CHAPTER- IV

JUVENILE JUSTICE IN THE
RIGHT OF THE CHILD FRAMEWORK

The focus of this chapter is to examine the findings of the field work under this research from the perspective of rights of the child. Such an analysis aims at review of state of juvenile justice as revealed from the empirical work in the backdrop of contemporary debates concerning rights of children. For that purpose, at the beginning of this chapter, an attempt has been made to provide a theoretical explanation to a fundamental question as to why Juvenile Justice should be seen as part of the Right of the Child debate? Questions such as why is Indian State and many countries in the globe choose to place children in conflict with law, under a system termed as juvenile justice and accordingly shaped legislative arrangement under the title of Juvenile Justice Act? How are we to understand the framework of Rights of the Child in relation to Juvenile Justice?

It is interesting to point out that the United Nations Convention on the Rights of Child 1989 (hereinafter UNCRC) does not use the term juvenile in all its Articles covering 3-parts of substantial rights (Article 1 to 41), administrative guidelines (Article 42 to 45) and procedures (Article 46 to 54). The Convention explicitly uses the term 'children in conflict with law' as prescribed terminology to describe children who are alleged as, or accused of; or recognized as having infringed the penal law of the country. This analysis may also be useful
in seeking an explanation as to whether juvenile justice can be considered as a right of child in accordance with the existing framework recognised by United Nations. By and large the available literature views juvenile justice as one of the recognised rights of the child and therefore, this Chapter will converge upon the framework concerning rights of the child in analysis to facilitate further investigation for such an understanding.

In order to trace the history concerning the use of the terminology 'juvenile justice' to identify children in conflict with law within the broader understanding of juvenile justice, one can refer to the system prevailing in the late 19th century USA. The first juvenile court was established in 1889 in Chicago which subsequently spread rapidly all across the globe. Young people formed violent street gangs in cities of USA during 18th century for which delinquency rates were reportedly rising. Reasonably, the combination of juvenile with delinquency contributed to coining of juvenile delinquency to exemplify the delinquent act by young people. Gradually, the term juvenile delinquency has come to imply disgrace. A reference can be made to zoology which describes juvenile as a psychologically immature or underdeveloped individual184. The term juvenile has been derived from Latin word juvenis, which means young. The term juvenile is very often cited as a young person having unruly behaviour. While in USA the nomenclature of legislation is made as Juvenile Justice and Delinquency Prevention Act, in Canada the juvenile justice system has been renamed as Youth Criminal Justice Act from Juvenile Delinquents Act, 1908 and subsequent Young Offenders Act in 2002.

In India until 1986 when the first uniform legislation came into being, involvement of children in criminal act was mostly regulated under the Children's Act of different States. From 1986 onwards the term juvenile justice has come to occupy the title of legislation that deals with children in conflict with law. This nomenclature is further extended in 2000 with re-enactment of Juvenile Justice (Care and Protection of Children) Act. Thus the words “Juvenile” and “Children” are brought together in the formulation of statute. It needs to be investigated whether both the words are interchange overlapping or distinct in the statute.

In a broader contextual level, while analysing the position of Indian State, it is found that the Indian Law while affording protection of juvenile in conflict with looks much beyond the provisions by brining into the orbit of law all such children who live in difficult circumstances, for which they might require care and protection. The Juvenile Justice Act 2000 addresses juvenile who come in conflict with law and children who need care and protection. While the former relates to a juvenile who is alleged to have committed an offence and has not completed eighteen years of age, the later mostly takes into account those child who are found without any shelter of a home or settled place and without any ostensible means of subsistence or who is found begging or who is either a street child or a working child or who resides with a person, whether a guardian of the child or not who has threatened to kill or injure the child or there is a reasonable likelihood of the threat being carried

186 Section 2(f) of Juvenile Justice Act 2000.
out, or has killed, abused or neglected some other child or children for which there is a reasonable likelihood of the child being killed, abused or neglected, mentally or physically challenged or ill children, where the parent or guardian is unfit or incapacitated or a ‘parentless’ child, there is a greater likelihood of being abused, tortured or exploited for purposes of sexual abuse or illegal act or likely to be inducted into drug abuse or trafficking or unconscionable gains or a child who is victim of armed conflict, civil commotion or natural calamity. The innovation it provides for this category of children is the conceptualisation of restoration of the child as being the focal point with restoration being conceptualised as restoration to parent, adopted parents or foster parents (Sec 39 of Juvenile Justice Act 2000) (Narrain).

Considering the larger framework in India, an analysis pertaining to Justice to Juvenile, which the Convention describes in the form of children in conflict with law, should not restrict the scope of analysis only to rights of children accused as or alleged of, or recognized as having infringed penal law. The analysis must appropriately take into account the broader definition as provided for in the legislation on juvenile justice by the Indian State. Thus, the thematic exploration into the subject to locate the position of Juvenile Justice in the framework of Rights of Child needs to be appreciated in the backdrop of the coverage of law in India under Juvenile Justice (Care and Protection of Children) Act, 2000. Such a broad based review shall help in locating the position concerning children who are covered under the legal framework

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187 Section 2(d) of Juvenile Justice Act 2000.
relating to Juvenile Justice in the canvas of Rights of Children in India. It is essential to investigate the position of the following fundamental aspects of Juvenile Justice.

1. What is the theory of ‘Rights’ under Jurisprudence?
2. The trajectory of the evolution of Rights in relation to Children in contemporary times.
3. What are Rights of the Child under UNCRC?
4. Can Juvenile Justice be considered as a recognised Right of the Child in India?
5. Analysis of Rights of the Child in India from empirical evidences.

Rights: A Jurisprudential Analysis:

The literature of ‘Rights’ offers a ‘Kaleidoscope’ intersecting theories. However, Rights are either moral or legal. A Legal Right is an interest recognized and protected by a rule of law. In case of moral right which is also regarded as natural right can only be protected by a rule of morality which means a moral wrong the respect for which is a moral duty. On the other hand a legal right being protected by rule of law, any violation of it would amount to legal wrong therefore; respect for it is a legal duty. He who ill-treats a child violates a duty which he owes to the child, and a right which is vested in him (Salmond). 189

There has been a paradigm shift in the legal order from the non-status position of a person who were below a certain age (which was variedly different), who were considered as child, to recognition of right of such child

persons. Such rights that gradually developed in law are based on protectionist philosophy which regarded a child a essentially a vulnerable human being dependent on adult for their care and protection. (Goonesekere, 1998:77). This development of law which recognizes Rights of Child requires to be traced for understanding the jurisprudential notion of Rights as a legal concept.

Legal Rights is significantly important in jurisprudence as it determines the status of a person on the basis of Rights and Duties. The conception of a right is fundamentally significant in legal theories. It has several analogous meaning like protection of interest of a person by law. The expression Legal Right is qualified by the word "Legal" which presupposes its enforceability. According to Salmond a Legal Right is an interest recognized and protected by a rule of legal justice – the violations of which would be a legal wrong done to a person.

The concept of legal right is addressed theoretically under Will Theory and Interest Theory of Rights. While Will Theory is largely extended on the basis of the doctrine of natural rights, the Interest Theory advocates for legally protected interest of individual.

The Will Theory (Hegel, Kent, Hume) argues that Right is an interest attribute of the human will. Right is derived from the exercise of human will.


192 Hegel, Kent and Hume advocated the Will Theory (Refer Paranjape,1997 and Chakravarti, 1989.)
The theory says Law confers power and entails freedom to persons in the form of legal rights. A Legal Right is a power over an object which by means of this right can be subjected to the will of the person enjoying the right (Puchta). Legal Right is the capacity residing in on Man of controlling with the assent and assistance of the State, the actions of others (Holland). There is a perpetual conflict between the freedom of one individual with that of the other, the individual and the State as a part of natural process – between the rights of the man and the rights of the State. In this process of conflict State cannot deny certain basic natural rights of man which are inherent in him because of his self-dignity and individuality called in other words human will. (Dhyani, 2002:230). Rights of a person means that others are obliged to do or forebear from doing something in relation to him (Austin).

The approach of Interest Theory (Ihering) to ‘Rights’ is fundamentally based on the understanding that Legal Right is a legally protected interest. The theory argues that the purpose or object of law is protection of human interest and to avert a conflict between individual interests. A Legal Right is an interest recognized and directed by a rule of right (Salmond). Rights are concerned with interests, and indeed have been defined as interests protected by rules of right, that is by moral or legal rules. Interests are things which are to a man’s advantage: he has an interest in his freedom or his reputation. His rights to these, if he has such rights, protect the interests, which accordingly form the subject of his rights but are different from them.

