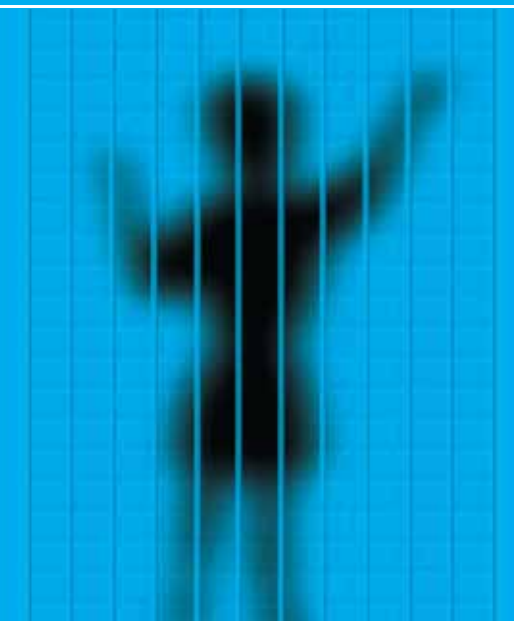
TOWARDS A JUSTICE DELIVERY SYSTEM FOR CHILDREN IN BANGLADESH

A GUIDE AND CASE LAW ON CHILDREN IN CONFLICT WITH THE LAW



JUSTICE M IMMAN ALI

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A GUIDE AND CASE LAW ON CHILDREN IN CONFLICT WITH THE LAW

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UNICEF Bangladesh
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ACRONYMS

ART/art.	Article
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC/UNCRC	Convention on the Rights of the Child
Cr.P.C.	Code of Criminal Procedure
DSS	Department of Social Services
GoB	Government of Bangladesh
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JATI	Judicial Administration Training Institute
JDL	Juveniles Deprived of their Liberty
KUK	Kishore Unnayn Kendra
LETI	Legal Education and Training Institute
MACR	Minimum Age of Criminal Responsibility
MoWCA	Ministry of Women and Children Affairs
MoSW	Ministry of Social Welfare
NGO	Non-Governmental Organization
UDHR	Universal Declaration on Human rights
UN	United Nations
UNICEF	United Nations Children's Fund

DEDICATION

This book is dedicated to the memory of SHEIKH ASU and SHEIKH MASU, two brothers. Sheikh Asu is my earliest known ancestor, whose name can be found mentioned in a registered document dated 1850 AD. These gentlemen and their forefathers are reputed to have migrated from Yemen, but when this was is unknown.

In addition, this book is dedicated to the children of Bangladesh. They constitute half of our population and are the future of our country. Many of them live in poverty and as a result of their living circumstances are subjected to child labour, early marriage, neglect, violence and abuse. It is often forgotten in our society that they are just children who should not be treated as adults but whose rights should be respected, ensured and protected. Children must be allowed to live and enjoy their childhood.

PREFACE AND ACKNOWLEDGEMENT

It amazes me that I managed to compile what looks like a book! This is certainly not the type of work that I am cut out for, and I apologise at the outset for my shortcomings.

Just like many other events in my life, the story of 'writing a book' happened quite accidentally. It all started with the case of ***Roushan Mondal alias Hashem vs. The State, 59 DLR 72***, in which I was the presiding judge of the High Court Division and delivered the judgement. Following the judgement, Barrister M Amirul Islam, Chairman of the Bangladesh Bar Council and the Founder Chairman of the Legal Education Training Institute (LETI), had some kind words to say and renewed his request that I should act as resource person for the Child Rights and Justice for Children Multi-Disciplinary Training Programme for lawyers, police and probation officers organized by the LETI with the support of UNICEF. As luck would have it, I met Tirza Theunissen, former programme officer for child protection with UNICEF in Bangladesh. She sat in on some of my lectures and suggested that I should write a book. This view was endorsed by my good friend Justice Ashfaqul Islam who was at that time sitting with me on the Bench that I presided. The task appeared daunting and I was right to be apprehensive. It was Tirza and Aminul Islam, child protection specialist with UNICEF Bangladesh, who gave the final impetus to start on my venture. I approached some of my seniors, including Justice Hamidul Haque, Director General of the Judicial Administration Training Institute (JATI) for advice. I was and still am a resource person for the training of Judges and Magistrates of the subordinate judiciary at JATI. There I try to impart whatever knowledge I have regarding the justice delivery system for children. I found a mentor in Justice Mustafa Kamal, former Chief Justice of Bangladesh, who himself has written a good number of books. My lessons at LETI still continue, thanks to Mr. Kazi Reazul Hoque, former Secretary to the Government and present Executive Director of LETI.

Children occupy the core of my heart. It pains me to see their plight in a society riddled with poverty and strife. It pains me even more to see the attitude of the rest of society who sit comfortably in their homes with a jolly scene of a perfect family with beautifully kempt and well-behaved children around them. But how much do we care about the hapless children who are driven by uncaring parents and a neglectful society into despair, destitution and crime?

So, I started with the intention of putting together a compilation of cases but ended up writing a book. However, I do not really consider it a 'book' but rather a guide to the Children Act 1974, the Children Rules 1976 and the related case-law for professionals dealing with children. Being a sitting judge, I understand that there are certain constraints on writing 'books' on law and expressing opinions, since the very same may be quoted in Court in support of any argument. Being conscious of these constraints, I have quoted copiously from judgements of the High Court Division and Appellate Division as well as some relevant decisions from other jurisdictions. Essentially, the setup of the 'book' follows the theme of my lectures to members of the Bar, Police personnel and officers of the Department of Social Welfare who receive training as part of the multi-disciplinary training programme on Child Rights and Justice for Children organised by LETI with support of UNICEF; to the learned Judges of the Subordinate Judiciary in Bangladesh, who receive training at the Judicial Administration Training Institute (JATI); and of trainings in which I participated as resource-person organized by various NGOs, including Save the Children UK and Aparajeyo Bangladesh.

In this book, I have tried to include most of the decisions on 'juvenile justice' which have been reported in the law reports available here. I hope that the most relevant and exemplifying decisions concerned with the issues faced by the practitioners and other actors will have been covered. Where certain specific issues are not covered by decisions of our Courts, I have resorted to my own angle of vision as expressed in my lectures.

I acknowledge with heartfelt gratitude my total indebtedness to Tirza for the painstaking editing of the manuscript without which I could not have completed this task. She also assisted in copying and typing much of the text from the law reports. In this task, I was also helped by my daughter, Najrana Imaan, Barrister-at-Law and son M Nahiyan Imaan, who is only thirteen years old and will do any odd job for a nominal fee. More importantly, both my offspring were a tremendous inspiration and great support against the sweet wrath of my dear wife who was deprived of my company for many long hours/days whilst I did the research. To be fair, my wife deserves much appreciation for her patience.

Finally, I wish to thank my friend and colleague Justice Mohammad Anwarul Haque for kindly proof-reading the text. Thanks also to Sanja Saranovic and Aminul Islam of UNICEF for their help and encouragement. Last, but not least, I wish to thank UNICEF, Bangladesh for agreeing to print the compilation and I sincerely hope that it will be of use to the learned judges, magistrates, lawyers, police, probation officers and other actors involved in the justice delivery system for children.

I must add that any mistakes or shortcomings are entirely my own.

Justice M Imman Ali

Supreme Court of Bangladesh

22 May 2010

CHAPTER I

Introduction

1.1 Background

Children constitute nearly 50% of the population in Bangladesh. This basic fact underlines the importance of protecting the rights of our children. The Constitution of Bangladesh contains a specific chapter on human rights but not specifically on children's rights. It does however specifically make provision for more favourable provisions for women and children to be enacted by the legislator.[1] The 1974 Children Act is an example of such a favourable provision as the main legislation relating to children, which is supplemented by the Children Rules, 1976.[2] Internationally Bangladesh has also committed itself to the protection of children's rights, being among the first countries of the world to ratify the Convention on the Rights of the Child in 1990. In addition, it ratified the two Optional Protocols to the Convention on the Involvement of Children in Armed Conflict and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography in 2000.

The Children Act, although its name suggests general coverage of the subject of children as a whole, mainly deals with three categories of children, namely children in conflict with the law, child victims and children in need of care and protection, it also deals very scantily with child witnesses. However, the main focus of the law is on children in conflict with the law, also often referred to as youthful offenders and in places as juveniles. Thus essentially, it is a juvenile justice legislation. The Preamble of the Children Act provides the intention behind the law, namely "WHEREAS it is expedient to consolidate and amend the law relating to the custody, protection and treatment of children and trial and punishment of youthful offenders." As such, the Children Act establishes a different regime for the treatment of children in conflict with the law in a manner which is separate and different from the treatment of adult criminals under the criminal justice system of the Code of Criminal Procedure of 1898 (Cr.P.C) and the Penal Code of 1860. The

1 Article 28 (4) of the Constitution.

2 The Act replaces the Bengal Children Act of 1922.

Act together with the Rules contains various safeguards affording children in conflict with the law special protection including prohibition of a joint trial with adults, informal trial conditions, bail in case of non-bailable offences, trial by a juvenile court etc.

Apart from the Act and Rules, there is a vast-growing body of case-law by the highest judicial body of this country, the Supreme Court (High Court Division and Appellate Division) providing authoritative guidance on the interpretation and implementation of the provisions of the Children Act. Over the last couple of years, in particular the High Court Division has been confronted with a growing number of cases of children who have come into conflict with the law. Apart from doing justice in a particular case, this has also provided an opportunity to provide clarification on various provisions of the Children Act, practical issues in implementation of these provisions, the duties and responsibilities of the different professionals working with children in conflict with the law, the relationship between the Children Act and International Law relating to children etc. As Bangladesh adheres to the common law tradition, precedents of the higher Courts are required to be followed by all judges of the lower Courts. The Constitution in Article 111 provides that the law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it.

At the time of post-independence Bangladesh the Act and Rules were perceived to be in favour of children and progressive for that time. It is true the Act and Rules do provide for some of the safeguards which also can be found in Articles 37 and 40 of the CRC relating to children in conflict with the law. However, it must also be acknowledged that pre-dating the CRC, the Act and Rules do not incorporate many of the principles and provisions of the CRC. Firstly, the provisions of the Act and the Rules are not phrased in a way that they actually grant rights to children, which in turn makes children an object rather than a subject of rights. Secondly, they do not include all rights and

fundamental principles provided for under the CRC such as respect for the views of the child (child participation) and only to a limited extent the best interests of the child. Thirdly, as a juvenile justice legislation, the emphasis of the Act and Rules is on institutionalisation of children. The Act And Rules do not establish the comprehensive juvenile justice system that the CRC foresees under Articles 37 and 40 which has been further elaborated by the Committee on the Rights of the Child, the main treaty body responsible for monitoring the implementation of the Convention by the States that have ratified the Treaty, in its General comment no. 10 on Children's rights in Juvenile Justice[3]. Thus, the Act and Rules do not incorporate concepts and practices which prevail in other countries such as restorative justice, i.e. promoting reparation of the harm done to the victim, diversion, i.e. dealing with children outside the formal justice system and alternative measures focusing on rehabilitation of the offender as opposed to deprivation of liberty. Through ratification of the CRC, Bangladesh is under a legally binding obligation to take all necessary legislative measures to ensure implementation of the provisions of the Convention. An amendment of the Children Act is currently in process.

Despite the short-comings of the Act, proper implementation of its beneficial provisions combined with the case-law would greatly serve the interests of children in conflict with the law. However, in practice most of these provisions and cases are not being implemented or applied and as a result children receive the same treatment as adults. Thus, until recently, it was not uncommon to find children in jail together with adults and in certain cases joint trials still do occur. While some of the provisions require allocation of additional human and financial resources by the Government of Bangladesh (GoB), many of the provisions can be implemented straightaway without any additional resources and would lead to a huge benefit for the child. There are various reasons for the non-implementation of

3 Committee on the Rights of the Child, forty-fourth session, Geneva, CRC/C/GC/10 25 April 2007.

these provisions. Firstly, there is a general tendency of the general public as well as professionals to view deviant child behaviour in the same light as adult criminal activities. The emphasis is on punishing children by showing more vengeance with a view to deter others from offending, rather than ensuring that the offending child does not re-offend. However, research worldwide has shown that punishment of children through deprivation of liberty has adverse effects on children and is not likely to deter or prevent re-offending. As such a change of mindset is needed. Secondly, the lack of implementation of the beneficial provisions of the law including case-law in many cases is due to lack of knowledge or proper appreciation of them by judges, lawyers, police officers and probation officers. They are often not aware of the existence or content of the Children Act or of the existing body of case-law. In most cases, they can hardly be blamed for this, as failure to disseminate the Act and case-law and lack of adequate training have prevented them from obtaining this knowledge. Thus, the greatest difficulty of the subordinate judiciary is that they do not have access to all the law reports containing the decisions of the higher Courts. As a result, decisions of the lower Courts are often not consistent with the decisions of the Supreme Court and there is often lack of uniformity in the decisions of the High Court Division. Thirdly, even when aware of the beneficial provisions for children, the lack of coordination between responsible professional groups results in poor service delivery and injustice for children.

