

Chapter 1

JUVENILE JUSTICE SYSTEM

1.1 Introduction

Everyday thousands of children around the world get caught up in an adult formal justice system. Children are arrested and detained by the police, tried by magistrates and sent to institutions, including prisons, under a system of justice which in many cases are setup for adults.¹ Although there are explicit international guidelines on the proper administration of Juvenile Justice and on community based conflict resolution and rehabilitation of child offenders, children's rights and special needs are being ignored. These children are alleged to have come into conflict with the law of the land.

Large numbers of children in conflict with the law are socio-economic victims, denied their rights to education, health, shelter, care and protection. Many of them have had little or no access to education; many are working children. Some children have left their homes and taken to the streets to escape from violence and abuse at the hands of their families. Some are forced to make a living on the streets, in order to survive. Others have been abandoned by their families and left to fend for themselves and sometimes for younger siblings. These children, who are abandoned and destitute, are also at high risk of sexual exploitation, trafficking and becoming involved in substance abuse and the drug trade through peer influence or the influence of the adult criminals.

For children in conflict with law the process of arrest, trial and custody destroy their childhood as a result of being denied their right to, for example, family life, education, care, protection and play. Many of them have little chance of rehabilitation and reintegration into society; discrimination against children

¹ Mabel Wong and Nikhil Roy, *Juvenile Justice: Modern Concept of working with Children in conflict with the Law*, (Dhaka: Save the Children UK, 2004), p.11.

who have been in conflict with the law, together with deprivation and poverty limit their opportunities for developing into active and contributing adult citizens.

Children who come into conflict with the law as a result of being accused or surfeited of committing a Crime are at greatest risk of having their fundamental rights violated.² For this reason, the convention on the Rights of Child (CRC), 1989 established the following as Core guiding Principle for treatment of children in conflict with the law:

“State parties recognise the right of every child alleged as, accused of, or reconised as having infringes the Penal law to be treated in a manner consistent with the Promotion of the child sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamentals freedoms of others and which takes into account the child age and the desirability of promotion the child’s reintegration and the child’s assuming a construction role in a society”.³

To this end, State Parties are requires to establish law, Procedure, Authorities and Institution specifically applicable to children alleged as, accused of or recognized as having infringed the Penal laws.

In Bangladesh, the Justice for both children in conflict with the law and children in need of protection are governed by the *Children Act, 1974* and the *Children Rules, 1976*.

The Children Act, 1974 is the primary Juvenile Justice model statute. It provides for informal processing of a youthful offender (Separate court separate court rooms restriction on the principal of public and open trial, involvement of Probation officer, Parents and guardians and so forth); Prohibits conviction and sentence of imprisonment by providing for housing and detention of young offenders in Certified institutes and approved homes rather than jail; and other such measure of custody, protection and treatment.⁴

²UNICEFInterParliamentaryUnionGuide107.pdf,2007,[http://www.juvenilejusticepanel.org/resources/?act=res&cat=&nod=_root_&id=UNICEFInterParliamentaryUnionGuide107&start=11,last visited 12 Jan 2010].

³ *Convention on the Right of the Child*, 1989, Art. 40.

⁴ Shahdeen Malik, *The Children Act, 1974: A critical commentary*, 1st ed., (Dhaka: Save the Children UK, 2004), p.vii.

1.2 History of Juvenile Justice System

1.2.1 International view

The official start of Juvenile Justice occurred in Chicago, U.S.A. in 1899 with the founding of the first separate Juvenile Court. There after within 20 (Twenty years Juvenile Court was replicated throughout Europe.

The first expression of international concern about the situation of children came in 1923 through “Declaration Geneva” under the aegis of League of Nations. In 1948 General Assembly of the United Nations adopted a new instrument named “Declaration of the Rights of the Child”, containing ten basic principles of child welfare and protection.⁵ In international arena the focus on children was sharpened in 1979 when Poland placed a formal proposal and General Assembly unanimously adopted the *Convention on the Rights of the Child* in 1989.

The CRC is the first legally binding international instrument to incorporate the full range of human rights civil, cultural, economic, political and social rights. It was designed to look at children as entire human beings and because “Umbrella Rights” Article 37 and 40 qualified by Article 3 state that in all actions whether undertaken by public or private social welfare institutions, courts of law, administrative authorities of legislative bodies, the best interest of the child shall be a primary consideration.⁶

1.2.2 Domestic View

The edifice of Juvenile Justice system in Bangladesh is founded on the *Children Act, 1974* which has replaced the *Reformatory School Act, 1897* and the *Bengal Children Act, 1922* together with 29B and 399 of the *Code of Criminal Procedure (Cr.P.C)* Chronologically the Children Act precedes “the Convention on the Rights of the Child 1989”.

Bangladesh is one of the first countries to sign & ratify the United Nations Convention on the Rights of the Child (UNCRC).⁷ Since the ratification some

⁵ M. Enamul Hoque, *Under-Aged Prison Inmates in Bangladesh: A Simple Situation of Youthful Offenders in Greater Dhaka*, (Dhaka: Save the Children UK, 2008), p.7.

⁶ *Ibid*, p.7.

⁷ *Ibid*, p.8.

significant strides have been made towards its implementation. However, it is a long way to attain the desire goal. In Bangladesh, laws regarding children rights and protection are not contained in our statute rather they are not contained in our statute rather they are present in various laws and statutes e.g. *The constitution*, the *Penal Code* and the *Children Act 1974*.⁸

The Children Act, which actually predates the UNCRC by 15 years categorically, Prohibits death sentence and life imprisonment against a child can only be given in very special circumstances. Generally, a certified institution has been recommended for detention of youth.⁹ Children are also protected by this law from abusive parent and guardians. Victimized child may be committed to certified institute or approved Shelter Homes.

1.3 Definitions of Juvenile Justice

Juvenile Justice is about not only the treatment of children in conflict with the law, but also about the root causes of offending behavior and measures to prevent such behavior.¹⁰ Work in the field of Juvenile Justice therefore has two major strands: Prevention and Protection.

Prevention: This work aims to ensure the children do not come into conflict with the law in the first place and therefore do not come into contact with the formal Criminal Justice system. The causes of children offending are wide ranging and complex, and include poverty, broken homes, lack of education and employment opportunities, Peer Pressure and lack of Parental guidance. These causes need to be tackled with a range of social and economic intervention, including programs for education, poverty reduction, skills development, parent counseling and job creation.

Protection: At the same time, measures are needed to protect children who are already in conflict with the law, in order to deter them from re-offending and to promote their rehabilitation and smooth their reintegration back into society. Programmers and Projects that focus of the following features which are:

⁸ *Ibid*, p.8.

⁹ *Ibid*, p.8.

¹⁰ Mabel Wong and Nikhil Roy, *ibid*, p.12.

Advocating for law reform, to ensure that national legislation conforms with international standards and guidelines on Juvenile Justice, Training, education and awareness programmers on Juvenile Justice issues for key members of government, criminal justice agencies and civil society, Diversion Project that aim to keep children away from the formal criminal justice system by resolving conflicts within the community.

1.4 Juvenile Justice Work

The goal of Juvenile Justice Work is the establishment of a fair and humane system of justice for children which is based on the rights of the child, applies the principles of restorative justice, Puts the best interests of the child first, Focuses on Prevention as Primary objective, Makes custody a sanction of last resort and for the shortest Possible Period of time while taking into account the effects on the victim and community.

Chapter 2

INTERNATIONAL AND DOMESTIC LEGAL INSTRUMENTS FOR THE PROTECTION OF CHILDREN

2.1 International Legal Instruments

An examination of the major international instruments dealing with children instruments dealing with children in conflict with the law reveals two broad principles that are of particular significant 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 commensurate 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.¹¹

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:

¹¹ Sumaiya Khair, 'Juvenile Justice Administration and Correctional Services in Bangladesh: A Critical Review', *Journal of Faculty of Law, The Dhaka University studies, Part F*, vol. xvi (2), (Dec, 2005), p.3.

2.1.1 UN Standard Minimum Rules for Administration of Juvenile Justice (The Beijing Rules) 1985

UN Standard Minimum Rules for Administration of Juvenile Justice (The Beijing Rules) 1985 set forth the minimum conditions internationally accepted for the treatment of Juveniles who come into conflict with law. The Rules contain specific provisions for a separate and specialized system of Juvenile Justice. The Rules provide that detention should be used as a last resort and that too for the shortest possible time. The rules encourage that capital and corporal punishment should be abolished. The rules provide that children should be allowed to participate in proceedings and that care and education of children are ensured during the period of detention. It is stressed that discretion is exercised in the best interests of the child all rights.

