

## The Triviality of the Children Act 1974 in the Juvenile Justice System of Bangladesh in the 21st century

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### Abstract

*This article finds that the Children Act 1974 in promoting the best interest of the child in the Juvenile Justice System in Bangladesh in the 21<sup>st</sup> century is flawed. Suggesting that it is imperative to incorporate the provisions of the United Nations Conventions on the Rights of Child 1989 in the Children Act, the article concludes that the Children Act 1974 currently turned out defunct in protecting the rights of the child in contact with law in Bangladesh. At the same time, the Ministry of Child Affairs of the Government of Bangladesh, the Supreme Court of Bangladesh and other law enforcing agencies should work together to ensure that the rights of the childcare protected. The Cabinet already approved the new Children Act, however, if strongly not supervised than all the efforts for a child oriented Juvenile Justice System in Bangladesh will not last.*

“Juvenile justice is a core dimension of the rights of the child and a pivotal area where States’ commitment to children’s rights can be best expressed. We have a unique opportunity to promote a paradigm shift and help the criminal justice system evolve from an adult universe where children and adolescents hardly belong and where violence remains a high risk into an environment where children are seen as rights holders and are protected from all forms of violence at all times.”

~ Marta Santos Pais<sup>1</sup>

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<sup>1</sup> Marta Santos Pais, ‘The Special Representative of the Secretary-General (Srsg) on Violence against Children Speaking at an Experts Meeting Held in January 2012 in Vienna to Formulate and Accelerate the Adoption of Effective Measures to Protect Children within Juvenile Justice System against All Forms of Violence’, *United Nations Office on Drugs and Crime*.

## Introduction

The initial idea behind the juvenile justice system is that children, being the most vulnerable persons in our society, when come in conflict with the law are victims of social hardship, violence and deprivation. Identically, children may commit crimes due to their incapability of realising the extent and consequences of their acts. Subsequently, the juvenile justice system accepted that children when comes in contact with the law should be helped rather than punished. It is also accepted that children should be dealt with somewhat differently from adults within the formal criminal administration. Moreover, the juvenile justice system is built on the principle of *parens patriae*, which means that instead of the lawyers fighting to decide whether a child is guilty or innocent, the court would act as a parent or a guardian interested in helping the child.<sup>2</sup> Presently, the United Nation Convention on the Rights of Child 1989 (UNCRC),<sup>3</sup> along with other international instruments, is playing a key role in protecting the rights of the child. Bangladesh is the most densely populated country in the world with over 143 million people of which 65 million are children.<sup>4</sup> Bangladesh, being party to the UNCRC and other international instruments such as the International Covenant on the Civil and Political Rights (ICCPR)<sup>5</sup> and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT)<sup>6</sup> has an obligation not only to protect the rights of the child but also to prohibit inhuman and degrading punishment imposed on them. The Children Act 1974<sup>7</sup> and the Children Rules 1976<sup>8</sup> which were enacted before the UNCRC have been protecting the rights of the child and have been working to meet the special needs of child in Bangladesh. The Children

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<sup>2</sup> Robert, C. H., 'Juvenile Delinquency: Cause and Effect', *Yale - New Haven Teachers Institute*, (2000) <<http://www.yale.edu/ynhti/curriculum/units/2000/2/00.02.05.x.html>>.

<sup>3</sup> *The United Nations Convention on the Rights of the Child (UNCRC)*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 20 November 1989) <<http://www.unhcr.org/refworld/docid/3ae6b38f0.html>>.

<sup>4</sup> 'Children's Situation in Bangladesh', *Save the Children* (2012) <<http://sca.savethechildren.se/sca/Countries/Bangladesh/Childrens-situation-in-Bangladesh/>>.

<sup>5</sup> *The International Covenant on Civil and Political Rights*, art 24, opened for signature 16 December 1966, 1057 UNTS 407 (entered into force 23 March 1976).

<sup>6</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

<sup>7</sup> The Children Act', *The Bangladesh Code* <[www.law.yale.edu/rcw/rcw/.../assc/bangladesh/frontpage.doc](http://www.law.yale.edu/rcw/rcw/.../assc/bangladesh/frontpage.doc)>.

<sup>8</sup> *The Children Rules (1976)* NNo. S.R.O. 103 L/76.

Act (CA) was a unique piece of legislation for its times, however, it is currently broken down compare to the provisions of the UNCRC in protecting the rights of the children in the 21<sup>st</sup> century.

This article lined up at evaluating the effectiveness of the CA in promoting the best interest of the child in line with the UNCRC in the juvenile justice system of Bangladesh in the 21<sup>st</sup> century. This article aims at exploring the relevant provisions of the CA related to juvenile justice in Bangladesh and juxtapose the relevant provisions of the UNCRC and other international instruments, such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules),<sup>9</sup> the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)<sup>10</sup> and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules)<sup>11</sup>. Moreover, this article will point out at the various Periodic Report submitted by the Government of Bangladesh (GoB) under the UNCRC; the observations made by the Committee on the Rights of the Child (CtRC) on those periodic reports; and the responses made by the GoB on those observations in order to fulfill their obligation under the UNCRC to protect the rights of the child. This article will draw the inference with some recommendations for the improvement of the administration of juvenile justice in Bangladesh.

