. While administering juvenile justice, convention mandates that the children's rights should be taken due care of. However, the convention does not extend the provisions of administration of juvenile justice in the procedures for protecting the children's rights under the Convention except the best interest principle.

The direction passed by the Supreme Court in Sheela Barse's case shows that the Parliament while enacting new Children Act could include children who either accused of offences or are abandoned or destitute or lost. This direction was against Rule 40 (3) of the Beijing Rules.

Further, the countries having written constitution have the principles of devolution of administrative, financial and the legislative powers. India is a union of states though the states do not have power to secede from the union but they have freedom in the matter of their international administration subject to constitutional limitation.

Apart from that, the Constitution of India envisages federalism with some departure. Therefore, before ratifying or incorporating binding international conventions into its municipal law, the constitutional schemes must be kept in mind. The Supreme Court should be at more guard to ensure that the fabric of the constitution is not destroyed. Love, kindness, humanity, respect, tolerance, excuse cannot be enforced through municipal law. Justice is a means to achieve the end and it is not the end itself. That end is good and that good is fundamental, legal or procedural rights. Therefore, justice is meant to provide a remedy to enforce those rights.

The Directive Principles of State Policy in India incorporates the
concept of welfare justice or social justice and not the legal justice. Further, the instruments of accession ratifying Convention on the Rights of the Child, 1989 submitted by the Government of India in the year 1992 contains reservations showing that the Government of India has not considered the socio-economic and cultural justice to the children as a right. Thus, incorporating provisions of the Convention on the Rights of the Child relating to social and economic justice to children, is nothing but Directive Principles of State Policy as contained in the Constitution of India. Then why we should have one more Constitution. The Directive Principle of State Policy in the Constitution contains the provisions for providing social and economic justice not only to the children but all. The judiciary more particularly the Apex Court can rightly direct the state to fulfill the constitutional obligation of providing social justice to its citizens more particularly to children by way of Schemes and Programmes through their Five Year Plan.

The Constitution of India has everything in it and the municipal laws are to be interpreted in terms of its Constitution. Therefore, interpreting the law in terms of human rights laws or international laws is nothing but undermining the Constitution and the principles of federalism.

As far as, the provisions of binding international instruments are concerned, they give due respect to the sovereignty of the state by leaving options to the states in the matter of manner and method of their enforcement and implementation. It can be help of the definition of juvenile justice clarified for the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders as follows

The above definition says, both could be separated for the purposes of
discussion and training.” What does it mean?. Does it not talk about separate legislation also. Certainly, it. But it was left to the state to deal with both the category of children into one legislation or separate legislation. There is no problem with the Congress as it is not concerned at all with its practical enforcement and implementation. It depends upon the understanding of the state whether to club both, 'right' justice and welfare or social justice together into a single enactment or provide 'welfare' or social justice through schemes and programmes. It is to be remembered that it is not the benefits in provisions of the legislation which make the legislation praiseworthy but it is the certainty in implementing the beneficial provisions of the legislation is praiseworthy and that is the essence of legislation.

Amartya Sen has rightly defined human rights as a pronouncement in social ethics, sustainable by open public reasoning.  

In this respect, the decisions rendered by the Supreme Court in Arnit Das\footnote{Arnit Das v. State of Bihar, AIR 2000 (SC) 2264} is praiseworthy as it had laid down the correct proposition of law on status of juvenility. Though the same was overruled by the same court in Pratap Singh\footnote{Pratap Singh v. State of Jharkhand, (2005) 3 SCC 551} not mainly on the ground of *per incuriam* in view of the ruling by larger bench in Umesh Chandra.\footnote{Umesh Chandra v. State of Rajasthan, 1982 Cri LJ 1994} The law laid down in Arnit Das was that juvenile justice refers to justice to a juvenile after onset of delinquency, i.e. remedial and not preventive, and what has been laid down in *Pratap Singh's* case, cover both before and after onset of delinquency, that is, preventive justice as well as remedial justice. Another way of saying the same is human
rights (civil and political rights as well as social and economic rights both).

It is submitted that the investigator is not against the human rights of the children. Human rights of the children must be protected but the protection process must be such that same is capable of being protected. By incorporating the philosophy of human rights of children as a substantive right into municipal law without any remedy, militates against the concept of positive law and the rights remains as a moral persuasion in the statute book for the government like the Directive Principles of State Policy in the Constitution. Therefore, the investigator is of the opinion that the human rights of the children can best be promoted and protected through an honest implementation of various government schemes and programmes.

Most of the cases that came up before the higher courts for determination were related to claim of status of juvenility, applicability of special laws, age determination etc. No appeal before the higher court has been made by any child either in conflict with law or in need of care and protection against the conviction or custody (child in need of care and protection), or for non-implementing the statutory mechanism or non-existence of quality of care and services in the juvenile justice institutions or complaint of offences or abuses or exploitation against them.

When the matter of implementation became so serious, the Supreme Court of India in Sheela Barse's case\textsuperscript{194} itself took the responsibility of monitoring the implementation of major provisions of Juvenile Justice Act, 1986. The case was disposed of with certain directions in 1995. In Sampurna Behrua's case\textsuperscript{195} again the Supreme Court of India took the responsibility of

\textsuperscript{194} [Sheela Barse v. Union of India, AIR 1986 (SC) 1773]

\textsuperscript{195} [W.P.(c) No. 473 of 2005],
monitoring the implementation (monitoring is still continue) of major provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000.

