

JUVENILE JUSTICE ADMINISTRATION AND CORRECTIONAL SERVICES IN BANGLADESH: A CRITICAL REVIEW

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1. Introduction

It is accepted that children who are criminally culpable under the State's penal codes are in conflict with the law. Historically, in matters of criminal justice, the violation of law was of greater significance than the age or the immaturity of the offender. This stemmed from the ideology that children, who were regarded as miniature adults at that time, did not merit special treatment. However, over the past century and a half changing perceptions and sustained efforts by specific groups within the civil society, have led to the development of a criminal justice system with a more child-friendly orientation. The rationale was that since children are not fully aware of the implications of their acts they are required to be treated with sensitivity and care.¹

The administration of justice for minors who are accused of, or alleged as having breached the penal laws of the country essentially constitutes the juvenile justice system. Juvenile justice, in the strict sense of the term, denotes the right of children to have the support at all levels, i.e., the State, the family and the community, in realising their rights of survival, protection, development and participation. The present exercise is an attempt at reviewing the administration of juvenile justice in Bangladesh and assessing the impact of correctional services on juveniles and children.

2. Administration of Juvenile Justice: International Perspectives

The international approach to administration of juvenile justice recognises the necessity to have the rights of children redefined and developed in concrete ways simply because they are a special category of human beings. Accordingly, the United Nations have taken significant steps that have contributed to the development of standards for treatment of children who come into conflict with the law. The initiatives are described below in brief for an understanding and appreciation of the standard setting role of the United Nations:

1. Khair, Sumaiya, "Street Children in Conflict with the Law: The Bangladesh Experience", *Asia-Pacific Journal on Human Rights and the Law*, Vol.2, No. 1, 2001, Kluwer Law International, pp.55-76, p.56.

2.1 Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) 1985

The Beijing Rules provide minimum conditions for the treatment of juveniles who come into conflict with law. The Rules explicitly provide for a separate and specialised system of juvenile justice and underscore that detention of children should be used as a last resort and that too, for the shortest possible time. The Rules discourage capital and corporal punishment for children. Under the Rules children should be allowed to participate in the legal proceedings. Moreover, care and education of children must be ensured during the period of detention. At all stages of the proceedings discretion should be exercised in the best interests of the child.

In terms of treatment the Rules require that children should be treated fairly and humanely. Measures adopted should be proportionate to the nature of the offender and the offence. The Beijing Rules however, refrain from prescribing approaches beyond setting forth the basic principles of proportionality and the limited use of deprivation of liberty, a shortcoming that has been resolved substantially by the Convention on the Rights of the Child.

2.2 The Convention on the Rights of the Child 1989

The Convention on the Rights of the Child (CRC) 1989 in Articles 37 and 40 spell out the rights of children in conflict with the law and ensure basic guarantees and legal and other assistance for their defence. Article 37 of the CRC ensures that no child shall be subjected to arbitrary arrest, detention, torture or other cruel, inhuman and degrading treatment including capital punishment and life sentence. The arrest or detention of a child must be in conformity with law during which the child shall be treated with humanity and dignity.

Many of the essential principles of the 1985 Beijing Rules find expression in Article 40 of the CRC and lend them a binding effect. Article 40 of the CRC provides that every child alleged as, accused of, or recognised as having violated the penal law must be treated in a manner consistent with the child's human rights, fundamental freedoms, sense of worth and dignity. Regard must be had to the age of the child and the need to promote its reintegration into society. Accordingly, a child must be presumed innocent until proven guilty, be informed of charges promptly and cannot be compelled to give testimony or confess to guilt and must have access to legal representation. Articles 37 and 40 are qualified by Article 3 of the CRC which states that in all actions, whether undertaken by public or private social welfare institutions, courts of law,

administrative authorities or legislative bodies, the *best interests of the child shall be a primary consideration*.

The Convention on the Rights of the Child is complemented by two other major documents, which set standards and guidelines for the protection of children in conflict with the law:

2.3 UN Guidelines for the Protection of Juveniles Deprived of their Liberty 1990

These Guidelines apply to all institutions, which detain any person under the age of 18 years. These include institutions for health, welfare or juvenile justice. The Guidelines advocate the least possible use of deprivation of liberty and discourages detention in prisons and other closed institutions. Moreover, the Guidelines advise that children, when detained, should be kept separate from adults in order to protect them from negative influences. Rather, facilities must promote health of juveniles and instil in them self respect and a sense of responsibility to enable them to make a smooth return to society. Access to parents during the period of detention is essential.

2.4 UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) 1990

The Riyadh Guidelines emphasise on the need for integrated and comprehensive plans for preventing crimes by children and young people. They advocate for formal mechanisms of crime control as a last resort. The Guidelines also underline the need for having due regard to the human rights and fundamental freedoms of children, particularly of those who are at 'social risk', such as children who are homeless, destitute, abused and so on. Accordingly, laws and procedures should promote, protect and uphold children's rights. The Guidelines further recommend that children should be encouraged to participate in policy formulation and implementation of prevention programmes as active and equal partners.

An examination of the international standards on the administration of juvenile justice reveals two broad principles that are of particular significance to children in conflict with the law. *Firstly*, that the well being of children who come in conflict with the law must be ensured and *secondly*, the children who come in conflict with the law must be treated in a manner commensurate to their circumstances and nature of the offence. In other words, the rights of children in conflict with the law must be protected in ways that will facilitate their reintegration into their societies and assumption of responsibilities therein. Therefore, it is essential to weigh the considerations adequately before committing

children to formal institutions. In this context, diversion from formal legal procedures is always an acceptable alternative.

Endorsement of international standards, however, does not automatically guarantee their practical enforcement in domestic context of states. While international standards are meant to apply objectively, they essentially lack binding force. Therefore, while international Conventions may engender certain responsibilities for ratifying states, they carry no formal obligations in terms of practical implementation.² In the circumstances, it is crucial to develop enabling mechanisms within the domestic legal system for utilisation of international standards in realistic ways.

3. Administration of Juvenile Justice in Bangladesh

The legal provisions relating to the administration of juvenile justice in Bangladesh have their roots in colonial laws. *The Bengal Code and Prisons Act of 1894* required separate trials for children and adults. Guidelines for reformation were contained in the *Reformatory Schools Act 1897*. *The Code of Criminal Procedure of 1898* provides for the trial of children in juvenile courts, which was also later recommended by *The Bengal Children's Act 1922*. These various laws and provisions relating to custody, protection, trial and treatment of children were eventually consolidated to produce *The Children Act 1974*, to be read together with *The Children Rules 1976*, a mechanism conceived to protect the child's best interest during all kinds of legal processes.