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193 The Champion of Interest Theory (Refer Chakravarti, 1989).
Right has two senses that is a proper sense and a metaphorical sense. Rights, proper so called, are the creature of law properly so called; real laws give birth to real rights. Natural rights are the creatures of natural law; they are metaphor which derives its origin from another metaphor. What there is natural in man is means – faculties. Rights are established to ensure the exercise of means and faculties. The 'Right' is the guarantee, the 'Faculty' is the thing guaranteed\(^{195}\).

The essence of a legal right seems to be not legally guaranteed power by itself nor legally protected interest by itself, but the legally guaranteed power to realize an interest (Allena). A right is the power of will of men applied to a utility or interest recognized and protected by a legal system (Jelinek). Will is not an essential element in law or right. The real basis of law is social solidarity. The emphasis on 'Will' is anti-social as it shows that man is in conflict with his fellow-beings. The theory of subjective rights is merely: A metaphysical abstraction. "The right of the individual as a pure hypothesis, a metaphysical affirmation, is not a reality. It implies a social contract at the origin of society, a manifest contradiction. No one has any other right than always to do his duty" (Duguit).

According to the totalitarians, the whole concept of legal rights is misplaced. The only real thing is the State, not much importance should be attached to the individuals. The State is omnipotent and all-embracing and individual has not existence independent of the State. All rights belong to the State and the individual as such can claim nothing.

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The Rights of the Child when reviewed from the perspective of jurisprudential underpinnings of Right, one can see that with the adoption of the Convention on the Rights of the Child by the United Nations Organisations in its General Assembly and the consequential ratification of the Convention by Nation-State makes it legally binding in the domestic legal systems. As the Convention receives sanction from General Assembly of the United Nations Organisation and consequential ratification by State Parties it becomes a part of international law in accordance with the provision of the Vienna Convention on the Law of Treaties (1986). It codifies the main norms of international law on the validity and interpretation of international instruments. Implementation of the Convention on the Rights of the Child is therefore, intrinsically connected to international law on treaties. It distinguishes between acts of signature, ratification and accession to a multilateral treaty (Goonesekere1998,31). The United Nations Convention is recognised as a binding law as it carries obligation for State Parties to give effect to the Convention through administrative and legislative measures in their respective Nations196. The Convention therefore is regarded as a hard law197 as the State Parties officially notify their agreement to be bound by the provisions of the Convention. Thus the Convention is not only a part of international law but it is also required to be incorporated in the domestic legal system. The obligation of State Parties for purposes of enforcement of UNCRC varies on the basis of the nature of acts like ratification, accession or signature by the State Parties to this Treaty.

196 The State Parties to the Convention are required to submit progress report in accordance with the provision contained in Article 42 – 45 of Part-II of the Convention.
197 Binding or hard law comprises treaties like convention and covenants that carries obligation.
In view of above position, the rights conferred on children by the United Nations Convention becomes recognised as legal rights of children and their violation shall be treated as a crime. The enforceability of rights of children as a legal right depends on the scope provided for reception of international law in the domestic legal system of a country to give effect through municipal laws.

If law is defined in terms of its enforceability by the courts, the Indian state has enacted laws which can be enforceable in the court of law. However, in modern times a considerable amount of law would be excluded from the definition of law if enforceability is made an essential element of law. The Convention relating to Rights of Children seeks to realise the best interest of the child which is explicitly reflected in the Convention as a fundamental principle. In the jurisprudential discourses it can regarded as a "jurisprudence of realities" as against a "jurisprudence of conception", as the rights conferred on children are based on practical needs and does not merely logical deductions, like the philosophy of analytical positivism, as this jurisprudence of realities is based on best interest notion which the legal system secures for children. It can be inferred from the overall discourses on jurisprudential notion of rights that the Convention on the Rights of the Child secures for children the best interest, hence these rights can be regarded as a means for the protection of the interests of children as a person as advocated by the jurisprudential concept based on the theory of interest in relation to rights. Juvenile Justice when examined in the context of the view of Austin that Liberty is illusory if it is not protected by law and if law protects it, it

198 Rudolf Von Ihering.
amounts to a Right. Right denotes that protection and absence of restraint. For the protection of liberty absence of a legal restraint is an essential element. The Convention provides for freedom and liberty which are in the interest of the inherent dignity and human right of children. The concept of legal right is inextricably attached with justice. In all modern state the objective of administration of justice is to protect a person’s right. Jurisprudence is specifically concerned with those rights which are recognised by law and to be enforced with the authority of the State.199

Do children have any rights or distinctive rights? The exclusive emphasis on autonomy and self-sufficiencies which typifies the 'will' or 'power' theory of rights, the theory that is used to question the legitimacy and usefulness of attributing rights to children, is inadequate as an expression of the moral significance of persons, particularly children. The equal moral worth of all human persons, including children, is often best protected by ensuring that they have properly protected positive rights justified in terms of their fundamental interests. The 'interest' theory of rights, requires identification of interests, which are to be protected and to be furthered by rights. In the case of children (that is, in law, 'minors') it is helpful to distinguish between their interest as persons (which they have in common with all other persons), as children (which they have as immature and dependent persons), as juveniles

(which they develop as they approach maturity), and as future adults (which relate to their future interest as adults).200

Legal Rights in jurisprudence have been classified in different ways like Perfect and Imperfect Rights, Positive and Negative Rights, Proprietary and Personal Rights, Rights in re propria and Rights in re aliena, Principal and Accessory Rights, Primary and Sanctioning rights or Antecedent and Remedial Rights, Legal and Equitable Rights, Vested and Contingent Rights, Public and Private Rights, Rights in rem and Rights in personam, Right at Rest and Right in Motion and finally sometimes Fundamental Rights and Legal Rights. A discussion pertaining to classification of legal rights would help to understand the nature of rights bestowed on children.

A ‘positive right’ is that right which has a correlative positive duty. In case of positive right, the person having the right can compel the person upon whom the correlative duty is imposed to do some positive act. The scope of a negative right is only that the person having the right shall not be harmed. For the law it is easier to enforce the negative than the positive right. A holder of a positive right is entitled to compel the person on whom the duty has to do some positive act. A negative duty – meaning that a person bound shall refrain from doing some act which is prejudicial to the person entitled. A positive right is positive benefit and that of a negative right is not to be harmed. A positive right is one which obliges ‘the person of inherence’ to compel the other person to abide by the terms which he has agreed to abide

under contractual agreement. A right of ownership and possession is a negative right as it imposed on the other a negative duty of non-interference and abstention with it. A positive right corresponds to a positive duty and entitles its owner to have something done for him without the performance of which his enjoyment of the right is imperfect and incomplete. Negative rights have negative duties corresponding to them and enjoyment is complete unless interference takes place. In case of positive rights, the person subject to the duty is bound to do something. In the case of a negative right, others are restrained from doing something. This analysis enables us to understand the manner in which the fundamental principles of the Best Interest of the Child should determine how children are treated by the parent and the State as it emphasizes on the Rights of the Child rather than the future adult.201

The Convention on the Rights of the Child is unusual among Human Rights Conventions in that it seeks to promote positive as well as negative rights. Negative Rights, enjoying a longer tradition, stipulate that something is not to be done. They are Rights not to be wronged in some specified way. Whereas Positive Rights include the Right to adequate nutrition, primary health care and basic education. Positive Rights are produced goods and services. They are therefore, dependent on resources, the allocation of which may be affected by scarcity and competition. Negative Rights, on the other hand known no such limitations. They do not have to be created, only protected and therefore, feasible to honour them whether a country is rich or poor. It is worth remembering that some Negative Rights such as the Freedom from violence

may well depend for their implementation on their being converted into Positive Rights, for example the Right to Protection by Govt. The fact that Negative Rights do not involve direct resource costs make it easier to argue the case for their universality and inviolability. In some cases it may be that an economy may simply not have sufficient resources to enable all to enjoy the Right to adequate nutrition and health care. This raises the disturbing possibility that Negative Rights are inviolable in a way that Positives Rights are not. The question here is how can a Right be considered inviolable, if it is not always possible to protect it. The Convention on the Rights of the Child implicitly recognises the distinction between Negative and Positive Rights.  

In declaring that children have rights, the United Nations may have been unaware that philosophers and jurists have differed among themselves over the basis for conceiving that children may have rights. The problem is compounded by the practice of framing policy towards children in the form of general duties to promote their welfare. The legal relationships of this kind exclude the essential features of rights-based relationships.