The Supreme Court monitored the implementation of various state children acts up to the time of enacting the Juvenile Justice Act, 1986. Thereafter, it has monitored the implementation of Juvenile Justice Act up to 1995. Thereafter, it is again monitoring the implementation of the major provisions of new legislation, that is, the Juvenile Justice (Care and Protection of Children) Act, 2000 as amended in 2006 from 2005 onwards in Sampurna Behrua's case.

It is also important to mention that on the Recommendation of Justice Verma Committee, 2013 the various high courts of the state have constituted Juvenile Justice Committees and the Juvenile Justice Committee of Delhi High Court is the model committee. In the backdrop of analysis of status of implementation as discussed in Chapter-5 of this study and also in the light of new development taking place in the field of implementation of the Act 2000, the investigator do not wish to highlight all the cases of juvenile justice decided by the higher courts. Most of the cases before the higher courts were relating to the time and date of determination of status of determination of juvenility and problem of children in jails.

Therefore, some old selected cases having historical importance in understanding the juvenile justice system in India are cited below.

Some important American Supreme Court's decisions showing changing view of due-process rights to the juvenile delinquents are also being referred below.

The courts have held that very young children should not be sent to prisons\footnote{Emperor v Dharam Prakash, AIR 1926 (Lah) 611, cited in Ved Kumari, The Juvenile Justice System in India: From Welfare to Rights, p.171, Oxford University Press, 2nd Edn, 2010}.

As far as possible, such young children should be released under the supervision and care of their parent or guardian\footnote{Mst. Parbati v Emperor, AIR 1921 (Oudh) 190, cited in Ved Kumari, The Juvenile Justice System in India: From Welfare to Rights, p.171, Oxford University Press, 2nd Edn, 2010}.

The court must have clear evidence of the age of a person before sending her/him to a reformatory school. It was clarified that a child could not be sent to a reformatory school unless an order of institutionalization, that is, of imprisonment, was made.\footnote{Nawab Dheru Gul v Emperor, AIR 1934 (Pesh) 29, cited in Ved Kumari, The Juvenile Justice System in India: From Welfare to Rights, p.171, Oxford University Press, 2nd Edn, 2010}

The accused was a boy, less than sixteen years old, accused for an offence under the Terrorist and Disruptive Activities Act (TADA). The issue was whether his case would be governed by the Juvenile Justice Act or TADA. The Guwahati High Court said that although both the Juvenile Justice Act and the TADA were special Acts, Section 25 of the TADA contained a non obstante clause, which clearly gave the TADA, in case of conflicts, an overriding effect over the provisions of other enactments.\footnote{Jagdish Bhuyan v State, 1992 Cri LJ 3194 (Gau), cited in Ved Kumari, The Juvenile Justice System in India: From Welfare to Rights, p.199, Oxford University Press, 2nd Edn., 2010}

The Madhya Pradesh High Court in relied on Antaryami Patra for
holding that a juvenile was not entitled to be released on bail under the
NDPSA unless the conditions mentioned in Section 37 were fulfilled.\textsuperscript{201}

What is the nature of juvenile courts is an important question that has
not been discussed and debated in the judicial arena. They have been
presumed to be criminal courts though only one decision of the Punjab High
Court supports that view.\textsuperscript{202}

The Court held that the provision of the Saurashtra Children Act,
restricting the appearance of a lawyer before a juvenile court, violated the
fundamental right to be defended by a lawyer as guaranteed by Article 22(1) of
the Constitution.\textsuperscript{203}

The court upheld order of sending the juvenile delinquent to an
approved school for two years for an offence of murder.\textsuperscript{204}

The Supreme Court, too, held that the sentence of life imprisonment
without proper determination of age could not be sustained in view of the
provisions of the Children Act and ordered the accused to be released on
probation.\textsuperscript{205}

Held that even if the crime by the child is shocking to the conscience
and the conduct abhorring, still Section 22, being aware of it, provides for
keeping them in safe custody.\textsuperscript{206}

In case the offence was serious or the child was of depraved character, the courts suggested that the appropriate course for the juvenile court was to send the matter to the government.\textsuperscript{207}

Even before the enforcement of the Juvenile Justice Act prohibiting imprisonment under all circumstances, the sentence of imprisonment under the State Children Acts was held permissible under law only if the child was so depraved or unruly that he cannot be kept in a juvenile institution.\textsuperscript{208}

Imposition of fine on the parents without giving an opportunity of showing that it was not because of him that the child committed the offence was held to be invalid.\textsuperscript{209}

The Sessions Judge sent a child to judicial custody as the list of certified schools to which he could be sent was not available.\textsuperscript{210}

The court observed that no distinction was maintained between a observation home, a special school and a children home. The children were sent to home as a matter of punishment and were treated in that manner.\textsuperscript{211}


It is only that the probation officer's report detailing familial, social, educational, religious background, age and characteristics of the accused, circumstances in which the offence was committed, and so on, were considered by the higher court before passing its order.\textsuperscript{212}

The higher courts consistently chose to minimize the term of imprisonment in all cases where the Children Act was not in force in a state, lamenting its absence and exhorting the state governments to enact or enforce one in the area.\textsuperscript{213}

The appellants were children at the time of commission of offence and were sent to life imprisonment, contrary to the provisions of the Act. It was only after undergoing imprisonment of twelve to fifteen years, the order of the sessions judge was declared to be illegal and they were released.\textsuperscript{214}

The juvenile delinquent was arrested and kept for some time in the police station and then remanded to judicial custody. The state government was ordered to invest Rs.25,000 in an approved scheme for five years in the name of the child. The amount was to be made available to him in a vocation in which he would be rehabilitated by the state.\textsuperscript{215}