The Children Act 1974 contains both procedural as well as substantive components. The procedural component, supplemented by *The Code of Criminal Procedure 1898*, sets out special procedures for juvenile courts and for committing children to the protection and care of state facilities. The substantive part, on the other hand, describes offences done to children and prescribes penalties for them.

The Children Act 1974 lays down protections for children in conflict with the law as well as those who are at social risks. The Act requires that Courts must have regard to the age and character of the child and other related factors before passing any order. It provides for separate juvenile courts and forbids the joint trial of child offenders with adults, even where the offence has been committed jointly. The Act also lays down measures for the care and protection of destitute and neglected children including children whose parents/guardians are either alcoholic or who habitually neglect, abuse or ill-treat children by engaging them in begging or other purposes.

2. *Ibid.*, p.64.

3.1 Delineating the Age of Criminal Responsibility

There is often no uniform standard regarding the age at which a person is necessarily considered a child. This is primarily because the age premise is likely to vary across cultures, values and social systems. Article 1 of *The Convention on the Rights of the Child* denotes that a child is a person under the age of 18 years unless, under the law applicable to the child, majority is attained earlier. In other words, the Convention permits member states to set the age of majority in conformity with national laws. This creates problems when, as is the case in Bangladesh, states have domestic legislations that define a child varyingly to suit specific contexts.

Having said that, it is difficult to find a clear-cut definition of a child in international standards as well. Whereas *The Convention on the Rights of the Child* regards all persons under the age of 18 years as children, none of the Rules and Guidelines relating to administration of juvenile justice, i.e., *The Beijing Rules*, *the UN Rules for the Protection of Juveniles Deprived of their Liberty* or *The Riyadh Guidelines* (as discussed later) contains any explicit indication as to who is a child. Rather, the Guidelines often use the terms 'child' and 'young person' in tandem and apply the term 'juvenile' to signify the form of justice system or the type of delinquency.³ It appears therefore, that in the context of juvenile justice 'it is the manner in which a child is treated for an offence which dictates whether a child is also a juvenile'.⁴

Just as the age of a child is a controversial issue, the age of criminal responsibility, though seemingly straightforward and elementary as a concept, presents concrete problems in the administration of juvenile justice. While there is no distinct international standard on the subject, the CRC and the *Beijing Rules* enjoin State Parties to establish a minimum age below which children will be presumed as not having the capacity to infringe the penal law. In so doing, the beginning of the age should not be set too low, having due regard to the child's emotional, mental and intellectual maturity.

The penal law in Bangladesh reflects these considerations to a certain extent. *The Penal Code of 1860*, which sets the age of criminal responsibility states that nothing is an offence, which is done by person under the age of 9 years (Section 82)⁵ and that full criminal responsibility commences

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3. *Juvenile Justice*, UNICEF Innocenti Digest No.3, 1997, p.4.
 4. Van Beuren, Geraldine, *The International Law on the Rights of the Child*, Save the Children, Martinus Nijhoff Publishers, Dordrecht et al., 1995, p.171.
 5. The age of criminal responsibility has been increased from 7 years to 9 years on the 8th of November 2005 by The Penal Code (Amendment) Act, 2004.

only after the age of 12 years. Section 83 of *The Penal Code* provide that an act of a child above 9 years and below 12 years, who has not attained sufficient maturity of understanding to judge the nature and the consequences of his conduct, is no offence. It follows therefore, that children under 9 years lack the capacity for crime and incur liability after the age of 12 years; in between these two ages, criminal responsibility depends on the state of mind. It is to be noted that apart from *The Penal Code*, immunity of children below 9 years of age from criminal responsibility also extends to offences under any other special or local law of Bangladesh.

The Children Act 1974 which is the principal law relating to the administration of juvenile justice states that a child means a person under the age of 16 years, and a youthful offender means a child who has been found to have committed an offence.⁶ When used with reference to a child sent to a certified home or committed by Court to the custody of a relative or other fit person means that child during the whole period of his detention notwithstanding that he may have attained the age of 16 years during this period.⁷ In other words, a child who is below 16 years at the time of his committal will still be considered a child until the end of his detention period even if he reaches the age of 16 years during this period.

Unless the age of a child is ascertained properly there is every possibility of misapplication of laws and misadministration of justice. The virtual absence of birth registration in Bangladesh raises serious difficulties in computing the correct age of a child in Bangladesh. This problem is of particular significance where children are brought before the courts and the magistrates have to rely on information furnished by the police who, in the majority of cases, misrepresent the age of the apprehended child. Although there are provisions in the law that require a medical examination to ascertain the age of the child this is hardly conducted in routine time. Consequently, the child remains in custody like an adult until the conclusion of the medical verification.⁸

3.2 *Setting the Law into Motion: Procedural Aspects*

Although *The Children Act 1974* and *The Children Rules 1976* are premised on the best interests of children who come in conflict with the law and who are destitute, their enforcement in practical terms is rather ineffective

6. Section 2(f)(n), *The Children Act 1974*.

7. Section 2(f), *ibid*.

8. Khair, Sumaiya, 2001, *op.cit.*, p. 61.

and often detrimental to the children. Children traverse through different stages in the criminal justice system from the moment they come into contact with the law. This section attempts to examine the procedural aspects of the juvenile justice system and explore the implications they have for children who come under its jurisdiction.

3.2.1 Arrest and Remand

Generally, a child may be arrested for breaching the penal laws of the land or under suspicion of committing an offence. However, there are other laws, such as *The Bengal Vagrancy Act 1943*, *Section 54 of The Criminal Procedure Code*, *The Special Powers Act 1974*, *The Arms Act 1878*, that are often utilised to arrest children. Children also fall prey to police raids in the wake of political unrest or criminal hunts.