The rules require that children should be treated in a fair and humane manner and that measures should be proportionate to the nature of the offender and the offence. These considerations are buttressed by the commentary to the Beijing rules which notes that with regard to sentencing the conflict between rehabilitation versus just desserts, assistances versus punitive, and general deterrence against individual loss of liberty is more pronounced with Juvenile Justice than it is with regard to adult. It is acknowledged that the Beijing Rules refrain from prescribing approaches beyond setting forth the basic principles of proportionality and the limited use of deprivation of liberty. This short coming has however been resolved substantially by the convention on the rights of the child (CRC).¹²

2.1.2 The Convention on the Right of the Child (CRC) 1989

The convention on the right of the child (CRC) 1989 was the first international instrument, which has been explicit in addressing the rights of children in conflict with the law and the administration of Juvenile Justice. Commensurate with the covenant on civil and political rights 1966 and the optional protocol thereto Articles 37 and 40 spell out the rights of the Child in conflict with the law and ensure basic guarantees and legal and other assistance for its defense. Articles 37

¹² Sumaiya Khair and Sharfuddin Khan, *Shoshur Bari: Street Children in Conflict with the Law*, (Dhaka: Save the Children UK, 2000), p.34.

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 have been incorporated into Article 40 of the CRC in order to give them a binding effect. Article 40 of the CRC provides that every child alleged as, accused of or recognized as having violated the Penal law must be treated in a manner consistent with the child's human right, 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 action, whether undertaken by public or private social welfare institutions, court 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 has been further strengthened by two other major documents, which set standards and guidelines for the protection of children with the law.

2.1.3 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL Rules) 1990

United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL Rules) 1990 rules apply to all instructions, which detain any person under the age of 18 years. These include instructions for health, welfare or Juvenile Justice. The Guidelines advocate the use of least possible use of deprivation of liberty particularly in prison and other closed institutions. It broadly provides that deprivation of liberty should be used as a last resort and for the minimum time and that again in exceptional cases. The Rules urge that children, when detained, should be kept from adult in an attempt to ensure their protection from harmful experiences. The JDL rules emphasise that facilities promoting health, self respect

and sense of responsibility must be ensured and juvenile should be assisted to return to society. The JDL Rules stress on ensuring access of Parents to their Children must be guaranteed.

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

UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guideline) 1990 deals with almost every facet of social life including Family, School, Community, Media, Social Policy, Legislation and The administration of Juvenile Justice in an attempt to emphasise on the need for integrated and comprehensive plans for preventing crimes by children and young people. The Guideline requires that formal mechanisms of crime control should be utilized as a last resort having due regard to the human rights and fundamental freedom of children, particularly of those who are at “Social risk”, such as children who are homeless, destitute, abused and so on. The guidelines stress that law and procedures should promote, Protect and uphold children’s rights ensuring children’s representation in Policy making. The Guideline recommends that children should be encouraged to participate in the formulation and implementation of prevention programmers and be regarded as active and equal partners in socialization processes.

From legal point of view, amongst the major international instruments, only the CRC is legally binding while the other three instruments (Beijing Rules Riyadh Guideline and JDL rules) operate as non-binding “Soft law”. These three non-binding instruments complement and provide guidance for the implementation of the CRC and accordingly referred to as ‘United Nations standards and norms in Juvenile Justice’.¹³ These three sets of Rules may be seen guidance for a three stage process: Firstly, Social Policies to be applied to prevent and protect young people from offending (Riyadh Guidelines). Secondly, establishing a progressive justice system for young persons in conflict with law (Beijing Rules) and finally, safeguarding fundamental rights and establishing

¹³ Borhan Uddin Khan and Muhammad Mahbubur Rahman, *Protection of Children in Conflict with the Law in Bangladesh*, 1st ed., (Dhaka: Save the Children UK, 2008), p.12.

measures for social re-integration of young people once deprived of the liberty whether in Prison or other institutions (JDL Rules).

2.1.5 Other International Standards dealing with Children in Conflict with law

Apart from the major standards or instruments, various other international instruments having relevance to the dealing of children in conflict with the law include the following:

Universal Declaration of Human Rights,¹⁴ International covenant on civil and Political Rights (Alternatively referred to as ICCPR),¹⁵ UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁶ UN Guideline for Action on Children in the Criminal Justice System,¹⁷ UN Standard Minimum Rules for Treatment of Prisoners,¹⁸ United Nations Standard Minimum rules for Non-Custody Measures (Popularly known as ‘Tokyo Rules’),¹⁹ UN Basic Principles for the Treatment of Prisoners,²⁰ UN code of conduct for Law Enforcement officials,²¹ UN Body of Principles for the protection of all persons under any form of detention or imprisonment,²² UN basic principles on the use of restorative justice programmes in criminal matters.²³

2.2 Domestic Legal Instruments

The major laws in Bangladesh relating with the children in conflict with the law are the *children act, 1974* and the *Children Rules, 1976*. The Children Act, enacted in 1974, came into force on November 1, 1976 for Dhaka district only and June 1, 1980 for other districts. Thereafter, the government in exercise of its power under section 77 of the *children Act, 1974* and promulgated the children Rules, 1976 on March 11, 1976.

¹⁴ *Ibid*, p.12.

¹⁵ *Ibid*, p.12.

¹⁶ *Ibid*, p.12.

¹⁷ *Ibid*, p.12.

¹⁸ *Ibid*, p.13.

¹⁹ *Ibid*, p.13.

²⁰ *Ibid*, p.13.

²¹ *Ibid*, p.13.

²² *Ibid*, p.13.

²³ *Ibid*, p.13.

2.2.1 Major Provisions of the Children Act, 1974 and the Children Rules, 1976

The one sentence preamble of the Act precisely and clearly draws attention to the purpose of this enactment and encapsulates its goals. This enactment formulated, primarily, the appropriate normative and legal procedure for proper custody, Protection and treatment of children. Secondly, the Act provides for a mechanism for a mechanism for the trial and punishment of such Children who may come into conflict with criminal laws.²⁴ Therefore, it is evident that the Act deals not only with Children in conflict with the law but also to some extent children in contact with law but also to some extent children in contact with law. On the other hand, the provisions prescribed by the *Children Act, 1974* are supplemented by the functional framework of the *Children Rules 1976*.

2.2.2 Other Domestic Laws Relating to Juvenile Justice System

Apart from the Children Act, 1974 and the Children Rules, 1976 there are some other laws having bearing on the children justice system of Bangladesh. *The Bengal code and Prison Act, 1894* required separate trials for children and adults and guidelines for reformation were contained in *Reformatory School Act, 1887*.²⁵ These laws supplement the Procedural Provisions Prescribed by the Children Act Of them; the most important one is the *code of criminal Procedure 1898*. It has been stated earlier that this law, prescribing Procedure for criminal Proceedings, contains some child-specific provisions.

Moreover, the procedure prescribed by this law is to apply in the trial of cases and the holding of proceedings by the Juvenile courts unless excluded by the Children Act, 1974 and the children rules, 1976.²⁶ *The probation of offender ordinance 1960* is another important legislation in this regard. This ordinance strictly speaking, has no application in cases where the Children Act applies. This is because, so far the Children Justice system of Bangladesh is concerned, the probation service related a provision prescribed by this ordinance is replaced by the *Children Act, 1974*. The *Children Act, 1974* empowers the government to

²⁴ Shahdeen Malik, *ibid*, p.22.

²⁵ Sumaiya Khair, *ibid*, p.4.

²⁶ *The Children Act, 1974*, s 18.

appoint a probation officer in each district.²⁷ Who shall, in the performance of his duties, be under supervision and guidance of the Juvenile Court where such court exists or, where there is no such court,²⁸ the Court of Session and duties and responsibilities of such probation officer shall be determined by the children Act, 1974 and the Children Rules, 1976.²⁹ Nevertheless, practically this ordinance is being applies for probation service relation to Juvenile Justice System.