### Juvenile Offender

The term child is defined in the UNCRC as a person under the age of 18.<sup>12</sup> This includes infancy, early childhood, middle childhood and adolescence.<sup>13</sup> In contrast, in defining the term juvenile the (pre UNCRC) Beijing Rules do not set a fixed age for childhood but state that, for the purposes of the Beijing Rules, “a juvenile is a child or young person who,

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<sup>9</sup> *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, Adopted by General Assembly Resolution 40/33 of November 1985' <<http://www2.ohchr.org/english/law/pdf/beijingrules.pdf>>.

<sup>10</sup> *United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)*, Adopted and proclaimed by General Assembly resolution 45/112 of 14 December 1990 <<http://www2.ohchr.org/english/law/juvenile.htm>>.

<sup>11</sup> *United Nations Rules for the Protection of the Juveniles Deprived of Their Liberty (Havana Rules)*, Adopted by General Assembly resolution 45/113 December 1990 <[http://www2.ohchr.org/english/law/pdf/res45\\_113.pdf](http://www2.ohchr.org/english/law/pdf/res45_113.pdf)>.

<sup>12</sup> *The United Nation Convention On The Rights Of Child*, art 1.

<sup>13</sup> Mondol, G. C., Child rights. *Academia.edu.*,(2012)<[http://www.academia.edu/845396/Child\\_Rights](http://www.academia.edu/845396/Child_Rights)>.

under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult”.<sup>14</sup> Similarly, the Riyadh Guidelines contain no explicit definition of children, but mention that their interpretation and implementation should be “within the broad framework of”, among other instruments, the UNCRC and the Beijing Rules.<sup>15</sup> The UNCRC, however, allows every society to consider its own laws and customs to determine the limit of age for a child. On top of that, the CtRC has consistently encouraged states to adopt the same definition in their national legislation and has emphasised that where the age limit is set lower for the purposes of the Convention the rights and protection offered under the Convention will be considered to be applicable to all persons under 18.<sup>16</sup>

The definitions of child and youthful offender can also be found in sections 2(f) and 2(n) of the CA of Bangladesh. According to those sections a child is a person under the age of 16 years and a youthful offender is any child who has been found to commit an offence.<sup>17</sup> The term in conflict with the law is generally used in a broader sense to include anyone coming into contact with someone in authority upon being accused of breaking the law.<sup>18</sup> Moreover, the Child Marriage Restraint Act defines a child if male as one under 21 years of age and if female under 18 years of age.<sup>19</sup> Similarly, the Bangladesh Labour Act 2006 says child means someone who has reached the age of 14 years but has not reached the age of 18 years.<sup>20</sup> According to the Vagrancy Act a child means a person under the age of 14 years<sup>21</sup> and as per the Nari-o- Shishu Nirjaton Daman Ain, a child is a person up to 16 years<sup>22</sup>. Additionally, the Contract Act 1872<sup>23</sup> and judicial pronouncements in cases under that law state that a minor is not competent to enter into a contract. The relevant Act to be followed to determine who is a minor is the Majority Act 1875, according to which a person shall be deemed to have attained his majority when he shall have completed the age of

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<sup>14</sup> *The Beijing Rules*, rule. 2.2.

<sup>15</sup> *The Riyadh Guidelines*.

<sup>16</sup> Ali, J. M. I., *Towards A Justice Delivery System For Children In Bangladesh*, (UNICEF Bangladesh 2010), p. 24.

<sup>17</sup> *The Child Act 1974*, art. 2(f) and 2(n).

<sup>18</sup> *Ibid* 2(k).

<sup>19</sup> *Child Marriage Restraint Act 1929*, section 2 (a)

<sup>20</sup> *Bangladesh Labour Act 2006*, section 2 (8).

<sup>21</sup> *Bengal Vagrancy Act 1943*, section 2 (3).

<sup>22</sup> *Nari-o-Shishu Nirjaton Daman Ain 2000*, section 2 (ta)

<sup>23</sup> *The Contract Act 1872*, section 11.

eighteen years.<sup>24</sup>

The CtRC, observing this variables as to the definition of the child in the laws and policies of Bangladesh, asked the GoB to redefine the age of child as 18 years in the CA.<sup>25</sup> In response, the GoB in 2011 adopted the National Children Policy (NCP) and declared that any person below the age of 18 years of age is a child notwithstanding any different age contained elsewhere.<sup>26</sup> Moreover, in the 5<sup>th</sup> Periodic report, the GoB in order to ensure the rights of the children in alignment with the UNCRC proposed a new Child Act, which will replace the existing Child Act 1974, defining the age of the child as 18 years.<sup>27</sup> In compliance of the 5<sup>th</sup> Periodic Report the Cabinet of Bangladesh on 25<sup>th</sup> of February 2013 approved the draft of the Children Act 2013, where those below 18 years of age are recognised as children.<sup>28</sup>

### Juvenile justice

The term juvenile justice system refers to the laws, policies, guidelines, customary norms, systems, professionals, institutions and treatment specifically applicable to children in conflict with the law.<sup>29</sup> In addition, juvenile justice is understood not only to cover the treatment of children in conflict with the law but also includes efforts to address the root causes of offending behaviour and implement measures to prevent such behaviour.<sup>30</sup> There are three major strands of work under this broad definition, all of which are features of 'restorative justice'.<sup>31</sup>

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<sup>24</sup> *The Majority Act 1875*, section 3.