Pande observes that the ideal Rawlsian individual decides to protect the child's needs as rights at the constitutional level. He wants to make sure that whatever their socio-economic class, children will be provided with resource and opportunities that will allow them to develop their freedom. The idea of fairness and justness to children, when given its widest extension,

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204 Pande. B.B. , The Indian Juvenile Justice Jurisprudence and the Convention on the Rights of the Right, The University of Delhi, New Delhi. (Website material)
would lead to conceding children’s rights generally and right to juvenile justice specifically.

In jurisprudence, legal rights have a number of characteristics. Firstly, a legal right needs to be vested in a person who may be distinguished as the owner of the right. As the owner of the right that person is the subject of a legal right, a person who is entitled to it or a person of inherence. Secondly, the legal right can be availed against a person upon whom rests the correlative duty. That person may be distinguished as the person bound or as the subject of the duty or as the person of incidence. Thirdly, the legal right obliges the person so bound either to act or omission in favour of the person who is vested with the right. This is termed as a content of the right. Fourthly, such an act or omission must be in relation to something (in widest sense of that word), which may be termed the object or subject matter of the right. Fifthly, every legal right has a title like certain facts or event by reason of which the right has become vested in its owner.

Every legal right consists of the following threefold relation like (i) it is a right against some person or persons, (ii) it is a right to some act or omission of such person or persons, (iii) it is a right over or to something to which that act or omission relates (Salmond\(^{205}\)).

Trajectories of the Evolution of Rights in relation to Child:

In the modern States, children are endowed with rights^{206}. They are no longer the subject of parents and family alone^{207}. State stands as the ultimate guardian under the notion of *parens patriae*^{208} principle. Under this notion, children are considered as the right holders and the responsibility to protect these rights rests with the parents and the family being the fundamental group of society^{209} along with the State, as duty bearers. Such a change in the approaches towards children brings about a fundamental shift in the treatment of children from the welfare notion of care of children to a right-based approach. This shift from welfare to right is being seen in the social sciences as a paradigm shift in the policy orientation (Bajpai, 2003; 1). A process of change was also marked in the legal orders pertaining to recognition of the interests of the child. The authority to protect the interest of the child rests with the State as ultimate guardian under the framework of law.

The concept of *parens patriae* is founded on the philosophy that the sovereign is authorised to act as the supreme parents of the child. The English Courts of Chancery (Lord Chancellor's Courts of Equity) modified the legal principles developed in the English Common Law Courts and interfered with parental right by exercising the prerogative power of the Crown to act as parens patriae from nineteenth century to protect the interest of child. Under

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206 Due to impact of the UN Convention on the Rights of the Child which is widely ratified by almost all States which presupposes that the provisions of the Convention are to be incorporated by ratifying countries, in modern states children are viewed as right holders.

207 The parental authority over children is restricted in the modern state. It is now important that the best interest of child must be protected in all situations.

208 Parens patriae - Translates roughly to "state as parent." This is the idea that the state has a responsibility to play a parental role to youths who have been neglected by their parents.

209 Preamble of UNCRC.
Roman and Dutch Law similar changes occurred where State responsibilities were recognised for protection of interest of children which came to be recognised as upper or superior guardian of minor children.

Prior to recognition of the authority of State to address the matters connected with interest of children which is commonly understood as the jurisdiction of parens patriae, the concept of patria potestas was the principle under the Roman Law which placed children under the all powerful authority of a male; pater familias. French law and Anglo-American law also had similar perception. The Napoleonic Code considered children as persons with no right. In the United States the legal system recognised the status of children under Stubborn Child Law {1646} (Gooneskere,1998;97,20,21). Such changes in the concept of law started recognising the status of children. These rights when receives legal backup or sanction, afford children a status under the law. When children do have legal rights then they have a recognized legal status. Thereby children do not merely figure in law as right holder, rather in a number of context they have a legal standing.210 Thus there exists a definite relationship between Child and the State. This relationship is based on a framework of Rights for Children in accordance with the provision of United Nation's Convention on the Rights of the Child.

The conditions experienced by many children make it important that their rights should be taken seriously. Rights are important if children are to be treated with equality and as autonomous beings. This means believing that

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anyone's autonomy is as significant as anyone else's. This Chapter shall offer a theoretical basis on which assertions that children have rights may be grounded and an explanation of the socio-legal significance of making such assertions within the framework of UN Convention on the Rights of the Child.

Hereinafter, I shall try to locate the position of Juvenile Justice, in the broader framework of Right of the Child with a historical analysis of development of the notion of Rights of Child in its various manifestation so also its position in the other International Human Right instruments with purpose to ascertain the nature of protection afforded to children in conflict with law whom the Indian State recognises under Juvenile Justice System. Such an exercise shall be helpful in understanding the rationales for bringing an analogy between Juvenile Justice and Rights of the Child.

A Historical Review:

The process of recognizing Rights of Children started just after the end of First World War, in response to the scourge of ravage and magnitude of violence that was unleashed perpetuated on Children. This concern of various nations was demonstratively reflected with opening up of a Committee on Child Welfare by the League of Nations in 1919. At this point of time private agencies like Save the Children International Union made an impact by bringing the plight of children to wider visibility for which it adopted a 5-point Charter describing basic conditions a society must create for protection


and care of children. In 1924 the League of Nations adopted the Declaration on Rights of the Child which was known as Declaration of Geneva. The Declaration pointed out that Children should not be the responsibility of families or communities or even individual countries, the world as a whole has legitimate interest in welfare of children. The Declaration reinstated that mankind owes to the child the best that it has to give. The 5-Principles of the Declaration established the basis of child right in terms of both protection of the weak and promotion of Child's development. The Declaration of Geneva, 1924 covered the following 5-points:

1. The Child must be given the means needed for its normal development, both materially and spiritually.

2. The Child that is hungry should be fed; the child that is sick should be helped; the erring child should be reclaimed; and the orphan and the homeless child should be sheltered and succoured.

3. The Child must be first to receive relief in times of distress.

4. The Child must be put in a position to earn a livelihood and must be protected against every form of exploitation.

5. The Child must be brought up in the consciousness that its best qualities are to be used in the service of its fellow men.

A bare reading of the Declaration of Geneva brings to notice that there was an explicit declaration with regard to erring child by observing that erring child

213 By the present Declaration of the Rights of the Child, commonly known as the "Declaration of Geneva", men and women of all nations, recognising that mankind owes to the child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed.
should be reclaimed. As the declaration recognised that mankind owes to the child the best that it has to be beyond all consideration like race, nationality and creed, therefore, men and women of all nations declared and accepted it as their duty. From this analogy it is clear that from the very beginning of the idea of having an international standard about the possible rights of child, children who come in conflict with law found a mention. The Declaration used the term erring child in stead of child who come in conflict with law probably because of the status of Law and State in that context, when the notion of Nation-State had undergone a tremendous change214. The Declaration of Geneva meticulously used "Reclaiming " which gives the general understanding that children should not be punished for their act or omission rather their life must be reclaimed by which their social integration can be made possible being human persons. A wider analysis of the Declaration even provides a more insight into the other forms of interest of children like Right to Relief, Right to Shelter, Right to a Livelihood and finally Right to Protection against every form of Exploitation. When the present Juvenile Justice Act 2000 of India is examined in the context of the Declaration of Geneva, it can be seen that the Indian law has followed the fundamental ingredient by making provision for children who need care and protection.

After almost 2-decades when the world passed through the wreck of Second World War the League of Nations was replaced by the United Nations Organisation in 1945. The Economic and Social Council of United Nations made a recommendation to reaffirm the commitment to the cause of children

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214 Like India which was a Colony of British Rule which subsequently developed into a Nation-State after independence.
on the basis of Declaration of Geneva. Accordingly UNICEF was established as a specialized Agency of UNO in 1946 with a mandate to care for the world's children. Also in 1948, the General Assembly adopted its first brief seven point Declaration of the Rights of the Child, building on the 1924 Declaration of Geneva. "By the present Declaration of the Rights of the Child... men and women of all nations, recognising that Mankind owes to the child the best that it has to give, declare and accept it as their duty to meet this obligation in all respects...". A proposal was accepted, almost immediately, to draft a more detailed Declaration.

In 1948, the same year, the United Nations had adopted the Universal Declaration of Human Rights (UDHR). This Declaration contained at least 2 direct provisions on Children. Article 25 of UDHR says that motherhood and childhood are entitled to special care and assistance and all children whether born in or out of wedlock shall enjoy the same social protection. Article 26 while recognizing Right to Education of Children, mandated that parents have a prior Right to choose the kind of education that shall be given to their children.