2.2.3 Constitutional Provisions and Other Important Statutory Law

The basic needs of children and the duties of the state toward them are enshrined in the constitution of the People's Republic of Bangladesh. Article 14 of the constitution Prohibits all sorts of exploitation and Article 15 of the same ensures the right to social security that is to say to public assistance in cases of undeserved want arising from unemployment, illness or disablement, or suffered by orphans.³⁰ Article 17 of the constitution Provides for adopting effective measures for the purpose of establishing a uniform mass-oriented and universal system of education and extending free and compulsory education to all children to such stage as may be determined by law.³¹ Article 18 of the constitution provides that the state shall regard the raising of the level of nutrition and the improvement of public health as among its primary duties. Although determination has been prohibited.³² Article 28 of the constitution provides that the state shall not be prevented from making special provision in favour of child and forced labor is also prohibited under Article 34 of the constitution.³³

The other statutory important laws relating to the Protection and welfare of children in Bangladesh are not contained in a single statute; rather they can be found scattered over numerous laws and statues, such as:

The Penal Code of 1860 states in sections 82 and 83 that full criminal responsibility only commences after the age of 12, as it is construed that any

²⁷ *Ibid*, s. 31(1).

²⁸ *Ibid*, s. 31(2).

²⁹ *Ibid*, s. 18.

³⁰ Gazi Shamsur Rahman, *Laws Relating to Children in Bangladesh*, 2nd ed., (Dhaka: Bangladesh Shishu Academy, 1994), p.13.

³¹ *Ibid*, p.13.

³² *Ibid*, p.13.

³³ *Ibid*, p.13.

person below that age has not attained sufficient maturity to understand the nature and consequences of his/her conduct. Section 90 provides that consent given by a person under the age of 12, shall not be regarded as consent in the strict sense of the term. However, in case of marital intercourse the offence of rape will not be held to have been committed if the wife is above 13 years of age. The kidnapping of a male under 14 years and a female of less than 16 years from lawful guardianship is an offence under section 361. The kidnapping or abduction of a person below the age of 10 is also an offence under section 364A.³⁴

The Contract Act of 1872 regards a minor as incompetent to enter into contracts. A minor's contract is void under section 11 of the Act. However the guardian of a minor can enter into a contract of sale on behalf of the minor either out of legal necessity or for the benefit of the estate.³⁵

The Evidence Act, 1872 provides that the Rule of Estoppel under section 115 of the Act does not apply to a child.³⁶

The Guardians and Wards Act of 1890 empowers a designated court to appoint a guardian of the minor's person, property or both. The court, however, has to be satisfied that it is for the welfare of the minor, and in the circumstances cannot appoint anyone as guardian against the will of the minor.³⁷

The Criminal Procedure Code 1898 directs, through a designated court, a person having sufficient means, who is neglecting or refusing to maintain his wife or child (whether legitimate or illegitimate), to provide a monthly allowance for their maintenance. Section 562 of the Code empowers the court to release certain first convicted offenders under the age of 21 on probation for good conduct instead of sentencing them to imprisonment.³⁸

The Code of Civil Procedure, 1908 Order 32 deals with the minor's capacity for prosecuting or defending a suit through a person who is called in such suit the next friend of the minor.³⁹

³⁴ *Ibid*, p.13.

³⁵ *Ibid*, p.14.

³⁶ *Ibid*, p.15.

³⁷ *Ibid*, p.16.

³⁸ *Ibid*, p.16.

³⁹ *Ibid*, p.17.

Section 6 of *The Limitation Act, 1908 (Act No. IX of 1908)* provides that where a person entitled to institute a suit or make an application for the execution of a decree is a minor at the time from which the period of limitation is to be reckoned, he may institute the suit or make the application with the same period after the minority has ceased.

section 7 of the Act, where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is a minor, and a discharge can be given without his concurrence, time will not run against them all; but where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the minority has ceased.⁴⁰

The Child Marriage Restraint Act 1929 (amended in 1984) prohibits the marriage between a male under 21 and female under 18 years of age, and imposes punishment on parents and guardians involved in child marriages.⁴¹

The Children (Pledging of Labour) Act 1933 penalises the parent, or the guardian in the event of their entering into an agreement to pledge the labour of a child or employing a child whose labour has been pledged.⁴²

The Dissolution of Muslim Marriages Act of 1939 gives certain rights to a minor girl given in marriage to repudiate the marriage before attaining the age of eighteen years, provided that the marriage has not been consummated.⁴³

The Factories ACT 1965 prohibits the employment of young persons below the age of 14 years in hazardous occupations, and lays down regulations for a secure and healthy working environment for a child or adolescent. The Act also provides for creche facilities for children under 6 years of age whose mothers are workers in a factory.⁴⁴

⁴⁰ *Ibid*, p.17.

⁴¹ *Ibid*, p.18.

⁴² *Ibid*, p.19.

⁴³ *Ibid*, p.20.

⁴⁴ *Ibid*, p.22.

Chapter 3

**ADMINISTRATION OF JUVENILE JUSTICE IN
BANGLADESH**

The process of arrest, trial and sentencing can be immensely frightening and damaging for a child. International rules and guidelines promote and outline alternatives to intimidating formal court procedures, including the use of diversion. However, where cases involving young offenders do come to trial, the court system needs procedures that protect the best interests of the child. For example: informing parents and family at point of first contact with the formal system, ensuring regular and free access to legal aid and legal representation, ensuring that children are supported throughout their court attendance by an appropriately trained and impartial person, ensuring that language used in court is understandable to the child judicial hearings which include specially trained lawyers and judges.

The court should be able to turn to a range of legislated options that are in the best interests of the child. It should also be able to use bail and/or some other measure in order to ensure children are not remanded in custody.⁴⁵

In 2004, Bangladesh raised the minimum age of criminal responsibility from seven years of age to nine. Criminal liability of children between the ages of nine and 12 is subject to judicial assessment of their capacity to understand the nature and consequences of their actions.⁴⁶ While this amendment has made a modest improvement, the minimum age is still far below international standards. Another concern is that the current protections for child offenders do not extend to all children under the age of 18.

⁴⁵ Mabel Wong and Nikhil Roy, *ibid*, p.78.

⁴⁶ *Penal Code (Amendment) Act, 2004*, Ss. 82 and 83.

Under the *Children Act, 1974* “child” and “youthful offender” are defined as a person under the age of 16.⁴⁷ Children between the ages of 16 and 18 are treated as adults.

3.1 Establishment of Juvenile Court

The Children Act, 1974 presents that any case in which a child is charged with the commission of an offence should be tried in a juvenile court. The government may establish one or more such courts in the country⁴⁸ besides when a juvenile court has not been established in a local area the High Court Division, 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 shall have the power to try any cases as Juvenile Court.⁴⁹ Thus though the Act provides for establishment of Juvenile Courts it also suggest ways for implementing the law if separate court is not possible to establish.

In Bangladesh it has already been mentioned that the aim of the Act is to establish a separate juvenile justice system but in practice, there are only three Juvenile Courts in Tongi, Jessore and Konabari correctional institutes. And there is no Juvenile Court either in Khulna or Barisal or other district headquarters and there are few Courts are exercising the power of a Juvenile Court though it is possible for all the courts to act as a Juvenile Court without any Gazette Notification.⁵⁰ Hence separate justice system does not only mean separation in administrative sphere but also difference in idea and practice. At present the courts which are disposing of juvenile cases are suffering from logistic and infra-structural debility. The magistrates of these courts are not well aware of juvenile justice. The magistrates have a tendency to follow the Code of Criminal Procedure rather than the procedure laid down in the *Children Act, 1974*.

⁴⁷ *Ibid*, s. 2.

⁴⁸ *Ibid*, s. 3.

⁴⁹ *Ibid*, Ss. 4 and 5.

⁵⁰ *Ibid*, s. 4.

3.2 Sitting of Juvenile Court

Juvenile Court should hold its sittings at least once in a week or as often as may be necessary and the Court should as far as may be practicable sit in a building or room different from that in which the ordinary sittings of the Court are held, or on different days or at different times from those at which the ordinary sittings of the court are held.⁵¹

In contrast to the provisions, courtrooms (traditionally designed) were built in the correctional institute by the Public Works Department violating the standards about court setup mentioned in the act. Probably, the Public Works Department had no idea about the exceptional format. Though there is a formal courtroom in the correctional institute, the authority is quite aware about the atmosphere as required in the Act.

Most often, the Juvenile Court in Jessore correctional institute sits in the official chamber of the concerned Magistrate. But in Khulna and Barisal there are no such arrangements. The arrangement in Dhaka Metropolitan Magistrate Office is more pitiable. The children informed that they can not avail of proper legal aid; the magistrate does not talk with them in the court- room. They exclaimed had they not been in this institute, their case would have been disposed of speedily.