<sup>25</sup> *Concluding observation: Bangladesh's third/fourth periodic report*. Report for Committee on the Rights of the Child, UNCRC/C/BGD/CO/4, (26 June 2009) <<http://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-BGD-CO-4.pdf>>.

<sup>26</sup> *National Child Policy of Bangladesh*, Ministry of Women and Child Affairs (2011) <<http://www.mowca.gov.bd/wp-content/uploads/NCP2011.pdf>>.

<sup>27</sup> *Draft of the 5th Periodic Report Convention On The Rights Of The Child (CRC)*, 2012 <<http://www.mowca.gov.bd/?p=948>>.

<sup>28</sup> Staff Correspondent, 'Cabinet Clears Children Act', *BDnews24.com*, 25 February 2013. <<http://bdnews24.com/bangladesh/2013/02/25/cabinet-clears-children-act-draft>>.

<sup>29</sup> 'Manual for the Measurement of Juvenile Justice Indicators', *United Nations Office on Drugs and Crime 2006*. <[http://www.unodc.org/pdf/criminal\\_justice/06-55616\\_ebook.pdf](http://www.unodc.org/pdf/criminal_justice/06-55616_ebook.pdf)>.

<sup>30</sup> 'Juvenile Justice', *Defence For Children (DCI)*, 2010 <<http://www.defenceforchildren.org/juvenile-justice.html>>.

<sup>31</sup> 'Handbook on Restorative Justice Programmes', *United Nations Office on Drugs and Crime 2006* <[http://www.unodc.org/pdf/criminal\\_justice/06-56290\\_Ebook.pdf](http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf)>.

The first strand is prevention, which ensures that boys and girls 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.

Second strand is diversion, which ensures that at all possible stages girls and boys are diverted from the formal justice system into community-based and restorative processes. The real intentions of this strand are to address effectively the causes of the behaviours of the children and identify strategies at the community level to effectively prevent re-offending.

The last strand, protection, aims at ensuring that children who are already in conflict with the law do not re-offend. Its objective is to promote the rehabilitation and smooth reintegration of the children into society. Additionally, it works towards developing children's protection against human rights violation by the government.<sup>32</sup>

Juveniles around the world, on many occasions, are involved with serious crimes, e.g. robbery, murder or offences related to drugs and the traditional legal procedures in the traditional criminal justice dealing with the juvenile offenders were not child friendly. Moreover, such laws did not take full account of the child's age, circumstances and needs; and fixed attention only on the offence and its punishment. Bearing this *motto* the stakeholders around the world have been trying for years to develop the administration of juvenile justice system in a child-friendly way inspite of the geographical and cultural differences. In the year 1967, in *reGault's* casethe US viewed that the juvenile courts, as a public social agency, must strive to find a right solution to the problems of juvenile delinquency rather convicting or punishing the juveniles for wrongful acts.<sup>33</sup> After more than 40 years this view has been reiterated with some changes in words by the Bangladeshi stakeholders, which can be found in *Fahima Nasrin's* case<sup>34</sup>. According to them, children who resort to offending do so, not through their own fault but through the neglect or fault of their parents and their immediate surroundings. Moreover, the society sometimes fails to provide the children with their basic needs. Therefore, it is the duty of the stakeholders' to act with equanimity and

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<sup>32</sup> 'Juvenile justice', *Innocenti Digest*,(Unicef ICDC, Florence1998)  
<<http://www.unicef-irc.org/publications/pdf/digest3e.pdf>>.

<sup>33</sup> *In re Gault* (1967) 387 U.S. 1.

<sup>34</sup> *Fahima Nasrin v Bangladesh and others* (2009) 61 DLR 232.

apply special mechanism when dealing with children coming in conflict with the law.<sup>35</sup>

Thus, children being completely different human beings with different sensibilities, requirements and necessities need a different model for treating them when they come into conflict with criminal laws.<sup>36</sup> For this, juvenile justice should essentially protect the rights of the children and ensure that the voices of the children are heard. Lastly, the juvenile justice should ensure that the children feel safe while in conflict with the law, considering their dearth as to knowledge of the law and complexity of criminal administration.

### **Legal Framework**

The United States of America (USA) pioneered in the development of a juvenile justice system. In 1825 the Society for the Prevention of Juvenile Delinquency established the New York House of Refuge to house juvenile delinquents; and subsequently, in 1899, the first juvenile court in the United States was established in Cook County, Illinois,<sup>37</sup> where the goals of the juvenile court were described:

The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude. The ordinary trappings of the courtroom are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.<sup>38</sup>

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<sup>35</sup> *Ibid.*

<sup>36</sup> Malik, S. (2004) *The Children Act, 1974: A critical commentary*, (Save the Children UK).