Again after a period of one decade in 1959 the General Assembly of United Nations adopted the Declaration of Rights of the Child. This Declaration was a further expansion of the 5-Principles contained in Geneva Declaration of 1924. This Declaration contained 10-basic principles like Non-Discrimination, Special Protection, Facilities and Opportunities for Development, Freedom...

and Dignity, Right to Name and Nationality, Right to Social Security, Protection and Entitlement to Education. The 1959 Declaration was a mere statement of Rights without any obligation. It was not binding on the member State. The Declaration of the Rights of the Child 1959 did not find explicit recognition regarding children in conflict with law like the Declaration of Geneva, 1924 which mentioned that erring children must be reclaimed, it is implied in most of the provisions like Principle 9 observed that child shall be protected against all forms of cruelty and exploitation. Principle 8 provided for protection for children in all circumstances.

Apart from specific international standards on Rights of Child and other instruments concerning human right which recognise some or other form of rights in relation to children, relevant international norms have existed for several decades. The 1955 Standard Minimum Rules for the Treatment of Prisoners – themselves inspired by standards endorsed by the League of Nations in 1934 – already set out the principle of separation of "young prisoners" from adults in custodial facilities and, for adults and juveniles alike, the separation of accused and convinced detainees. The 1966 International Covenant on Civil and Political Rights (CCPR) reiterates these principles in the form of "hard law", as well as prohibiting the death penalty for persons found guilty of a crime committed when they were under the age of 18 (Art. 6.5). The CCPR also contains many safeguards application to all persons brought to trial and detained, and specifically states that "in the case of juvenile persons, the (court) procedure shall be such as that takes into
account of their age and the desirability of promoting their rehabilitation" (Art 14.4).²¹⁷

The first ever international instrument that recognised the needs of children in the context of criminal justice was the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (commonly known as the "Beijing Rules"), which was adopted by the General Assembly of United Nations in the year 1985. In fact, the decision to adopt such specific rules for children was probably due, at least in part, to the attention already being paid to child rights through the negotiation of the Convention. Given the importance placed on Juvenile Justice by the international community, as evidenced by the scope and detail of the international instruments it has adopted on the subject, it seems somewhat paradoxical that the rights, norms and principles involved are regularly ignored and seriously violated virtually throughout the world, on a scale that is probably unmatched in the field of civil rights implementation²¹⁸. The resolution by which the General Assembly adopted the Beijing Rules recognised the new attitude that children "owing to their early stage of human development, require particular care and assistance with regard to physical, mental and social development, and require legal protection in conditions of peace, freedom, dignity and security" (Lundy, 1997, 77).

The subject of Rights of Children assumed great significance in the modern state with adoption of UN Convention on the Rights of the Child in 1989 by the

²¹⁷ Innocenti Digest 3, Juvenile Justice, January 1998, UNICEF International Child Development Centre, Italy.
General Assembly of the United Nations. This adoption of the Convention was made after a decade long exercise since the observation of International Year of the Child in 1979 by United Nations. On the eve of the United Nations-sponsored International Year of the Child, Poland formally proposed a draft text for a new initiative for the Convention on the Rights of the Child. The UN Commission on Human Right was given the task of appointing a special working group to draft the instrument. The following year, the United Nations Commission on Human Rights formed a working group to review and expand on the original Polish text. The working group drew heavily from the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in formulating what became the 41 substantive articles of the Convention on the Rights of the Child. A thorough review of the areas having bearing on the interest of children across the globe by a group of experts finally produced a document which was adopted by the General Assembly of United Nations by Resolution 44/25 on 20th November, 1989 at the Forty-Fourth Session of the General Assembly. It entered into force on 2nd September 1990. The Convention received wide acceptance by almost all the modern democratic States and by August 1997 all countries ratified it except for United States of America and Somalia.

The significance of rights of children in a modern state can be observed from the fact that, the Convention swept the entire globe resulting in widest

220 USA is not a state party to the Convention as it has neither entered into accession or ratification. Somalia has not a state party due to internal disturbance in the nation. So far 187 Nations ratified the Convention.
possible ratification and accession. The Convention created a conducive international legal environment with its ratification by the state parties. The Convention has helped create a positive international legal environment on child right. Implementation of the Convention is intrinsically connected to international law of treaties. The Vienna Convention on the Law of Treaties (1986) has codified the main norms of international law on the validity and interpretation of international instrument.  

As has been observed in the previous paragraphs, the idea of giving protection to children who come in conflict with law developed simultaneously in the course of evolution and development of rights of children in various phases of history. The explicit recognition of erring children in the Declaration of Geneva laid the foundation for giving special treatment to children who come in conflict with law as a matter of right of children. It is also observed that in the debate about recognition of rights for children at the international level there is always a specific mention of children who are in conflict with law. Not only in international instruments concerning children but also in other human right instruments there was an explicit provision for such categories of children. The subject of Juvenile found significant importance with adoption of United Nation's Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (widely known as Beijing Rules) by the United Nations General Assembly which used the term Juvenile Justice. It was turning point in the history of Juvenile Justice as hitherto the subject received special attention by Nations worldwide including that of Indian state which adopted the first

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uniform legislation for the entire country in 1986 under the title of Juvenile Justice Act. The idea of juvenile justice not only since then addressed as a special subject but also viewed from the lenses of the framework for rights of the child. Consequentially two other international instruments have been adopted in relation to Juvenile Justice such as the United Nations' Rules for the Protection of Juveniles deprived of their Liberty 1990, the United Nation's Guidelines for the Prevention of Juvenile Delinquency, 1990 (known as the Riyadh Guidelines), which prescribed the basic standard norms for administration of juvenile justice systems.

**Review of Rights under UNCRC:**

On 20th November 1989, the General Assembly of the United Nations unanimously adopted the Convention on the Rights of the Child (CRC) by Resolution 44/25 at the Forty-Fourth Session, which entered into force in September 1990. In the same month, the World Summit for Children was held in New York, encouraging all States to ratify the Convention, with world leaders making a "solemn commitment" to accord a high priority to the rights of children: "The well-being of children requires political action at the highest level. We are determined to take that action". The world community has maintained the pressure, and the 1993 World Conference on Human Rights set the end of 1995 as the target for universal ratification. By the last day of that year, 185 States had ratified the Convention. At the end of 1997, only two countries had still to ratify.²²²

The UN Convention on the Rights of the Child recognizes a wide range of rights pertaining to persons below the age of 18. The Convention contains 54 Articles in three parts, out of which almost 41 articles bestow rights on children, which are considered as substantive rights. These rights are inalienable and mostly interwoven. While all children are entitled to all rights equally, some rights are contextual and based on age disaggregated approach which conforms to needs of children at various stages of childhood like protection of children who come in conflict with law. The Convention on the Rights of the Child is the first United Nations human right instrument since the Universal Declaration of Human Rights which brings together an inextricable element of the life of an individual human being the full range of civil and political rights, and economic, social as well as cultural rights. It treats children as completely rounded individual, rather than as elements in either political society or economic systems. Thus, it is a holistic document. Each Article of the Convention is inextricably connected with other Articles, therefore, exert an influence on the interpretation of each other (Lundy, 1997:25).

The Rights of Children are categorised as Right to Survival, Development, Protection and Participation. The Convention does recognize family as the fundamental group for growth and well being of children for which family should be afforded with the necessary protection and assistance so that it can fully assume its responsibilities within the communities. It has at least 4 principles like non-discrimination (Article 2), best interest of the child (Article 3), right to family environment (Article 9 & 10) and right to be heard (Article 223 Para Four of the Preamble of the UN Convention on Rights of the Child.)
The best interest of the children is the fundamental principle governing the entire gamut of rights conferred on children. The state parties to the convention are required as a matter of treaty obligation to bring their administrative, legislative and institutions as well as services in conformity with the provisions of the convention. This requirement of the convention makes it a hard international law, which is binding on the state for its implementation through reception of the provisions into the domestic legal system. That makes the convention unique and authoritative.

An analysis of the UNCRC indicates how the initial focus on the 'non-status' position of children in law gradually developed into recognition of rights. It is based on the protectionist philosophy that saw the child essentially as a vulnerable human being, dependant for its care and nurturing on an adult world. The initial efforts to recognize a child's right to protection from violence in Anglo-American jurisprudence drew an analogy between children and animals, since early legislation reflected a policy of preventing cruelty to animals. The 'protectionist' value system had an important impact on domestic legal systems. Though a concern for child survival and development could be found in Anglo-American legal systems, these interest were not clearly articulated as social, cultural or economic rights (Goonesekere; 1998).