Policemen on the beat identify vagrant children and pick them up from the streets, railway and bus stations, shopping centres, parks and so on. The recognition of status offences, as where a child runs away from home or is deemed disobedient or destitute, also presents a paradox. The practice of taking vagrant and street children into custody essentially criminalises acts which are otherwise not offences in the strict sense of the term. Consequently, a neglected and homeless child becomes the victim of a legal system, which, under the best of conditions, tends to be unjust. Although the right to be heard is fundamental in the human rights discourse the child arrested under *The Vagrancy Act 1943* is devoid of this right, either directly or through appropriate representation in judicial proceedings. The child's right to privacy is virtually non-existent during the process. The right not to be deprived of liberty and only to be detained in conformity with law is also not ensured under *The Vagrancy Act 1943*. This is evident from the fact that children arrested under this Act are often detained for unspecified periods in prisons. Thus, while *The Vagrancy Act 1943* concentrates on maintaining public order, it overlooks children's interests by ignoring their special needs.

Section 54 of *The Criminal Procedure Code 1896* is yet another device that serves to oppress, amongst others, children. The police are empowered under this section to arrest any person on mere suspicion without a warrant of arrest. It is common for law enforcing agencies to indiscriminately arrest and incarcerate street children under the cover of this law on the slightest of pretexts. Apart from Section 54 of *The Criminal Procedure Code*, children's rights and freedom are also compromised by *The Special Powers Act 1974*, which empowers the police to arrest people on suspicion of anti-state activities. *The Special Powers Act 1974* is frequently used to pick up children who, either happen to be loitering on the streets, or are engaged in political agitation by political parties during political

demonstrations and *hartals* (strikes). Street children in such situations, become victims of circumstances and have their rights seriously jeopardised. Children arrested under *The Arms Act 1878* for possessing and carrying illegal arms is another instance of victimisation of children by adults and an insensitive legal system.

When it comes to arresting girls the scenario is even more perplexing. Girl children reportedly make up a much less percentage of juvenile offenders. It is not be so much that girls breach the law less but more, that, the specificities of their contact with the law are not adequately addressed. Classic examples are prostitution and rape where it is more common for girls to be arrested rather than the perpetrators. In other words, girls come into conflict with the law more as victims of prostitution and sexual offences, even if they have actually breached other penal laws. Since there are no separate provisions for housing girl offenders, they are customarily branded as prostitutes and victims of rape in order to acquire for them a place in shelter homes.

Normally, a child may be arrested without a warrant for a cognizable offence⁹ under *The Criminal Procedure Code 1896* but s/he cannot be detained in custody for more than 24 hours. Moreover, if a child under 16 has been charged with a non-bailable offence, the officer in charge of the police station may release her/him on bail and arrange for the child to be placed in a remand home or a safe place until s/he is brought before the court.¹⁰

There is virtually no separation between inmates who are here for correction and those who live here in remand. The resultant is a free mixing between boys with perpetrating and non-perpetrating nature. The consequence is pernicious as children with less or occasional criminal

9. 'Cognizable offence' means an offence for which a police officer may in accordance with the second schedule or under any law for the time being in force, arrest without a warrant. See Section 4(f) of *The Code of Criminal Procedure, 1898*.

10. Sections 48 and 49, *The Children Act 1974*.

are compelled to mix with the more hardened types.¹¹ The current situation raises serious questions about the places of safety ordained by law.

Immediately after the arrest of a child, it shall be the duty of the police officer effecting the arrest to inform the Probation Officer of such arrest in order to enable the Probation Officer to proceed to obtain necessary information about the child's family and other material circumstances likely to assist the Court in making its order.¹² At the same time the officer in charge of the police station to which the arrested child is brought shall inform the parents/guardian of the arrest, if found, and specifying the date, direct them to attend the court before which the child will appear.¹³

The situation on the ground is, however, quite different. Charge sheets are virtually non-existent and children arrested and detained are not shown the grounds for arrest nor are their parents duly informed. The police allege that it is frequently difficult to trace parents and in the absence of adequate facilities they are compelled to detain children in jails until they are brought before the Magistrate. Consequently, children are interned with adult criminals who collude with the police officials to abuse and mistreat the children. Although *The Bengal Jail Code* under Section 499 expressly provides that none shall be admitted into any jail without a writ, warrant or order signed by a competent authority, the reality is quite different as children are frequently locked up with adult criminals without proper authorisation.

It is during arrest and interrogation that children are more likely to suffer police brutality as is evident from a number of studies in the area. Children are allegedly subjected to various forms of maltreatment ranging from transportation to the police stations and jails in handcuffs to detention over 24 hours. Physical abuse and torture are also reported. The practice of placing girl children who are victims of rape or trafficking in the so-called safe custody increases their vulnerability to victimisation and abuse by the police and other inmates.

11. See Rahman, Mizanur, *Tracing the Missing Cord: A Study on the Children Act, 1974*, pp.35-36.

12. Section 50, *ibid.*

13. Section 13(1), *ibid.*

3.2.2 Trial

The Children Act 1974 provides that child offenders may only be tried by juvenile courts or other courts duly empowered.¹⁴ Under the *Children Act 1974* the powers conferred on a juvenile court can be exercised by:

- the High Court Division of the Supreme Court;
- a court of Session;
- a court of an Additional Sessions Judge and of an Assistant Sessions Judge;
- a Sub-Divisional Magistrate; and
- a Magistrate of the First Class;¹⁵

It is evident from the above that although the establishment of separate courts for juveniles is prescribed by law, the above-mentioned courts are permitted by law to try child offenders provided that they apply the same rules and procedures as followed by a juvenile court. These courts sit as juvenile courts only when the offender is under 16 years of age. When a Juvenile Court has been set up for any local area such court shall try all cases in which a child is charged with the commission of an offence.¹⁶ The concurrent jurisdiction of the Magistrate and Sessions Court is to a large extent responsible for the failure to establish an independent juvenile justice system. The inability of providing a separate trial system for juveniles stems from the criminal justice system that is largely traditional in its approach and jurisdiction that is limited in terms of subject matter.¹⁷

Although the law requires the establishment of separate courts for juvenile offenders to date there are only two juvenile courts in Bangladesh, one in Tongi and the other in Jessore. Moreover, despite existing concessions in the exercise of jurisdiction by other courts it is found that very few of them in fact sit as juvenile courts. Most Magistrates, being unaware of the procedures under *The Children Act, 1974* choose instead to try children in accordance with *The Code of Criminal Procedure*.