1.2 Objectives

The book is primarily intended to function as a guide and reference book for the application and implementation by the various professional groups dealing with children in conflict with the law of the provisions of the Children Act 1974, Children Rules 1976 and the case-law relating to children in conflict with the law. Through familiarisation of professionals with the provisions of the Children Act in conjunction with the vast body of case-law on the Children Act, it is hoped that they

can collectively work towards achieving justice for children, in this case children in conflict with the law, i.e. to ensure that children are better served and protected by the justice delivery system in Bangladesh. The title of this book "Towards a Justice Delivery System for Children- A Guide to the Children Act 1974, Children Rules, 1976 and the Case-Law on Children in Conflict with the Law", is intending to signify an aspiration for the progressive development towards such a system which is child-centred, promotes the well-being of the child and its rehabilitation into the family setting and mainstream society. In addition, the book may serve to assist others interested in the subject matter to enhance their knowledge of the Children Act and the large volume of case-law. Finally, the book aims to act as an impetus for all of us including academia, civil society, donors and the general public to advocate for strengthening the promotion and protection of children's rights in Bangladesh.

1.3 Methodology and Sources

This book has been based on a series of lectures that I have given as resource person as part of the Child Rights and Justice for Children Multi-disciplinary Training Programme organized by LETI with the support of UNICEF. In examining the provisions of the Children Act and the relevant case-law, it has been attempted to discuss the various issues in the order of how they would arise at the various stages of the juvenile justice process, i.e. pre-trial, pending trial and post-trial.

Primary sources for this book constitute 1. the text of the Children Act itself 2. relevant case-law of the High Court Division and Appellate Division of the Supreme Court as published in the in the various law reports in Bangladesh, primarily the Dhaka Law Reports (DLR), the Bangladesh Law Chronicles (BLC), the Bangladesh Law Times (BLT) and Bangladesh Legal Decisions (BLD). The case-law in itself often draws upon cases from the Judiciary abroad, in particular of the Indian Courts. 3. other relevant laws relating to children including the Code of Criminal Procedure 1898, the Penal Code 1860, the Majority Act 1875, Guardian and Wards Act 1890,

Mohammedan Law, the Nari–o-Shishu Nirjatan Daman (Bishesh Bidhan) Ain 1995, the Nari-o-Shishu Nirjatan Daman Ain 2000, Acid Aporadh Daman Ain 2002, the Probation of Offenders Act etc. 4. International child rights standards in particular the CRC as a binding instrument on Bangladesh as well as other available soft-law standards.

Secondary sources include relevant literature, reports etc. It must be noted that there are various books and reports providing detailed commentary and analysis of the Children Act 1974, Children Rules 1976 and to a lesser degree the case-law.[4] However, as this book is intended as a practical guide for professionals dealing with children in conflict with the law rather than a source of academic deliberation and much of the relevant literature is not widely available in Bangladesh, the book has tried to rely as much as possible on primary sources.

1.4 Scope and Limitations

There are a number of observations that must be made as regards the scope and limitations of this book. Firstly, this book focuses on the provisions of the Children Act and Rules and related case-law on children in conflict with the law and to a small degree is also concerned with children who are victims and children in need of care and protection. This is because the main body of jurisprudence of the Courts has been concerned with children in conflict with the law. Although, the Children Act is also concerned with child victims and children who are in need of care and protection, there is very little case-law available on this subject and this is an area of international law that is still under development in particular through the formulation of soft-law guidelines and principles. Nevertheless, the book does attempt to familiarise the reader with the relevant provisions of the Children Act and the available case-law on both these categories of children.

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4 See for in particular Malik, Shahdeen, The Children Act, 1974 A Critical Commentary, Save the Children UK, Dhaka, 2004 ;and also Khan, Dr. Borhan Uddin Khan and Rahman, Muhammad Mahbubur, Protection of Children in Conflict with the Law in Bangladesh, Save the Children UK, Dhaka, 2008. For other relevant literature see the Bibliography.

Secondly, despite the vast growing body of national cases pertaining to children in conflict with the law, it must be acknowledged that the case-law does not deal with all aspects of the juvenile justice process. Thus, in the area of children in conflict with the law, the case-law does not deal extensively with the right to legal counsel. There are two other particular sectors involving children which have not yet seen the limelight. A huge number of children are engaged in hazardous work, including very young children employed as 'domestic help' and a large number of children are employed in various other highly dangerous types of work, including in the shipbreaking and tobacco industries. Cases regarding working children are virtually non-existent. However, very recently two Rules were issued by the High Court Division with regard to torture and abuse of child domestic workers, which are now *sub judice*. There is also the issue of corporal punishment which is pervasive throughout the country across all social and economic strata. It is particularly noticeable in schools and other educational institutions such as Makhtabs and Madrashas. But these matters seldom come to the courts. Hence, at this stage, in these instances, it is only possible to look at the actual text of the Children Act and where there are no relevant provisions, the relevant international standards may be turned to. As highlighted before, the Children Act does not contain all the principles and rights of the CRC. As will be explained in more detail later in this book, the Court has in several instances been confronted with the question on the status and relevance of the international standards such as the CRC within the domestic legal order. Despite recognition by the High Court of the growing importance of international law for domestic law, in particular where national provisions are absent, domestic law will generally prevail. However, it is essential for professionals dealing with children to have knowledge of the international standards relating to justice for children, so that when there are gaps in the national law these standards can be drawn upon. Therefore, this book will provide, prior to discussing national law and case-law, an overview of the history and development

of the concept of child rights and the international body of law that has developed in this area.

Finally, a limitation to this book that must be mentioned is that it is based on the Children Act at the time of writing. As noted before, the Children Act is currently in a process of amendment. In 2006 the High Court Division recommended that the existing Children Act should be amended or new laws enacted to bring the law into line with developments in the international arena.[5] In 2007, the Government established an Inter-Ministerial Committee headed by the Ministry of Social Welfare to review the national legislation in Bangladesh. This Committee instituted a sub-committee headed by the Joint Secretary of the Ministry of Social Welfare to review the laws relating to children and prepare draft texts as recommendations. UNICEF together with Save the Children is a member of the sub-committee and is providing technical and financial support to the sub-committee. A technical working group was formed to prepare a draft law. This has resulted in a draft Children Act, 2010.

Although, the amendment of the Children Act will be an important step in ensuring conformity between the CRC and national legislation, the amendment does not fully incorporate the CRC into national legislation. In UNICEF's view, inclusion of all Articles of the CRC into the Act would conflict with the specialised nature of the Children Act 1974, which is essentially a juvenile justice legislation and with the proposed amendment has become a specialised justice for children legislation. Therefore, UNICEF has recommended to the sub-committee to opt for the drafting of a separate Children's Code which domesticates all provisions of the CRC and will act as framework legislation for the harmonisation of other conflicting laws relating to children in Bangladesh with the CRC as well as for the adoption of new laws for children in the future. Hopefully, following the enactment of the Children Act 2010, the adoption of the Children's Code will be the next step in

5 *State v. Roushan Mondal alias Hashem, 59 DLR 72.*

ensuring incorporation of the all the rights of the Convention into national legislation in Bangladesh. Therefore, it may well be that in the near future, a revised version of this book will have to be written due to the changes of the Children Act. However, until that is the case, the current text of the Act which forms the basis of this book still prevails.

1.5 Terminology

In this book, it has been attempted to use to the largest extent possible child-sensitive terminology that reflects the special treatment that is afforded to children in conflict/contact with the law under national and international law which is different from the treatment that adults receive under the criminal justice system. However, as much of this terminology is novel to Bangladesh, for clarity purposes this has not always been possible and resort had to be made to the existing and commonly used terminology.

1.6 Structure

Chapter II on the international legal framework on child rights and justice for children is intended to act as a background to the other chapters of the book, which mainly deal with national legislation and case-law, as it is important for professionals to have knowledge on this subject-matter. The chapter provides a brief overview of the history of the concept of child rights from the late nineteenth century when the child was first recognised as a legal entity in itself, followed by three generations of rights with the most important international instrument for children, the Convention on the Rights of the Child, being adopted in 1989. It demonstrates that the concept of child rights is of fairly recent origin and how children having started with almost no rights now have one of the strongest legal positions internationally. The chapter addresses the question of the legal status and relevance of the Convention in the domestic legal order on the basis of the recent case-law. In particular, it focuses on the provisions of the CRC and the related General Comment No.10 of the CRC Committee. In addition, it examines the

relevant other international instruments that contain more detailed provisions in this area. Finally, it provides a glance at the international standards relating to the other categories covered by the Children Act, namely child victims and witnesses and the children in need of special care and protection.

Chapter III on Children in Conflict with the Law under the Children Act, 1974 examines the aim of the Act and provides an overview of its general provisions. In particular, the chapter addresses one of the most contentious issues of the Children Act, namely the definition of a child as a person under 16 years old versus the definition of the CRC as a person below the age of 18. The issue of age determination is very important for the application of the Act, as children (under the definition of the CRC) who are above 16 are excluded from the application of the Act. In addition, not all children below 16 can be held criminally liable for their acts. The chapter discusses the Minimum age of Criminal Responsibility (MACR) under the Penal Code and contrasts this with the MACR as required by the CRC Committee. Furthermore, it addresses the determination of age by the police. As a first point of contact, the police are the first to determine the age of a child. In doing so, they are often faced with difficulties as Bangladesh until recently had a very low rate of birth registration and birth certificates still are not readily available. However, with the increase of the birth registration rate and other means to establish the age of a child this issue will in future become less of a concern.

Chapter IV on Arrest, Bail and Pre-Trial Detention deals with the discretionary power of the police to arrest children for minor offences and when they are first time offenders, the relevant procedures such as tracing of the child's parents under the Children Act upon arrest of the child and the role of the various actors involved, in particular the police and probation service, the possibility of granting bail by the police and Magistrates' Court and temporary custody of children.

Chapter V on Jurisdiction of the Court is concerned with the question of the competent Court for cases of children in conflict with the law that go to trial. It discusses the jurisdiction of the Juvenile Court, which Courts can act as Juvenile Court, how to decide jurisdiction and when a case needs to be referred to another Court such as a Court of Sessions. In particular, it examines the two conditions that the Juvenile Court needs to fulfil before it can declare itself competent to hear a case, namely the jurisdiction over the person and over the offence. Especially, the question of jurisdiction over the person has proved to be challenging as it involves a presumption and determination of age, which are discussed in detail in this chapter.

Chapter VI on Trial Procedures before the Court sets out the procedures that need to be followed before the Juvenile Court including the requirement of a separate trial of the child, the sittings of the Court, the mode of the trial including protection of privacy, presence of the child, attendance of the parents and other Constitutional guarantees for a fair trial.

Chapter VII on Sentencing by the Court discusses the process and duties of the Court in adjudicating a case under the Children Act. In particular, it focuses on the guiding principle of the best interests of the child and how this can be determined. In addition, it examines the options of the Court in disposing of a case concerning a child in conflict with the law.

Chapter VIII on Custody and Detention addresses the procedures and conditions for custody and detention of offenders, the possibilities for release as well as custody of victims and children in need of care and protection.
Finally, the Conclusion summarises the key principles of the separate regime for children under the Children Act and outlines what issues need to be addressed to move towards a justice delivery system for children in Bangladesh.

CHAPTER II

The International Legal Framework On Child Rights and Justice for Children

2.1 History of the concept of child rights

The recognition that children have rights is a relatively recent concept. Most of the ancient civilizations did not recognize that children have rights.[6] Children were seen as property of their parents and were subjected to various forms of torture and inhuman and degrading treatment. In the middle of the 17th century, a new approach to understanding childhood and children's issues was adopted by John Locke, who called for a different approach in dealing with children.[7] However, it was not until the beginning of the 18th century that Jacques Rousseau recognized childhood as a specific phase in life and that the child was an independent personality with special requirements.[8] Children were only recognized as a separate category of rights holders at the beginning of the 19th century when national legislatures started to enact laws providing or special measures of protection for children.

An excerpt from the judgement of the High Court Division in the ***Roushan Mondal*** case[9], which in turn refers to other decisions as well as other materials, is reproduced below to highlight some of the developments.

"In order to appreciate the present law and how it should be enforced, it is necessary to look to the background history suffered by the children/youth community.

Up to the mid-19th century children were treated as a smaller, albeit weaker, version of their adult counterparts. They worked in the factories and foundries and were made to labour more than their physiques would allow and in horrendous conditions. This happened as much in the West as in the East. Such tales are only too well illustrated in the writings of eminent novelists

6 For a detailed account of the history of child rights see Khalil, Ghassan, *Child Rights, The Historical Evolution*, Beirut, Lebanon, Chemaly & Chemaly, 2002.

7 Idem. p.14.

8 Idem. p.15.

9 Paragraph 31 to 36 on the Background to the Development of Juvenile or Youth- friendly legislation of *Roushan Mondal*.

such as Charles Dickens (b.1812), who himself suffered the life of an impoverished child in the poor part of London and had to work as a child without the benefits of an education until he came into some funds by way of a legacy and again took up studies. It was at this juncture in our not too distant history that feelings for children were kindled and attitudes changed.

Regarding child labour, Dr. Stephen S. Wise, a Rabbi of the Free Synagogue, New York wrote in March, 1910 in an Article entitled "Justice to the Child" in very poignant language thus,

"Seeing that "The Cry of the Children" [a poem by Elizabeth Barrett Browning published in 1843 telling the tale of children working in the mines (added by me)] "has not been heard, it is meet that we here cry out, on behalf of children, in protest against the inequity of the enslavement of the child, which, if anything, is even more unjust and iniquitous than the enslavement of man."