<sup>37</sup> 'The History of Juvenile Justice', *American Bar Association* (United States of America: ABA Division for Public Education, 2010), p. 5

<<http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf>.

<sup>38</sup> Mack, J. (1909) The juvenile court. *Harvard Law Review*, 23(2), p. 120 <<http://heinonline.org/wwwproxy0.library.unsw.edu.au/HOL/Page?page=104&handle=hein.journals%2Fhlr23&collection=journals>>.

The idea quickly caught on by every country, which has also been reflected in the UNCRC.

States that are parties to the UNCRC have a clear obligation to take all appropriate legislative, administrative and educational measures to protect children in detention from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment or exploitation, including sexual abuse.<sup>39</sup> Moreover, States Parties are obliged to recognise the right of every child alleged to have infringed the penal law. In such circumstances, children should be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which not only reinforces the child's respect for the human rights and fundamental freedoms of others but also takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.<sup>40</sup> This view has been reiterated by the CtRC in the General Comment on Children's Rights in Juvenile Justice (General Comment No. 10).<sup>41</sup> The Committee asserts that all forms of violence in the treatment of children in conflict with law must be prohibited and prevented.<sup>42</sup> Moreover, a State cannot place children in conflict with the law in a closed facility unless and until there are other options available.<sup>43</sup> Lastly, a State cannot impose death penalty and sentences of life imprisonment for offences committed by children under the age of 18 years.<sup>44</sup>

In addition to the UNCRC, provisions regarding the right of children to protection from violence are also found in the ICCPR and the CAT. Under Article 24 of the ICCPR, children enjoy the right 'to such measures of protection as are required by [their] statutes' as minors.<sup>45</sup> The Preamble of the CAT prohibits all sorts of torture towards individuals including children.<sup>46</sup>

The CtRC also called States Parties to bring their juvenile justice system

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<sup>39</sup> *The United Nations Convention on the Rights of Child*, art 19.

<sup>40</sup> *Ibid*, art 40.

<sup>41</sup> *CRC General Comment No. 10 (2007): Children's rights in juvenile justice*. Report for Committee on the Rights of the Child (25 April 2007) <<http://www.refworld.org/docid/4670fca12.html>>.

<sup>42</sup> *Ibid*.

<sup>43</sup> *The United Nations Convention on the Rights of Child*, art 37 (b).

<sup>44</sup> *Ibid*, art 37(a).

<sup>45</sup> *The International Covenant on Civil And Political Rights*, art 24.

<sup>46</sup> *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Preamble.

into conformity with a number of international guidelines and agreements, such as the Beijing Rules and the Havana Rules.<sup>47</sup> Bangladesh was among the first 20 countries to ratify the UNCRC in August 1990. Moreover, Bangladesh has ratified the ICCPR and the CAT. Therefore, Bangladesh is under obligation to give effect to the UNCRC, ICCPR and CAT as well to the observations of the CtRC by means of laws, policies and practices designed to further its goals.

In Bangladesh, the juvenile justice system is administered by the Children Act 1974 and the Children Rules 1976. The Act and the Rules were promulgated as a direct manifestation of Article 28(4) of the Constitution of Bangladesh, placed in Part III under the heading "Fundamental Rights"<sup>48</sup>, which allows discriminatory laws to be made in favour of children.<sup>49</sup> The High Court Division of the Supreme Court of Bangladesh in the case of *The State Vs. Md. Roushan Mondal alias Hashem*<sup>50</sup> reiterating the above view also adds that the CA was a response of the GoB in fulfilling the mandate of international instruments including the UNCRC.

Apart from the CA, there are several national laws in Bangladesh that deal with children in conflict with the law. They are the *Penal Code* 1860, the *Code of Criminal Procedure* 1898, *The Suppression of Violence against Women and Children Act* 2000 and *Nari O Shishu Nirjaton Doman (Songshodhoni) Ain* 2003. The CA is the one to include important procedural protection for children and places primacy on formal court structures, legalistic responses and institution-based rehabilitation. However, the CA does not provide a particularly sound basis for the development of a child-centered, rights-based juvenile justice system especially because it is currently running behind the time.<sup>51</sup>

The CA 1974 was a unique piece of legislation, well advanced for its time, enacted to cater for the rights of children. However, being 35 years

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<sup>47</sup> Buck, T. The United Nations Convention on the Rights of the Child, *International child law*. (Hoboken Routledge 2010), p. 159.

<sup>48</sup> *Constitution of the Peoples' Republic of Bangladesh*, art 28(4).

<sup>49</sup> Ali, J. M. I., Comprehensive Children Justice System In Bangladesh. *The New Nation* (2012) <<http://thenewnationbd.com/newsdetails.aspx?newsid=35978>>.

<sup>50</sup> BCR 2006 HCD 275.