In another case, the Supreme Court initiated a Public Interest Litigation on the basis of a picture of a policeman taking a child in handcuffs. The court

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ordered the state government to pay a compensation of Rs.20,000 to the child and directed that Rs 2000 of this amount be paid from the salary of the erring policeman.\textsuperscript{216}

P.C. Borooah, Justice of the Calcutta High Court visited the jail in the course of the proceedings in a writ petition. He was shocked to find abandoned young person roughly 4 to 6 years old, confined together with spastics and lunatics. He held such confinement improper and directed the state government to take immediate steps for their dispersal to some welfare home.\textsuperscript{217}

In relation to the charge of neglect or ill-treatment of a child, it was held that for conviction on the charge there must be evidence to establish that the custody, charge, or care of the child alleged to have been ill-treated was with the person so charged.\textsuperscript{218}

It is worthy of note that though the Bombay Children Act had already been repealed by the Juvenile Justice Act by the time the offence took place in 1988, it is shocking that the accused was convicted and sentenced under the said repealed Act.\textsuperscript{219}

The sole instance where the protective provisions of the Acts became the motivation for the child to commit an offence was in this case. In order to

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marry her paramour, the delinquent girl killed her husband in the hope of getting away with it due to the non-penal approach of the Children Acts towards delinquent children.\textsuperscript{220}

Justice Krishna Iyer lamented at the existing state of juvenile justice. He said

Regrettably our juvenile system still thinks in terms of terror, not cure, of wounding, not healing, and a sort of blind man's buff is the result. This negative approach converts even the culture of juvenile homes into junior jails. From the reformatory angle, the detainees are left to drift, there being no constructive programme for the detainees nor correctional orientation and training for the institutional staff. I highlight these drawbacks largely because the state's response to punitive issues relating to children has been stricken with illiteracy and must awaken to a new enlightenment\textsuperscript{221}

The High Courts of Assam considered the inaction to enforce the Children Act as violative of the Directive Principle contained in Article 39(f) of the Constitution.\textsuperscript{222}

The Kerala High Court initiated revision proceedings \textit{suo motu}, after seeing first hand the deplorable conditions under which children were sent to and maintained at the Children's Home at Trivendrum\textsuperscript{223}

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The bench consisting of V.R. Krishna Iyer and P.N. Bhagwati, JJ., lamented at the absence of Children Act in the state.\textsuperscript{224}

**Important American Juvenile Rights Cases**

The concept of juvenile rights became a central tenet of juvenile justice initiatives during the 1960s.\textsuperscript{225}

**Kent v. United States** - In *Kent v. United States*,\textsuperscript{226} the Supreme Court rendered a decision that inaugurated a line of decisions on juvenile due process, *parens patriae*, and constitutional requirements for court processes involving juveniles.

Morris Kent, Jr., was a teenager arrested for a Sept. 1961 break-in, burglary, and rape in Washington, DC. Kent, who was 16 at the time, had a police record because of suspicion in 1959 that he was responsible for a series of burglaries and an attempted purse snatching.

The Supreme Court reversed the district court's decision, holding that in cases such as Kent's an adequate hearing must be convened at the juvenile court level prior to transfer to criminal court. In addition to a hearing, juveniles have a right to counsel, and their lawyers must have access to social records, probation records, or other reports that may be considered by the court. The Supreme Court also held that juveniles and their counsel are entitled to statements of reasons for the juvenile court's decision.

The Supreme Court mandated in an appendix that states consider the following factors prior to transferring juveniles to adult criminal court:

- whether the offense was committed against persons or property, with greater weight given to offenses against persons, especially if a victim was injured;
- whether the offense was perpetrated aggressively, violently, with premeditation, or willfully;
- whether transfer is required in light of the egregiousness of the offense and the need to protect the community;
- consideration of the juvenile's maturity and sophistication, as determined by his or her home, environment, and emotional development;
- consideration of the juvenile's history and prior record;
- consideration of whether an offense should be tried and disposed in a single court, when the juvenile's co-suspects are adults who will be brought to trial in an adult criminal court;
- consideration of the merit of the complaint.

The Supreme Court firmly required states to provide at least minimal due-process protections in their juvenile court proceedings. However, the impact of *Kent* was limited to its specific context. The following year, these protections were significantly reinforced and broadened by the Supreme Court.

**In re Gault 1967** - The Supreme Court rendered a decision that mandated sweeping due-process requirements for state juvenile court proceedings. This decision, in *In re Gault*, guaranteed many of the same procedural rights for juveniles as held by adults.

The Supreme Court reversed the juvenile court's decision, holding that juveniles have certain constitutional due-process rights that must be protected by state juvenile justice systems.

It held that the states must protect the due-process rights for juveniles,\textsuperscript{227} infra f.n. 226 pp.47-48


\textsuperscript{225} (Gus Martin, Juvenile Justice: Process and Systems, Edn. 2005, Sage Publications, p.4)

following factors prior to transferring juveniles to adult criminal court whether the offense was committed against persons or property, with greater weight given to offences against persons, especially if a victim was injured; whether the offense was perpetrated aggressively, violently, with premeditation, or willfully; whether transfer is required in light of the egregiousness of the offence and the need to protect the community; consideration of the juvenile's maturity and sophistication, as determined by his or her home, environment, and emotional development; consideration of the juvenile's history and prior record; consideration of whether an offense should be tried and disposed in a single court, when the juvenile's co-suspects are adults who will be brought to trial in an adult criminal court and consideration of the merit of the complaint.