He went on to urge that the rights of childhood should be regarded as sacred and inviolable, and included in those rights is the right not to be forced to labour.

At about the same time the Court system was geared up to cater for the rights of the child vis-à-vis the justice system. Prior to that the one instance where the Court of Chancery in England interfered with the rights of the child was where the activities of the parents/guardian would jeopardise the rights of the child, for example where the father's squandering activities would fritter away the child's estate. In the 1790 case of ***Creuze v Hunter, 2 Bro., C.C., 449*** *Lord Thurlow, L.C. was of the opinion that "the Court had arms long enough ….to prevent a parent from prejudicing the health or future prospects of the child…" Thus the Court of Chancery gave itself power to protect the child against parents/guardians with immoral and profligate habits. Essentially the Court took interest in protecting the property of the child. This was taken a step further in 1828, even though no property rights was in issue, when Lord Eldon, L.C. propounded the broad proposition that the crown is the ultimate parent of the child, the king, as parens*

patriae, through the chancellor, will step in and protect the child by removing it from the environment that must make for its undoing. [See ***Wellesley v Wellesley, 2 Russ., 1; 2 Bligh N.S., 124****] Thus developed the protection of the right of the child's property and concern for his wellbeing.*

Special Courts handling problems of delinquent, neglected, or abused children were set up subsequently, viz. Juvenile Courts. These Courts processed both civil matters, often concerning care of an abandoned or impoverished child, and criminal matters, arising from antisocial behaviour by the child. Most statutes provide that all persons under a given age (often 18 years) must first be processed by the juvenile Court, which can then, at its discretion, assign the case to an ordinary Court.

Before the creation of the first juvenile Court, in Chicago in 1899, and the subsequent creation of other such Courts in the United States and other countries (e.g., Canada in 1908; England in 1908; France in 1912; Russia in 1918; Poland in 1919; Japan in 1922; and Germany in 1923), juveniles were tried in the same Courts as adults."

2.2 Three generations of child rights

The real recognition of the rights of children only came in the 20th century. The developments during this period can be categorised in three different groups, the so-called three generations of child rights i.e. the first generation from 1923-1959, the second generation from 1959-1979 and the third generation from 1979 till now.[10] The developments throughout these three generations show a gradual move away from the principal believe that children have needs and hence have to be protected as a matter of social welfare to the explicit recognition that children have rights of their own which have to be protected as a legal obligation. The main events during each of the generations are discussed below.

The first generation of child rights began with the adoption of

10 Khalil, p. 18

the Child Rights Declaration of the Save the Children International Union of 1923. The Declaration drafted by the founder of Eglantyne Jebb, contained five principles[11] including one principle stipulating that "the delinquent child must be reclaimed". It was adopted in 1924 by the League of Nations without alteration as the Geneva Declaration on Child Rights. In 1948, the Universal Declaration on Human Rights (UDHR) was adopted by the General Assembly. It provides in Article 1 that "All human beings are born free and equal in dignity and human rights." Thus the UDHR is applicable to all persons including children. Article 25 (2) is the only Article that specifically deals with children. It provides that "Motherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock, shall enjoy the same protection." As the UDHR did not grant any specific rights to children, the International Union for Child Welfare, an international NGO replacing the International Save the Children Union in 1920, issued the Child Rights Declaration in 1948. The Declaration was a modified version of the 1923 Declaration adding two provisions and amending one provision. The first one provides the necessity of protecting children regardless of considerations based on race, nationality and belief. The second one covers the necessity of taking care of the child while respecting the independent identity of the family.

The second generation of child rights was initiated with the United Nations Declaration on the Rights of the Child which was adopted by the UN General Assembly in 1959. It consisted of 10 principles, which can be divided in two groups: first the rules aiming at protecting the child's physical integrity and standard of living; second the rules relating to the child's mental and moral development. The Declaration added one new principle which stipulates that "The child shall in all

11 The principles are: 1. The child must be given the means requisite for its normal development, both materially and spiritually. 2. The child that is hungry must be fed, the child that is sick must be nursed, the child that is backward must be helped, the delinquent child must be reclaimed, and the orphan and the waif must be sheltered and succoured 3. The child must be first given relief in times of distress. 4. The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation 5. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow man.

circumstances be among the first to receive protection and relief." However, despite the importance of the Declaration, as soft-law it was not legally binding for States. In 1966, International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) were adopted. Although the Covenants provide for human rights in general, they are especially important as both instruments contain relevant provisions for children[12] and are binding international law for those States that have ratified them which includes Bangladesh.[13] In particular, the ICCPR contains provisions specifically concerning children in conflict with the law:

- Article 6 (5): "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
- Article 10 (2) (b):"Accused juveniles shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons"
- Article 10(3): "Juvenile Offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status."

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12 The ICESCR contains various relevant provisions relating to children i.e. Article 10(3) on special measures of implementation and assistance for children including against economic and social exploitation; Article 12 on reduction of the still-birth rate and of infant mortality and for the healthy development of the child; Article 13 (2) (a) on compulsory primary education free of charge for all and (3) liberty of the parents and legal guardians to choose schools for their children; Article 14 on the adoption of a detailed plan of action for the progressive implementation of the principle of compulsory education free of charge for all. The ICCPR also contains numerous provisions relating to children i.e. Article 23 (4) relating to protection of any children in case of dissolution of marriage and 24(3) the right to a nationality; Article 24 (1) on the right to protection of a child required by his or her status as a minor, on the part of his family, society and the State without discrimination and (2) the right to birth registration and the right to have a name. In addition, it also contains many provisions relating to the administration of justice applicable to any person including children and specific provisions for children in conflict with the law. These are the following: Article 7 prohibition of torture; Article 9 .....(1) the right to liberty and security of the person and the prohibition of arbitrary arrest (2) the right to be promptly informed of the charges; (3) the right to be brought promptly before a judge and to have a trial within a reasonable time; Article 10 the right of a person deprived of his/her liberty to be treated with humanity and with respect for the inherent dignity of the person and separation from convicted persons; Article 14 and 15 on due process guarantees.

13 Bangladesh ratified the ICESCR in 1998 and the ICCPR in 2000.

- Article 14 (1): “Any judgement rendered in a criminal case or in a suit at laws shall be made public except where the interests of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of the children.”
- Article 14(4):” In the case of juvenile persons, the procedure shall be such as will take account of their age and desirability of promoting their rehabilitation.”

In 1978, the Polish Government submitted a draft Convention on Child rights to the United Commission on Human Rights, which was similar to the 1959 Declaration. However, due to many criticisms on its draft from various UN Member States, it was not adopted.

The third generation of child rights started off in 1979 with the international year of the child. In the same year, the UN Commission on Human Rights adopted a Resolution to set up a working group to draft a Convention on the Rights of Child, based on the draft Convention as submitted by the Government of Poland. Also in that year, the UN General Assembly adopted the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).[14] The CEDAW contains various rights relating to children but these are primarily tied to the rights of women in the context of motherhood. However, the most important event of the third generation of child rights was undoubtedly the adoption of the Convention on the Rights of the Child in 1989. The Convention is the first international binding legal instrument that is specifically devoted to children’s rights while at the same time recognizing the indivisibility of these rights. The Convention as well as various other instruments that were adopted as part of the third generation which are of particular relevance to children in conflict with the law will be discussed later in this chapter.

14 The CEDAW contains several provisions which concern children i.e. Article 9 (2) on the right of women to equal rights with men with respect to the nationality of their children; Article 10 on the right to education; Article 13 (1) on the elimination of discrimination against women in all matters regulating to marriage and family relations including in matters relating to their children and Article 16 on the minimum age for marriage and nullification of child marriage.

2.3 Convention on the Rights of the Child

2.3.1 General

The United Nations Convention on the Rights of the Child (CRC), adopted in 1989 and entered into force in 1990, is the main international instrument on child rights. The Convention has been ratified by 193 states.[15] Bangladesh was among the first countries in the world to recognize the importance of the Convention by ratifying the CRC in 1990.[16]

The Convention consists of 54 Articles and contains both civil, political rights as well as economic, social and cultural rights underlining the indivisibility of the Convention's rights. The Articles of the Convention can be divided into a set of guiding principles and four categories of rights, i.e. survival and development rights relating to the resources, skills and contributions necessary for the survival and full development of the child; protection rights from all forms of child abuse, neglect, exploitation and cruelty, including the right to special protection in times of war and protection from abuse in the criminal justice system; participation rights entitling children to the freedom to express opinions and to have a say in matters affecting their social, economic, religious, cultural and political life; And rights to non-discrimination.

A different classification which is used by the Committee on the Rights of the Child, the body responsible for monitoring the implementation of the Convention by the State Parties, is as follows:

1. General measures of implementation (arts. 4, 42, 44.6)
2. Definition of the child (art. 1)
3. General Principles (arts. 2, 3, 6, 12)
4. Civil rights and freedoms (arts.7, 8, 13-17, 37 (a))

15 Ratification means that State Parties agree to be bound by the Convention and ensure its implementation.

16 The Government of Bangladesh ratified the Convention with a reservation to Article 14, paragraph 1 and to Article 21 which applies" subject to the existing laws and practices in Bangladesh."

5. Family Environment and Alternative Care (arts. 5, 18.1, 18.2, 9, 10, 27.4, 20, 21, 11-19, 39, 25)
6. Basic Health and Welfare (arts.6.2, 23, 24, 26, 18.3, 27.1, 27.2, 27.3)
7. Education, Leisure and cultural Activities (arts.28, 29, 31)
8. Special Protection Measures
    - Children in situations of armed conflict and other emergency (arts. 22, 38, 39
    - Children in Conflict with the Law (arts. 40, 37, 39)
    - Children in situations of exploitation (arts.32, 33, 34, 35, 36, 39)
    - Children belonging to a minority or an indigenous group (art.30)

2.3.2 Definition of the child and the general principles

Article 1 provides: "A child means every human being below the age of eighteen, unless under the law applicable to the child, majority is attained earlier". Thus, while for the purposes of the Convention, childhood ends and majority is achieved at the age of 18, the CRC does leave scope for national laws to set a different age limit. This age limit can either be lower but also higher.[17] However, the Committee on the Rights of the child 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.

At the core of the Convention, are the four general principles. These should be respected in all actions, decisions and all other matters affecting children.

17 See Article 41 of the CRC, which provides that nothing in the present Convention "shall affect any provisions which are more conducive to the realization of the rights of the child which may be contained in: (a) the law of a State Party."

- Article 2 (Principle of Non-Discrimination)

  Article 2 paragraph 1 of the CRC provides that States should respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. According to paragraph 2 States are obliged to take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

- Article 3 (Best Interests of the Child)

  Article 3 of the CRC provides that "In all actions concerning the child, whether undertaken by public or private social welfare institutions, the Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration". The State shall provide the child with such protection and care as is necessary for his/her well being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and to this end, shall take all appropriate legislative and administrative measures.

- Article 6 (The right to life, survival and development)

  According to Article-6 of the CRC every child has the inherent right to life, and the State has an obligation to ensure to the maximum extent possible the child's right to survival and development.

- Article 12 (Principle of Respect for the Views of the Child)

  Article 12 of the CRC provides that States must ensure that the child who is capable of forming his or her own views has the right to express his or her own views in all matters

affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of the national law.[18]

The Convention is supported by the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography adopted in 2000 and the Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts also adopted in 2000. Bangladesh ratified both the Optional Protocols in 2000.

2.3.3 General measures of implementation

Through ratification the Convention has become binding on Bangladesh. The Convention in Article 4 sets out the general measures of implementation that states are required to undertake to implement all the rights in the CRC, including in the area of legislative reform.[19] Thus, Article 4 of the Convention provides that "State Parties shall undertake all appropriate *legislative*, administrative, and other measures for the implementation of the rights recognized in the present Convention." State parties to the CRC must have a legal framework that is both effective and compatible with the CRC and that ensures that the rights the Convention vests in children are fully enforceable under national laws.

State parties are required to submit an initial report to the Committee on the Rights of the Child, the body responsible for monitoring the implementation of the Convention by the State parties, within two years after ratification of the Convention and thereafter a periodic report every five years.[20] Upon receiving

18 See Committee on the Rights of the Child, General Comment No.12, Right of the Child to be Heard, CRC/C/GC/12, 2009 in which this principle in the context of judicial proceedings is discussed in more detail.

19 See also Article 42 and 44 of the CRC.

20 Article 44 (1) of the CRC.

the State parties' reports, the Committee issues Concluding Observations in which it provides comments on the progress States have made in the implementation of the Convention and makes recommendations on the areas in which States have to improve.

Apart from Concluding Observations, the Committee also issues General Comments on specific areas of the Convention, in which it gives a more detailed explanation of how certain Articles are to be interpreted and need to be implemented by States. In addition, it also issues Decisions (called Recommendations) on specific issues under the Convention which provide recommendations to States as well as specific UN Agencies on implementation of the Convention.

In its general Comment no. 5 on the General Measures of Implementation of the Convention[21], the Committee on the Rights of the Child emphasised that "a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the Convention is an obligation." In addition, it noted that "the review needs to consider the Convention not only Article by Article, but also holistically, recognising the interdependence and indivisibility of human rights." Furthermore, it provides that "the review needs to be continuous rather than one-off, reviewing proposed as well as existing legislation."