<sup>51</sup> Ara, S., Bangladesh: Rights of the Child Come Into Contact With Law and State Of Juvenile Justice System-Bangladesh Perspective. *Asian Human Rights Commission* (2012) <<http://www.humanrights.asia/news/ahrc-news/AHRC-ART-046-2012>>.

old it is currently no longer up to the mark compared to the UNCRC. The CA does not comply with the above principles of international instrument and, therefore, children in need of protection are often treated the same as children in conflict with law.

### **Minimum Age of Criminal Responsibility**

According to the UNCRC, the age of criminal responsibility shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.<sup>52</sup> The CtRC repeatedly noted that the minimum age of criminal responsibility (MARC) is too low in Bangladesh and asked the GoB to raise the MARC.<sup>53</sup> In 2004, the GoB raised the MARC from 7 to 9 years and amended Section 82 of the Criminal Procedure Code (CrPC), which confirms that if a child below the age of 9 years commits any crime it would not be considered as offence.<sup>54</sup> The GoB, however, set the criminal liability of children between the ages of 9 and 12 subject to judicial assessment of their capacity to understand the nature and consequences of their actions at the time of the occurrence.<sup>55</sup> A child between the ages of 12 to 18 would not be considered for judicial assessment, however, the case would be tried in special court suitable for children and would be given special preferences.

### **Absence of proper mechanism to determine the age**

The Child Act deals with the presumption and determination of age. It says that 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, the Court shall make an inquiry 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.<sup>56</sup> However, Bangladesh, being a developing country, previously had a low record of birth registration and, thereby, children in conflict with the law were often deprived of age-appropriate protections. Until now, police reportedly has either failed to record a child's age or has deliberately

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<sup>52</sup> *The United Nation Convention On The Rights Of Child*, art 40(3)(a).

<sup>53</sup> *Third And Fourth Periodic Report Of The Government Of Bangladesh Under The CRC*. Report for Committee on the Rights of the Child (2007)  
<<http://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-BGD-CO-4.pdf>>.

<sup>54</sup> *The Code of Criminal Procedure 1898*, sec 82.

<sup>55</sup> 'Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law', *UNICEF* (2006) <[http://www.unicef.org/rosa/Juvenile\\_Justice\\_in\\_South\\_Asia.pdf](http://www.unicef.org/rosa/Juvenile_Justice_in_South_Asia.pdf)>.

<sup>56</sup> *The Child Act 1974*, section 66 (1)

noted an increased age to avoid having to comply with procedural protection.<sup>57</sup> Moreover, a physical examination as well as a scientific test to determine the age of a child is not accurate. In addition to that, the law also does not recognise Judges as experts in this field and, as a result, in many cases juvenile justice is hampered and sometimes denied to a child.<sup>58</sup> However, the directives of the Supreme Court of Bangladesh, in different cases, serve as guidelines for the judges to ascertain the proper age of a child. Such as, in *Hasina Begum's* case the High Court Division (HCD) directed the judges of the lower court to rely on the date of birth given in the child's school record if it seems to them that the doctor's opinion is ambiguous.<sup>59</sup> Similarly, in *Monir Hossain's* case, the HCD went further and directed a judge of first instance to make an enquiry before the proceeding of a case in order to satisfy whether the accused is a child or not entitled to juvenile justice.<sup>60</sup> Recently, GoB made the birth registration compulsory and the CtRC in its concluding observation has appreciated it.<sup>61</sup>

#### **Arrest Procedures, Detention and Specialised Institutes for Children**

The UNCRC recognises that a child shall not be subjected to torture or other cruel, inhuman or degrading treatment or punishment. It further recognises that no child shall be deprived of his or her liberty unlawfully or arbitrarily. If a child needs to be arrested, kept in detention or imprisoned than such measures should be the measure of last resort and it must be short in time. Moreover, every child deprived of liberty must be treated with humanity and in a manner, which takes into account the needs of persons of his or her age. Lastly, children deprived of liberty must be separated from adults.<sup>62</sup>

The UNCRC in article 40(3) requires the party to promote the establishment of special procedures, authorities, or institutions, which would be child friendly and child sensitive.<sup>63</sup> The UNCRC Committee in

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<sup>57</sup> Ara, 'Bangladesh: Rights of the Child Come into Contact with Law and State of Juvenile Justice System-Bangladesh Perspective'.

<sup>58</sup> Ali, J. M. I., Are judges experts in determining age? *Child Rights International Network [CRIN]* (2009)-<http://crin.org/resources/infoDetail.asp?ID=19889>.

<sup>59</sup> *Hasina Begum vs. State and another*, 1 BLC 315.

<sup>60</sup> *Monir Hossain vs. State*, 53 DLR 411.

<sup>61</sup> 'Concluding Observation: Bangladesh's Third/Fourth Periodic Report'.

<sup>62</sup> *The United Nation Convention on the Rights of Child*, art 37.

<sup>63</sup> *Ibid*, art 40(3).