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It held that the states must protect the due-process rights for juveniles,
for examples, right to representation by counsel, right to confront and cross-
examine complainants and witnesses, right to protection against self-
incrimination and right to notice of charges brought by the authorities.

In *In re Gault* had an unprecedented and incomparable impact on the juvenile
justice system. The states are required to protect the constitutional rights of
juveniles brought before juvenile courts. In this regard, the case is arguably
the most important decision on juvenile rights ever rendered by the United
States Supreme Court.

The 1960s ended with unabated momentum for the expansion of
juvenile rights. Federal initiatives and the Supreme Court continued to press
for greater national standards and coordination of juvenile justice process.
This effort led to increased research on the effectiveness of contemporary
theories and institutions used for juvenile treatment and rehabilitation. The
1970s were a time of greater due-process protections for juveniles, coupled
with greater emphasis on net widening, or expansion of alternatives to the
institutionalization of juveniles.

The “Four Ds.”- The juvenile rights era can be summarized by
classifying its principal features as deinstitutionalization, diversion, due
process, and decriminalization- termed the *Four Ds*

**Deinstitutionalization**- A preference for using community-based programs
to treat juvenile offenders.

**Diversion**- The process of moving juveniles out of the juvenile court and
detention systems and into community-based alternatives.

**Decriminalization**- The process of creating standards to re-categorize some
juvenile offenses as a way to deemphasize the criminalization of juvenile transgressions.

**In re Winship** - In 1970, the Supreme Court held that juveniles accused of delinquent offenses are entitled to a strict standard of proof before they can be adjudicated delinquent. The case was *In re Winship*. Samuel Winship was a 12-year old boy who was adjudicated delinquent in New York Family Court for stealing $112 from a purse in a locker. The standard of proof used in the adjudication was preponderance of the evidence.

The Supreme Court's holding was that juveniles accused of crimes should be accorded the same standard of proof as adults, that is, proof beyond a reasonable doubt. The policy outcome has been that juvenile delinquents are adjudicated under the standard of proof beyond a reasonable doubt.

**McKeiver v. Pennsylvania** - Although juveniles received many of the same due-process rights enjoyed by adults during the juvenile rights period, not all of these rights were mandated for juvenile proceedings. For example, there is no right to trial by jury, an issue that was decided in 1971 by the Supreme Court in *McKeiver v. Pennsylvania*.

Joseph McKeiver, 16, was charged with the felony offenses of larceny, receiving stolen goods, and robbery. His case was heard before a juvenile court judge; he was adjudicated delinquent and remanded to a juvenile development centre. On appeal, the Supreme Court held that trial by jury is not constitutionally mandated in juvenile adjudications. The significance of this case is that juvenile courts may proceed without giving recognition to every due-process consideration. In essence, juvenile delinquency proceedings are not constitutionally akin to adult criminal proceedings.
**Breed v. Jones**— After McKeiver, the Supreme Court considered whether double jeopardy attaches for juvenile adjudications. Double jeopardy refers to the prohibition against a second prosecution for the same offense - to be twice put in jeopardy. This issue as it pertains to juveniles was decided in 1975 in *Breed v. Jones*.

Jones, 17, was adjudicated delinquent in a California juvenile court for robbery with a deadly weapon. At his dispositional hearing (comparable to a sentencing hearing in adult criminal court), the court determined that Jones could not be treated by facilities in the Juvenile Justice system; his case was transferred to criminal court, where he was prosecuted and found guilty. Jones's counsel argued on appeal that he had been twice put in jeopardy for the same offence in violation of the United States Constitution. The Supreme Court agreed, holding that his adjudication in juvenile court and subsequent prosecution was indeed double jeopardy.

**Juvenile Justice in America: The Modern Era**

Law and order, and the welfare of victim and society supplanted public consent for the welfare of offenders. The modern era of juvenile justice came to reflect this growing cultural and political intolerance for criminal behaviour. A major crackdown on crime began during 1980's has lasted into the new millennium.

Juvenile rights was an unknown concept for most of human history. With the advent of the Reform Movement, the Progressives, and the Great Society, juvenile rights became deeply ingrained in juvenile justice doctrine. In the United States, court decisions have played a prominent role in the
promotion of juvenile rights.

1. Ex parte Crouse- 1838- Holding- Enforcement of parens patriae is constitutionally recognised. Policy outcome- State intervention as guardian became common practice.

2. Kent v. United States- 1966- Holding- Adequate hearings are required in juvenile court prior to transference to adult court. Policy outcome- Due process applied to narrow legal question.


6. Shall v. Martin- 1984- Holding- Preventive detention can be used for juveniles. Policy outcome- Constitutional detention standards are established.

In Schall v. Martin decided in 1984, the Supreme Court upheld the constitutionality of preventive detention by juvenile authorities. It held that juveniles can be detained without violating their due-process rights if they pose a high risk of further delinquency. Schall additionally set due-process standards for detention hearings, requiring that notice, opportunity to be heard, and a factual statement to be given to offenders prior to preventive detention. Also during this period, standards for juvenile court jurisdiction were modeled differently among the states.
Sheela Barse Case

According to the information supplied by the Ministry of Home Affairs and Ministry of Social Welfare, there were about 1400 children under 16 years of age in jails of eighteen states and three Union Territories. The petitioner prayed to the court for an order releasing all children below 18 years of age detained in various states and to direct District Judges to visit jails and police lock-ups to identify and release children and to ensure follow up action after release. She requested that the respondent states be directed.