In addition, the Committee explicitly held that "State parties need to ensure, by all appropriate means, that the provisions of the Convention are given legal effect within their domestic legal systems". "Of particular importance is the need to clarify the extent of applicability of the Convention in States where the principle of "self-execution" applies and others where it is claimed that the Convention "has constitutional status" or has been incorporated into domestic law." According to the Committee, incorporation means " that the provisions of the Convention can be directly invoked before the Courts and

21 Committee on the Rights of the Child, General Comment no. 5, General Measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44), U.N. Doc. CRC/GC/2003/5 (2003)

applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice. Incorporation by itself does not avoid the need to ensure that all relevant domestic law, including any local or customary law, is brought into compliance with the Convention. In case of any conflict in legislation, predominance should always be given to the Convention, in the light of Article 27 of the Vienna Convention on the Law of Treaties. Where a State delegates powers to legislate to federated regional or territorial governments, it must also require these subsidiary governments to legislate within the framework of the Convention and to ensure effective implementation. "

As regards, the existence of general human rights provisions in the Constitution, the Committee held that:

> *"Some States have suggested to the Committee that the inclusion in their Constitution of guarantees of rights for "everyone" is adequate to ensure respect for these rights for children. The test must be whether the applicable rights are truly realized for children and can be directly invoked before the Courts. The Committee welcomes the inclusion of sections on the rights of the child in national constitutions, reflecting key principles in the Convention, which helps to underline the key message of the Convention - that children alongside adults are holders of human rights. But this inclusion does not automatically ensure respect for the rights of children. In order to promote the full implementation of these rights, including, where appropriate, the exercise of rights by children themselves, additional legislative and other measures may be necessary."*

2.3.4 Status of the Convention and other international human rights instruments in the domestic legal order of Bangladesh

Bangladesh adheres to the principle of dualism. This means that international law does not upon ratification become automatically effective and cannot be directly invoked in Court.

It requires incorporation into domestic legislation in the form of a new law or amendment of existing legislation to ensure conformity with the Convention. Despite ratification of the Convention in 1990, the Government of Bangladesh until recently did not undertake any comprehensive review of its legislation regarding children. Hence, the Committee on the Rights of the Child in its 1993, 2003 and 2009 Concluding Observations[22] on the Initial[23] and Periodic State Reports[24] of Bangladesh expressed its concern about "the unclear status of the Convention in the domestic legal framework and the insufficient steps to bring existing legislation into full conformity with the Convention."[25] It recommended to "take all effective measures to harmonise its domestic legislation fully with the provisions and principles of the Convention."[26]

In light of the binding legal obligation that the CRC imposes and the absence of comprehensive legislative reform being undertaken by the Government of Bangladesh, the question arises whether the CRC can be relied upon in Court. The applicability of international instruments when dealing with cases in our Courts was considered in the decision of ***The State vs Metropolitan Police Commissioner*.[27]** In this regard it was held as follows:

> "27. (.....) Bangladesh was one of the first signatories to the Convention and is bound to take steps for implementing the provisions thereof. Being signatory we cannot ignore, rather we should, so far as possible, implement the aims and goals of the UNCRC. The matter of international covenants, conventions and their incorporation into national laws was considered in a decision of the Indian Supreme Court in

22 Concluding Observations of the Committee on the Rights of the Child, Bangladesh, U.N. Doc. CRC A/53/41 (1998), CRC/C/15/Add.221 (2003) and CRC /C/BGD/CO/4 (2009)

23 Initial Report of States Parties due in 1992: Bangladesh;07/12/95, CRC/C/3/Add.38.

24 Periodic State Reports 1997, 2001. Recently, Bangladesh submitted its combined third and fourth report (2007).

25 Concluding Observations (1998), para.12

26 Concluding Observations (2003), para. 13

27 State vs. Metropolitan Police Commissioner, 60 DLR 660

People's Union for Civil Liberties v. Union of India, 1997 SCC (Cri) 434. Their lordships made extensive reference to an Australian decision in ***Minister for Immigration and Ethnic Affairs v. Teoh, (1995) 69 Aus LJ 423.*** In the latter case the applicability of the UNCRC was in issue. Mason C.J. stated the position as follows:

> "It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute..... [But] the fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law." His lordship went on to say, "The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the Courts as a legitimate guide in developing the common law." Jeevan Reddy J. delivering the judgment in the People's Union for Civil Liberties case, cited above, after deliberation on the Australian decision, stated as follows: ".... the provisions of the covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by Courts as facets of those fundamental rights and hence, enforceable as such."

So, it is an accepted principle that international covenants, conventions treaties and other instruments signed by State parties are not considered to be binding unless they are incorporated into the laws of the land. Bangladesh has not yet incorporated the provisions of the UNCRC into its national laws.

In this regard reference may also be made to the decision in ***Hussain Muhammad Ershad vs Bangladesh and others*** [28] per Bimalendu Bikash Roy Choudhury,J.

> "2. True it is that Universal Human Rights norms, whether given in the Universal Declaration or in the Covenants, are

28 Hussain Muhammad Ershad vs Bangladesh and others, 21 BLD (AD) 69

not directly enforceable in national Courts. But if their provisions are incorporated into the domestic law, they are enforceable in national Courts.(.....) The national Courts should not, I feel, straightaway ignore the international obligation, which a country undertakes. If the domestic laws are not clear enough or there is nothing therein, the national Courts should draw upon the principles incorporated in the international instruments. But in the cases where the domestic laws are clear and inconsistent with the international obligation of the State concerned, the national Courts will be obliged to respect the national laws, but shall draw the attention of the law makers to such inconsistencies."

Further deliberation was made in the ***Metropolitan Police Commissioner***[29] case, mentioned above, as follows:

"30. Let us consider some of the relevant provisions of the UNCRC in juxtaposition to our Constitution and laws. We bear in mind that Article 28(4) of the Constitution permits favourable laws to be enacted with regard to children even though it might be otherwise discriminatory. .....

The Children Act, 1974 has promulgated succinct provisions aimed at giving special treatment for children. The UNCRC goes further to provide more beneficial provisions dealing with children. It is stated in the preamble of the UNCRC that the child for the good and harmonious development of his or her personality should grow up in a family environment, in an atmosphere of happiness love and understanding. It is also stated in the UNCRC, quoting from the Declaration of Rights of the Child, **"the child by reason of his physical and mental immaturity needs special safeguards and care including appropriate legal protection before as well as after birth."**

In Article 3(1) of the CRC it is stated as follows:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law,

29 State vs Metropolitan Police Commissioner, 60 DLR 660

administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration** [emphasis added]"

After discussing the beneficial provisions of the CRC, one of the recommendations the Court made in the ***Metropolitan Police Commissioner***[30] case was as follows:

> "The Legislature should consider amending the Children Act, 1974 or formulating new laws giving effect to the provisions of the UNCRC, as is the mandate of that Convention upon the signatories."

2.4 International standards relating to justice for children

2.4.1 Justice for children approach

Justice for children is a relatively new approach used by the UN and increasingly also by other development and child rights organizations and by academia. It represents a shift from focusing only children on children in conflict with the law and dealing with these separately, to dealing with all children who contact with the law in a comprehensive manner. Reference to it is made in this book, as it is a particularly useful approach for professionals working with children. The UN guidance note of the Secretary General on a UN approach to justice for children[31] defines the goal of the justice for children approach as:

> " to ensure that children, defined by the Convention on the Rights of the Child as all persons under the age of eighteen, are better served and protected by justice systems, including the security and social welfare factors. It specifically aims at ensuring full application of international standards for all children who come into contact with justice and related systems as victims, witnesses and alleged offenders; or for other reasons where judicial, state and administrative or non-state adjudicatory intervention is needed, for example

31 Guidance Note of the UN Secretary General: UN Approach to Justice for Children, 2008.

regarding their care, custody or protection."[32]

Thus, justice for children applies to any child who comes into contact with the law whether as child offender, child victim, child witness or as a child in need of care and protection. The rationale behind the approach is that there is frequent overlap between these categories. Whatever the reasons for children being in contact with justice systems, they are usually dealt with by the same professionals and institutions.

This goal of the approach also includes ensuring children's access to justice to seek and obtain redress in criminal and civil matters, which can be defined as the ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards (including the CRC).

The Guiding Principles of the approach are the following;

1. *Every child has the right to have his or her best interests given primary consideration.*

   In all actions concerning children, whether undertaken by Courts of law, administrative or other authorities, including non-state, the best interests of the child must be a primary consideration

2. *Every child has the right to be treated fairly and equally, free from all kinds of discrimination.*

   This principle must underpin all actions and requires that gender sensitive approach should be taken in all interventions.

3. *Every child has the right to express his or her views freely and to be heard.*

   Children have a particular right to be heard in any judicial/administrative proceedings, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

32 Guidance Note, p.1

4. *Every child has the right to protection from abuse, exploitation and violence.*

   Children in contact with the law should be protected from hardship while going through state-run and non-state justice proceedings, as well as after the process.

5. *Every child has the right to be treated with dignity and compassion.*

   Every child has to be treated as a unique and valuable human being and as such his or her individual dignity, special needs, interests and privacy should be respected and protected.

6. *Respect for legal guarantees and safeguards.*

   Basic procedural safeguards as set forth in relevant national and international standards and norms shall be guaranteed at all stages of proceedings in both state-run and non-state systems, as well as in international justice arena. This includes for example the right to privacy, the right to legal aid and other type of assistance and the right to challenge any decision with a higher judicial authority.

7. *Prevention of conflict with the law as a crucial element of any juvenile justice policy.*

   Within juvenile justice policies, emphasis should be placed on prevention strategies facilitating the successful socialisation and integration of all children, in particular through the family, the community, peer groups, schools, vocational training and the world of work. In particular, prevention programmes should focus on support for particularly vulnerable children and families.

8. *Deprivation of liberty of children should only be used as a measure of last resort and for the shortest appropriate period of time.*

   Provisions should therefore be made for restorative justice, diversion mechanisms and alternatives to

deprivation of liberty. For the same reason, programming on justice for children needs to build on informal and traditional justice systems as long as they respect basic human rights principles and standards, such as gender equality.

Despite the application of the concept of justice for children to all categories of children in contact with the law, the most of international standards related to justice for children issues predate the adoption of the approach and focus on specific categories of children which will be discussed below.

2.4.3 Children in conflict with the law

The High Court in the case of ***Roushan Mondal*** reflected on the reasons why children in conflict with the law should be treated separately from adults:

> *Bernard Flexner writing almost a century ago on the Legal Aspects of the Juvenile Court [Annals of the American Academy of Political and Social Science, Vol.36, No.1, Administration of Justice in the United States. (Jul., 1910), pp. 49-56] poses a question, as would a lawyer, as to why the child who is accused of a crime should be treated differently from an adult, since both have violated the law, and they must be punished. On the other hand, he points out, a distinction already existed at common law as a child below the age of seven did not reach the age of criminal responsibility and would not be liable for his criminal acts. Of course, since then the common law has developed considerably. Cross and Jones in 'An Introduction to Criminal Law' state: "It is conclusively presumed that no child under the age of ten can be guilty of an offence; a child of ten years or over, but under the age of fourteen, is presumed to be incapable of committing a crime, but this presumption may be rebutted by evidence of 'mischievous discretion' i.e. knowledge that what was done was morally wrong". **R. v. Owen, (1830) 4 C & P 236.** [This presumption*

was, however, abolished by section 34 of the Crime and Disorder Act 1998.]

Then referring to the Illinois legislation of 1898 and 1899, which led to the establishment of the Juvenile Court in Chicago, the first in the United States, Flexner stated that it raised the age limit and said that a child of 16 or 17, or under for violations of law, shall not be deemed a criminal. However the Court would apply the same procedure to a delinquent as it would to the neglected child.

The dominant feature of the legislation regarding proceeding against the delinquent child is that it is meant for the protection of the child. The State or the Crown, as the case may be, stands in loco parentis and through the 'Court' ensures that the unlawful activity of the child does not go unpunished and at the same time that the child is not exposed to the rigours of the criminal justice system with all its awe-inspiring paraphernalia and the stigma of criminality at the conclusion of the proceedings leading to a finding of guilt. Many have advocated that upon reaching the conclusion that the child has violated the law, he is not to be branded a "delinquent child" or a "wayward child" or a "juvenile delinquent", but it should be merely adjudged that the child is in need of care and protection of the State."[33]

The reason for a distinctive dealing of children in the justice system is aptly stated by the Supreme Court of India as follows:

> "If there be no proper growth of children of today, the future of the country will be dark. It is the obligation of every generation to bring up children who will be citizens of tomorrow in a proper way. Today's children will be the leaders of tomorrow who will hold the country's banner high and maintain the prestige of the

33 The State v. Roushan Mondal alias Hashem, 59 DLR 72, paragraph 37-39 Reasons for separate handling of children

> Nation. If a child goes wrong for **want of proper attention, training and guidance, it will indeed be a deficiency of the society** and of the government of the day."[34]

The establishment of Juvenile Courts laid the foundation for the development of a separate system for the administration of juvenile justice in national and international law. The Convention on the Rights of the Child is the main international binding instrument dealing with the rights of children who come into conflict with the law in particular Article 37 and 40 of the CRC.[35] It is supported by the CRC Committee's Decision on the Administration of Juvenile Justice [36] and its General Comment no. 10 on Children's Rights in Juvenile Justice[37] of 2007. Apart from the CRC, there are a number of specialised legal instruments which provide more detailed guidance on children in conflict with the law. The instruments do not create legally binding obligations, although some of the rules therein are binding on States as they are also contained in the Convention on the Rights of the Child, while others can be considered to provide more details on the contents of existing rights. They are also consistently invoked by the Committee on the Rights of the Child when it considers the reports of the State parties under Articles 37 and 40 of the Convention. The standards are the following:

- the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) of 1985;

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34 Sheela Barse v. Secretary, Children's Aid Society and others, 1987 (3) SCC 50.