14. Section 3, *ibid.*

15. Section 4, *ibid.*

16. Section 5, *ibid.*

17. Rahman, Mizanur, *Tracing the Missing Cord: A Study on the Children Act, 1974*, SCF(UK), 2003, p.34.

According to Section 7 of *The Children Act 1974* and Rule 3 of *The Children Rules 1976*, the Juvenile Court should sit at least once a week or as often as may be necessary. Moreover, the Court should, as far as practicable, sit in a place separate from that where ordinary sittings of the Court are held. If need be a different date or time should be chosen for the court to sit. Where a child and adult are charged together, a separate trial must be conducted for the child.¹⁸ Thus, it is provided in Section 8 of *The Children Act* that when a child is a co-accused with an adult in any offence and it appears to the Court that the case is fit for committal to the Court of Session, such Court shall, after separating the case in respect of the child from that of the adult, direct that the adult may be committed to the Court of Session alone. This measure is prescribed strictly in the best interests of the child. In practice, however, the child is often tried together with the adult in the same court without any regard for the law in this context or the child's right to privacy.

The Children Act 1974 also provides for confidentiality in respect of court proceedings against a juvenile offender. To this end Section 9 of *The Children Act* lays down that no person shall be present at any sitting of a Juvenile Court, except

- The members and officers of the Court;
- The parties to the case or proceeding and other persons directly concerned with the case/proceeding including police officers;
- The parents or guardians of the child; and
- Such other person as the Court specially authorises to be present;

Confidentiality often entails the withdrawal of certain people from the hearing of the case. If at any stage during the hearing of a case or proceeding the Court considers it necessary in the interest of the child to direct any person, including the parent/guardian or the spouse of the child or even the child himself/herself to withdraw, the Court may make such order whereupon the person concerned shall withdraw.¹⁹ In the same fashion if at any stage of the hearing of the case or proceeding the Court is satisfied that the presence of the child is not essential, the Court may dispense with the attendance of the child.²⁰

18. Section 6, *The Children Act, 1974*.

19. Section 10, *ibid*.

20. Section 11, *ibid*.

The provision on confidentiality must also be invoked during examination of a child witness. Section 12 of *The Children Act* provides that if at any stage of the hearing of a case or proceeding in relation to an offence against or any conduct contrary to morality or decency, a child is summoned as a witness, the Court may direct such persons as it thinks fit, not being parties to the case/proceeding and their legal advisers and court officials, to withdraw. In any event no report in any newspaper, magazine or any news agency shall be permitted to disclose any details of the Court proceedings in which a child is involved. Similarly, no photograph of the child shall be published which directly or indirectly leads to the identification of such a child unless the Court deems it essential in the interest of the child.²¹ The requirement of confidentiality also extends to reports of Probation Officers and other reports impinging on a child offender.²²

During trial of a juvenile there are certain salient aspects that require special consideration. Section 15 of *The Children Act 1974* states that for the purpose of any order, which the Court has to pass, the following factors shall be taken into consideration:

- The age and character of the child;
- The circumstances in which the child is living;
- The reports made by the Probation Officer;
- Such other matters as may be required to be taken into consideration in the interest of the child;

In practice however, there is evidence that reports by Probation Officers are not sought, the Magistrates preferring to rely on charge sheets or the final reports in police cases. Whatever little merit is attached to reports of Probation Officers is evident only in guardian-referred cases.

Whenever a person whether charged with an offence or not, is brought before any criminal court otherwise than for the purpose of giving evidence, and it appears to the court that he is a child, that court shall make an enquiry as to the age of that person and for that purpose, shall take such evidence as may be forthcoming at the hearing of the case, and shall record a finding thereon, stating his age as nearly as may be.²³ In reality, however, the police and jail authorities make no mention of children's age when they send them to the correctional centers.

21. Section 17, *ibid.*

22. Section 16, *ibid.*

23. Section 66, *ibid.*

Consequently, there are instances when children over the acceptable age are also detained with younger children.

Although it is essential that at every phase of criminal proceedings the child's age, identity and other necessary information be treated as classified in order that the child is protected from the effects of labelling, the reality is quite different. Although a medical examination is legally required to specify a child's age, the usual practice is to put down an age on pure guesswork. The special treatment of children during trial includes the expeditious disposal of the case by a competent and impartial authority in a congenial and a child friendly environment. However, children are frequently denied this privilege, as our courtrooms are chaotic, daunting and far from child-friendly.

Rule 4 of *The Children Rules 1976* states that the hearing of all cases and proceedings shall be conducted in a simple manner without formality. In other words, the proceedings must be conducted in a congenial and homely environment so as to put the child at ease. As such, the Court shall ensure that a child brought before it is not kept under police guard; rather, it must be ensured that the child is in the company of a close relative, friend or the Probation Officer. This is hardly the case on the ground. To begin with the children arrive in the court premises in prison vans along with adult offenders. They are often shackled. As they are ushered into the courtroom they are pushed on to the dock with the other adults. In the circumstances, proximity is more in terms with other adult criminals rather than their relatives, friends or even their Probation Officers.

Rule 4 further lays down that in examining a child and recording his statement the Court shall freely interact with the child during which the Court can elicit information about the offence the child is accused of, as well as other attending factors, like his family, home, physical and mental conditions and so on. Where a child offender pleads guilt or is found guilty the Court shall not forthwith make an order upon such finding. Rather, it shall direct the Probation Officer or such other person as may be deemed fit by the Court to furnish it with a report containing *inter alia* information on family background of the child, his character and antecedents, his physical and mental conditions and the circumstances in which the offence was committed or any such information considered significant in the interest of the child.

In reality however, the attitude and demeanour of judges demonstrate a general apathy towards children's well-being. While the accused are rarely segregated in terms of age, the fact that a large number of accused are brought before the court at the same time makes it difficult for the

judge to single out the child offenders from amongst the teeming adults. Contrary to legal requirements the entire courtroom atmosphere is such as to generate fear in children and intimidate them into silence and submission. This seriously compromises the spirit of the juvenile justice laws.

During the trial stage, the accused reserves the right to cross-examine witnesses and to produce his/her own witnesses thereby placing the burden of proof on the prosecution. Children are never able to exercise this option, as Magistrates summarily decide their cases. Children, like adults, have the right to benefit from the principle of equality before the law and equal protection of law. If any of these rights are infringed the trial itself cannot be deemed 'fair'.²⁴ There is a general lack of due process resulting in arbitrary actions. The attitude of courts towards young offenders is often biased and not based on considerations of the gravity of the offence. Individual circumstances and the offence often have no bearing on the sentence, which is frequently disproportionate.