3.3 Powers of Arrest and Arrest Procedures

The Police have wide discretionary powers to arrest children under a variety of laws. *The Children Act, 1974*, the *Vagrancy Act 1943*, and the *Suppression of Violence against Women and Children Act, 2000* give police the authority to take children into custody on very broad grounds, including for prostitution, begging, being in the company of a “reputed criminal or prostitute,” being “likely to fall into bad association or to be exposed to moral danger,” or being a victim of crime.⁵² Both children who have committed crimes and children in need of protection are processed through the police station and subject to involuntary detention in a remand home or other “places of safety.” Girls who have been victims of abuse and exploitation are particularly vulnerable to detention on these

⁵¹ *Ibid*, s. 7 and *the Children Rules, 1976*, Rule 3.

⁵² *Ibid*, s. 32.

grounds, and are often sent to adults jails due to lack of appropriate facilities. In addition, Article 54 of the *Code of Criminal Procedure, 1898* and the *Dhaka Metropolitan Police Ordinance* allow police to arrest anyone on the grounds of “reasonable suspicion” that the person has been involved in a criminal act. These broad discretionary powers are reportedly used by the police during regular raids to round up street children and girls suspected of prostitution, to clean the streets before hartals or VIP visits, or to extract money from those who are arrested. Street children are especially vulnerable to arrest under these laws, either on “suspicion” or for having engaged in criminal activity. They are often targeted by adult criminal elements, and are easily lured with small amounts of money to engage in drug and arms carrying, and bomb throwing during political agitation. Since police performance is evaluated on the basis of the number of arrests made, there is an incentive for police to make “easy” arrests under these broad powers. In some cases, after a period spent in the police lock-up, the child is handed over to his/her parents in exchange for money.⁵³ In other cases, children arrested on suspicion spend lengthy periods in custody while police frame charges. There are currently no specialized police units for dealing with children, and no comprehensive protocols or procedures governing how police should handle children in conflict with the law. Children are generally treated the same as adults, and there have been numerous reported cases of children being subjected to violence and abusive treatment by police. Girls are particularly vulnerable to physical and sexual abuse at the hands of the police.

The Committee on the Rights of the Child has expressed concern at the incidence of violence, including sexual abuse and physical brutality, directed at children by police officers, and has called for the State to take all necessary measures to prevent and punish police violence.

The Children Act, 1974 does not contain any special provisions limiting the use of physical force, restraints or handcuffs in the arrest of a child, nor does it have any special provisions with respect to the taking of statements or confessions from children. There is no provision, either in law or practice, for measures that might protect children from abuse or intimidation during police questioning or

⁵³ Mizanur Rahman, *ibid*, p.24.

interrogation, such as mandatory presence of a parent, probation officer or lawyer. Mechanisms to monitor and supervise police conduct are weak, and they are rarely held accountable for abuses.⁵⁴

When a child has been arrested, the police are required to immediately notify both the probation officer and the child's parents or guardian.⁵⁵

However, in practice this is generally not done, often because the police do not have time or resources to trace parents.⁵⁶ Furthermore, some police reportedly deliberately misstate the child's age on the charge sheet in order to avoid the added procedural bother that flows from identifying him/her as a child.

Children subject to arrest must be brought before the Court within 24 hours. Although the *Children Act, 1974* states that children may be kept in custody at the police station only if arrangements are available to keep them separate from adults, in practice children are often mixed with adults in police lock-ups. Police contend that, in the absence of adequate facilities they are compelled to detain children in the jails with adults until they are brought to Court.

3.4 Bail and Pre-trial Detention

Under the Children Act, the officer in charge of a police station has the authority to release a child on bail, even for a non-bail able offence.⁵⁷ This provision potentially gives broad scope for the police to prevent children from being unnecessarily detained in police lock-ups. However, in practice this authority is rarely used, reportedly because police are unaware of the law, or do not have the resources to trace parents.⁵⁸ The law itself places restrictions on their authority, stating that the police should not release a child if it will "bring the child into association with reputed criminals," "expose him to moral danger", or where release would "defeat the ends of justice." These grounds are very broad and do not promote the minimum use of detention. When a child who has been arrested is brought before the Court, the Court may release the child on bail or order him/her

⁵⁴ *Ibid*, p.25.

⁵⁵ *Ibid*, Ss.13 (2) and 50.

⁵⁶ Mizanur Rahman, *ibid*, p.25.

⁵⁷ *Ibid*, s.48.

⁵⁸ Mizanur Rahman, *ibid*, p.25.

to be detained in a remand home or place of safety.⁵⁹ There is no stated preference for a non-custodial option.

The Children Act, 1974 does not contain any special considerations for the granting of bail to children, and they are subject to the same requirements as adults with respect to sureties and bond payment. The Courts often detain children prior to trial for minor offences, or set bail bond requirements that parents cannot afford to pay. There are no limitations on the duration of pre-trial detention, and children can languish for years waiting for their case to be determined by the Courts. Many are eventually found not guilty by the Courts due to lack of evidence.

Children who are subject to pre-trial detention may be sent to one of the three specialized Remand Homes (two for boys at Tongi and Jessor, and one for girls at Konabari). Although these Remand Homes are located on the same grounds as the Child Development Centres, children who are on remand are kept under full-time confinement and are not permitted to take part in educational classes, trade courses or games and cultural activities.

Furthermore, despite the fact that the children's remand homes are consistently operating under capacity, the vast majority of children who are detained while awaiting their trial are sent to regular prisons. For example, in one four-month period between October 2006 and January 2007, 476 children were sent to Dhaka Central Jail, while only 19 were sent to Tongi Correction Centre. The police note that they do not have vehicles to transport children out to Tongi, which is approximately 20 kms from Dhaka. Due to lack of separate facilities, children in jails are generally not separated from adults and are subject to abuse.

The government is acutely aware of the problem of children in pre-trial detention, and the High Court itself has issued several rulings requiring the release of children who have been detained on minor grounds, or for lengthy periods of time. Joint efforts of the National Task Force and NGOs have resulted in thousands of children being released from police custody and pre-trial detention. However, the problem of excessive reliance on pre-trial detention persists, largely due to the absence of alternatives deemed acceptable by the police and courts.

⁵⁹ *Ibid*, s. 49.

3.5 Juvenile Court and Trial Proceedings

The Children Act, 1974 calls for the designation of specialized Juvenile Courts, and requires courts of all levels to follow the special juvenile court procedures when hearing cases involving an alleged offender under the age of 16.⁶⁰ When hearing juvenile cases, the Court should sit in a different building or room from the ordinary court sittings, or on a different day or time of day.⁶¹ The Court is closed to the public, and the media is prohibited from disclosing the child's identity.⁶² Proceedings must be conducted in as simple a manner as possible and in a "home-like atmosphere."⁶³ When being brought before the Court, children should not be under the close guard of a police officer, but should be permitted to sit in the company of a relative or probation officer.⁶⁴ The child's parents or guardian have the right to be present, and may be required by the Court to attend.

However, there is no requirement that all children in conflict with the law have legal assistance, including free legal aid where required, and no explicit statement of their right to express their views and to participate in the proceedings. Contrary to due process rights, the Court may dispense with the attendance of the child and proceed without him/her if the Court is satisfied that the child's attendance is not essential to the hearing.⁶⁵

The existing Juvenile Courts are no different from adult courts in terms of their physical design, and tend to re-create the same formal environment as the regular courts. They have limited jurisdiction, and cannot hear cases of children who have committed serious offences. Most children in conflict with the law are therefore referred to the regular courts. While children's cases should be referred to a designated juvenile magistrate, in practice this does not always occur. Most Courts do not comply with the requirement to separate juvenile cases and deal with them at a different time of day than the adult proceedings. *The Children Act, 1974* is reportedly not well-known by magistrates, and even when they are aware there is still the tendency to approach cases involving children like ordinary

⁶⁰ *Ibid*, Ss. 3 and 4.

⁶¹ *Ibid*, s. 7 (2).

⁶² *Ibid*, Ss. 9, 13 and 17.

⁶³ *Ibid*, s. 4.

⁶⁴ *Ibid*, s. 4.