35 It must be remembered that the general principles of the CRC are relevant for all areas of the Convention, including children in conflict with the law. Hence, in its General Comment no. 10, the Committee emphasises the importance of a comprehensive approach to juvenile justice which" should not be limited to the implementation of the specific provisions contained in Articles 37 and 40 of CRC, but should also take into account the general principles enshrined in Articles 2, 3, 6 and 12, and in all other relevant Articles of CRC, such as Articles 4 and 39.".

36 Committee on the Rights of the Child, Decision on the Administration of Juvenile Justice, CRC/C/90/22nd Session, September 1999.

37 Committee on the Rights of the Child, General Comment No. 10 (2007) Children' s Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007.

- the United Nations Rules for Protection of Juveniles Deprived of their Liberty (Havana Rules),1990
- the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), 1990 and
- the United Nations Guidelines for Action on Children in the Criminal Justice System, 1997

Other non-child specific standards include the Convention against Torture and other Cruel, Inhuman or Degrading Treatment (1984); the ICCPR (1966); UN Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) (1990); the UN basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (2000); the UN Standard Minimum Rules for the Treatment of Prisoners (1955).

The provisions of the international standards on children in conflict with the law can be summarised in the following manner in relation to the different stages of the juvenile justice process[38]:

> "- Powers of Arrest and Arrest Procedures
>
> The CRC states that the arrest and detention of a child must be in conformity with the law, and should be used only as a measure of last resort. Children have the right to be informed promptly of the charges against them, and to have the assistance of their parents and a legal representative at all stages of the proceedings. They must not be subject to torture or other cruel, inhuman or degrading treatment or punishment, and their right not to be compelled to give testimony or to confess guilt must be guaranteed.[39] The Beijing Rules state that, when a juvenile is arrested or detained, his or her parents must be notified immediately, or within the shortest possible period of time. In addition, any contacts between law

38 Summary taken from UNICEF, Juvenile Justice in South-Asia, Improving Protection from Children in Conflict with the Law", 2006, Kathmandu, Nepal.

39 Article 37 and 40(2) of the CRC.

enforcement agencies and a juvenile must be managed in such a way as to respect the legal status of the juvenile, promote his or her well-being and avoid harm to the juvenile. Specifically, police must not use harsh, abusive or obscene language or physical violence in their dealings with children. In order to best fulfil their functions, police officers who frequently or exclusively deal with juveniles must be specially instructed and trained. In large cities, special police units should be established for that purpose.[40]

- Bail and Pre-Trial Detention

CRC states that detention pending trial shall only be used as a measure of last resort and for the shortest possible period of time.[41] The Beijing Rules state that, whenever possible, alternatives such as close supervision, placement with a family or in an educational or home setting should be used.[42] In addition, the JDLs state that juveniles detained under arrest or awaiting trial are presumed innocent and must be treated as such. Detention before trial must only be used in exceptional circumstances, and all efforts should be made to impose alternative measures. When detention is used, Courts and investigators must give the highest priority to expediting the process to ensure the shortest possible period of detention. The juvenile detained at the pre-trial stage must be separated from convicted juveniles, and should have opportunities to pursue work and to continue their education or training.[43]

- Juvenile Courts and Procedures

The CRC states that children alleged or accused of a law violation have the right to have the matter determined

40 Rule 10 and 12 of the Beijing Rules

41 Article 37of the CRC.

42 Article 13 of the Beijing Rules.

43 Rule 17 and 18 of the Havana Rules.

without delay by a competent, independent and impartial authority in a fair hearing. Throughout the proceedings, children have the right to have a parent present, and to have appropriate legal or other assistance. In addition, children must be provided the opportunity to express their views and to be heard in any judicial or administrative proceedings affecting them.[44] The Beijing Rules state that proceedings must be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate fully and to express herself or himself freely. In addition, both the CRC and the Beijing Rules require that juveniles' right to privacy be respected at all stages of the criminal proceedings in order to avoid harm being caused to them through publicity or by the process of labelling. No information that may lead to the identification of a juvenile shall be published.[45]

- Sentencing

The CRC states that deprivation of liberty shall be used only as a measure of last resort, for the shortest appropriate period. A variety of sentencing options, such as care, guidance and supervision orders, counselling, probation, foster care, education and vocational training programmes and other alternatives to institutional care should be available to ensure that juveniles are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and to the offence. Neither capital punishment nor life imprisonment without the possibility of release shall be imposed on children under the age of 18.[46]

The Beijing Rules require that any reaction to juvenile offenders must be in proportion to the circumstances of both the offenders and the offence (principle of

44 Articles 12 and 40 of the CRC.

45 Article 40 (2) CRC and Rule 8 of the Beijing Rules.

46 Articles 37 and 40 of the CRC.

proportionality). Before imposing a sentence on a juvenile, the background and circumstances in which the juvenile is living and the conditions under which the crime has been committed must be properly investigated. The sentence imposed should be proportionate not only to the gravity of the offence, but also the circumstances and needs of the juvenile. Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response. A wide variety of dispositions should be available, allowing for flexibility so as to avoid institutionalisation to the greatest extent possible. Furthermore, in order to promote minimum use of detention, appropriate authorities should be appointed to implement alternatives, and volunteers, local institutions and other community resources should be called upon to contribute to the effective rehabilitation of juveniles in a community setting.[47]

- Conditions in Detention

The CRC requires that every juvenile deprived of liberty must be treated with humanity and respect for their inherent dignity, and in a manner which takes into account the needs of persons of his or her age.[48] Juveniles must be separated from adults in all places of detention. The JDLs set out a complete code for the care and treatment of juveniles deprived of their liberty, with a view to counteracting the detrimental effects of institutionalisation. The Rules promote the establishment of small, decentralised facilities for juveniles with no or minimal security. Children in detention must be afforded the same right to basic education as others, and should have access to vocational training and other meaningful activities. Emphasis is placed on promoting community

47 Rules 16-18 of the Beijing Rules.

48 Article 40 (1) of the CRC.

contact through leaves of absence, outside schooling, and liberal family visit policies (in principle once per week). Rules should also be in place to ensure that children are not subject to corporal punishment, solitary confinement, or other cruel and inhumane punishments.

-Diversion

The CRC requires Parties to promote the establishment of measures for dealing with juveniles in conflict with the law without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.[49] The Beijing Rules provide further guidance on diversion, stating that consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal proceedings. The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without initiating formal proceedings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in the Rules. Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian, and must be subject to review by a competent authority. 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.[50]"

In addition, the CRC Committee has issued *General Comment No.10 on the Rights in Juvenile Justice*"[51], identifying the leading principles and core elements of a comprehensive juvenile justice policy that each State Party to the CRC is required to adopt:

49 Article 40 (3) (b) of the CRC.

50 Rule 11 of the Beijing Rules.

51 See footnote 35.

- Non-discrimination; best interests of the child; the right to life, survival and development; the right to be heard and dignity
- Prevention of juvenile delinquency through education at schools, peer group support of parents and community based services and programmes as an essential component;
- Promotion of interventions without resorting to judicial proceedings (diversion) for both children who commit minor offences/first time offenders and more serious offences
- Use of alternative measures in interventions in the context of judicial proceedings, such as social and educational measures promoting reintegration into society
- **The minimum age of criminal responsibility (MACR) of 12 in national legislation as the minimum internationally acceptable norm**
- **The upper age limit for the application of the rules of juvenile justice must be set as a minimum at 18**
- Guarantees for a fair trial, including no retroactive juvenile justice, presumption of innocence, right to be heard, right to effective participation in proceedings, prompt and direct information of the charges, legal or other appropriate assistance, decisions without delay and with involvement of the parents, freedom from compulsory self-incrimination, presence and examination of witnesses, right to appeal, free assistance of an interpreter, full respect of privacy
- Diversion as pre-trial alternative and alternative measures as dispositions by the juvenile Court/judge
- Prohibition of the death penalty for all persons under 18; no life imprisonment without parole
- Rules regarding treatment during deprivation of liberty including pre-trial detention and post-trial incarceration

Below an excerpt is reproduced of the Concluding Observations of the CRC Committee of 2009 on the third and fourth periodic report of Bangladesh in relation to the status of implementation of the CRC as far as the administration of juvenile justice is concerned to highlight the main issues that need to be addressed.

Box. Concluding Observations of the CRC Committee of 26 June 2009

on the third and fourth periodic report of Bangladesh

Administration of juvenile justice

92. The Committee appreciates the efforts of the State party to address the previous concluding observations, including the removal of some children from adult jails, the establishment of juvenile development centres and the increased training for judges, magistrates and law enforcement officers concerned with juvenile justice. However, the Committee expresses great concern over information indicating that children younger than 15 years old had been condemned to life sentences and children younger than 18 years old to the death penalty. The Committee also notes with concern that the legal age of criminal responsibility has been raised to only 9 years old. Furthermore, the Committee is concerned at the remaining number of children in adult jails and ill-treatment of children in custody by police, the length of police detention and the absence of juvenile Courts.

93.The Committee reiterates its previous recommendation that the State party bring the system of juvenile justice fully in line with the Convention, in particular Articles 37, 39 and 40, and with other relevant standards including the Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules), the Vienna Guidelines for Action on Children in the Criminal Justice System; and the Committee's General Comment No. 10 (2007) on the rights of the child in juvenile

justice. In this regard, the Committee recommends that the State party inter alia:

Ensure with immediate effect that neither the death penalty nor life sentence are imposed for offenses committed by persons under 18 years of age;

Raise the minimum age of criminal responsibility to at least 12 with a view to raising it further as recommended in the Committee's general comment No. 10 (2007) on the rights of the child in juvenile justice;

Consider the establishment of specialized juvenile Courts across the country, the appointment of trained juvenile judges and offer training for professionals;

Limit by law the length of pre-trial detention of children;

Continue efforts to ensure that children deprived of liberty are separated from adults, that they have a safe, child-sensitive environment in police custody, and that they maintain regular contact with their families, and to review the decision of detention with a view to its withdrawal;

Adopt a global and national policy in prevention and promotion of alternative measures to detention such as **diversion**, probation, counselling, community service or suspended sentences, wherever possible;

Provide children, both victims and accused, with adequate legal and other assistance at an early stage of the procedure and throughout the legal proceedings;

establish an independent body for the monitoring of detention conditions and receiving and processing complaints by children in detention;

Request further technical assistance in the area of juvenile justice and police training from the Interagency Panel on Juvenile Justice, which includes UNODC, UNICEF, OHCHR, and NGOs.

2.5 Child victims and witnesses

Article 39 of the CRC deals specifically with child victims and provides that:

"States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child. "

There is no specific provision in the CRC on the rights of child witnesses. The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography in Article 8 and 9 contains specific provisions relating to child victims of offences under the Protocol. Article 8(1) requires States to adopt appropriate measures to protect the rights and needs of victims by recognizing their special needs including as witnesses; by informing child victims of their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases; allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a manner consistent with the procedural rules of national law; providing appropriate support services to child victims throughout the legal process; protecting, as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims; providing, in appropriate cases, for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation; avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims. Article 9 (3) provides that "States Parties shall take all feasible measures with the aim of ensuring all appropriate assistance to victims of such offences, including their full social reintegration, and their full

physical and psychological recovery. Paragraph 4 provides that States Parties shall ensure that all child victims of the offences described in the present Protocol have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime adopted in 2000, also includes a section on the protection of victims of trafficking.

The ECOSOC Resolution 2005/20 of 22 July 2005 on the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime[52] contains more detailed guidance than the CRC on the rights and treatment of child victims and in particular witnesses in the context of crimes. The Guidelines provide for the right to be treated with dignity, the right to have his/her best interests to be given primary consideration, the right to participation, the right to be protected from discrimination, the right to be informed, the right to be heard and express views and concerns, the right to effective assistance, the right to privacy, the right to be protected from hardship during the justice process, the right to safety, the right to reparation and the right to special preventive measures.

2.6 Children in need of care and protection

Children in need of care and protection are children whose parents cannot provide adequate care or who do not have parents to care for them. The relevant international standards relating to children in need of care and protection are the CRC, the Decision of the CRC Committee on Children without Parental Care, the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally of 1986, the Guidelines issued by the UN General Assembly, e.g. No. A/HRC/11/L.13 of 15 June 2009 -

52 ECOSOC Resolution 2005/20 of 22 July 2005 on the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.

Guidelines for the Alternative Care for Children and the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption of 1993.