The Convention creates a holistic framework of rights and thus encourages the development of a coordinated legal policy that perceives child rights as the entitlement of a determined segment of the population. The child thus

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224 Article 3 and 4 calls upon state parties to undertake appropriate legislative, administrative and other measures as a treaty obligation.
moves from non-status of a person to the status of a person who enjoys right, usually vicariously through adults, to a human being who has rights because he/she is a child. This concept of separate identity and status within the community and the 'dignity' of a child is stressed in many specific articles of the convention, and reflects the basic philosophy of the Convention and its perception on rights. The Convention adopts a very positive concept of the child's right to privacy, honour and reputation, since these appear as the only rights which are treated as absolute rights demanding the highest standards of protection.

*Article 1 defines the holder of rights under the Convention on the Rights of the Child as 'every human being below the age of 18 years, unless under the law applicable majority is attained earlier'. The Convention clearly specifies the upper age limit for childhood as 18 years, but recognizes that majority may be obtained at an earlier date under laws applicable to the child. The article thus accommodates the concept of an 'acceleration' or advancement of majority at an earlier age, either according to the federal or state laws of a country, or personal laws applicable to a child within that country. However, the upper limit on childhood is specified as an age of 'childhood' rather than 'majority' recognizing that in most legal system a child can acquire full legal capacity with regard to various matters at different ages.*

The convention recognizes a child as a person below the age of 18 in Article 1, thereby maintaining uniformity in matter of the attainment of majority and the stretch of period of childhood in the life of a person, of course with relaxation for States where majority is attained earlier in accordance with their
law. Such recognition of childhood in the international arena brings an uniformity in respect of treatment of children on the basis of age, which was different from country to country and even in different laws within India prior to adoption of the convention.

Semantic and Conceptual Debates:
Certain terminological issues raised intellectual debates. The Convention's attitude to the commencement of childhood reflects the absence of consensus that emerged during the drafting. Countries with strict abortion laws wanted the concept of pre-natal rights recognized in the Convention, while others with liberalized abortion laws could not agree to this formulation. The compromise was to leave this issue to the domestic laws of state parties and define childhood only in terms of the upper age limit. This has been clarified in the travaux preparatoires, so that the reference in the preamble to the need for 'special safeguards and care including appropriate legal protection before Birth' cannot be used to undermine this interpretation. Article 6 of the Convention that refers to a state party's obligation to 'recognize that every child has the inherent right to life', should not therefore be interpreted to refer to the unborn child.

English common law did not clearly recognize the concept of an unborn child as a legal person. The concept of a person's capacity to claim damages for pre-natal injuries was introduced into contemporary law by legislation. The articulation of the 'right to life' in the Indian constitution reflects the common law approach since it is stated that this right is conferred on a 'person'. India has also permitted medical termination of pregnancy through
post-independence legislation enacted in 1971. Every child in the mother’s womb has the right to be born and survive as a general rule unless there are certain special circumstances against it. Section 312 to 318 of the Indian Penal Code provides punishments for voluntarily causing abortion destroying it in embryonic stage and preventing its birth. According to Section 8 of the Hindu Succession Act (No 30 of 1956), children are entitled to a right in the property of his or her father or grandfather / great grandfather. Section 20 of the Hindu Succession Act, 1956 provides right for the child in womb to inherit to the intestate after being born alive. The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act 2002 with the objective of prohibition of sex selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto was enacted to prevent sex selective abortion and sex based discrimination perpetuated on girl child.

The UN Convention brings into its orbit a large number of issues having substantial impact on children, which inter alia covers the right to identity, right to be heard, right to receive education, right to receive the highest attainable health services, right to freedom of expression and of association, right to receive parental care, freedom from exploitation, special measures for children in conflict with law and right of indigenous children to have their right to religion, language and culture etc.
Most of the rights conferred on children are considered to be positive rights. A broad range of rights have been contemplated for children in two dimensional level, some of which are rights to be secured for child and some of them are given in a wider sense to children. Although it is not made clear the reason for use of singular and plural use of the term child and children, but it is considered to be an overall protection mechanism for the children community. Similarly, while the convention desires the state parties to undertake legislative and administrative measures for attainment of rights of children, it distinctively recognizes in two separate context the best interest of the child in two different dimension by observing that it is paramount consideration and in some cases such rights as primary consideration. The convention enlarges its scope by giving recognition to international cooperation for implementation of the provisions of the convention. Among this vast array of provisions, the following are among the most notable improvements and additions to existing standards in this sphere.

**The best interests of the child (Art-3):** This Article is fundamental to the whole Convention in that it stipulates that the child's best interest must be a "primary consideration" in all actions concerning children. Whilst the term "best interests" leaves room for interpretation, its inclusion as the guiding principle marks an important step forward in terms of the approach to be taken- to children as a group as well as in individual cases – when determining the most appropriate solutions to situations in which they find themselves.
Survival and Development (Art 6): The State's obligation to do everything possible to ensure child survival is a concept that has never before been recognised in international human rights law. It reflects the fact that special measures are required to prevent child mortality and disablement due to disease and malnutrition.

Registration of Birth (Art 7): The Convention made it obligatory that Child shall be registered immediately after birth. It also recognises the right of child from birth to have a Name, Nationality and as far as possible the right to know and be cared for by his or her parents.

Preservation of Identity (Article 8): This is another totally new obligation. Here the Convention underscores the child's right to name and nationality by the careful protection of the child's identity. The provision is intended to prevent the recurrence of this phenomenon anywhere in the world.

Right to Parental Care (Art 9 & 10): A Child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedure that such separation is necessary for the Best Interest of the Child. A child who is separated from one or both parents shall be given opportunity to maintain personal relation and direct contact.

The Child's Freedom of Expression (Article 12 & 13): The right of the child not only to express an opinion but also to have that opinion taken into account in matters that affect him or her is a highly significant recognition of the need to give children a greater say in their own lives.
Freedom of Children (Art 14 & 15): Every child is entitled to the right concerning freedom of thought, conscience and religion as well as freedom of association along with freedom of peaceful assembly. No restriction can be imposed on the exercise of these rights other than those imposed in conformity with the laws which are necessary in a democratic society.

Right against unlawful interference (Art 16): No child shall be subjected to arbitrary arrest or unlawful interference. Child has the right to the protection of law against such interference or attacks.

Child Abuse and Neglect (Article 19): The feature of special interest in this article is the emphasis placed on the prevention of intra-familial abuse and neglect, which has never previously figured in a binding instrument.

Adoption (Article 21): This article is of special importance because of the emphasis it places on the need for strong safeguards surrounding the adoption process – especially as regards inter-country adoption and the fact that it brings into this binding instrument principles that were adopted only three years ago by the United Nations in the framework of a non-binding declaration.

Health (Article 24): In addition to its explicit references to primary health care and to education regarding the advantages of breast-feeding as means of promoting access to the highest attainable standard of health, this article stands out because it mentions – for the first time in a binding international instrument – a State obligation to work towards the abolition of traditional
practices, such as female circumcision and preferential treatment of male children, that have harmful consequences for children's health.

**Periodic Review of Placement (Article 25):** The obligation to review periodically all institutional placements designed to ensure the care, protection or treatment of children, in order to determine whether or not they are still appropriate has never previously figured in a human rights instrument.

**Education (Article 28):** This Article recognises the right of the child to education progressively and on the basis of equal opportunity. It obliges the State Parties to recognise child right to education for which primary education shall be made compulsory and available free to all. Higher education shall be accessible to all on the basis of capacity by every appropriate means. This provision has a direct relationship with the Universal Declaration of Human Right which recognises Right to Education which is at least free up to elementary and fundamental stages under Article 26. In this regard the Universal Declaration of Human Rights recognises the Right of parents to choose the kind of education that shall be given to their children. The novelty here is that, whilst corporal punishment is not explicitly outlawed, there is reference to the fact that school discipline must be administered "in a manner consistent with the child's human dignity".

**Drug Abuse (Article 33):** This is the first time that specific mention is made of the need for protection of children from drug abuse and from being used in the production and distribution processes of illicit substances.
**Deprivation of Liberty (Article 37):** The aspect of special note in this article is the inclusion of the principle that deprivation of liberty must be looked upon as a last resort and, if it is nonetheless ordered, must be limited to the shortest possible period of time.

**Rehabilitative Care (Article 39):** An important addition to the body of children's rights is this article which places an obligation on States to promote adequate treatment for children harmed physically or psychologically as a result of violations of their right to protection, in particular, from exploitation and cruelty.