General Comment No. 10 stated that a comprehensive juvenile justice requires the establishment of specialised units with the police, the judiciary, the court system, the prosecutor's office, as well as with specialised defenders or other representatives who provide legal or other appropriate assistance to the child.<sup>64</sup> The establishment of specialised child friendly institutions, for instance, the child ombudsman and the juvenile police unit, aims to foster the rehabilitation process and nourish the child's development.<sup>65</sup>

At present, there are only three specialised institutions for the detention of child offenders in Bangladesh. These institutions are called Juvenile Development Centers in accordance with the CA, the National Children Policy and the UNCRC.<sup>66</sup> Although the objectives of these institutions are to promote the rehabilitation and reintegration of children, in reality, they lack the necessary staff and resources to effectively promote rehabilitation and reintegration. As a result, many children are sent to ordinary jails where they are imprisoned with adults and where they suffer torture, ill treatment and other forms of abuse.<sup>67</sup> In view of this, the HCD in *ASK and Blast vs. Bangladesh and Others* ['*Juvenile in Jail*' case]<sup>68</sup> directed the GoB to transfer all the juveniles to Juvenile Development Centers and take necessary steps to stop the existing practice.

In Bangladesh, a police officer is empowered to grant bail to a child even if the arrest is made under a non-bailable offence<sup>69</sup>. However, if the child cannot be released on bail, the officer-in-charge of the police station shall cause the child to be detained in a remand home or a place of safety until s/he can be brought before a court.<sup>70</sup> The CtRC, however, in this regard made some observations and requested the GoB to comply

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<sup>64</sup> 'Crc General Comment No. 10 (2007): Children's Rights in Juvenile Justice'.

<sup>65</sup> Rahman, K. F., *Diversion And Alternative Sanctions In The Juvenile Justice System In Bangladesh: A Child Rights Perspective*. (Masters Thesis, Erasmus Universiteit Rotterdam, 2011) <[http://thesis.eur.nl/theses/law\\_culture\\_society/iss/hds/index/167996363/](http://thesis.eur.nl/theses/law_culture_society/iss/hds/index/167996363/)>.

<sup>66</sup> 'Juvenile Development Centres', Ministry of Social Welfare Government of the People's Republic Of Bangladesh, <[http://www.dss.gov.bd/index.php?option=com\\_content&view=article&id=90:juvenile-development-centres&catid=41:institute&Itemid=104](http://www.dss.gov.bd/index.php?option=com_content&view=article&id=90:juvenile-development-centres&catid=41:institute&Itemid=104)>.

<sup>67</sup> Ara, 'Bangladesh: Rights of the Child Come into Contact with Law and State of Juvenile Justice System-Bangladesh Perspective'.

<sup>68</sup> Writ Petition No. 6373 of 2007.

<sup>69</sup> *The Children Act 1974*, sec 48.

<sup>70</sup> *Ibid*, sec 49.

with those observations in the Concluding Observations of the 3<sup>rd</sup> and 4<sup>th</sup> Periodic Report.<sup>71</sup> Those observations are:

The police rarely provided bail to the juvenile as the police were unaware of the law and did not had the resources to trace their parents; the requirements for granting bail were same as for the adults; the children were placed in detention without any record being kept after their arrest; there were no limitations on the duration of pre-trial detention; and the children had to wait for years for their case to be determined by the courts.<sup>72</sup>

In response to the Concluding Observations, the GoB set a National Task Force to ensure that the child did not go to an adult prison and to ensure the release of children from adult prisons. The GoB engaged specialised child friendly police across the country to deal with children in contact and conflict with the law. Moreover, the GoB proposed a new CA to appoint one judge in each district to deal with all the cases of children in a child friendly environment for speedy disposal. The new CA also ensured the provision to use detention of children coming in conflict with the law as a measure of last resort.<sup>73</sup>

Moreover, the High Court Division of the Supreme Court of Bangladesh in the *Metropolitan Police Commissioner*<sup>74</sup> case made a number of observations regarding the arrest procedures, detention and specialised institutes for children in line with the UNCRC. The High Court Division also directed the Court, Police and other agencies dealing with the children to follow those observations for the purpose of ensuring justice for children who come into contact with the law. The summaries of those observations are:

1. The Courts as well as the other state departments, functionaries and agencies dealing with children are duty bound to uphold the best interests of the child (accused or otherwise).
2. The parents of the children, who are brought before the police

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<sup>71</sup> 'Concluding Observation: Bangladesh's Third/Fourth Periodic Report'.

<sup>72</sup> *Ibid.*

<sup>73</sup> 'Draft of the 5th Periodic Report Convention on the Rights of the Child (Crc)',

<sup>74</sup> 60 DLR 660.

under arrest or otherwise, must be informed without delay.

3. A probation officer must be appointed immediately to report to the Court with regard to matters concerning the child.

4. Bail should be considered as a matter of course and detention/confinement should ensue only as the exception in unavoidable scenarios.

5. In dealing with the child, its custody, care, protection and well being, the views of the child, its parents, guardians, extended family members as well as social welfare agencies must be considered.

6. Where the best interests of the child demands its separation from its parents, special protection and assistance must be provided and there must be alternative care for the child.

7. Steps must be taken to assist the parents to mend their ways and to provide a congenial atmosphere for the proper development of the child.

8. If a child is detained or placed in the care of someone other than the natural parents, its detention or placement must be reviewed at short intervals with a view to handing back custody to its parents or guardians, subject to their attainment of suitability to get custody of the child.