The international standards emphasise the principle, in the words of the preamble of the CRC, that "the family, as the fundamental group of society and the natural environment for growth and the well-being of all its members and particularly children, should be afforded the necessary protection and the assistance so that it can fully assume its responsibilities within the community." It continues by stating that the child, for his full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of "happiness, love and understanding."

Children have a right to be cared for by his or her parents as far as possible and States have a duty to provide assistance to parents/legal guardians in the upbringing and care of children.[53] Article 9 of the CRC provides that children "shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary in the best interests of the child." Removal of a child from the care of the family is a measure of last resort and should be where possible temporary and for the shortest period of time.[54] Article 20 (1)states that "a child temporarily deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State."[55] Article 4 of the Decision states that when care by the child's own parents is unavailable or inappropriate, care by relatives of the child's parents, by another substitute-foster or adoptive- family or, if necessary, by an appropriate institution should be considered.

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53 See Article 7(1), Article 18 (2) and 27 (3) of the CRC, Guideline no. 3, Article 3 of the Decision.

54 Guideline 13.

55 Guideline 5.

State parties are accordingly required to provide for alternative care which could include foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children.[56] In considering the solutions, due regard must be paid apart from the child's ethnic, religious, cultural and linguistic background, to the desirability of continuity in a child's upbringing. Furthermore, Article 5 of the Decision states that in all matters relating to the placement of a child outside the care of a child's own parents, the best interest of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration. Hence, family-based alternative care is preferable. Article 3(3) provides that institutions, services and facilities responsible for the care and protection of children shall conform with the standards established by competent authorities. Finally, Article 25 provides that a child has been placed by the competent authorities for the purpose of care, protection or treatment, has the right to periodic review of the treatment and placement.[57]

56 Guideline 5 and 28 (b)

57 Guideline 14.

CHAPTER III

Children in Conflict with The Law under the Children Act 1974

3.1 Aim of the law

The main law for children in Bangladesh is the Children Act, 1974 which is supplemented by the Children Rules, 1976. The Act is a statute which deals mainly with three categories of children, namely delinquent/offending children who are also termed as 'children in conflict with the law', neglected/destitute children and victim children. There is also brief mention of how to protect child witnesses in Court. The law is gender neutral and does not discriminate between boys and girls. However, in the case of custody of the girl child, separate provision is made. The Act is silent about the family members of the different categories of children who are equally in need of such protection.[58]

The preamble to the Act gives an idea about the intention behind the law:

> "WHEREAS it is expedient to consolidate and amend the law relating to the custody, protection and treatment of children and trial and punishment of youthful offenders"

The aim is, therefore not only to deal with the trial and punishment of youthful offenders, but also to ensure care, protection and treatment of children and to lay down the procedures for doing so. However, a number of observations are warranted here.[59] Firstly, it must be noted that the provisions in the Act relating to care, protection and treatment of the child are mainly directed towards neglected and destitute children. The provisions on children in conflict with the law focus on trial and punishment of the child. However, the Act provides for a trial process and punishment which are different from those under the criminal justice system for adults. Secondly, it must be noted that punishment of children in conflict with the law and

58 In practice, the parents/guardian of the child victim or witness are very much in the fray. When prosecution is started the parents/guardian and sometimes close relatives of the child victim/ witness also become targets of recrimination of the perpetrators of the crime.

59 See for a different view Malik, Shahdeen, Children Act, 1974, A Commentary, p.24. Malik argues that the primary purpose of the Act is to provide for custody, protection and treatment of children.

treatment of other children from a plain reading of the provisions of the Act is primarily geared towards correction of the child rather than rehabilitation of the child as it is under the international standards in relation to justice for children.

The Act is essentially a juvenile justice legislation as most of the provisions deal with children who come in conflict with the law. The Act, as mentioned above, sets out a separate regime in relation to these children that differs fundamentally from the criminal justice process for adults. The Act features a number of basic characteristics inherent to a juvenile justice system. These include the establishment of a juvenile justice Court, a separate trial for children, the possibility of bail even for non-bailable offences etc. In addition, the terminology to a certain degree also reflects this. Apart from the preamble, the Act uses the word 'punishment' only once more in section 51. In addition, in section 71, the Act forbids the use of the words 'conviction' and 'sentence' in relation to a child who is found guilty of an offence and any sanction is imposed upon him under the Act. Moreover, such finding of guilt is not to have any effect under section 75 of the Penal Code or section 565 of the Code of Criminal Procedure or to operate as a disqualification for any office, employment or election under any law.[60]

3.2 Structure and relationship with other legislation

The Act consists of 10 parts:

Part I	:	Preliminary
Part II	:	Powers and Functions of Courts Having Jurisdiction under the Act
Part III	:	Certified Institutes and Other Institutions
Part IV	:	Officers and Their Powers and Duties
Part V	:	Measures for the Care and Protection of Destitute and Neglected Children
Part VI	:	Special Offences in Respect of Children

60 Viz. section 70 of the Children Act.children.

Part VII : Youthful Offenders

Part VIII : Measures for Detention, etc. of Children and Youthful Offenders

Part IX : Maintenance and Treatment of Committed Children Miscellaneous

The Act deals both with the procedural aspects as well as substantive aspects in relation to children in conflict with the law. The procedural law is concerned with the procedures that need to be applied by the police, the probation officer and the juvenile Court. The relevant provisions of the Act are supplemented by the Children Rules, 1976 which set out in more detail certain procedural aspects of the Children Act, 1974.

In addition, the Act is reliant upon the Penal Code of 1860, and a number of special laws, e.g. Arms Act, Nari-o-Shishu Nirjatan Daman Ain, Acid Aporadh Daman Ain etc., which provide details of offences that may be committed by any person, including children, and the Code of Criminal Procedure 1898.[61] Due to an oversight, unfortunately section 29B of the Cr.P.C. relating to 'Jurisdiction in the case of juveniles' still appears as existing law and is printed in the Code of Criminal Procedure as amended up to October 2007. [62] Section 78 (3) of the Children Act provides that "the provisions of section 29B and 399 of the Code shall cease to apply to any area in which this Act shall be brought into force." Section 399 of the Cr.P.C. which relates to

61 See section 18 of the Children Act, which provides that provisions of the Code of Criminal Procedure, 1898, to apply unless excluded i.e. "Except as expressly provided under this Act or the rules made thereunder, the procedure to be followed in the trial of cases and the holding of proceedings under this Act shall be in accordance with the provisions of the Code."

62 Section 29B, "Jurisdiction in the case of juveniles: Any offence, other than one punishable with death or transportation for life, committed by any person who at the date when he appears or is brought before the Court is under the age of fifteen years, may be tried by a [Chief Judicial Magistrate] [or the Chief Metropolitan Magistrate]…, or by any Magistrate specially empowered by the Government to exercise the powers conferred by[or under any law] providing for the custody, trial or punishment of youthful offenders, by any Magistrate empowered by or under such law to exercise all or any of the powers conferred thereby." The footnotes refer to amendments made in 1974 and 2007. Section 29B was inserted by the Code of Criminal Procedure (Amendment), 1923 (XVIIII) of 1923) s.6. However, it ceased to apply for the whole of the district of Dacca with effect from 1st November, 1976 and for the rest of Bangladesh with effect from 1st June, 1980 on which date section 29B stood repealed by virtue of section 78(3) of the Children Act, 1974.

confinement of youthful offenders in reformatories has been reproduced in the Cr.P.C. with a note that the section shall cease to apply to the whole of the district of Dacca by reference to section 78 (3) of Act XXXIX of 1974 (with effect from the 1st November 1976). In fact the Children Act has come into force for Dhaka district on 1st November 1976 and for the rest of the country on 1st June 1980. So, section 399 is no longer valid law and has been erroneously included in the latest amended version of the Cr.P.C.

The Children Act does not set out the offences for which a child may be tried. These are embodied in other substantive laws, such as the Penal Code 1860, the Special Powers Act 1974, the Arms Act 1878 , Explosive Substances Act 1908, the Nari-o-Shishu Nirjatan Daman (Bishesh Bidhan) Ain 1995, the Nari-o-Shishu Nirjatan Daman Ain 2000, Acid Aporadh Daman Ain 2002, Railways Act 1890, Vagrancy Act 1943 etc[63]. Many of these laws provide wide discretionary powers to the police to arrest children. While some of these laws also contain procedural aspects, it must be noted that when a child is suspected of an offence under any of these laws the procedures as provided under the Children Act, 1974 need to be followed. This will be clarified further at a later stage in this book.

A substantial part of the Act (in Part VI sections 35 to 46) describes the offences committed by adult offenders against children and prescribes the penalties. The prosecution of these offences, however, is not administered in juvenile Courts and the special procedures of the Children Act are not applicable to these trials as provided by section 47 of the Act.

3.3 Definition of a child

The beneficial provisions of the Act, the Rules and other provisions expounded in the several international instruments relating to children, are only accessible to the child in contact/conflict with the law if she/he can establish her/his

63 See List of Laws at the end of this book.

status of being a child.

Section 2(f) of the Children Act provides the following definition of a child:

"(f) "Child" means a person under the age of sixteen years, and when used with reference to a child sent to a certified institute or approved home or committed by a Court to the custody of a relative or other fit person means that child during the whole period of his detention notwithstanding that he may have attained the age of sixteen years during that period;"

However, there are other definitions of the child in various other legislations. A few examples are cited below to illustrate this. Thus, for example the Child Marriage Restraint Act section 2 (a) defines a child and a minor if male as one under 21 years of age and if female under 18 years of age. The Bangladesh Labour Act, 2006 section 2 (8) says Kishore means someone who has reached the age of 14 years but has not reached the age of 18 years. The Vagrancy Act, section 2(3) provides that a child means a person under the age of 14 years. The Nari-o-Shishu Nirjatan Daman Ain provides in section 2 (ta) that a child is a person up to 16 years. Section 11 of the Contract Act 1872 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 1875. Under section 3 of the Majority Act, 1875 a person shall be deemed to have attained his majority when he shall have completed the age of eighteen years. This applies to matters other than those relating to marriage, dower, divorce and adoption. In the latter cases the provisions of the personal laws prevail.

Thus, it can be concluded that here is no uniform definition of a child in the law. However, in case of children who come into contact with the law, the relevant definition is the one as is given under the Children Act. It may be mentioned in passing that this definition of 'child' is not in conformity with the definition in the Convention on the Rights of the Child (CRC), where a child has been defined in Article 1 as 'every human

being below the age of eighteen years.' The anomaly and difficulties which this creates were discussed in the case of ***Roushan Mondal***. Arguably, the same definition ought to apply to children of Bangladesh since, being a signatory to the CRC, we are obliged to incorporate its provisions into our domestic law. The CRC Committee reiterated its recommendation to Bangladesh to do so most recently in its Concluding Observations of 2009.[64]

3.4 Upper age limit and Minimum Age of Criminal Responsibility

Section 2 (f) of the Children Act clearly establishes that in order to get the benefit of the provisions of the Act the offender must be below the age of 16 years. Thus, an offender of 16 or above will be considered and treated as an adult, which is not in line with the CRC and the Committee has recommended to Bangladesh to change the definition.[65]

The Children Act is silent on the Minimum Age of Criminal Responsibility (MACR), i.e. the age below which the child cannot be held criminally liable for an offence. The reason for establishing a MACR is that children below a certain age are unable to fully understand and foresee the consequences of their acts. It is presumed that below this age they lack the capacity to commit an offence. The relevant provisions are to be found in the Penal Code. In 2004, Bangladesh raised the MACR from seven to nine years.[66] Section 82 of the Penal Code provides that nothing is an offence that is done by a child below the age of 9 years. Section 83 provides that criminal responsibility between the ages of nine and 12 is subject to judicial assessment of their capacity to understand the nature and consequences of their actions at the time of the occurrence. While this amendment has made a modest improvement, the minimum age is still far below international standards.

64 Committee on the Rights of the Child, Concluding Observations: Bangladesh, CRC/C/BGD/CO/4 26 June 2009, para. 12-13.

65 Ibid para.8-9.

66 Penal Code amended by Act XXIV of 2004.

Although the CRC itself does not specify the MACR, the CRC Committee has stated that the MACR should be at a minimum 12 years and has recommended that Bangladesh should raise the MACR from 9 to 12. Arguably the MACR in Bangladesh is 12 years since if the Court finds that the child did not have sufficient maturity of understanding to realise the consequence of his actions at the time of the occurrence then it would not be an offence.

3.5 Relevant date

Section 82 and 83 of the Penal Code have established that the relevant date for establishing the MACR is the date of the commission of the offence. However, neither the Children Act nor the Penal Code specify what the relevant date is for determining whether the child is below the age of 16 and hence falls within the regime of the Children Act. Which is the date on which he must prove his age to be below 16 years? Is it the date on which the offence is committed, or the date on which the trial commences upon framing of charge? The question of the material date on which the age of the offender becomes relevant has caused considerable technical problems in relation to trial of child offenders.

Divergent views appear from decisions of the High Court Division. The Appellate Division has held in a number of cases that the relevant date is that on which the charge is framed.[67] At this juncture, I may refer to a paper which the author presented at a seminar organised by Save the Children UK in Dhaka, wherein it is stated that the state of the law as it stands is that the relevant date on which to ascertain the age of the offender is the date of commencement of the trial, i.e. the date of framing of charge.[68] It was further observed as follows:

"However, it may be pointed out, with respect, that in the case of ***Mona***,[69] the Court was ill-informed about the purpose and purport of the legislation concerning children. Moreover the

67 Mona alias Zillur Rahman vs The State, 23 BLD (AD) 187.

68 Also held in Abdul Munem Chowdhury @ Momen vs The State 47 DLR (AD) 96.

69 See note 67 above

point in issue in that case was with regard to joint trial with an adult and the appellant was not able to prove her/his age with any materials.