⁶⁵ *Ibid*, s. 11.

criminal matters. Magistrates do not communicate directly with the child, and it has been noted that children exhibit a great deal of fear in court and sometimes cry. Although there is a legal aid system in place, many children are unrepresented, or are taken advantage of by unscrupulous lawyers. When being transported from the police station to the court, children are packed into ill ventilated prison vans together with adults. While waiting for their cases to be heard, children are kept in the court custody cell, sometimes for five or six hours, along with adults. There continue to be incidents of children being brought into court in handcuffs.

Children who are arrested under the Vagrancy Act are taken before the Special magistrate at the Vagrant Reception Centre, rather than the Juvenile Court. Hearings are reportedly very brief, and children are generally not given the opportunity to speak. The Vagrancy Act does not provide a fixed time for confinement, and children may be detained there for lengthy periods of time, particularly if they are unable or unwilling to provide the address of a parent or guardian.

3.6 Sentencing

When making an order under the Act, the Court must take into consideration the character and age of the child; the circumstances in which the child is living; and the report from a Probation Officer as to the child's background and family history.⁶⁶ While probation officers may be instructed by the court to prepare a social inquiry report, in practice these are rarely requested.⁶⁷ Upon finding a child under the age of 16 guilty of an offence, the Court may impose one of the following dispositions which are:

Admonishment and discharge, Release on probation in the care of a parent or other fit person, and under the supervision of a Probation Officer for a period of up to three years, Commitment to a certified institution (now a Child Development Centre) for a minimum of two years and maximum of ten years, but not extending beyond the age of 18 years, If the offence is serious in nature or the

⁶⁶ *Ibid*, s. 15.

⁶⁷ Mizanur Rahman, *ibid*, p.20.

child is “of so unruly or depraved of character” that he/she cannot be placed in a certified institution, the child can be imprisoned for up to the maximum time stipulated for that offence in the Penal Code. The UN Committee on the Rights of the Child has expressed concern that this provision permits adult sentences of imprisonment, including life imprisonment, to be imposed on a child from the age of 7 (now 9).

Children between the ages of 16 and 18 are not covered by the Act, and are therefore subject to adult sentences. While the Act states that no child shall be subject to the death penalty, this applies only to children under the age of 16, not 18, as explicitly required by Article 37(a) of the CRC. *The Children Act, 1974* does not include any statement of preference for non-custodial dispositions, and there are no guidelines governing the Court’s exercise of its sentencing discretion. The Act provides limited scope for non-custodial dispositions. In practice the Courts tend to impose custodial sentences, even for minor offences, since this is the easiest option. Probation remains under-utilized. There is also no explicit requirement that deprivation of liberty be used only for the shortest appropriate period. To the contrary, under the law all institutional dispositions are for a minimum period of two years. The Court also has broad discretion to exceed the ten year maximum penalty, in and itself quite severe, and to impose an adult term of imprisonment where the child is considered “unruly”. Sentences are often quite severe and disproportionately heavy, and there are no special protections at all for children between the ages of 16 and 18.

3.7 Conditions in Detention

There are three specialized institutions for the detention of child offenders, recently renamed Child Development Centres (KUK), which are under the responsibility of the Department of Social Services of the Ministry of Social Welfare. There are Centres for boys at Tongi and Jessore, and one for girls at Konabari. These are large institutional centres (150-200 children each), and care for a mix of children in pre-trial detention, child offenders under the age of 16 who have been sentenced by the courts, and children voluntarily admitted by their parents for being “uncontrollable.” One new KUK is under construction in

Joypurhat district, and three more are in the process of receiving approval. Each would have a capacity of 300. The KUK provide general education up to primary level and some vocational training. Children also participate in weekly cultural programmes, sports and exercise. Each has at least one social case worker on staff to provide individual and group counselling and to promote behavioural development. The Centres are housed on quite large grounds, with gardens and facilities for outdoor games. Although the stated objective of these Centres is to promote the rehabilitation and reintegration of children, in practice they do not have the required skills or resources to fulfill this objective effectively, and have been criticized for being simply places of confinement. Concerns raised by various reports include:

The quality and quantity of food is insufficient, Vocational training programmes do not provide certificates of qualification and the necessary equipment is generally inadequate, While the KUK aim to provide an individual case management approach, they do not have adequately trained and qualified staff to fulfill this function, The emphasis remains on confinement, rather than rehabilitation, Following an escape attempt at Tongi, all of the boys were kept locked in their dorms 24-hours per day for several months and were not permitted to participate in schooling, vocational training, or recreation programmes, Corporal punishment and other degrading punishments are used in all the institutions, including beatings, hanging by tying hands with a rope, and handcuffing. Corporal punishment is officially sanctioned under the Children Rules, which permit “caning not exceeding ten stripes” as a punishment for violating any one of the 30 stipulated rules of conduct,⁶⁸ Many children have limited family contact. The institution rules themselves are quite restrictive on family contact, stating that children are permitted only two letters per month and two visits with parents per month. This limited privilege may be cancelled as punishment, or increased to one visit every 10 days on good behavior,⁶⁹ There is limited support for reintegration of children who are released, While some children are released from KUK upon turning 18, others are sent to jail for the

⁶⁸ *Ibid*, Ss. 23, 24(e) and 24(4).

⁶⁹ *Ibid*, s. 22(5), (6), (8).

remaining period of their sentence. This depends on the precise formulation of the judgment, and is generally unrelated to the seriousness of the offence.

Children are also subject to detention in regular adult prisons. Despite the fact that the KUK are consistently operating under capacity, the police and Courts continue to send children under 16 to the adult facilities. Overcrowding in prisons is a chronic problem, and nutrition and sanitation are poor. There are limited recreation facilities, and all convicted prisoners are required to perform manual labor. Parents reportedly are required to pay a fee to visit children in jails. Although the Act states that they must not be allowed to associate with adult prisoners,⁷⁰ in practice this is not always respected. There have been numerous reported cases of children being subjected to physical and sexual abuse in jails.

3.8 What is committal?

The court may order a child in respect of whom an offence is committed to be committed to a certified institute or an approved home or may be committed to the care of his parent, or guardian, or a relative or other fit person⁷¹ and the court which makes an order committing a child to the care of his parent, guardian or other fit person may in addition, order that he be placed under supervision.⁷²

Though it is necessary that the juvenile offenders or victimised children should as far as possible be kept within the society and among community, the above provisions are not exercised accordingly. There is no category to distinguish and determine whom to be let out in community and whom to be kept inside the correctional institute.

3.9 Age determination

When it appears to the court that a person charged with an offence is a child, the court shall make an enquiry as to the age of that person and shall take such evidence and shall record a finding thereon.⁷³

⁷⁰ *Ibid*, s. 51(2).

⁷¹ *Ibid*, s. 58.

⁷² *Ibid*, s. 59.

⁷³ *Ibid*, s. 66.

In fact, very few Courts take initiative to determine the age of the juveniles. Where police arrest juveniles under Arms and Explosive Act, Women and Child Repression Act etc. the Judges try them under those laws in a manner prescribed to try an adult person. The Judges also convict them under such laws.

3.10 Probation Officer for Specialized Assistance

A Juvenile Court may appoint Probation Officers from among suitable persons in the district, if there is no Probation Officer in its area and may appoint a Probation Officer for a particular juvenile. His duties to be under the supervision of the Juvenile Court and where no court exists, the Court of Sessions. Duties of the Probation Officer include: to visit or receive visits from the child at reasonable intervals; to scrutinize that the conditions of bond are fulfilled; to report the court as to the behaviour of the child; to advise, assist and befriend the child and, when necessary endeavour to find suitable employment; and perform any other duty which may be prescribed.⁷⁴

Probation Officers are appointed under the Social Service Department and their number is very few. In most of the districts Social Welfare Officer has to perform the job of the Probation Officer. In addition to this, Probation Officers are overburdened. They have to supervise the homes and schools (atimkhana, shisu sadan, etc) established under the Social Service Department. Even they have to prepare the speech of their superiors to be delivered in a function.

⁷⁴ *Ibid*, s. 31.

Chapter 4

MAJOR CHALLENGES OF THE JUVENILE JUSTICE SYSTEM

The Children Act, 1974 has failed to reap its fruit because; most probably the law is inherently weak in various aspects. But, why the Act has failed may be discussed from two points of views:

The first may be of sociological nature in the sense that in the legal history of Bangladesh juvenile justice was never a concern of legal study until the present day. The matter was always a topic of social perspective prone to find its link with the breach of social values.