9. When dealing with children, detention and imprisonment shall be used only as a measure of last resort and for the shortest period of time, particularly keeping in view the age and gender of the child.

10. If detention is inevitable, then the child shall be kept in the appropriate Homes/Institutions, separated from adults and preferably with others of his/her same age group.

11. Every effort must be made at all stages for reintegration of the child within the family and so as to enable him/her to assume a constructive role in society.

12. Due considerations must be given to the fact that children come into conflict with the law due to failure of their parents/guardians or the State to provide adequate facilities for their proper upbringing. If the parents or guardians lead the child astray, then it is they who are liable and not the child.

13. The State must make provision for diversion of child offenders

from the formal placement in government safe homes/prisons to be placed in an atmosphere where the child may be guided in more congenial surroundings within a family unit, either with relatives or unrelated foster families, if necessary, on payment of costs for the child's maintenance.<sup>75</sup>

### Sentencing

The UNCRC is very sympathetic in regards to sentencing a child offender. Neither the capital punishment nor life imprisonment without the possibility of release or any type of torture or other cruel, inhuman or degrading treatment or punishment can be imposed on children under the age of 18.<sup>76</sup> Moreover, rule 16 (1) of the Beijing rules provides that in all cases except those involving minor offences, before the competent authority renders a final disposition prior to sentencing, the background and circumstances in which the juvenile is living or the conditions under which the offence has been committed shall be properly investigated so as to facilitate judicious adjudication of the case by the competent authority.<sup>77</sup> The Child Act 1974 provided the procedure for sentencing children and there are directions through which the court may direct the probation officer to prepare a social inquiry report, however, the reality is that these provisions are rarely applied.<sup>78</sup>

Moreover, the CA 1974 does not cover children between the ages of 16 and 18, and are subject to adult sentences. The CtRC in its Concluding Observations remarked that the CA is inconsistent with Article 37(a) of the UNCRC as it allows capital punishment as well as life sentences to children between 16 and 18. The CtRC requested the GoB to take the necessary steps to abolish capital punishment, that is, the death penalty and life sentences for children. The HCD of the Supreme Court of Bangladesh, however, in *Blast and another vs. Bangladesh and others [Shukur Ali case]* declared the death penalty for children illegal and unconstitutional.<sup>79</sup> Moreover, in response to CtRC, the GoB proposed a

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<sup>75</sup> Ali, J. M. I., Arrest, Bail And Pre-Trial Detention, *Towards A Justice Delivery System For Children In Bangladesh*. (UNICEF Bangladesh, 2010), p. 74.

<sup>76</sup> *The United Nation Convention on the Rights of Child*, art 37(a).

<sup>77</sup> *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, rule. 16.

<sup>78</sup> Rahman, M., *Tracing the missing cord: A study on the children act 1974*, (Save the Children UK, 2003)

<sup>79</sup> Writ Petition No. 8283 of 2005.

new CA, which prohibits death penalty, and life imprisonment without the possibility of release for children.<sup>80</sup>

### Alternative Sanctions

The basic principle of the juvenile justice system is to rehabilitate and reintegrate the child offender in the community and to ensure the full and harmonious development of the personality of a child coming in conflict with law.<sup>81</sup> A State is under obligation to treat a child offender in a manner consistent with the promotion of the child's sense of dignity and worth. This takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a productive role in society.<sup>82</sup> It has been found that the use of deprivation of liberty such as, harsh criminal punishments or imprisonment has very negative consequences for the child's development and seriously hampers his/her reintegration in society.<sup>83</sup>

The CtRC observed that the CA lacks social reintegration of children and requested that the GoB take necessary steps in this regard. The principle of Diversion, which is the cornerstone of the international standards on juvenile justice, is yet to be recognised by the legislation and legal practice of Bangladesh.<sup>84</sup> However, in order to strengthen the juvenile justice system in Bangladesh, the HCD passed a number of friendly guidelines focusing on the safety of homes with comprehensive child friendly services, the age of the child to get the protection of the juvenile justice, basic needs to be followed by the child development centers and the minimum standard of care to be provided by the centers.<sup>85</sup> Moreover, the guidelines provided by the HCD includes, whether a child has right to consent in a contract or not, importance of child's opinion in choosing her/his father or mother and the prohibition of death penalty and capital punishment for any offence committed by a child. In response to the CtRC, the GoB introduced alternative sanctions in the new CA to punish a child, such as, probating a first time child offender with good conduct

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<sup>80</sup> 'Draft of the 5th Periodic Report Convention on the Rights of the Child (CRC)'

<sup>81</sup> Ali, *Towards a Justice Delivery System for Children in Bangladesh*.

<sup>82</sup> *The United Nation Convention On The Rights Of Child*, art 40(4).

<sup>83</sup> 'Crc General Comment No. 10 (2007): Children's Rights in Juvenile Justice'.

<sup>84</sup> Haque, S., *Juvenile Justice In Bangladesh*, UNICEF  
<[http://www.blast.org.bd/content/Resources/Juvenile\\_Justice.pdf](http://www.blast.org.bd/content/Resources/Juvenile_Justice.pdf)>.