Arguably the relevant date should be the date of commission of the offence, otherwise the purpose of the CRC would be defeated. The Supreme Court of India has settled the issue thus:[70]

> 'Children Act was enacted to protect young children from the consequences of their criminal acts on the footing that their mind at that age could not be said to be mature for imputing *mens rea* as in the case of an adult. This being the intention of the Act, a clear finding has to be recorded that the relevant date for applicability of the Act is the date on which the offence takes place. It is quite possible that by the time the case comes up for trial, growing in age being an involuntary factor, the child may have ceased to be a child.'

We have suggested[71] that—being signatories to the UNCRC—Bangladesh is obliged to formulate laws in conformity with the provisions of the Convention. We also suggested that the anomalies, such as the relevance of age at the time of the commission of the offence and exclusive jurisdiction of the Juvenile Court to deal with all matters concerning children, could be ironed out."

3.5.1 Date of commission of offence

In many decisions of the High Court the relevant date for consideration of age has been discussed. In a judgement and order dated 31.5.2000 passed by the Special Tribunal, Nari-o-Shishu Nirjatan Daman Bishesh Adalat, Comilla in Nari-o-Shishu Case No. 100 of 1998, the trial Court convicted the accused appellant under section 6(1) of the Nari-o-Shishu

70 Pratap Singh v. The State of Jharkhand and another, 2005 (3) SCC 551.

71 As suggested in the Roushan Mondal case.

Nirjatan (Bishesh Bidhan) Ain 1995 and sentenced him thereunder to imprisonment for life. When the matter came before the High Court Division in the case of ***Monir Hossain (Md.) @ Monir Hossain vs. The State***[72] it was held:

> "Per Gour Gopal Saha,J. …. "12. It is found from the charge-sheet that the Investigation Officer of the case has mentioned the age of accused appellant Md. Monir Hossain as between 14 and 15 years at the time of submission of the charge-sheet on 24-9-98. It is also found from the order sheet of the case that the learned Special Tribunal framed charge against accused appellant Monir on 31-1-99 under section 6(1) of the said Ain. It appears that no objection was taken by the accused petitioner before the trial Court on the question of his being a minor below 16 years of age either on the date of commission of the offence or on the date of framing of the charge on 31-1-99. As a matter of fact, there is even no suggestion at the trial on the part of the accused appellant that he was a child below 16 years of age at the time of framing the charge against him by the learned Special Tribunal. In the absence of any objection by the defence that the accused is a child as contemplated in the Children Act, 1974 and, as such, the Tribunal had no jurisdiction to try the accused as usual without directing an enquiry to ascertain as to whether the accused appellant was really a child to be tried as a juvenile offender.
>
> 13. In this regard, we like to emphasise that the defence must raise specific objections before the trial Court that since the accused is a child within the purview of the Children Act, 1974, the Court/ Tribunal has no jurisdiction to try him. If such exception is taken and the Court/Tribunal tries the accused and convicts him on the charge or charges framed against him, it shall be presumed that the learned trial Court/Tribunal found the

72 53 DLR 411

accused not to be a child and tried him as a major. With the scant and inadequate materials on record it is very difficult, for the appellate Court, if not impossible, to ascertain the actual age of the accused at time of framing of the charges against him and, consequently, any objection before the appellate Court raised for the first time on the question of the accused being a child within the meaning of the Children Act, 1974 must be viewed with disfavour, unless it is found imperative in the interest of justice under given circumstances.

14. From the scrutiny of the record, we find some redeeming features and vital facts (.....) we find from the charge sheet that the accused appellant Md. Monir Hossain was 14-15 years on the day of submitting the charge-sheet against him on 24-9-98. It is also found from order No. 6 dated 22-12-1998 from the order sheet of the case that the prayer for the accused appellant was specifically grounded on the question of his being a 'minor'. In the facts of the case, it is found that the question of the accused appellant being a child was before the learned Tribunal, although not specifically pressed for an answer. Since the conviction against the accused appellant is one for imprisonment for life and the age of the accused appellant on the date of framing charges against him is a matter of great importance touching the jurisdiction of the Court, we find it necessary in the interest of justice that the learned Special Tribunal should direct an enquiry to satisfy himself as to whether accused appellant Md Monir Hossain was a child below 16 years of age on the date of framing charges against him on 31-1-99."

Referring to ***Bablu vs. The State***, ***1981 BLD 454,*** the case of ***Bakhtiar Hossain vs. The State, 47 DLR 542*** and the case of ***Sheela Barse and another vs. The State, AIR 1986 (SC) 1773***, his lordship observed as follows:

"15. (...) In all these cited decisions it has been held that

> when the question of age of the accused is claimed to be below 16 years of age, a duty is cast upon the Court to direct an enquiry to satisfy itself as to whether the accused is a child below 16 years of age on the day of framing charges against him. If the Court on enquiry finds the accused to be a child, it loses the jurisdiction to try him in the usual manner. If, on the other hand, the appellant is found above 16 years of age on the day of framing of the charges, the Court or Tribunal will reject the objection and try the accused as usual."

In the abovementioned decision both the date of commission of the offence and the date of framing of charge were mentioned, without clearly stating the relevant date for applicability of the Act, i.e. which date was considered to be the material date for the accused to be below 16 years of age.

In the case of ***Md. Aslam Ali –Versus- The State***[73] relevant date was clearly stated to be the date on which the offence was committed. It was observed as follows:

> "2. (.....) It appears that the occurrence took place on 25.2.2002 and the order was passed on 11.4.2004. Therefore, the question before the learned Adalat was, as to whether the petitioner was a child as contemplated under the Children Act on the date of occurrence and not on the date when he had passed the impugned order."

Their lordships went on to direct the learned Sessions Judge and Judge, Nari-o-Shishu Nirjatan Daman Bishesh Adalat to conduct an enquiry as contemplated under section 66(1) of the Children Act, 1974 to ascertain as to whether the petitioner was a child as contemplated under the said Act on the date of occurrence or not and after conducting such enquiry if it is found that the petitioner was in fact a child under the said Act then the case should be transmitted to the Juvenile Court or he himself, assuming the jurisdiction of a Juvenile Court can try the same and if the process of such enquiry requires some time

73 12 BLT (HCD) 475

in that case further proceedings of the case should be kept in abeyance by the learned Sessions Judge and immediately after conclusion of such enquiry, he will be at liberty to deal with the case as indicated in the judgment.

Md Shamim Vs The State[74] tends to suggest that the material date is the one when the offence was committed. Their lordships, referring to sections 2 and 5(1) of the Children Act, stated as follows:

> "4. According to the aforesaid sections of the Children Act a Juvenile Court shall try all cases in which a child is charged with the commission of an offence. According to section 2 (f) of the aforesaid Act a child means a person under the age of 16 years. In the instant case we find that the accused appellant was regular student of class IX at the time of commission of the offence and he is aged about 14 years when the Court examined him under section 342 Cr.P.C. Except those there is no other evidence about the age of the accused appellant. During examination of the accused appellant under section 342 Cr.P.C. the accused appellant was before the Court and within the sight of the Court and the Court after seeing the accused considered him as a person of tender age and minimised his punishment as it appears from the ordering portion of the judgement. After examination of the accused appellant under section 342 Cr.P.C. trial Court did not try to ascertain the actual age of the accused. So if the accused petitioner is more than 16 years old the Court would have corrected the same as the examination of the accused under section 342 Cr.P.C. was done by the Court and the same is also signed and sealed by the Court. So we have reasons to accept the age written by the Court as the approximate age of the accused appellant."

Similarly, in the case of ***Bablu v. The State***[75] the date of commission of the offence was taken to be the material date on

74 19 BLD 542

75 (1981) 1BLD 454

which the offender had to satisfy that he was below 16 years of age. His lordship F.I. Chowdhury, J. held as follows:

> "9. (.....) the learned Advocate appearing on behalf of the accused appellant produced before me an Admit Card of the accused appellant for S.S.C. examination which is to be held on 1981. It shows that the accused appellant Saifullah was born on 1.1.65. The offence was committed on 21.1.78. So, age of the accused appellant was 13 years 20 days on the date of commission of the offence if he was born on 1.1.65. The accused appellant was examined under section 342 of the Criminal Procedure Code on 7.12.79. At that time his age was recorded as 16 years 2 months. Taking his age as 16 years 2 months on 7.12.79 his age came to 14 years 3 months 14 days on 21.1.78. So there cannot be any doubt that the accused appellant was under 16 years of age when he committed the offence. Hence, the provisions made in Children Act 1974 will be applicable in the present case."

In the case of ***Md. Nasir @Nasir @ Nasir Ahmed vs. The State***[76]**,** with regard to the venue for trial, it was observed as follows:

> "21. It has been proved by evidence on record that at the time of commission of the crime appellant Nasir was 10/12 years old. So he ought to have been tried by Juvenile Court as per provision laid down in the Child Act 1974 (Act No.XXXIX/1974). The "child" has been defined in sub-clause (f) of section 2 of the aforesaid Act."

The issue of date relevant for the assessment of age was discussed in the case of ***Roushan Mondal***[77]. Reference was made to the decision of the Indian Supreme Court. It was observed as follows:

> "60. (.....) In view of the international covenants, declarations and other instruments, we feel inclined to the

76 42 DLR 89

77 DLR 72

view that the relevant date must be the date on which the offence is committed, otherwise the whole thrust of the law to protect those who are immature, impetuous, unwary, impressionable, young, fickle-minded and who do not know the consequences of their act, would be lost. It is the mental capacity of the offender at the time of committing the offence which is of crucial importance. It was observed in the case of ***Pratap Singh v. The State of Jharkhand and another, 2005 (3) SCC 551*** as follows:

"Children Act was enacted to protect young children from the consequences of their criminal acts on the footing that their mind at that age could not be said to be mature for imputing mens rea, as in the case of an adult. This being the intendment of the Act, a clear finding has to be recorded that the relevant date for applicability of the Act is the date on which the offence takes place. It is quite possible that by the time the case comes up for trial, growing in age being an involuntary factor, the child may have ceased to be a child."

We may also look at the issue in juxtaposition with sections 82 and 83 of the Penal Code, where the law clearly states that nothing is an offence which is done by a child below the age of nine years. Hence the cut off point is the age on the date of the act done by the child. The matter is clearer in section 83 where the Court is required to ascertain the understanding of the child 'on that occasion', meaning the date on which the act was done. The CRC Committee in General Comment no.10 also has held that the relevant date for determining the age is the date the offence was committed.

3.5.2 Date of framing of charge

A number of cases, including decisions of the Appellate Division have held that the relevant date for applicability of the Children Act vis-à-vis the age of the offender is the date of framing of charge.

The decision of the Appellate Division in the case of ***Abdul Munem Chowdhury@Momen vs. The State***[78] affirmed the view of the High Court Division, which had held that the petitioner was not able to prove that he was a child on the date of framing of the charge. In that case the trial Court had noticed that there was sign of interpolation in the registration card and the certificate issued from the school which had been produced by the petitioner as evidence of age.

That view of the Appellate Division was more categorically stated in the case of ***Mona alias Zillur Rahman v. The State***[79]**,** where their lordships observed and held as follows:

> "6. Mr. Idrisur Rahman, the learned Counsel appearing for the accused petitioner advances before us only one point namely that at the time of commission of offence the convict petitioner was aged below 16 years and as such his trial could not be held legally with adult who was other co-accused of the petitioner, which is barred under section 6(1) of the Children Act, 1974 and he submits that the petitioner should have been tried as a Juvenile Offender under section 4 of the Children Act, 1974....
>
> 7. The relevant law was amended later on by adding sub-section 1 with section 6 and it was enacted that if at the time of trial, the offender is not below the age of 16 years at the time of framing charge for trial can be held together with adult and no separate trial is necessary.
>
> 8. Mr Idrisur Rahman the learned Counsel submits that the trial was illegal because the convict petitioner was below the age of 16 years at the time of his trial which was held with another adult accused and the trial has been vitiated by operation of law. But the learned counsel for the petitioner totally fails to convince us by presenting any material whatsoever from the evidence on record or

78 47 DLR (AD) 96

79 23 BLD (AD) 187

from the judgments of the Courts below that the petitioner was below 16 years at the time of framing charge against him vis-à-vis, at the time of holding trial."

As observed earlier, the point in issue was joint trial with an adult. But the petitioner was unable to prove his age. However, in the process of dealing with the argument regarding the petitioner's right to separate trial under section 6(1) of the Children Act, the Appellate Division adverted to the material date for determining age as at the time of trial.

There can be no doubt that the decisions of the Appellate Division are binding on all the Courts of this country, as provided by Article 111 of the Constitution. **In the light of the judgments of the Appellate Division, the law as it stands is that the material date for assessing the age of the offender is on the date of framing charge, which is taken to be the date of commencement of trial.** This situation will prevail until either the law is changed or the position is reviewed by the Appellate Division.