The response of various state agencies to the orders of the Supreme Court pointed out that the issues in the case were not limited only to the juveniles in jails or their release or the conditions of their detention either in jails or other institutions. The problem was more deep-rooted in the apathy, ignorance and insensitivity of the state to the needs of children.

The Supreme Court, in the interest of juveniles, undertook the responsibility of co-coordinating between the Union Government and the state governments and between authorities within the state. This order of the court brought within the purview of the Sheela Barse Case, various issues raised so far relating to the implementation of the Children Acts.

In its subsequent orders the Supreme Court sought information on various important aspects relating to institutionalization of juveniles and implementation of the services under the Juvenile Justice System, and made orders for their improvement.

In its first long order passed on 15 April 1986 the court directed the District Judges throughout the country to nominate Chief Judicial Magistrates, Judicial Magistrates, and other appropriate judicial officers to...
visit jails and sub-jails in the district and report by 10 June 1986.

The court also issued direction to the State Legal Aid Boards and any other legal aid organization to arrange visit of two advocates to custodial institutions once every week. In its subsequent orders, the Supreme Court asked for information on certain other matters also. These included the conditions of homes under the Children Acts, reasons for non-enforcement of the Children Acts, names of government and non-government homes and organizations for the care of mentally and physically handicapped juveniles.

In the process, the court involved many more agencies, such as the central and state social welfare boards, High Courts, Ministry of Social Welfare, Home Secretaries, All India Radio, and Doordarshan for ensuring submission of the required information. The deadline of 10 June 1986 was also extended time and again till it issued a contempt notice on 4 May 1988.

The reports submitted in the meanwhile indicated that mentally and physically handicapped children were lodged in various jails for 'safe custody'. It ordered the state governments to transfer the handicapped juveniles to appropriate homes with facilities for medical treatment and other children to homes with medical, educational and vocational training facilities. All India Radio and Doordarshan were also asked to give publicity requesting non-governmental organizations to offer their services.

The court deprecated keeping of children in jail even if they were kept in a separate ward away from other prisoners, because there were no other institutions for children. It pointed out that on no account should the children be kept in jail and if a state government has not got sufficient accommodation in its remand homes or observation homes, the children should be released on
bail instead of being subjected to incarceration in jail.

After the enforcement of the Juvenile Justice Act, the court asked for fresh information on the juveniles in jails, the existence of rules, Juvenile Court and Juvenile Welfare Board, Observation homes, Children homes, and Special homes. Emphasizing the need for an adequate and immediate action for care and protection of juveniles. It took over the responsibility of overseeing the implementation of the Juvenile Justice Act in view of the apathetic response of the state in this respect. In pursuance of this responsibility, it directed a committee of senior advocates to prepare a scheme for overseeing such implementation.

It further directed the states to frame and enforce rules under the Juvenile Justice Act, appoint an adequate number of probation officers, establish and recognize various categories of homes under the Juvenile Justice Act, constitute the Juvenile Courts and Juvenile Welfare Boards, and set up advisory boards.

However, the petitioner was dissatisfied with the responses of the states and the Court, and sought withdrawal of the petition to prevent 'the loss of the credibility of the court and the institution of justice. One order of the court should have been enough. In this case, several orders have been ignored by numerous parties to whom the orders were addressed. Counsel have treated this case as frivolous exercise. In the last analysis both the dignity of the court, the honour of the institution of judiciary and the effectiveness of judicial process are at stake.' The court on 29 August 1988 rejected both her requests and directed that the petitioner be deleted from the array of parties in this proceeding. The Supreme Court Legal Aid Committee (SCLAC) was directed 'to prosecute the petition together with the aid and assistance of such persons
or agencies as the court may permit or direct from time to time'.

The case established a new proposition in public interest litigation of retaining the cause even if the petitioner is unwilling to pursue it further. It prohibited the petitioner to publish the information gathered for the purposes of the case and pursuant to the directions of the court during the pendency of the case.

The orders of the court may be broadly divided into two categories. First, orders seeking information and second, orders giving directions for implementing various provisions of the Juvenile Justice Act. The most noticeable in the response of the respondent states is that everyone agreed that juveniles ought not to be in jails and that the infrastructure for the implementation of the Juvenile Justice Act needs to be created, yet the facts spoke just the opposite.

The State Counsel, the District Judges, the advocates deputed by Legal Aid and Advice Board and others, had an equally important role to play and duties to discharge in this marathon exercise for the removal of juveniles from regular jails and also for the implementation of the Juvenile Justice Act. But the response pattern of each one was similar. None of the respondents in any category ever replied in the first instance. Their number increased only if repeated reminders were issued. Out of the original twenty-five respondents, only nine had filed their affidavits by 11 December 1986, a year after notices returnable on 7 October 1985 were served.

Despite its repeated reminders over six months the court could procure full reports of the District Judges in the case of only twenty-one out the thirty-two states and Union Territories. The reports of Legal Aid Advisory Board
from only ten states/Union Territories were submitted four months after the expiry of the original deadline fixed by the court. The social welfare departments of just eight states/Union Territories sent their reports over the same period.

The Reports by all the District Judges were still not submitted when the case was heard on 4 May 1988 after a gap of a year and a half, and the court issued the contempt notice. However, the contempt notice issued by the court was flouted by as many as ten states and three Union Territories. By 29 August 1988, the court had received reports of District Judges from 400 out of a total of 429 districts. The court acknowledged receipt of reports from all districts only in its order dated 17 March 1989. As and when the reports were filed, it was observed that they did not contain the complete information as asked for in the order of the court.