<sup>85</sup> *Fahima Nasrin v Bangladesh and others* (2009) 61 DLR 232.

for a specific period and releasing a child from the safe custody at the care of fit persons.<sup>86</sup>

### **Way Forward**

The Juvenile Justice System in Bangladesh aims to provide special treatment to each and every child accused of a crime. Thereby, the reformation and reintegration of the juvenile justice system in Bangladesh is in need to be placed on the top priority list. The modification of certain correctional activities will not help for proper rehabilitation of children. The development of juvenile justice in Bangladesh needs total reform of the laws, policies, guidelines related to the protection of the rights of child and a strong will (politically, socially and culturally) to capitalise all the modification and reformation for the best interest of children. Some of the suggestions in order to ensure child friendly juvenile justice system are as follows.

The Ministry of Child Affairs of the GoB, the Ministry of Law, Justice and Parliamentary Affairs and the Supreme Court of Bangladesh are working together to ensure the protection of the rights of the child. In doing so, the stakeholders should bear in mind the best interest of the child.

The GoB in its 5<sup>th</sup> Periodic Report submitted under the UNCRC stated that a new Children Act is replacing the Children Act of 1974 to improve the administration of juvenile justice. In line with the UNCRC and other child related international instruments, diversion, and other alternatives to prevent and reduce the privation of liberty of children have been incorporated in the new law.<sup>87</sup> The cabinet has already approved the final draft of the new law. However, previous records showed that only the enactment of the law is not enough to ensure proper juvenile justice system. The GoB should set up a strong monitoring committee to supervise whether the stakeholders and the relevant authorities are properly following the provisions of that new law or not.

To fulfill the substantive commitment of the GoB, a National Taskforce comprised of key national and international stakeholders has been established to identify priority areas to provide the principal secretary to the Prime Minister with strategic information; and to coordinate the action

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<sup>86</sup> 'Draft of the 5th Periodic Report Convention on the Rights of the Child (CRC)'

<sup>87</sup> *Ibid.*

on justice for children.<sup>88</sup> This taskforce needs to work on national efforts to emphasize different child friendly sanctions in the laws of Bangladesh. Along with that, the Social Services Department needs to come up with some promising initiatives to make the present system more child-centered.<sup>89</sup>

To protect and promote the human rights of children in conflict with the law in Bangladesh, an independent child ombudsman or commission is needed. The office could investigate complaints made by children if police or attorneys or any other individual violates their rights.<sup>90</sup>

The minimum age for criminal responsibility remains nine years old and the rebuttable presumption of innocence exists for children between the ages 9 and 12.<sup>91</sup> The minimum age for criminal responsibility of children should be raised to at least 12 years old and the rebuttable presumption of innocence should be raised to 18 years for the best interest of the child.

### **Conclusion**

Children are basically incapable of forming criminal intent and the crimes committed by them are not criminally intended. The whole administration of juvenile justice is established on this principle. In order to provide a greater shape to this principle the UNCRC, the Beijing Rules, the Riyadh Guidelines and the Tokyo Rules are working together for ensuring the rights of the child. The CtRC within the UNCRC and the United Nations Children's Fund (UNICEF) have been relentlessly working redundant to monitor and ensure that the rights of the children are protected in every country and that no child becomes subject to torture, cruel, inhuman or degrading treatment.

Due to repeated observations of the CtRC, the GoB has been forced to adopt child friendly National Children Policy; to introduce a National Task Force to ensure that the children do not go to adult prisons; and to replace its Children Act 1974 in order to make it more compatible with the UNCRC and other international instruments. The Cabinet has approved the final draft of the new Children Act 2013 and awaits

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<sup>88</sup> 'Justice for Children', *Penal Reform International* (2012) <<http://www.penalreform.org/themes/juvenile-justice>>.

<sup>89</sup> Rahman, 'Diversion and Alternative Sanctions in the Juvenile Justice System in Bangladesh: A Child Rights Perspective'

<sup>90</sup> *Ibid.*

<sup>91</sup> 'Draft of the 5th Periodic Report Convention on the Rights of the Child (CRC)'.

enactment by the National Parliament. The amendments include the raise of age of children from 16 to 18; appointment of one judge with appropriate jurisdiction to deal with all the cases of children in each district, i.e. the number of juvenile courts will increase to 64 from 3; assignment of child friendly police office at all police stations across the country; use of detention of children in conflict with the law as a measure of last resort; introduction of alternative sanctions such as probation of good conduct; and the abolition of death penalty and life imprisonment with possibility to release for children. Moreover, in order to strengthen the Juvenile Justice system in Bangladesh number of child friendly guidelines has been passed by the Honorable High Court Division of Bangladesh focusing on safe home with comprehensive child friendly services, age, protection, basic needs, minimum standard of care, right to consent & opinion, prohibition of death penalty & capital punishment. However, all the efforts for a child oriented Juvenile Justice System in Bangladesh, which will ensure the well being of children in conflict with the law will not last if the enacted laws and policies are not properly monitored and enforced.