3.2.3 Sentencing

Verdict of the Court

The mode of punishment for children is restricted to detention and institutionalisation in a certified home. In fact, Section 71 of *The Children Act 1974* prohibits the use of the words 'conviction' and 'sentenced' in relation to children. Alternatively, the words may be read 'found guilty of an offence'.

After the hearing the Court can exercise three options:

- commit the child to a certified home;
- release him on probation; and
- discharge him after admonition;

Section 51 of *The Children Act 1974* lays down that no child shall be sentenced to death, transportation or imprisonment. However, if the Court is of the opinion that the crime committed is of so serious a nature or the child is so unruly or depraved that he cannot be committed to a certified institute, the child can be sentenced to imprisonment. Nevertheless, a child offender so committed shall not be allowed to associate with adult offenders. However, there is no clear indication of what constitutes 'unruly' behaviour. Moreover, once children have been sentenced it is not clear where they should be kept.

24. Khair, 2001, *op.cit.*, pp.70-71. See also Shoshur Bari. *Street Children in Conflict with the Law*, SCF(UK), 2000.

Where the Court finds a child guilty of an offence punishable with death, transportation or imprisonment, it may, if it thinks so expedient, order him to be committed to a certified institute for detention. In such cases the period of detention shall not be less than two years and not more than 10 years, and in any case shall not extend beyond the time when the child will attain the age of 18 years.²⁵ However, during one of the visits to the Tongi Correctional Centre a 15-year old boy who was fined Tk. 10,000 and sentenced to 7 years detention. It is evident that there exists no mechanism for specifying time periods for detention nor any guideline on the course of action once a detainee reaches 18 years. In the absence of birth registration the possibility of children outstaying their time in certified institutes cannot be ruled out. According officials of Correctional Institutes children are sent off to the central jail to complete their unfinished sentences once they attain the age of 18 years. This presents a paradox---if these children are sent to jail then what is the purpose of correctional treatment.

The Court may also, instead of committing him to a certified institute, discharge a young offender after due admonition and advice.²⁶ Contrarily, the young offender may be released on probation for good behaviour for a period not exceeding three years. In this context, the child may be released into the care of his parent/guardian or any other fit person executing a bond, with or without surety, as the Court may require.

The Court may also order that the child may be placed under the supervision of a Probation Officer.²⁷ However, if it appears to the Court from reports of the Probation Officer that the youthful offender has not been behaving well during the probation period, it may, after due inquiries, order the young offender to be detained in a certified home for the remaining period of his probation.²⁸

Detention Measures

Children may be detained either for having been found guilty (as discussed above) or for reasons of safety.

Section 55 of *The Children Act* provides that any Probation Officer or police officer not below the rank of Assistant Sub-Inspector or any other person authorised by the Government for this purpose may take any child to a place of safety in respect of whom there is reason to believe that

25. Section 52, *The Children Act*. 1974.

26. Section 53(a), *ibid.*

27. Section 53(1)(b), *ibid.*

28. Section 53(2), *ibid.*

an offence has been or is likely to be committed. A child so taken to a place of safety or a child seeking such refuge may be detained until he can appear before the Court. However, this detention shall not, in any event, exceed 24 hours exclusively of the time required to commute from the detention centre to the Court.

According to Section 2(j) of *The Children Act* 'place of safety' includes a remand home or any other suitable place or institution, the occupier or manager of which is willing to receive the child temporarily. Where such suitable places are not available, the Act permits only male children to be kept in police stations or in custody separate from adult offenders. The Act is silent about alternative arrangements for girls. A remand home is a place that is used for the purposes of detention, diagnosis and classification of children committed to custody by any Court or police.²⁹

If the Court is convinced that there is reason to believe that an offence has or is likely to be committed against a child who is brought before it, it may make an order for the care and detention of the child until a reasonable time has elapsed for proceedings to be initiated against the person for having committed the offence or such other lawful action as may be expedient.³⁰

In case of children who are victims of an offence, the Court trying the perpetrator shall direct such child to be produced before the Juvenile Court for appropriate orders.³¹ Upon appearance before it the Court may exercise two options:

- Commit the child to a certified institute or an approved home until he attains the age of 18. In exceptional cases the period may be shorter, in which case the reasons for such shorter period is to be recorded in writing.
- Commit the child to the care of a relative or other fit person on such bond, with or without surety, as the Court may require provided that such relative or person is willing and capable of exercising proper care, control and protection subject to the conditions the Court may impose in the interests of the child for a period not exceeding three years.³²

Where a child is committed to the care of a relative or any other fit person, the Court may, if it thinks fit, withdraw the child from such care any time

29. Section 20, *ibid.*

30. Section 56, *ibid.*

31. Section 57, *ibid.*

32. Section 58(a)(b), *ibid.*

before the expiry of the period for which he was so committed. In such cases the Court may commit the child to a certified institute or an approved home for the remainder of the time.³³ In this context it is difficult to understand why a victimised child should be kept in remand.

Under Rule 12 of *The Children Rules* a youthful offender or child may be permitted by licence to live with a trustworthy or respectable person provided that

- he shall obey the person to whom he is licenced to live;
- he shall stay away from bad company and refrain from taking intoxicants;
- he shall not leave the place of his residence without permission of the person under whose care he has been placed;

However, if the child has a parent or guardian, who is fit and capable and in the opinion of the Court, capable of exercising proper care, control and protection, the Court may allow the child to remain in his custody or commit the child to his care on bond, with or without surety as the Court may require, subject to the conditions the Court may impose in the interests of the child.³⁴ A child committed to a parent, guardian or any other fit person may, in addition, be placed under supervision of a Probation Officer.³⁵ Similar provisions are available for children who are homeless, destitute, neglected and ill-treated by parents/guardians, in bad company and involved in immoral activities.³⁶

The Children Act 1974 makes special provisions for uncontrollable children. Section 33 of the Act provides that where the parent /guardian of a child complains to a Juvenile Court or a Court duly empowered that he is unable to control the child, the Court may, if satisfied upon inquiry, order the child to be committed to a certified institute or an approved home for a period not exceeding three years. However, if the Court is of the opinion that home conditions are satisfactory and all that the child requires is careful supervision, it may, instead of committing the child to a certified institute or an approved home, place him under the supervision of a Probation Officer for a period not exceeding three years.