When different respondents filed multiple reports on the same points, a comparison reflected inertia, apathy, contradictory or differential responses were all-pervading, whether the respondents were judicial officers or high officials in the government, or whether the information related to the Act in operation, or the number of homes for juveniles.

An analysis of these responses showed the widespread lack of awareness of even the existence of basic norms and standards, leave alone the norms and standards themselves, among the very people who had to operate or function under them.

One District Judge from Assam stated that his office was unaware of any rules under Section 62, while another said that none had been supplied to the undersigned. Similar was the response of the District and Sessions Judges,
West Champaran, Bihar. The Registrar, Bombay High Court, instead of making an inquiry and finding the exact position, was satisfied by reporting that it was not known to the High Court whether the existing homes for juveniles in Maharashtra had been notified under the Juvenile Justice Act.

Directed by the court to establish homes for juveniles, states notified a wide variety of homes as observation/juvenile/special homes so notified by the states were questionable from the point of view of adequate facilities for the care, protection, and rehabilitation of juveniles.

Section 53 of the Juvenile Justice Act spells out the important functions to be discharged by an advisory board in a state but these functions can be discharged only if its meetings are held on a regular basis, reviewing the progress made pursuant to its earlier decisions. The importance of implementation of this provision, both in terms of constitution of advisory boards and their meetings, does not seem to be appreciated and has been ignored by most of the states.

Quite a few children were either released or transferred to alternative homes for children pursuant to the court's orders and intervention. In its order of 17 March 1989, the court recorded 614, 247, 60, 63, and 437 children in the jails of Assam, Bihar, Orissa, Punjab, and West Bengal respectively. In other states, however, the number did not exceed 30-35. Orders for their transfer to homes for juveniles resulted in further reduction of these numbers.

The sole defaulting Union Territory was directed to make arrangements for transfer of the delinquent children from jails to separate homes for them as required by the Juvenile Justice Act and to file compliance.
It should be noted that the available information did not present the actual and accurate picture in this regard because information was not available for all the states as also for the whole state in many aspects.

**Juvenile Courts/Boards**

The information received in response to the court's orders inquiring about the existence of juvenile courts/boards and directing the constitution of juvenile court and board, shows that most of the states took recourse to Section 7(2) of the Juvenile Justice Act.

District Magistrates, Judicial Magistrates of the first class, and Chief Judicial Magistrates were authorized to exercise the powers and discharge the functions of a juvenile court/board. Apart from Delhi, only Chennai reported the constitution of a Juvenile Welfare Board.

**Homes for Juveniles**

State-wise details regarding institutions set up under the Juvenile Justice Act were given in the affidavit filed by the Union of India. The number and categories of homes established or recognized under the Juvenile Justice Act differed from state to state.

Tripura listed the voluntary, state-aided, and state-run homes for neglected juveniles in its three districts. Juvenile delinquency, it pointed out, was a problem of big cities, and Tripura had none. The number of delinquent children being very small in Tripura, it proposed to establish for the time being only one home for delinquents in the state capital at Agartala.

Gujarat issued three separate notifications to notify juvenile homes, observation homes, and special homes but each named the same twenty-four
existing remand/observation homes. Some states renamed the existing institutions according to the Juvenile Justice Act terminology, others retained the status quo. All districts did not have a home each, and sometimes only one home was notified for receiving children from various districts, sometimes even from the whole state. For example, homes for girls for the whole of Andhra Pradesh were all situated only in Hyderabad.

The court's direction to establish/recognize homes under Section 2(f) and (o) had been ignored by most states. Information on 'place of safety' or 'fit person/fit institutions' was available only rarely.

Reports of visits to the homes for juveniles sent by some Chief Justices and advocates appointed by Legal Aid Advisory Board painted a picture of dilapidated buildings without playing grounds, lack of sanitation, monotonous food, substandard or absent educational/vocational training, and rare aftercare programmes.

The affidavit of the state of Andhra Pradesh regarding the dilapidated condition of a home pointed towards reasons other than mere lack of funds for this state of affairs. It expressed its inability to undertake repair works because the observation home was in a rented building.

The reports by some District Judges pointed to the insignificant number of juveniles present in the homes visited by them. The Observation Home in Bharatpur, Rajasthan, had no inmate, while the remand-cum-observation home in Amritsar, Punjab, had only five on the day of the visit. The low number of juveniles in the homes remand homes in Dhanbad (7), Sitamarhi (4), Chapra (11), Begusarai (8), and Arrah (4), and juvenile home in Bhagalpur (17) of Bihar was especially intriguing in view of the high number
of juveniles in the jails of Bihar reported earlier in the case.

Very few state reports filed information about the probation officers under the Juvenile Justice Act. Fresh appointments of probation officers pursuant to the court order was a rarity and the majority among those who reported, chose to declare district welfare officers as the probation officers under the Juvenile Justice Act. Some states directed their existing probation officers under the Probations of Offenders Act to handle cases of children under the Juvenile Justice Act also.

The monitoring scheme suggested four essential measures to be taken immediately by each state for ensuring protection to children, namely (i) recognition/establishment of institutions/places for keeping children falling under the Juvenile Justice Act, (ii) ensuring that such institutions functioned in a manner conducive to the development and all-round growth of children kept therein, (iii) provision for special training (in child psychology and welfare) of the personnel who decide the future course of action for the child, and (iv) appointment of an appropriate number of probation officers to function under the Juvenile Justice Act.