**Administration of Juvenile Justice (Article 40):** Many of the essential principles of the 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice – a non-binding instrument – have been incorporated into this article, the longest and most detailed of the whole Convention, with the result that international norms in this sphere have been significantly upgraded.

**Making the Convention Known (Article 42):** Strictly speaking, this article comes under the implementation provisions of the Convention. It is well worth highlighting here, however, because it is the first time that specific and explicit recognition has been given to the need for children themselves to receive information on their rights. This is a further indication of the gradually changing attitude towards children that, overall, this Convention both reflects and helps to foster.

The above analysis of UNCRC should not be seen as an exhaustive list of the improvements that the Convention brings to children's rights standards. Many
others – including those dealing with minority children or indigenous children, the special needs of handicapped children, protection from all forms of exploitation, freedom of expression and association, to name but a few – could also validly be mentioned. With that proviso, however, it does demonstrate that considerable extent to which the Convention contributes to the struggle to improve practices and objectives in child welfare and protection.

**Tracing Juvenile Justice:**
This section ascertains the position of Juvenile Justice in the contemporary international framework concerning Rights of the Child. In India and many other countries there exist a separate system in the nomenclature of Juvenile Justice System, which by and large derives sanction for such special treatment to children in conflict with law from the framework concerning Rights of the Child. It also guarantees children who come in conflict with law through legal protection that their freedom and liberty does not be curtailed. In this endeavour to ascertain the position of Juvenile Justice, the framework contemplated under the United Nations Convention on the Rights of the Child shall be the subject of review. Occasionally, Juvenile Justice legislation of different countries especially of India shall be examined in order to find an explanation to the question why these countries along with India chose to formulate their laws in the nomenclature of Juvenile Justice.

It is essential to point out here that the UN Convention does not use Juvenile Justice anywhere in the body of the text. Juvenile Justice is conceived in the UN Guidelines like the United Nations Standard Minimum Rules for the
Administration of Juvenile Justice (The Beijing Rules) 1985, the United Nation's Rules for the Protection of Juvenile Deprived of their Liberty, 1990, United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) 1990 and also domestic sphere of various countries including India. Municipal law of India and many other States uses the term with same sprit as understood from the construction of language which is termed in the Convention as Children who come in conflict with law. Interchangeably the Convention also uses the term Child deprived of liberty. In this regard provisions have been made under Article 40 and 37 as well as Article 16 of the Convention. The liberal construction must flow from the language used taking into consideration for whose benefit the provision may have been enacted. The choice between a strict and liberal construction arises only in case of doubt in regard to the intention of the words used. The need to resort to any interpretative process arises only where the meaning was not manifest on the plain words of the provisions. If the words are plain and clear and directly convey the meaning, there was no need for any interpretation.\(^{225}\) The Juvenile Justice law mostly convey the same meaning when the provisions of children with conflict with law is analysed. Therefore, there is hardly any ambiguity between both the phrases. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. In order to define the intention of the Legislature, there can scarcely be a better test that of probing into the motive and philosophy of the relevant provisions keeping in mind the goals to be

\(^{225}\) A similar view was held in Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner of Commercial Taxes, AIR 1992 SC 152 at 158, while interpreting the intention of the legislature.
achieved by enacting the same. For this purpose intention has to be gathered first by ascertaining the meaning of the words used in the provisions in question and then noticing their legal effect. To ascertain the literal meaning it was equally necessary first to ascertain the just apposition in which rule was placed, the purpose for which it was enacted and the object which it was required to sub-serve and the authority by which the rule was framed. As has been observed in Goodyear India Ltd. v. State of Haryana, the nomenclature of the Act was not conclusive nor determining the true character and nature of a particular tax, with reference to the legislative competence of a particular legislature, the court will look into its pith and substance. In view of this observation of the court one can deduce that by merely using Juvenile Justice it is not restricted another category of children rather the detailed provision of the Act which seeks to address children in conflict with law. To find out the intention of the legislation, if possible it should be found out from the language used in case of doubt. The purpose of legislation should be sought for, to clarify the ambiguity only, if any, the fairest and most rational method, says Blackstone to interpret the will of the legislator was by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are neither the words, the context's the subject matter, the effects and consequence, nor the spirit and reason of the law.

The Convention guarantees all Rights for all Children. When a special condition is inflicted like the status changes from subject of a nation to refugee

227 Prithi Pal v. Union of India, AIR 1982 SC 1413 at 1419.
228 AIR 1990 SC 781 at 797.
or exposed to a condition of exploitation like child slavery or comes in conflict with law in such situational exceptions different safeguards have been conceptualised, which are special safeguards mostly in the nature of affirmative actions. As a situation of conflict with law is circumstantial and occurs to child contextually therefore, it has been separately dealt with. It is circumstantial because a child in his her childhood might come in conflict with law or may not also, but in case of an occasion that arises where a child comes in conflict with law they are entitled to these special safeguards. In contrast the Indian Law is construed with the understanding that it is the environment around the child, which creates delinquent behaviour among children. Accordingly it attempted to address the issues of a certain category of children who due to their disadvantaged position might adhere to delinquency. As a matter of preventive conflict situation with law involving child, the Indian law brings the children who need care and protection under its framework. However while the UN Convention makes special safeguard for children in conflict with law the other aspects, which the Indian law puts in the same legislation, are addressed separately in various Articles of the Convention. It is needless to say that there are provisions made in the convention to cater to the needs of children who need care and protection as visualised in Indian law, but that is inbuilt in the body of the text in different manner and different contextual rights of children. In a nutshell the convention detached preventive measures to address delinquency act from provision for children in conflict with law. In fact the categorisation of children for purposes of prevention of any situation where the child might come in conflict with law for that matter special treatment to a class of children is very much contested
and vehemently criticised in the policy environment on the ground that the criminal orientation of one aspect of a legal framework might influence the other without any exposition of children to crime (Goonsekere). Moreover, it is also an imaginary provision that those children who need care and protection unless given opportunity might end up in crime. While one can see that Indian law has clubbed both categories of children under one umbrella legislation the UN Convention has contemplated different provisions for different kind of situation. The provision for children who come in conflict with law has been exclusively dealt with in clear terms. The differential treatment of children in the criminal justice system from adults is conceptualised as a Right against the State, keeping the State Party under obligation to provide treatment in a manner in which children are not seen as criminals.

While an attempt to locate juvenile in the broader framework of Rights of Child gives the understanding that it is viewed as a special situation for a category of children and protection to such children is to be afforded as a matter of Right, the Convention also lays down that a variety of disposition such as care, guidance, supervision, counselling, probation, foster-care, education, vocational training as against institutional care and in course of rendering the above services the rights conferred on children are required to be fulfilled.

Article 37 and 40 are specifically aimed at protecting the rights of the child who comes in conflict with the law. The principle that capital punishment and

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imprisonment cannot be imposed for offences committed by children and the principle that every child deprived of liberty shall be separated from adults have been duly recognised as Rights of children who come in conflict with law. As Article 37 and 40 are specifically dealing with children in conflict with law, an analysis of both the provision in its exact verbatim would provide further explanation about how both the provisions found expression in the Convention. These provisions are quoted verbatim below:

Article 37: States Parties shall ensure that:

Article 37(a) no child shall be subject to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age;

Article 37 (b) 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 last resort and for the shortest appropriate period of time;

Article 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 persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
Article 37 (d) 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.

Art 40 (1) States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

Art 40 (2) To this end, and having regard to the relevant provisions of international instruments, State Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed:

(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 according to 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
guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority of judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(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.

Art 40(3) States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
(a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringed the penal law.

(b) 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.

Art 40 (4) A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes 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 their circumstances and to the offence.

In this regard, a reference can also be made about Article 16 which provides that 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 honour and reputation. The Child has right to the protection of law against such interference or attacks.