It is found that guardians often send addicted children to correctional institutes labelling them as 'uncontrollable' as seen in the National

33. Rule 7(3), *The Children Rules 1976*.

34. Section 58 (proviso), *The Children Act 1974*, Rule 7(1), *The Children Rules, 1976*.

35. Section 59, *ibid.*, Rule 7(4), *ibid.*

36. Sections 32 and 33, *The Children Act, 1974*.

Correctional Institute at Jessore. This is possible because although it is required by law to conduct a medical examination of children on admission this is not done in practice. Consequently, one may question the validity of labelling children as 'uncontrollable' without first assessing them in practical terms. Mechanisms for such assessment and allocation of detention periods in the circumstances are absent.

The Probation Officer shall operate the supervision and guidance of the Juvenile Court. The Probation Officer shall, in the exercise of his duty under *The Children Act*,

- Visit or receive visits from the child at regular intervals;
- Ensure that that the relative or any other person to whose care such child is committed observes the conditions of the bond;
- Report to the Court about the behaviour of the child;
- Advise, assist and befriend the child and where necessary, try to find some kind of employment for him;
- Perform any other duty that may be prescribed.³⁷

Thus the overall functions of the Probation Officer include maintaining a close liaison with the child and the family/guardian in whose care to which he has been committed, issuing cautionary warnings in case of breach of conditions, seeing that the child is free from unsavoury or corrupt influence and so on.³⁸ An ideal Probation Officer essentially adopts a combination of material aid techniques, executive techniques, guidance techniques and counselling techniques in discharging his responsibilities.

The government may, at any time, order a child or youthful offender to be discharged from a certified institute or approved home, either absolutely or on such conditions as the government may specify.³⁹ While it is not clear what is meant by 'any time' there is also no mention of specific procedures for releasing children. Moreover, no specific government agency has been earmarked for this purpose. Similar confusion arises when Section 68 of *The Children Act 1974* provides that the government and the Chief Inspector may order any child or youthful offender to be transferred from one certified institute or approved home to another. The circumstances and the procedure of such transfer are not discussed.

37. Section 31, *ibid.*

38. Rule 21, *The Children Rules, 1974.*

39. Section 67, *The Children Act, 1974.*

4. Certified Institutes

The Children Act 1974 and *The Children Rules 1978* provide concrete guidelines for the setting up and running of certified institutes or approved homes.

4.1 Establishment and Certification

Section 19 of *The Children Act 1974* empowers the Government to establish and maintain training institutes for the reception of children and youthful offenders. In this context, the Government may prescribe conditions subject to which any training institute, industrial school, educational institution or approved home shall be so certified or recognised.⁴⁰ No such place shall be certified or recognised unless the Government is satisfied that

- the object of such institute, school, institution or home is the welfare of the children;
- there is suitable accommodation for establishing dormitories and conducting training programmes for children and youthful offenders;
- the management of such institute, school, institution or home is efficient and has adequate funds to conduct the programmes;
- it has adequate number of trained personnel for running its programmes;⁴¹

4.2 Control and Management

The control and management of certified institutes rests on the Superintendent and a Committee of Visitors who are appointed by the Government. Every institute, school or institution certified under this Act shall be under the management of its governing body.⁴² The Superintendent is the principal officer in charge of the certified institute or approved home.⁴³ He shall maintain separate case file for each inmate containing detailed information about the family background, character, aptitude, performance in education, training and such other matters as may be deemed necessary. In every case, the Court shall consult the managers of a certified institute before committing a child to their care.⁴⁴

40. Section 21, *ibid.*

41. Rule 5, *The Children Rules 1976.*

42. Section 22, *The Children Act 1974.*

43. Rule 2(g), *The Children Rules 1976.*

44. Section 23, *The Children Act 1974.*

Although this process is meant to ensure both the well being of children and the efficiency of the institution its is not practiced in reality.

The Governing Board of a certified institute shall exercise such powers and conduct its business in a manner as may be determined by the Director who will approve the decisions of the Governing Board.⁴⁵

The Committee of Visitors for a certified institute shall comprise six members to be appointed by the Government. They shall be selected from amongst the following category of persons:

- i. Reputed social workers;
- ii. Medical practitioners;
- iii. Retired police or prison officers;⁴⁶

The Committee of Visitors shall be responsible for the management of the training institute and shall discharge such duties and perform such functions as specified in writing by the Director.⁴⁷ Every certified institute or approved home shall maintain registers indicating *inter alia* admission, discharge, attendance, sickness, punishment and leave of inmates.⁴⁸

4.3 Treatment of Inmates

Salient aspects of the treatment of inmates are clearly spelt out in *The Children Rules 1976*. These may be broadly grouped into the following categories:

Health

Immediately after the admission of a child into a certified institute or approved home, he shall be medically examined. An inmate suffering from a contagious disease shall be kept segregated from other inmates and the Superintendent or managers of the certified institute shall make arrangements for his treatment. Apart from this, medical check ups shall be conducted at regular intervals.⁴⁹ Children suffering from dangerous diseases or ailments requiring prolonged treatment shall ordinarily be sent to government hospitals. Where the requisite treatment is not available in Government hospitals, arrangements shall be made for

45. Rule 9, *The Children Rules, 1976*.

46. Rule 10, *ibid*.

47. Rule 11, *ibid*.

48. Rule 13, *ibid*.

49. Rule 15, *ibid*.

treating the child in a private clinic or hospital duly selected for the purpose.⁵⁰

The inmates of a certified institute shall be supplied with diet and clothing as prescribed in the *Schedule to The Children Rules 1976*. Special diets shall be supplied to inmates during illness in accordance with the instructions of the attending physician. On festivals and special occasions inmates shall be provided with improved diets. Inmates in the star grade shall be allowed such extra food as the Director may decide. Apart from food and clothing the inmates shall be provided with necessary toilet articles.⁵¹

Grading

After a child is admitted into a certified institute he shall remain under observation for at least two weeks. During this time his mental disposition, conduct, aptitude and other behavioural aspects shall be studied in order to formulate an effective treatment plan. On the basis of the findings of the assessment the child shall be assigned to one or more tasks or vocation. Contrarily, he may be recommended for general education, religious instruction or moral guidance.⁵²