It goes without saying that the Supreme Court's initiative in the implementation of the Juvenile Justice Act did not change either the direction or the pattern of implementation of juvenile justice services. The case brought forth the fact that the government failed to cooperate fully with the Supreme Court in this mammoth exercise aimed at improving the lot of children.

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**Data**

The basic data relating to the number of juveniles in need of care and protection and their location continues to be non-existent. Therefore, it is difficult to ascertain the criteria by reference to which the number of juvenile courts or juvenile welfare boards, homes, and other services at various places may be determined

Data feedback has not been integrated in the operations of the Juvenile Justice system. The data, as and when submitted by the states, have been published but do not seem to have been analysed. No changes were visible in
various irrational patterns over the years, for example, the expenditure on homes.

**Intake Agency**

Under the Juvenile Justice Act, apart from the police, other persons and organizations were unauthorized to take charge of the neglected juveniles and bring them before the competent authority, as was the case under some of the earlier Children Acts. But no information is available on the use of the provision.

**Adjudicatory Body**

The reports pursuant to the direction of the Supreme Court in the *Sheela Barse Case* for constitution of the juvenile courts and the juvenile welfare boards showed that a majority of the states had taken recourse to Section 7(2) of the Juvenile Justice Act and authorized an existing judicial magistrate to discharge the functions of the juvenile court or the juvenile welfare board.

**Home for Juveniles**

Most of the states established or recognized one home only for a number of districts or for the whole state. Most of the time, the same institution was notified as the three homes provided under the Juvenile Justice Act.

**Community Participation**

The Juvenile Justice Act integrated the participatory model by laying down a wide range of activities for the community. In actual practice,
however, the role played by volunteers, voluntary organizations, and community services has remained marginal. Neither has the government taken active steps for involving the community nor has the community shown any inclination to participate in the juvenile justice system.

**Sampurna Behrua's Case**

An affidavit was filed before the Supreme Court of India in *Sampurna Behrua's case* filed by way of Public Interest Litigation in which the hon'ble Supreme Court is monitoring the implementation of major provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 by National Commission for Protection of Child Rights (NCPCR) constituted under Section 3 of the Commission for Protection of Child Rights (CPCR) Act, 2005. Annexure-I to the affidavit contains the State-wise status of the implementation of major provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 as on April 2011.

For the purpose of study, the relevant portions of the affidavit are stated as below

(1) As per Para. 2 of the affidavit, the major provisions of the Act, 2000 related to Child Welfare Committees (CWCs), Juvenile Justice Boards (JJBs), Special Juvenile Police Units (SJPUs), Observation homes, Special homes, Children's homes, Shelter Homes, Specialized Adoption Agencies (SAAs) and constitution of State Child Protection Society/ Unit (SCPS/SCPU) and District Child Protection Unit (DCPU).

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Child Welfare Committees and Juvenile Justice Boards

(ii) A large number of abandoned children, missing children & trafficked children pass through railway stations. These children are in need of care and protection. The decision regarding their interim care, restoration & long term rehabilitation has to be taken by Child Welfare Committee.

(iii) In the states of Haryana and Sikkim, the Deputy Commissioners (District Collectors/District Magistrates) have been appointed as the Chairpersons of concerned Child Welfare Committees in contravention of the provisions of Rule 22(3) (iii) of the Juvenile Justice (Care and Protection of Children) Rules, 2007.

In Meghalaya, also, the District Social Welfare Officers (DSWOs), who have full-time responsibilities towards implementing various schemes/programmes of the Government, have also been assigned the role of Chairperson of the Child Welfare Committees in the state. Consequently, not only do such officers have dual functions but also there is a conflict of interest issue as well.

Special Juvenile Police Units

(vi) Although many States have reported the constitution of Special Juvenile Police Units (SJPUs), their functioning remains confined to mere notification (except in Delhi and in other Metropolises).

(vii) NCPCR has received many cases involving the unlawful detention/confinement of children alleged to be in conflict with law by the police, be it in Odisha, Jharkhand, Uttar Pradesh or Haryana. The police often uses its discretion to produce children alleged to be in conflict with law before
any magistrate (as against producing them before the Juvenile Justice Board).

Strict actions (legal/administrative/disciplinary) are taken against erring police official/juvenile welfare officer who are not complying with the relevant provisions of the Juvenile Justice Act and Rules as well as the instructions/directions sought above;

The concerned Juvenile Justice Board may initiate appropriate legal action against the police officer in the event of complaint being received and verified regarding children detained in a lock up, harmed, taken in public glare, presented before the media and the like [as envisaged under Rules 84(11) of Juvenile Justice Rules, 2007]

**Age Determination**

(viii) Ordinarily the police presume children in the age group of 14-18 to be adults, apparently on the basis of looks and appearance of such child and deals with them as per the procedure provided under the criminal justice system. This is illegal, especially in the light of the provisions under Rule 12(3) to (6) of Juvenile Justice Rules, 2007 which read as follows.

Suitable directions may be passed by this Hon'ble High Court that the hierarchical process of age determination as mentioned under above rule position are strictly adhered to by the concerned police officials, Juvenile Justice Boards and other Magistrates.

**Expeditious Disposal of Cases**

(x) Although it is a requirement under law [Section 33(3) of the Juvenile Justice Act] for the State Governments to review the pendency of cases in the Child Welfare Committees on six monthly basis, there has been no instance of
such review being conducted.