The United Nations Convention on the Rights of the Child stipulates that children appearing before courts of law be treated well. They should receive a fair hearing; they should be allowed to speak freely; they should be presumed innocent until proven guilty; they should not be compelled to give testimony; and they should be treated with dignity. Their best interests should be the court's primary concern231. The theory of Children's Right is a

consequentialist one with the goal of maximising welfare. It encompasses the welfare value of a community of people who have not been let down by adults in the past ('the good of non-betrayal'). It differs from most recent theorising about children's rights which proceeds from a priori concerns with liberty, autonomy or respect. Whilst similar conclusions on many matters might be reached on either approach, one advantage of a consequentialist theory is that it lends itself readily to a transformative political strategy.\textsuperscript{232} It is justifiable to deny a legal right or to grant a claim right to a class of beings if this produces maximum happiness consistent with the principle of just distribution.\textsuperscript{233}

The UN Convention on the Rights of the Child provides for protection of freedom, liberty and dignity of child as a human person. Therefore, it can be held that protection of children who are alleged as, accused of, or recognised as having infringed the penal law have been endowed with rights within the framework for rights of child. As it creates a special category of children who are in conflict with penal laws, similar conditions of children can be identified as part of the definition of Children in Conflict with Penal Law. Such a review indicates that juvenile justice system in various parts of the globe relate to this definition, except change in the nomenclature. In India the Juvenile Justice System in fact addresses two categories of children who are recognised as Children in Conflict with Law and Children who need Care and Protection. The Indian law in its amended version recognises children in conflict with law as a

separate segment for which it made special provisions. In view of this relationship between juvenile justice and child who come in conflict with law, it can be inferred that juvenile justice being the substitute word for child in conflict with law has been recognised as a right of the child within the existing framework of rights of child. It can be inferred from such an analysis that Children who come in conflict with penal law being alleged as; or accused of; or recognized as having infringed the penal law of the country are entitled to protection in the criminal justice system as a matter of right by virtue of Article 37 & 40 of UNCRC.

**Juvenile Justice in India from the Perspective of UNCRC**

The interface between Rights in relation to children as envisaged under United Nations Convention on the Rights of the Child and the Juvenile Justice Law in India reveals that Juvenile as notion is grounded on the sublime framework of the Rights of the Child as both seek to secure for children their best interest for realisation of full and harmonious development of child personality. While analysing the conceptual framework of the Convention in relation to the child who come in conflict with law, which the Indian law terms as Juvenile Justice, it is apparently clear that among a wide range of Rights, children who are alleged as; or accused of; or recognized as having infringed the penal law of the country are also conferred with right for their protection in the criminal justice system in such a manner which takes into account the inherent dignity of child as a human person. Under the provisions of the Convention such children are required to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces
the child's respect for human right and fundamental freedom. Every child deprived of liberty shall be treated with humanity and shall be separated from adult. Thus regulatory control are often based on the duty of the State to protect the children who come in conflict with law (Goonesekere, 1998:252). The Convention provides for explicitly, the manner in which rights of children need to be protected in the context of any kind of conflict between children and the criminal justice system of the State.

These principles for protection of children when they come in conflict with law are generally accepted in the common law tradition, but these were not widely followed in different countries. Some of the example of such rights, which are recognised in the common law system are the principle of presuming innocent until proven guilty, the right to be informed promptly of charges level against accused, the right to speedy trial, impartial trial in free and fair system, legal representation, the right to protection from self-incrimination, right to appeal against the decision of trial court, the right to have an interpreter if the trial is conducted in a language which the accused does not understand and the right to protection of privacy (Lundy, 1997;78). Thus as a matter of obligation under the Convention, the States are required to provide protection to children who come in conflict with law no matter whether the State concerned follows common law tradition or not. In India, as it largely pursue common law tradition, it has framed legislation to deal with children in conflict with law in the nomenclature of Juvenile Justice Act 2000. The Indian law concerning Juvenile Justice, eventually protects interests of Child as envisaged under UN

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234 Article 40 of UN Convention on Rights of the Child.
235 Article 37(c) of UN Convention on Rights of the Child.
236 The first uniform law was also named as Juvenile Justice Act 1986. The present law has an extended title.
Convention on Rights of the Child in relation to Children who have come in conflict with law.

It has been seen that there is a trend of enactment of central law which are uniform for the entire nation on the subject of children living behind the trend of making state wise laws in the last quarter of 20th Century. This may be due to the reason of the obligation of union government at the international level due to its ratification or accession to various international binding or hard treaties. In fact the Indian constitution authorises the union govt. to make legislation for giving effect to international agreements under Article 253. This provision empowers the Indian Parliament to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decisions made at any international conference, association or other body. In relation to rights of children juvenile justice becomes a subject matter of legislation for the Indian state as it ratified the UN Convention on the Rights of the Child along with 3-instruments pertaining to juvenile justice. A reference can be made in this regard that apart from Article 253 of the Indian constitution, under the Directive Principles of State Policy Chapter, in Article 51 provides that the state shall endeavour to promote international peace and security, maintain just and honourable relations between nations, foster respect of international law and treaty obligations in the dealings of organised people with one another and encourage settlement of international dispute by arbitration.

The right of the juveniles has been gaining importance in various International Declarations and Convention framed at different point of time. Article 14 (4) of
International Covenant on Civil and Political Right 1966 (ICCPR), provides that "in the case of juvenile persons, the procedure (determining the criminal charge) shall be such as it will take account of their age and desirability of promoting their rehabilitations". India is a signatory State to the ICCPR. The covenant requires the State parties to take into account the above provisions for juvenile justice. The first and foremost responsibility of the State parties is to treat juveniles in such a conducive manner as it would maximize their opportunity to mature into responsible citizen rather than to fall into a life of crime. The objective of the juvenile justice system should be based on reformation and rehabilitation rather than punishment.

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (known as Beijing Rules) 1985 has a substantial contribution to the international system for the protections of children’s rights. The Standard are intended to be an ideal model for the member states in handling the young persons in conflict with law within the prescribed guidelines of juvenile justice system. The Beijing Rules provide for strict limits to the juvenile detention, optimum use of community based modalities establishment of separate juvenile courts and provision of special police personnel as well as provision of specialized facilities, programmes and services. With the changing of times, the perceptions and looking of international body as well as nation states has been more purposive and meaningful for the protection and development of child rights. The United Nations Convention on the Rights of the Child postulates the special treatment to the juvenile delinquent or children in conflict with law with more vigour and clarity.
The United Nations Convention on the Rights of the Child, which Indian State ratified in 1992, under Article 2 (2) desires the State Parties to take appropriate measures to ensure that the Child is protected against all forms of punishment on the basis of status, activities, expressed opinion, belief of the child's parent, legal guardian or family member. This provision seems to have adequate influence over the legal reform to ostensibly given way to legislations concerning children and juvenile by adopting a principle of less punitive punishment.

The notion of best interest of the child as primary consideration should be undertaken in all public or private bodies including the court of law. Child should be provided with protection and care as is necessary for his/her well being. Appropriate legislative, administrative or other measures shall be undertaken for implementation of the rights.

The uniform age group both for boys and girl in the definition of child and juvenile seems to have the resultant of the impact of UNCRC which emphasises on non-discrimination as a basic principle. Besides the cut off age group of 18 is also the targeted age group of the convention when it said in Article 1 that every human being below 18 is a child for the purpose of the Convention. It can be construed that UNCRC had impacted the Indian legislation on the basis of the fact that while the Juvenile Justice Act 1986 provided for two different age group for boys and girls, where the culpability was construed by gender, the new Act of 2000 done away with a uniform age group in a non-discriminatory manner. One of the basic principles of the Convention is non-discrimination. It says that the State Parties within their
jurisdiction shall respect and ensure the rights without discrimination on any kind irrespective of child’s or his/her parents or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.\textsuperscript{237} Thus the 2000 Act has done away with the differential treatment on the basis of sex.

The provisions of Article 3 and 4 of UN Convention also desired for legislative measure for protection of rights conferred on children in conflict with law under Article 37 and 40 of the Convention. In this regard the right of child concerning inherent right to life guaranteed under Article 6 is an important aspect as in course of making of law for dealing with children in conflict with law adequate provision has been made for abolition of death penalty on children who are found guilty of any penal provision which attracts death sentence.

There is a provision in Article 9 in the Convention that as far as possible child shall not be separated from his/her parent against their will. Of course such separation is permissible when competent authority subject to judicial review determines in accordance with law and procedure that such separation is necessary for the best interest of the child. Even though the provision can be construed as separation is permissible when child is taken into custody for infringement of penal law but the Indian law seems to have accepted this notion in a positive spirit while it contemplated the forms of punishment for juvenile which can be given by sending the child back to parents with admonishment.