The second one has a concern with legal point in an indirect way. The administration of criminal justice in Bangladesh is a firmly established institution from British period and it is regarded to have a universal criminal jurisdiction against every crime committed. So, to set up a concurrent and adverse jurisdiction against it the piece of legislation should be a very strong and self-contained one.

Although many successes in developing the children justice system of the country in a pro-child manner have been achieved, Bangladesh still has a long way to go. In this journey, many challenges are to be faced. The major challenges can be outlined as follows:

4.1 Vulnerability of the Children of Bangladesh

Vulnerability of the children of Bangladesh to be in conflict with the law is another great challenge. Many children of Bangladesh are always likely to be in conflict with the law. Lack of parental care, extreme poverty, lack of education & awareness and lack of access to justice prevailing among huge number of population of the country lead the children to such awesome likelihood. Street children of Bangladesh are devoid of adequate care and support that they require

to live as a human being. Consequently, they are often left without any option but to engage themselves in activities which are offences under the law of the land. In this process, many children come in conflict with the law primarily because they had to do something to maintain their human existence.⁷⁵

Moreover, extreme poverty and lack of education of a good number of children cause them fall in prey to the criminals. Accordingly, many children are recruited by the adult criminals to aid them in their criminal activities. Another dimension of the vulnerability of the children is that extremely poverty and access to justice, many a times, turn the children an easy option for the law enforcing agencies to arrest or to prosecute.

4.2 Development of Policy and Strategy to Promote Diversion of Children

Development of policy and strategy to promote diversion of children from the formal justice mechanism is a great challenge for Bangladesh. While the handling of a child through formal methods may be justifiable up to a certain extent, an institutional measure 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.⁷⁶ Day by day, many countries are developing various strategies like caution, mediation, family group conferencing, pre-trial community service etc to deal with children in conflict with the law. Contrarily in Bangladesh, law does not contain adequate provision for diversion of children in conflict with the law. Bail seems to be only pre-trial diversion mechanism available under the laws of Bangladesh.

Moreover, institutionalization, both in law and in practice, is the primary tool used to rehabilitate children in conflict with the law, regardless of the seriousness of the offence committed. Although the *Children Act, 1974* makes provision for two other alternative adjudication options such as admonition and probation. These are hardly exercised by the courts. This aspect of the children justice system of Bangladesh is a threat for the well beings of the children. This is because the overuse of institutions for children exacts enormous costs on children, their

⁷⁵ Borhan Uddin Khan and Muhammad Mahbubur Rahman, *ibid*, p.128.

⁷⁶ Sumaiya Khair, *ibid*, p.27.

families, and society. Extensive research in child development has shown that the effects of institutionalization can include poor physical health, severe developmental delays, disability, and potentially irreversible psychological damage. The negative effects are more severe the longer a child remains in an institution and in instances where the conditions of the institution are poor.

4.3 Non-Compliance with International Standard

The aims and standards maintained in the local legislation in Bangladesh do not in every aspect show the resemblance of the standards and aims contemplated by the International Conventions. Hence infra-structural facilities should be provided along with flexible and lenient legal norms. If it becomes expedient to keep a juvenile under detention, necessary arrangements should be made to provide the juveniles the facilities that a human being is entitled. The Riyadh Rules 1990 from article no. 31 to 37 has given out the full details of the requirements of detention. Again within the paradigm of our national legal system there are not many scopes for pre-trial probation system. This weak side of the laws should be properly cared about.

About the process of trial stage there are not many discrepancies between International Standards and national legislation as per the text and wording. The prime problem in this respect is lack of proper infrastructure facility and logistic support. Of course the concurrent jurisdiction of criminal courts to try offences of the juveniles as conferred by section 4 of *the Children Act 1974* should be amended forthwith. Only a juvenile court with exclusive jurisdiction should try juvenile cases. Again it should be clearly pointed out in the legislation as to which crimes should be regarded as heinous and which are not. The weakness that the juvenile justice system in Bangladesh suffers mostly from its inefficacious post trial treatment system.⁷⁷ Though detention in remand home is the prime concern of the national legislation the International Standards always put emphasis on a community based correctional system. It is highly questionable whether the method of correction in remand homes in Bangladesh is capable of making a child socially responsible citizen.

⁷⁷ Sumaiya Khair, *ibid*, p.44.

4.4 International Standard as to pre trial treatment

The definition of child is primarily conceived as a human of 18 years.⁷⁸ The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.⁷⁹ 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.⁸⁰ The police, the prosecution or other agencies shall have the power to dispose of such case before final hearing. The police officers who frequently or exclusively deal with juvenile offences should be specially trained. Regarding this special group of police may be established. Detention pending trial may be used as a measure of last resort and for the shortest possible time.⁸¹

Whenever possible detention pending trial shall be replaced by alternative measures such as close supervision, incisive care or placement in a family or in an educational setting. The juveniles in detention shall not be discriminated upon their status and civil, economic and political right can not be denied on this ground.

4.5 International Standard as to trial stage treatment

The children Act, 1974 after all contains the provisions which if properly followed shall be able to maintain a good degree of right and security towards a child. 3(b) (iii) of the CRC 1989 speaks for speedy disposal of a trial to which a juvenile is a party. But this is not always possible when the case is exclusively traible by a Court of Session or courts established under section 4 of the *children Act 1974*. The juvenile justice system shall emphasise the well being of the juvenile and restriction on the personal liberty of the juvenile shall be imposed only after the careful consideration and shall be limited to the possible minimum. The well

⁷⁸ *Ibid*, Art. 1.

⁷⁹ *Ibid*, Art. 7.

⁸⁰ *Ibid*, Art. 37 (b).

⁸¹ Mizanur Rahman, *ibid*, p.45.

being of the juvenile shall be the paramount factor in the consideration of a child's case.⁸²

4.6 Lack of Proper Administrative and other Co-Ordination

It is badly felt that there exists a huge gap between administration of justice and law enforcing agent. Police officials through their corrupt practices are frequently violating the basic rights of the juvenile offenders and remain untouched. There are lots of instances where Investigation Officers have charged children of three or four. Most of the police officers do not have knowledge about the Children Act. Especially, they are confused about the age limit of the child, i.e. whether it is 14, 16 or 18.

Co-ordination is badly needed between the police and jail authority, judicial officers, public prosecutors, engaged lawyers the probation officers. As per the Act, the police officer is under an obligation to inform the Probation Officer within the shortest possible time. Then the juvenile will be handed over to the Probation Officer or to the Place of Safety and will be kept there until the case is finally disposed of. During the trial, both the judicial officers and the lawyers have a very important role to safe guard the interest of the juvenile for proper investigation of the case, proper representation in the court.⁸³

4.7 Police Behavior with the Children

In the administration of justice the police play one of the most vital roles and juvenile justice system is not an exception to that. In fact, in pre trial stage police is the most important agent that comes in contact with the juveniles.

Field level police officers have not the least training and orientation on the juvenile justice system. They often behave roughly towards the children. Only a very few motivated workers in the juvenile justice administration really understand child psychology and sociology. *The Children Act, 1974* prescribes separation of children from adults in every possible stage of the juvenile justice system. The trial and subsequent imprisonment of a juvenile has to be separated

⁸² *Ibid*, p.46.

⁸³ *Ibid*, p.47.

from that of an adult. But the fact is children have to remain in police custody, remand, under trial stages and various forms of preventive custody together with adult. Children are subjected to long remands in police custody because of courts' failure to sit regularly. There are children and adults who have remained under trial for more than 5 years, when the alleged offence deserves an imprisonment of only 2 or 3 years. Another problem with the police is substitution of physical violence for investigation process in police custody.⁸⁴ Violence within the police station is actually considered a very normal information obtaining process. Every child who has come in contact with police has complained against it.

4.8 Other Challenges

Lack of logistic support is one of the reasons behind non-implementation of the Act. The arrangement necessary for compliance with the Act is not adequate at all. There are only three correctional centres in this country. So it is not possible in each case to send the juveniles from all over the country to these centres due to shortage of fund, vehicle and manpower. Hence, juveniles are generally kept in the jails with adult prisoners. Again the Act in these cases stipulates separate arrangements for juvenile offenders, and in most cases it is also far away from the practice. Jails in our country are over crowded, so it is not logically possible to make any arrangements for juvenile offenders. Since most of the magistrates have no legal backgrounds, they do not understand the inner meaning of a specific law. Most of the magistrates are unaware of the existence of the *Children Act, 1974*.⁸⁵

When any youthful offender is arrested, his/her lawyers in most cases conceal his/her age to the court and move for his/her bail. This creates negative impact on the juveniles. In addition to this if, any lawyer tutors witnesses to tell lies in order to secure the bail of a juvenile, the juvenile is encouraged to commit offences.