The inmates of a certified institute are normally divided into three grades, namely, the *penal grade*, the *general grade* and the *star grade*. Upon admission inmates are usually placed in the general grade. The privileges of each grade in the given order are higher than those of the preceding grade. A close scrutiny and monitoring of the general behaviour, amenability to discipline and performance in educational, vocational and other activities forms the basis for promotion to the star grade. Special incentives/rewards are given to inmates of the star grade that range from a distinctive dress and badge money to assisting the administration and communicating with families more frequently.⁵³

Inmates in the penal grade receive a different brand of treatment. Where an inmate is believed to be exercising a bad influence over others, he shall be placed in the penal grade for such time as may be considered necessary for his reform. During this period he shall be employed in hard and laborious work and shall have all privileges forfeited. Inmates of the penal grade shall be kept separate at nights from other inmates.⁵⁴

50. Rule 16, *ibid.*

51. Rule 17, *ibid.*

52. Rule 8, *ibid.*

53. Rule 22, *ibid.*

54. *Ibid.*

Education and Training

Inmates shall be provided with primary standard education. In special cases they may be given the opportunities of pursuing higher education outside of the certified institute. Arrangements shall be made for vocational training of inmates as may be suitable for their rehabilitation.⁵⁵

Work

All inmates, as long as they are medically fit, shall be required to work for eight hours each working day. Each day shall be normally divided along the following line of activities:

Drill and Exercise: 1 hour

Literary Instructions: 3 hours

Manual Work: 4 hours

Recreational Activities: 1 hour

The time slots for literary instructions shall be increased to 5 hours and for manual work shall be decreased to 2 hours respectively for examinees of SSC examinations.⁵⁶

Disciplinary Measures

The Children Rules 1976 provide a comprehensive list of acts the commission of any of which shall render an inmate liable to punishment. Most of the acts are premised upon wilful disregard for the rules and regulations of the institute and overt waywardness.⁵⁷ It may be noted that the list specifies certain acts as punishable that appear to be quite ridiculous considering the age of the inmates. For example, it is forbidden to talk loudly in latrines or during bathing. It is also forbidden to sing or talk after 9.00 pm at night. An inmate committing any of the specified acts shall be liable to any or a combination of the following punishments: formal warning; waiving privileges; reducing the grade; separate confinement; caning not exceeding ten stripes.⁵⁸

4.4 Monitoring and Withdrawal of Certified Institutes

Every certified institute and approved home shall be liable to inspection at all times and in all departments by the Chief Inspector or Assistant Inspector of certified institutes. This exercise shall be conducted at least

55. Rule 18, *ibid.*

56. Rule 25, *ibid.*

57. Rule 23, *ibid.*

58. Rule 24, *ibid.*

once in six months every year. Where the certified institute is for the reception of girls only a woman authorised by the Chief Inspector shall carry out the inspection.⁵⁹

The Chief Inspector of certified institutes may be appointed by the Government along with such number of Inspectors and Assistant Inspectors as the Government may deem fit.⁶⁰ The Chief Inspector shall be responsible for the control and supervision of the certified institutes or approved homes. He may, if he thinks fit in the interest of any child, order him to be transferred from one certified institute to another. Besides, the Chief Inspector shall supervise and control the work of Inspectors, Assistant Inspectors, Superintendents and other officials and staff of the certified institutes or approved homes. He shall visit the certified institutes at least once in two months and perform such other duties as may be assigned by the Director from time to time.⁶¹

When an institute ceases to be certified institute, the children or youthful offenders detained therein shall be either discharged absolutely or on such conditions as the Government may impose or may be transferred by order of the Chief Inspector to some other certified institute.⁶²

5. Analysis and Concluding Observations

The formal law of Bangladesh attempts to protect its citizens against all forms of discrimination. Children are not the exception but the rule. This is evident not only from the juvenile justice laws but also from the *Constitution of Bangladesh* which ensures under Articles 15, 17, 27, 28 and 31 that children and others shall be entitled to protection against all forms of discrimination. The Constitution also guarantees everyone the right to life, liberty and freedom from arbitrary detention. While the right to bail and a fair and speedy trial is embodied in the Constitution, it also gives every citizen the right to freedom from torture and other cruel, degrading and inhuman treatment.

Children who come in conflict with the law are not unlike other children. It is only the particular situations they find themselves in that set them apart from ordinary children. In the circumstances, designating children in accordance with the offences committed by them essentially have a 'labelling' effect, which is hardly compatible with their rights under the law. This is compounded by the fact that many children are

59. Section 29, *The Children Act, 1974*.

60. Section 30, *ibid*.

61. Rule 20, *The Children Rules, 1976*.

62. Section 28, *The Children Act, 1974*.

institutionalised for activities that hardly merit as 'offences', much less treatment. In the circumstances, the children are very often subjected to double victimisation.

The impact of corrective measures under the existing system appears inscrutable to say the least. Given the diversity of factors that compel children to breach the law, it is necessary for the juvenile justice system to assume a differential approach towards treatment of children who come under its purview. In this regard, distinction must be made between child victims of abuse and those who have broken the law. While non-institutional methods should be applied in helping maladjusted children, attempts must be made for separating status offences from criminal offences. Indeed, sentencing and institutionalisation on false or minor charges harden children to life's realities and provoke them into committing real crimes the next time.

The situation is compounded by parents/guardians who prefer to abdicate their responsibilities by handing over their children to correctional institutes for being wayward and uncontrollable. This is indicative from the preponderance of guardian-referred cases than police referred ones in correctional institutes. Although one may deduce from this scenario that Bangladesh has the trappings of a welfare state this is certainly not the case in actuality. The family is a strong medium through which children develop their attitudes and conduct. It is necessary for families to be mindful of their responsibilities if children's confidence in them as care givers is to sustain. In the circumstances, efforts must be made to strengthen the homes and develop healthy relationships between caregivers and the children.

It would be useful to remember that the welfare model of juvenile justice should in no way be used to subvert the inherent rights of children. Therefore, existing laws need to be applied in a sensitive manner in order to avoid unfair biases against children who come in contact with the criminal justice system. A scrutiny of juvenile justice laws in both the international and national contexts reveals that recourse to deprivation of liberty of children as a sentence should be the last resort and for the shortest possible time. This stems from the understanding that deprivation of liberty must not be imposed unless the judge or the magistrate is convinced of the objectives of the measure. In other words, it is imperative to assess whether such deprivation will necessarily have a positive impact on the child's reform and development. Therefore, in every case, the judge or the magistrate has to weigh all circumstances of the child before committing him/her to imprisonment.