\textsuperscript{237} Article 2(1) UN Convention on the Rights of the Child.
Article 12, 13 and 14 together speak of the right of the child to express themselves and form opinion. The freedom of expression includes the Right to be Heard in any judicial and administrative proceedings affecting the child directly or through representative or an appropriate body consistent with procedural law of the land.\textsuperscript{238} The Juvenile Justice Act made a provision of enquiry report by Probation Officer which commensurate with the provision that the right of the child to be heard can be ensured through appropriate body. In this case also the provision of Article 12 (2) influenced the Indian law. Similarly, Article 16 made it a mandatory provision that child shall not be subjected to arbitrary arrest or unlawful interference with his/her privacy, family, home or correspondence nor to unlawful attack on his/her honour and reputation. The child has the right to the protection of the law against such interference or attack. This provision is apparently reflected in the provision of Juvenile Justice Act, which in Section 27 prohibits disclosure of identity of children in conflict with law in newspaper, magazine or other media. In another dimension the Convention under Article 19(1) makes out that appropriate legislative measures shall be taken by State Parties to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse while in the care of parent, legal guardian or any other person. The Juvenile Justice Act has pointed out punishment for cruelty on child in conflict with law from Section 23 to 28.

Article 37 and 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 and the

\textsuperscript{238} Article 12 (2) UNCRC.
principle that every child deprived of liberty shall be separated from adults have been duly reflected in the law. As Article 37 and 40 are specifically dealing with children in conflict with law, an analysis of both the provision in detail would provide further explanation about how both the provisions found expression in the Juvenile Justice Act.

Article 37(a) of the Convention says that no child shall be subject to torture or cruel, inhuman or degrading treatment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age. The JJ Act 2000 has made a provision under Section 23 for punishment in case of cruelty to juvenile or child which may extend to six months or fine or both by persons having the actual charge of, or control over, a juvenile or child. The offences relating to cruelty shall be considered as cognisable offence and where such act is punishable under any other law which is higher than or greater in degree from the prescribed punishment under this Act, in that case offenders shall be liable to punishment only under such Act. The term cruelty under this provision in the normative structure covers assault, abandonment, expose wilful neglect which may cause mental or physical suffering. The JJ Act in Section 16 stated that no juvenile in conflict with law shall be sentenced to death or imprisonment of any term or committed to prison in default of payment of fine or in default of furnishing surety. The same provision of course makes an exception in case of juvenile who has attained the age of 16 years and who has committed an offence which is so serious in nature according to the view of the Juvenile Justice Board that in the interest of other juvenile and also in the interest of that particular juvenile in that case an order can be made to keep the juvenile in
such a place of safety and in such manner as the Board thinks fit with report to the State Govt. Even though the JJ Act of 2000 made the above provision which are in conformity with 37(a) but the impact of the Convention cannot be held to be the sole reason as similar provision was made in the JJ Act of 1986 under Article 41. Not only JJ Act 1986, even the Children Act of 1960 enacted by Indian Parliament for union territories also had exactly the same provision under Section 41. There is a tradition of such normative approach concerning legislation on children in conflict with law in India historically. Both the 1960 and 1986 laws even made provision against imposition of death penalty or imprisonment with using term delinquent which was used in the previous Acts. What did not find a place is the use of term torture and degrading treatment in course of construction of the broader definition of cruelty.

Article 37 (b)-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 last resort and for the shortest appropriate period of time; The JJ Act 2000 delineated the procedure in relation to arrest, detention and imprisonment, which can be practiced as lawful recourse. The Act makes provision under Section 63 for Special Juvenile Police Unit to deal exclusively with juveniles. It says that once it is revealed that the accused is a juvenile he or she shall be separated from adult and be placed before Juvenile Justice Board or Child Welfare Committee as the case may be on the basis of the nature of incidence. No child can be detained in police custody or in adult prison. They even suggested that imprisonment of juvenile cannot be imposed. In fact the constitutional guarantee under Article 21 about
life and liberty of individuals, the criminal procedure code and penal law do not allow unlawful or arbitrary arrest, detention or imprisonment.

Article 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 persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances; 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 (Narrain).239

Article 37 (d)-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 (Narrain).240

With regard to the provision of Art 40, Narrain observed that, it obliges the state to incorporate basic safeguards of all those who come in contact with the criminal justice system. None of these safeguards have been 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. However it has to be noted that the JJ Act 2000 does not incorporate the procedure as envisaged in the Code of Criminal Procedure instead leaving the procedure to be determined by rules made by State governments. 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. The fact that rights of children who come in conflict with the system have not been specifically incorporated is a serious omission (Narrain).

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 Indian Penal Code. However it has not been incorporated under the JJ Act 2000. If Art 40(3) is read along with the principle of best interests of the child (Art 3) and the principle enunciated in the Beijing Rules 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) contains, 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 stigmatised.

Art 40 (4) mandates a variety of dispositions such as care, guidance and supervision order 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 JJ Act 2000 does provide a variety of dispositional options these options do not 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.

The above analysis of legal framework for juvenile justice in India reveals that the present law has attempted to incorporate the provisions of UNCRC in the body of normative structure. Although the law is not yet oriented with the spirit of UNCRC to a larger extent it is in conformity with the provisions contemplated under Article 37 and 40 of the UNCRC. Major challenges inherited in the criminal laws in India like imposition of death penalty and imprisonment of any
term for juvenile are no longer a part of the law. As has been discussed in the foregoing paragraphs, it is within the reach of the state to protect negative rights as it does not involve much cost. In fact the juvenile justice and restorative measures are considered as cost saving endeavour of the state. Caeti and Fritsch observe that one of the reason behind propagation of success of juvenile justice as a separate system is that the cost of juvenile justice system is far less than that of the adult system of justice. Cases are processed quickly in the juvenile court, for most cases attorneys are not needed, and the time spent on each case is also reduced (Caeti and Fritsch, 2006:669). However, the extended coverage under the Juvenile Justice Act 2000 in India by bringing children in need of care and protection does not make it purely a cost saving endeavour.

**Translation of Law into Action - The Field Realities:**

The discussion in this chapter so far conveys that justice to juvenile is recognised as a right of children under UNCRC. The Juvenile Justice Act 2000 in India by and large follows these principles and provides in explicit term for the protection of these rights of the child. Even the Juvenile Justice Act 2000 enlarges the scope of juvenile justice by making provision for children in need of care and protection. In this regard it is essential to verify the status of law at the level of enforcement. In fact the major focus of this chapter is to analyse rights of the child from the perspective of state of children. Hence an attempt is made here to analyse the rights of the child as envisaged under UNCRC with empirical evidences (see chapter III of this thesis). If juvenile justice is an inherent aspect of rights of the child framework, then it must have an impact at
the operational level. Therefore, through the empirical evidences the provision relating to juvenile justice in the UNCRC is analysed here.

The provision under Article 37 of UNCRC desires the state parties to ensure that children are not subjected to torture. Capital punishment or life imprisonment are not imposed on persons below the age of eighteen years. The engagement of the present research in Cuttack district brings to notice that while punishment is generally not imposed there are indications of torture at various levels. None finalisation of cases also a form of torture as juveniles are constantly worried about their future. Besides the principle of presumption of innocence until guilty is proved through a process of natural justice also gets marginalised. Many children who claim not to have committed any offence also being stigmatised due to delay in court process. The provision that any kind of arrest, detention or imprisonment must be in conformity with the law is also not satisfactorily ensured. As the law prohibits imprisonment and detention therefore the fact relating to custodial detention in police custody is against the fundamental norm. The provision of access to justice which finds expression through the provision of legal assistance and prompt justice is also denied in most of the cases. The cases are pending for indefinite period violating the prescribed time limit. Disposition measures are hardly asserted.

The empirical work in the Cuttack district, reveals that the performance of various institutions created under the Juvenile Justice Act 2000 is grossly manifestly low. There can be no denying that in many areas particularly in matter of rehabilitation and social reintegration the performance of these agencies has fallen disappointingly short of the vision of the Act. For variety of
reasons like inadequate funding, lack of awareness and absence of coordination the reality has not even approached the ideal, and much remains to be accomplished in the administration of juvenile justice system. Due to inordinate delay in finalising cases of juveniles the goal of socialisation and reintegration could not be achieved. In the absence of these efforts the goal of prevention of delinquency has suffered a set back.

Conclusion:
The idea that children should have right finally received recognition through the effort of United Nations. India as a state party to UNCRC has also made progress in legislative reform. But an investigation into working of such legal measure encounters an imperfect order. There is a great deal of need to give proper expression to the laws as otherwise such endeavour would not help in bringing about a change in the life of children. Children are an important asset of a nation. It is the nation's responsibility to nurture them through various stages of their development to enable them to realise their full human potential. A constellation of legislations have been enacted, but what is required is to chart out meaningful measures to make juvenile justice an accomplished fact (not phoney legality) of the social order (Krishna Iyer, 1999).