The probation officers are coming from different disciplines; as a result lack of professionalism is evident. In the districts where there is no probation officer, social welfare officer has to execute extra jobs of probation officer.

⁸⁴ *Ibid*, p.48.

⁸⁵ *Ibid*, p.51.

Most of the adult persons do not have adequate knowledge about the rights of children. As a result, in most cases, adults' behaviour towards children is not always supportive of the welfare and overall development. The weakest point is children cannot also force the authority to protect their own rights. There is no strong and effective children's organization, especially in the rural areas, through which children can organize themselves in order to protest against violent activities.

Chapter 5

DIVERSION PROCESS AND ALTERNATIVE MEASURES IN THE JUVENILE JUSTICE SYSTEM

5.1 Diversion process and its importance

Diversion means referring cases away from formal criminal justice proceedings towards community support to avoid the negative effects of being implicated in such proceedings. Diversionary measures can come into play at any stage - at the time of the arrest or immediately before the foreseen court hearing - either as a generally applicable procedure or on the decision of the police, prosecutor, court or similar body. The alternative to formal adjudication must be compatible with the rights of the child which preclude measures such as corporal punishment. Diversion may involve a restorative justice component.

Restorative justice is an approach that recognises how crime affects the victim, the community and the offender. Its primary focus is to repair the damage caused by the offence, to make reparation to the community and to the victim, and to return the offender to a productive place in the community. For justice to be truly restorative, the community, the victim and the offender must take active roles.⁸⁶

The process of going through the formal criminal justice system can be deeply disturbing for children. Once a young person has been branded a criminal by going through the formal justice process, they are more likely to remain criminals. Young people who are diverted away from the criminal justice system have a much lower re-offending rate, and this is particularly the case with first-

⁸⁶*UNICEF InterParliamentary Union Guide 107.pdf, 2007*, [http://www.juvenilejusticepanel.org/resources/?act=res&cat=&nod=_root_&id=UNICEFInterParliamentaryUnionGuide107&start=11,last visited 12 Jan 2010].

time offenders.⁸⁷ When children are alleged to have infringed penal law, or are accused of or recognised as having infringed penal law, the importance of diversion (i.e., dealing with them outside the formal justice system) is very essential to the accused children.

The importance of diversion process is given below:

Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority, The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system, Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application,⁸⁸ In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims, Repairing the harm done and restoring the balance within community and society, Restitution for the victim, Ensuring that the offender understands and is willing to take responsibility for his or her actions, Helping to change and improve future behaviour of the offender concerned.

5.2 Necessity of Diversion Process and Alternative Measures in Bangladesh

Overuse of deprivation of liberty and the existing palatable situation in the places of confinement are but key reasons for the strongly felt need for alternatives. To this may be added other underpinning reasons.

Firstly, “There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children”.⁸⁹

⁸⁷ Mabel Wong and Nikhil Roy, *ibid*, p.51.

⁸⁸ *Ibid*, p.51.

⁸⁹ Mizanur Rahman, *ibid*, p.58.

Secondly, the existing model may be written in theory but its punitive approach within (deprivation of liberty) should be restructured to embrace a system that focuses more on the needs of the child in contact with the law. The punitive system must be replaced by one that makes rehabilitation (reintegration with the family/ community) a primary goal, but that also provides children with the procedural safeguards necessary to ensure survival in the system. What is necessary, therefore, is significant restructuring of the current system as a means of achieving that goal.⁹⁰

Thirdly, rehabilitation requires treatment of children rather than punishment. It has been mentioned elsewhere in this paper that we are including in the ambit of our intervention all children coming in the contact with the law and not merely the offending children. The notion of punishment, therefore, needs to be discarded in favor of a rehabilitative model that is based on treatment of children in contact with the law.⁹¹

Fourthly, professionals who work with children in contact with law believe that the latter do not need incarceration or any other form of deprivation of liberty as much as they need to be removed from their environment. Removing a juvenile from his or her environment under the existing law means confinement in detention facilities that have been shown to be detrimental to juveniles.⁹²

Fifthly, community based diversions should be the ultimate goal of a new child centered justice policy. When properly staffed and adequately funded, community based programs that “rehabilitate” children in contact with law, are less expensive, more humane, more protective of public safety, and at least as effective as a punitive system, if not better, in reducing recidivism in case of juvenile delinquents. Community based systems keep children close to their families, and increased contact between the child and the family enhances the chances for reintegrating the child into the family.

Lastly, but not in the least, the existing justice model in Bangladesh does not make any distinction between the juvenile delinquents and juvenile victims.

⁹⁰ *Ibid*, p.58.

⁹¹ *Ibid*, p.59.

⁹² *Ibid*, p.59.

Almost similar treatment in relation to two distinct groups of children, who are placed diametrically opposite in relation to each other as regards their relation to and with the law, makes the existing justice system anti-human rights, anti-child and reactionary. Introduction of development of alternatives and diversions therefore, are but indispensable.⁹³

In Bangladesh, Diversion is not formally recognised in the *Children Act, 1974*. However, the draft National Social Policy on Alternative Models of Care and Protection of Children in Contact with the Law establishes the goal of diverting children from the formal justice system to the greatest possible extent, and calls for the development of procedures to deal with petty offences without intervention of the judicial system. Informal measures are already in operation in many parts of the country. For example, the police can issue warnings to children rather than arresting them, and are increasingly making use of this discretion. In addition, traditional shalish courts are often used to deal with community problems involving children. *The Village Courts Ordinance, 1976* provides for trial of certain minor cases in rural areas by Village Courts, but they are currently prohibited from trying any case where the interest of a minor is involved.

⁹³ *Ibid*, p.59.

Chapter 6

CONCLUDING REMARKS

6.1 Recommendations

6.1.1 Amendment of the Children Act, 1974

The following amendment should be made forthwith in the *Children Act, 1974*-

The application of the *Children Act, 1974* and the *Children Rules, 1976* should be extended to the children between sixteen to eighteen. To that effect, necessary amendment to the *Children Act, 1974* should be made to consider everyone below the age of eighteen as 'child'.

The minimum age of penal responsibility is to be raised from nine to twelve and accordingly section 82 of the *Penal Code, 1860* is to be amended. At the same time, *doli incapax* provision contained in section 83 of the *Penal Code, 1860* is to be omitted.

To ensure that no child is deprived of the procedural safeguards of the *Children Act, 1974*, section 66 of the Act is to be amended as such: "If a question arises as to whether a person before a Court is a child for the purposes of this Act, the Court shall record a finding after such inquiry, which shall include a medical report for determination of the age of the child".

Section 48 of the *Children Act, 1974* places restrictions on the authority of the police to release an arrested child on bail stating that the police should not release a child if such release is likely to 'bring the child into association with reputed criminals' or 'expose him to moral danger', or 'defeat the ends of justice'. Herein the last two grounds are too broad and hence being omitted.

Section 50 of the *Children Act, 1974* should be amended. No child should be sent to jail because of the gravity of offence committed.

A pro-child explanation should be added to section 51 of the *Children Act, 1974* to interpret the terms 'unruly' and 'of depraved character' occurring in 1st proviso to section 51 (1). Additionally it should statutorily be prescribed that

every judgment offering punishment of any child should state why the trial judge regards the child concerned as ‘unruly’ or ‘of depraved character’ so that the satisfaction of the trial judge can be subject to scrutiny by the higher court.

A new section is to be inserted in Part VI consisting penalty for engaging children to take part in activities disturbing public tranquility. Penalty should also be provided for engaging child in manufacturing, sale, transport, export, import of arms and ammunition.

A new section may also be added in Part VI of the *Children Act, 1974* providing penalty for those who employ children for exploitative purposes which is hazardous for child’s education, health etc.⁹⁴

Enhancement of penalty for publication of report or pictures relating to child under sec.46 of The *Children Act, 1974* should be provided. Penalty for arbitrary or unlawful interference with his or her privacy, family or correspondence may also be added as these rights are guaranteed under art.16 of CRC.

There should be a specific provision in the Criminal Procedure Code to the effect that trial of every child below 16 should be held under the of the *Children Act, 1974*.