**Juvenile Justice Institutions**

(xiii) In majority of states, the number of existing Observation Homes are inadequate to cater to the needs of children in conflict with law in following manner: (a) The location of such Homes are quite far for the poor parents/relatives of children belonging to other Districts to visit Homes periodically for inter-facing/interaction with their wards; (b) Some children in conflict with law miss their dates for production before the Juvenile Justice Board due to non-availability of escort party of police on such dates resulting in delay in the disposal of cases; (c) travelling of long distance by a child in the company of police involves greater risk for abuse; (d) The concerned Juvenile Justice Board/Child Welfare Committee on the basis of whose order, such children are sent to an Observation Home/Children Home out of its geographical jurisdiction, has no opportunity to see the conditions in which such children live.

(xiv) The members of National Commission for Protection of Child Rights have visited various homes in different parts of the country during the last three years. The impression gathered from such visits is not encouraging in so far as the conditions of children living in such Homes are concerned. There is no proper schooling (for all children in school-going age) and no creative engagement programme for them. Most of the homes have inadequate professional staff. The supervisory/administrative and watch and ward staffs in such homes require adequate training/orientation for creating child-friendly environment in such homes.

(xvii) It has come to the notice of National Commission for Protection of
Child Rights during the visits of its members to the Homes in various parts of the country that children living therein are deprived of full time formal education at par with other children. In fact, many school going children have discontinued their studies after they are lodged in such homes. This situation is not acceptable especially after the enactment of the Right of Children to Free and Compulsory Education Act, 2009.

(xviii) All state governments/Union Territories may be directed to maintain a register/list of institutions run by the government as well as non-governmental organisation/Trust (at district/sub-district level) under Section 34(3) of the Act to ensure holistic development of children within the framework of law and in the best interest, care, protection and rehabilitation of children. This process should be completed within 03 months by a sworn affidavit to this Hon'ble Court and under intimation to National Commission for Protection of Child Rights.

Non-Institutional Approach and Alternative Care

(xix) All concerned (juvenile justice boards, child welfare committees, police and homes) should resort to 'institutionalisation' as last resort in view of the provisions of law under Section 15(1)(a) to (f) and Section 40 of the Juvenile Justice Act.

Non-Stigmatizing Approach

(xx) The non-stigmatizing semantics should be strictly adhered to and the use of adversarial or accusatory words, such as arrest, remand, accused, chargesheet, trial, prosecution, warrant, summons, conviction, inmate, delinquent, neglected, custody or jail should be avoided by all concerned in the processes pertaining to the children in conflict with law under the Act.
NGO Participation

(xxiii) Since most of the Homes are not having proper counselling, education, recreation and vocational training facilities, the state governments/Union Territories administrations should encourage structured partnership/participation of experienced non-governmental organisations for having creative programmes for the children living therein [as envisaged under Rule 55(5) of the Juvenile Justice Rules, 2007].

Monitoring and Evaluation

(xxiv) The respective state governments/Union Territories administrations should ensure that the Inspection Committees [as envisaged under Section 35 of Juvenile Justice Act and Rule 63 of the Juvenile Justice Rules, 2007] carry out surprise inspections of all Children Homes (Government and NGO run) on a periodic basis.

(xxv) Child Protection Units should be constituted at the state level and in all districts (under Section 62 A of the Act) by the respective state governments/union territories administrations without further delay in order to have better implementation of the Juvenile Justice Act and its monitoring.

(xxvii) The respective state governments/union territories Administrations should ensure that the State level and district level Advisory Boards are constituted (as envisaged under Section 62 of the Act) have periodic meetings at least four times in a year in order to review the situation of the implementation of the Juvenile Justice Act.

Resource Mobilisation

(xxviii) The Fund, as envisaged under Section 61 of Juvenile Justice Act and
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Resource Mobilisation

The Fund, as envisaged under Section 61 of Juvenile Justice Act and Rule 95 of Juvenile Justice Rules, 2007 should be created and operationalized by all states/union territories at the earliest, so as to support the expenditure for various purposes, including for the welfare and rehabilitation of children in need of care and protection and children in conflict with law.

Conclusion

It is apparent from the above referred cases that the conflict between right and welfare has become an ongoing affair in all the jurisdictions. In fact this rights regime idea has been developed in the background that the government policy of providing protection and care to the children is not clear and so far the juvenile justice story tells the opposite of the professed philosophy of care and protection. The children get nothing from both the world, that is to say, neither from the juvenile justice system or from their homes and society. Therefore, the matter is very serious and a very serious consideration has to be made regarding the improvement in the juvenile justice system.

What the court can enforce is the rights of the children, for example, establishment of major provisions regarding basic structure of the juvenile justice system and not the love and affection which comes from within. Without being sensitive, without believing in humanity, kind heart, one may operate a heavy machine but not the juvenile justice system. The insensitivity, lack of benevolence, greed, avarice and lust for material gain prevails everywhere. It appears that the hidden agenda behind the government's welfare policy is to avoid international economic sanction and to get grant from the United Nations Children's Fund, International Monetary Fund and World Bank to fulfill that hidden agenda and that is corruption.
Children are voteless, voiceless and without any enforceable rights because of their minority. The children's enforceable civil and political rights are not enforced by themselves but by some social activists or public spirited persons approaching to the court under its jurisdiction. How far these stay cases of public interest litigation be continued to afford care, protection and welfare of the children. The juvenile in conflict with law and the children in need of care and protection have limited social and economic rights of food, clothing, shelter, health etc. In this background the higher courts can enforce the establishment of basic statutory infrastructure of juvenile justice system however again in the absence of fundamental freedom in terms of social and economic justice, the fundamental freedom of civil and political rights is meaningless.