In practice however, recourse to deprivation of liberty is too frequent an occurrence, which is totally inconsistent with the objectives that it may be used only as a 'last resort'. It is a common enough practice to sentence children to imprisonment without taking relevant circumstances into consideration. While regard must be had to the situation of each individual child and the nature and circumstances of the crime, there is little evidence of this practice during investigation and trial. This essentially compromises a child's right to a fair hearing and treatment.

Children are frequently institutionalised for quite different reasons; instead of training and protection, child offenders are faced with demands of retribution by the society, irrespective of their age. This effectively draws out hostile and aggressive responses from most children. Despite having reformatory or deterrent aspirations, judicial response to delinquency often has the effect of 'labelling' a child as delinquent. This may well influence the child's perception about him/herself and how he/she behaves. The experience of being 'caught', institutionalised and publicly labelled as 'deviant' may have far-reaching consequences on a child's physical and psychological development.

Another difficulty lies in the associational practices in the correctional institution. Keeping a large group of children having different anti-social propensities in close proximity for extended periods of time may have deleterious effects on them. Numerous cases of serious maladjustments in child offenders make it nearly impossible to offset the unhealthy effects that result automatically from the exchanges amongst themselves. Moreover, where the number of cases to be handled is great, individual treatment can be, and often is, exacting. There is also a great dearth of facilities offering separate treatment of divergent types of cases. Institutions do not provide clinical and therapeutic programmes; as a result, individualised diagnosis and treatment of child offenders are virtually non-existent.⁶³

Under the juvenile justice laws in Bangladesh the Court has the power to discharge youthful offenders or commit them to 'suitable' custody. Therefore, on the basis of adjudication young offenders may either be sent to some correctional institution or placed under the supervision of

63. Khair, Sumaiya, *Exploring Root Causes of Juvenile Crime in Bangladesh: A Study*, UNICEF, 1998, p.40.

a Probation Officer, the latter being an attempt at a non-institutional approach. In practice the absence of adequate probationary services results in increasing institutionalisation of children who come into contact with the law. The fact that the certified institutions operate both as centers for remand and correction presents a paradox. There is an urgent need to separate these two streams of services by developing necessary capacity and infrastructure. The other serious lacking of the system is the absence of correctional facilities for girls. Consequently, when girls come into contact with the law they are either despatched to jails or to some shelter home that accommodates prostitutes and rape victims. There are reportedly a good number of derelict and unutilized structures across the country that the Government may renovate and use for these purposes.

While existing legal standards generally discourage institutionalisation, minimum parameters for the care of institutionalised juveniles do exist to offset the deleterious effects of detention and to foster the reintegration of juveniles into society. Nevertheless, although institutions for juveniles are supposed to operate as care, education and rehabilitation centres rather than penitentiaries, treatment in institutions gives rise to serious concern. This is evident from the gaps between the views of children who have been to the correctional institution and those of the institutional authorities. While children generally voice their dissatisfaction at the way they are treated in the certified institutes or approved homes, Social Welfare authorities take a more favourable view about the existing scenario in correctional homes. The gaps between these views speak volumes.

It is admittedly difficult to reconcile the actual scenario in the administration of juvenile justice with policy recommendations, particularly when there are differing ideologies supporting the welfare model on the one hand, and the justice model on the other. In the former instance, deviance is viewed as a manifestation of intense maladjustment resulting from an unfavourable environment; in the circumstances, treatment of the child is considered a proper intervention where the child's welfare needs to be pre-eminent. In the latter, deviance is viewed as a matter of choice; therefore, sanctions and controls serve as legitimate responses to validate and sustain the norms endorsed by society. Dissent surrounds both the above-mentioned models. It has been argued that

the 'need for treatment' has sometimes been used as a justification for very considerable restrictions on the liberty of the child which seem out of proportion to the seriousness of the offence. Equally however, it is evident that an exclusively

'crime control' or 'justice' approach, in which serious crimes result in strong punishments, ignores the extensive evidence that severe and persistent delinquency is often accompanied by widespread personal difficulties and disturbance which give rise to distress and social impairment for the individual as well as 'trouble' for the community.⁶⁴

Thus, in the absence of foster homes, problem children are usually institutionalised. Institutions in Bangladesh hardly have the home-like quality that is essential for rehabilitation of young offenders. Although it is difficult to measure the impact of institutionalisation with any certainty, as children generally go through different ordeals before being actually sent to institutions, a safe assertion would be that more ought to be achieved through institutionalisation in the given circumstances.

Treatment of children in welfare institutions should be toned down to the extent where children do not feel over-controlled and over-protected. The general feeling among children is that 'they are more likely to be responded to as a problem than to have their problems responded to'.⁶⁵ It is obvious that concrete interventions that would raise the general level of the psycho-social development of children are yet to materialise.

Institutions should avoid harsh treatment, corporal punishment and excessively stringent discipline of child inmates. While the handling of a child through formal methods may be justifiable up to a certain extent, institutional measures beyond a point is likely to become counterproductive for children. Thus, there is a need for diversion from institutional mechanisms into more non-institutional alternatives. The Government must create conditions and opportunities conducive to child development and mobilise human and material resources in that regard. Improved social services, specialised assistance, child-centred initiatives and committed personnel with requisite skills, knowledge and experience are fundamental to a sound juvenile justice system.

64. Rutter, Michael and Giller, Henri, *Juvenile Delinquency. Trends and Perspectives*, The Guilford Press, New York et al., 1983, p.322.

65. Newburn, Tim, "Youth, Crime and Justice" in Maguire, Mike et al., (eds.), *The Oxford Handbook of Criminology*, Clarendon Press, Oxford, 1997, pp.613-660, at p.635.

Informal initiatives within the community may be an effective strategy for monitoring children's activities and diverting them from coming into conflict with the law. Community policing may include counseling and support services for parents to equip them with techniques on planned parenthood, child rearing and strengthening family relationships. Similar services to children and juveniles would ensure that they do not feel alienated and uncared for. When communities demonstrate their willingness to share the responsibility of their children, it instills in young people a sense of belonging and a confidence that there is someone to fall back on in times of crises. Wholesome activities and recreations within the community may offer children with viable outlets for their energies, emotions and anxieties. Community involvement in counseling juveniles on salient aspects of their conduct will ensure that they utilise their time in constructive ways.