Ambiguity in different provisions of laws should be removed. For example section 20 (7) of the *repression of Women and Children Act 2000*. Here two separate provisions could be inserted in respect of treatment of child offender and child witness. The specific section directs that if any child commits any offence or becomes a witness to the offence the provisions of the Children Act should be followed as far as possible. According to reasonable interpretation as regards a child offender the provisions of the Children Act must be followed but as regards a child witness the provisions of the children Act may not be followed strictly in every case for different circumstantial problem.

The uncontrollable parent referred children should not be dealt in the same manner like offender child under the Children Act. It is also not desirable that they should be detained in the correctional institute. There should be separate day care institute which will ensure their contact with law as well as correction of

⁹⁴ *Ibid*, p.71.

character. Non-residential correctional institute should be set up for petty juvenile offenders.

A provision should be introduced mentioning the applicability of this Act to children irrespective of other laws under which a child is accused. Provision may be included ensuring that no child shall be denied the provisions of this Act on the basis of the gravity of the offence accused of a new chapter on procedure for treatment of children before and during trial should be introduced. This should include the provision of separation of children in the police stations and provisions when such separation should not be made.

Section 18 of the *Children Act 1974* lays down that procedure is to be followed in the trial of cases of juveniles in accordance with the provisions of Criminal Procedure Code such as framing of charges, fixing date for examination of prosecution witness, examination of witnesses for the defense, argument of both parties and finally a judgment. The procedure of conducting cases according to section 18 does not conform to the ends and aim of the juvenile justice. So this section should be struck off and a new convenient, flexible and relaxed procedure should be introduced.

A new section in Part VI of the Children Act providing penalty for exposing children to pornography or use of children in pornographic performances.

A new section should be added in Part VI of the *Children Act, 1974* providing penalty for the use of children in the illicit production, manufacture, distribution, sale or trafficking of intoxication, liquor, drugs and psychotropic substances.

6.1.2 Legal Reforms

Jurisdiction of the Special Tribunal and the Nari-O-Shishu Nirjatan Daman Tribunal should not extend to the children in conflict with the law. To ensure it, amendment of law is recommended to give the children courts all exclusive jurisdiction over the children in conflict with the law.⁹⁵

Contacts between the law enforcement agencies and a children offender should be managed in such a way as to respect the legal status of the children,

⁹⁵ Borhan Uddin Khan and Muhammad Mahbubur Rahman, *ibid*, p.131.

promote the well being of the children and avoid harm to her or him. Accordingly, use of handcuffs in the arrest of a child should be strictly prohibited by law.

Legislative intervention is recommended to put a closure on the judicial debate over the issue of 'relevant date'. Such legislative intervention should unequivocally prescribe that the benefit of the children justice system should be available for everyone who was a child at the time of the alleged date of occurrence of the offence with which he is charged.

Every child who is accused of the commission of an offence should be entitled to have the right of legal assistance at the expense of the State.

Arrest of a child on suspicion should be strictly regulated by law leaving the least minimum discretion on the part of the law enforcing agencies.

Arrest of children under the preventive law should statutorily be prohibited.

Possibility of a child being subject to adult punishment should be ruled out by legislative intervention. It is therefore recommended that even if a child is subjected to punishment, the quantum of punishment be not more than one third of adult punishment.

Where detention is unavoidable, greater contact between a child and his family is expected in the child's best interest. As such, restrictive provisions of the Children Rules regarding family contact should be amended to make it compatible with the international standards.

Provision of corporal punishment contained in the Children Rules should be repealed.

To make the probation related provisions of the Children Act and the Children Rules more effective, making of Rules under the *Probation of Offenders Ordinance, 1960* is recommended.

There should have statutory prescription to the effect that (a) arrest of a child in conflict with the law should be used only as a matter of last resort; (b) detention shall be used only as a measures of last resort and for the shortest appropriate period; and (c) any sentence imposed on a child shall be proportionate to the gravity of the offence and to the circumstances and needs of the child.

6.1.3 Executive and Administrative Actions

The government should prepare a yearly report on the situation of the children justice system of the country. This report should also be meant to be placed and discussed before the parliament and also be made available to the public.

Adequate number of remand homes and places of safety in the vicinity of police stations should be constructed.

Sometimes the law enforcing agencies, in violation of law, file cases against the children below the minimum age of penal responsibility. To uproot this practice, exemplary administrative and judicial actions should be taken against the delinquent personnel.⁹⁶

6.1.4 Establishment Territorial Jurisdiction of the Juvenile Courts

There are three designated juvenile courts in the country. To add number to this figure, the government is considering to establish four other juvenile courts at four divisional cities. In the interim, 64 special magistrates have been authorized by the government to hear juvenile cases in all 64 districts. It is noted that this interim arrangement should not be disturbed. If the jurisdictions of these 64 magistrates are taken over by the four juvenile courts planned to be established in divisional cities, because of the extent of territorial jurisdiction of these courts it will cause more hardship to the children in conflict with the law. Territorial jurisdiction of any of these proposed courts should by no means extend beyond the district concerned where the court would be established.⁹⁷

6.1.5 Training for the Official

The Beijing Rules draw attention to the need for specialized training for all law enforcement officials who are involved in the administration of children justice. The Rules stress that professional education n, in-service training, refresher courses and other appropriate modes of instruction shall be utilized to establish and maintain the necessary professional competence of all personnel dealing with children cases. Similarly, the UN Guidelines for Action on Children in the

⁹⁶ *Ibid*, p.133.

⁹⁷ *Ibid*, p.138.

Criminal Justice System prescribes: “All persons having contact with, or being responsible for, children in the criminal justice system should receive education and training in human rights, the principles and provisions of the Convention and other United Nations standards and norms in juvenile justice as an integral part of their training programmes. Such persons include police and other law enforcement officials; judges and magistrates, prosecutors, lawyers and administrators; prison officers and other professionals working in institutions where children are deprived of their liberty; and health personnel, social workers, peacekeepers and other professionals concerned with juvenile justice”.⁹⁸

In Bangladesh, currently juvenile justice training is generally being conducted on an *ad hoc* basis, and numerous duplicative training manuals and training programmes have been developed with the support of various NGOs, INGOs and donor agencies. It is noted that juvenile justice training is standardized, institutionalised and more systematic. In particular, training programmes should be based on participatory techniques that promote sensitisation and behavioural change. Building the capacities of persons concerned and their understanding of child rights and sensitivity towards children must be carried out on a large scale. It should not be a one-time training programme, but should be a regular and continuous process.

6.2 Conclusion

In Bangladesh, children in conflict with the law experience particularly high levels of abuse at the time of arrest and in police custody. The conditions in detention facilities are generally bad and children are often detained with adults. There is almost no practical experience of crime prevention programmes or diversion in the formal system, and little support to help children returning to their communities to become socially reintegrated after detention. That’s why the government should take some steps for Children who are conflict with the law according to the diversionary process. Such as the establishment of a neighbourhood police force and judicial service and the setting up of judicial centres. It is important that the judiciary is closer to the public for the settlement

⁹⁸ *Ibid*, p.139.

of disputes arising in daily life, such as neighbourhood quarrels, incidents involving petty theft or property damages, family disputes, failure to pay maintenance or failure to present children for visitations. The conventional judicial approach is not the most appropriate response as it does not ensure prompt access to justice in all cases. Moreover, mechanisms are to be developed to reduce the recourse to detention for juveniles in conflict with the law. According to international standards on juvenile justice, deprivation of liberty is to be used as a last resort and for the shortest possible period.

The Judicial system should be changed as like promote restorative justice as an alternative response to children's conflict with the law and advance preventative efforts to reduce crime and children's conflict with the law.

The Judicial officers (Police, Magistrate, Probation officers) must be trained up for Children's rights, growth and development. The training should be following issues namely:

Training on roles and jurisdiction in handling child-related cases, Training on data collection and management, Training on diversion measures and their importance, Training on mediation and restorative justice, strengthening capacity to follow up cases and promote rehabilitation of child offenders. The local police should have a sound knowledge of Child Rights, and they do not handcuff children, but rather explain why they are apprehending them and taking them of the police station.

In the other sense the "places of safety" other than jails should be the first resort to improve pre-trial situation. For situations the Criminal Court format should not be used. A more informal procedure which allows child to speak normally, if necessary, should be encouraged.

Duties of police and probation officer should be fully outlined by respective enactment. "Counseling", "foster care" and compensatory and punitive damages may be introduced as new dispositions.

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