3.6 Determination of age by police prior to arrest

Based on the definition of a child under Section 2(f) of the Act and the MACR under section 82 and 83 of the Penal Code it can be inferred that no offender can benefit of the provisions of the Children Act and Children Rules unless he/she is below 16 years of age and cannot be arrested by the police unless she/he is above 9 years of age. It must be established that the person who comes into contact with the law is a child within the definition of the Children Act and can be held criminally liable.

The police face various problems in assessing the age of child offenders. Firstly, the main difficulty arises due to lack of proper documentation relating to the birth of the alleged child offender in the form of a birth certificate. However, this will become less of a problem as birth registration increases. As a starting point, the police should verify whether the child is in the possession of a birth certificate through contacting his parents or the UP Chairman in the area where the child resides

who according to the Births and Death Registration Act, 2006 is responsible for maintaining a register of births in his locality. Alternatively, if the child is attending school a primary/secondary enrolment Register, can serve as the basis to determine the age. Contacting the Headmaster of the school may evince the necessary information. Secondly, although there are now some examples of specialised child units or designated police officers for children at selected police stations, in most cases the police lack both human as well as financial resources and are otherwise too busy to make any inquiry into the age of child in a proper manner. In reality, this means that in many cases where the parents/family of the child are unknown or live far away , they or other family members or other relatives cannot be traced due to limited resources or lack of time of the police. If there is no birth certificate and no proof that the child is registered; and children are not enrolled in school, most often there are no immediate prospects of ascertaining the age of the child. It is only in these exceptional circumstances that a preliminary assessment can be made of the child's age based on the physical appearance of the child until this is further substantiated by the Magistrate's Court before whom the child is produced and when the Court makes its own assessment of the age of the child in accordance with the law.

While the constraints that the police face in determining the child's age must be realised, it must also be acknowledged that certain malpractices have developed. Thus, very often the influence of the informant upon the police officer, who records the information, frequently leads to inclusion of children as offenders who are classified in the information as adults. Where the informant has not stated the age of the offender, then at the initial stage of arrest the person arrested is at the mercy of the police to estimate his age favourably to enable him to qualify as a child offender in order to get the benefits under the Children Act. It is a common phenomenon that police tend to estimate the age upwards rather than in favour of the arrestee in order to avoid certain formalities peculiar to children's cases. Depending on the age as stated by the informant or recorded by the police,

the accused may be sent to jail custody instead of custody in a remand home or place of safety. Similarly, since police are often evaluated on the basis of the number of arrests they make, there is an incentive to deliberately increase the age of the child on the charge sheet when it is known that the age of the child does not meet the criterion of the MACR, i.e. is below nine years and hence should not be arrested. This is particularly so in cases involving drugs where incentives exist for arrests made. Here no scruples are applied and even children below MACR are arrested to demonstrate efficiency of the arresting officer.[80]

It is seldom considered that a child who is deprived of the benefits, to which he would be entitled as a child, can never be adequately compensated if in due course he is able to prove that he is a child. The damage done to a child, if he is confined in a prison with adult offenders, can never be repaired nor forgotten by the child. The bad experience and memories would remain indelible. Hence, it is crucial for the police officer to exercise his duty to determine the age of the child with due diligence.

80 See the case of The State vs. Secretary Minister of Home Affairs (unreported) where children aged 7, 8 and 14 were arrested having been found in possession of hemp 'GANJA.'

CHAPTER IV

Arrest, Bail and Pre-Trial Detention

4.1 Procedure on arrest

If it is established by the police that a offender is a child who is nine years or above or is between nine and twelve years and has the capacity to understand the nature and consequences its actions, the police, if it has reasonable suspicion that the child has committed or is involved in the offence, may arrest the child. The Children Act sets out the appropriate procedures that need to be followed after arrest of the child.

The Act does not contain all relevant pre-arrest procedural safeguards. Thus, the Children Act is silent on a number of issues which are recognised internationally to be guaranteed for all persons and for which the CRC makes special provision. These include the requirement that arrests can only be in conformity with the law, the right to be informed of the charges, the right to have legal representation, provisions limiting the use of physical force, restraints or handcuffs in the arrest of children and provisions relating to the taking of confessions or statements of children.[81] It may be noted that according to section 18 of the Act, where no procedure is specified in the Act the provisions of the Code of Criminal Procedure will apply. However, as will be discussed later, the case-law has enunciated on many of these provisions.

In addition, there are constitutional safeguards regarding the liberty of the person as enshrined in Article 33 of the Constitution, which are often overlooked. Article 33(1) provides as follows:

> "33(1) No person who is arrested shall be detained in custody without being informed, as soon as may be of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice."

In general the neglect or failure of the Police to apply the provisions of the Constitution or the Children Act does not come to the Courts. However, it may be pointed out that the provisions mandating duties upon the Police are most relevant

81 Article 37 and 40 (2) of the CRC.

for the purpose of ensuring justice for children who come into contact with the law. It was observed in the case of ***The State vs. Metropolitan Police Commissioner, 60 DLR 660*** as follows:

> "12. The police, it appears, acted in violation of the provisions of the Act. At least, there appears to be no indication that they were aware of the above-noted provisions of law or made any attempt to comply with the requirements. The police station is two kilometres from the place of occurrence. But there is nothing to suggest that they made any attempt to locate the parents of the girl or any other relatives. No attempt was made to appoint a probation officer, which is the requirement of section 50....."

As stated earlier, cases relating to the procedures to be followed by the Police and at the initial stage of the trial are very rare. The ***Metropolitan Police Commissioner***[82] case provided an opportunity for the Court to issue a number of directions in this regard. These may profitably be reproduced below:

> "36. In the light of the above discussion we may summarise our observations as below:
>
> 1. It is the duty of this Court and all other Courts as well as the other state departments, functionaries and agencies dealing with children, to keep in mind that the best interests of the child (accused or otherwise) must be considered first and foremost in dealing with all aspects concerning that child.
>
> 2. The parents of the children who are brought before the police 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.

82 60 DLR 660

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 consideration 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 Legislature should consider amending the Children Act, 1974 or formulating new laws giving effect to the provisions of the UNCRC, as is the mandate of that Convention upon the signatories.

14. The use of children as 'drug mules' should be made an offence and incorporated in the Children Act, making the parents/guardians of any child used for carrying drugs criminally liable.

15. 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.

4.1.1 Duties of the police

A child coming into contact or in conflict with the law will face the Police as the first actor engaged in providing protection, aid and assistance as well as maintaining law and order and to secure their trial. When a child is apprehended by any law enforcing agency, there arises an immediate need for the provision of physical and emotional security for the child. The best persons to provide such security would be the parents of the child. The simple presence of the parents/guardian will give a sense of security to the child and an assurance in his mind that no harm will come to him. Moreover, when a child is apprehended for any alleged wrong doing, then the parents/guardian naturally need to know.

4.1.1.1 Tracing child's parents

Section 13(2) of the Act provides as follows:

> "(2) Where the child is arrested, the officer in charge of the police station to which he is brought shall forthwith inform the parent or guardian, if he can be found, of such arrest, and shall also cause him to be directed to attend the Court before which the child will appear and shall specify the date of such appearance."[83]

Due to various reasons, a child's parents may not be traceable. Nevertheless, the police officer concerned must indicate reasons for his inability to trace the parents. His explanation would show, at least, that he was aware of the requirement of the law. These days, with the advent of mobile phones, it would not be difficult for the officer in charge of a police station to maintain a list of the mobile phone numbers of all the Chairmen within his territorial jurisdiction and to contact the concerned Chairman with a view to tracing the parent/guardian of any child brought to his police station, either as an alleged offender, or as a victim child, or just a child who is lost. In the case of lost children, it would now be simple to take a photograph with the mobile phone, which these days have cameras built in, and to publish the photograph in the locality and the local newspaper with a view to tracing the family of the child.

4.1.1.2 Appointment/notification of the probation officer

Section 50 of the Act provides as follows:

> "50. **Submission of information to Probation Officer by police after arrest**.-Immediately after the arrest of a child, it shall be the duty of the police officer, or any other person affecting the arrest to inform the Probation Officer of such arrest in order to enable the said Probation Officer to proceed forthwith in obtaining information

83 The Children Act is in conformity here with the CRC and the Beijing Rules which provide that children have the right to assistance of their parents at all stages of the proceedings and that parents need to be informed immediately, or within the shortest period of time possible.

> regarding his antecedents and family history and other material circumstances likely to assist the Court in making its order."

The appointment of a Probation Officer serves two purposes, namely providing friendly support for the distraught child and also in order to fulfil the requirement of law in collecting and placing before the Court all necessary background information of the child and his family which will enable the Court to come to a proper decision in the best interests of the child. Section 15 of the Act requires the Court to take into consideration the report of the Probation Officer in reaching the decision.

In many cases it is seen that no attempt is made to contact the Probation Officer. The requirements of the law are not fanciful. When any child is arrested for an alleged crime or is brought to a police station for any other reason, including as a victim of a criminal act, the immediate need for the child is to be assured of his physical integrity and to be provided with mental support. He would naturally require a relative or friend by his side, to comfort and reassure him. Moreover, there is a legal requirement for the Probation Officer to collect all background information about the child and his surroundings and to compile a report for the Court. If for any reason the officer in charge of the police station is unable to inform the Probation Officer, then his notes should indicate the reasons so that it becomes apparent that he was aware of the provision of law.

Again, mobile phones being at the fingertips, each police station should be equipped with the contact numbers of all relevant actors, including the Probation Officer and the Department of Social Welfare. In addition, the officer in charge should maintain the contact numbers of all the relevant Local Government officials, including Chairmen of the Upazila and Union Parishads and Members of the Union Parishads within his jurisdiction so that he may contact them as and when necessary.

4.2 Bail

4.2.1 Bailable offence

If the offence is bailable, as described in Schedule II of the Code of Criminal Procedure, then bail is to be granted as of right. This provision gives potentially broad scope for the police to prevent children from being unnecessarily detained by the police.[84] However, the safety and security of the child should be considered. If the child cannot be released for any security reason, then those reasons must be stated, otherwise the question of infringement of personal liberty may arise. In the event that the child is not released, she/he may be sent to a place of safety under the provisions of the Children Act.

4.2.2 Bail in case of non-bailable offence

Here is an instance where it becomes abundantly clear that the justice delivery system for children is set apart from the conventional criminal justice system. Under the Cr.P.C. the Police have no authority to consider bail of any person apprehended upon allegation of an offence which is non-bailable. Bail in a non-bailable offence may only be considered by the Court under the proviso to section 497 Cr.P.C. However, an exception to this principle is found in the Children Act, 1974. Here, the officer in charge of the police station has the discretion to grant bail to a child offender, who is alleged to a committed a non-bailable offence.

Section 48 of the Act provides as follows:

> "48. Bail of child arrested. Where a person apparently under the age of sixteen years is arrested on a charge of a non bailable offence and cannot be brought forthwith before a Court, the officer in charge of the police station to which such person is brought may release him on bail, if sufficient security is forthcoming, but shall not do so

84 This is supported by Article 37 of the CRC and Article 13 of the Beijing Rules, which state that detention pending trial shall be a measure of last resort and for the shortest period of time. Whenever possible, alternatives such as close supervision, placement with a family or educational setting should be used.

where the release of the person shall bring him into association with any reputed criminal or expose him to moral danger or where his release would defeat the ends of justice."

In the case of ***The State v. Secretary, Ministry of Home Affairs and others***,[85] [Suo Motu Rule No.1 of 2010] the High Court Division pointed out an internal circular issued by the Inspector General of Police with regard to bail of child offenders. In that case various aspects of justice in respect of children in conflict with the law at the initial stages of the process were considered. It was observed as follows:

"There is nothing on record to suggest that the OC was at all aware of the need to inform the Probation Officer, as required by section 50 of the Act. It is also clear that the OC was oblivious of the provisions of section 48 of the Act to consider bail of the children. Evidently he is also ignorant of the Police Order No.1 of 1987 published on the order of the Inspector General of Police on 2.2.87 and circulated for implementation to all D.I.G of police and Police Superintendents. The circular provides as follows:

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
পুলিশ হেডকোয়ার্টার্স, ঢাকা
পুলিশ অর্ডার-১, ১৯৮৭

শিশু আইন ১৯৭৪ এর প্রয়োগ ও বাস্তবায়নের জন্য ইন্সপেক্টর জেনারেল অব পুলিশ ২-২-৮৭ তারিখে পুলিশ অর্ডার-১ জারি করেন এবং সকল ডি.আই.জি অব পুলিশ ও পুলিশ সুপারগনকে এর সঠিক বাস্তবায়নে যথাযথ পদক্ষেপ গ্রহণের জন্য অনুরোধ জানান। এর মূল বিষয় বস্তুর বঙ্গানুবাদ নিম্নরুপঃ-

১। ফরোয়ার্ডিং রিপোর্ট, হাজত রেজিষ্টার, ৫৪ কার্যবিধি সংক্রান্ত রেজিষ্টার এবং থানার সংশ্লিষ্ট সকল নথিপত্রে শিশুর বয়স উল্লেখ করতে হবে।

85 Unreported judgment dated 01.03.2010.

২। শিশু আইনের ৪৮ ধারা মোতাবেক থানার ভারপ্রাপ্ত কর্মকর্তা গ্রেফতারকৃত শিশুকে থানা থেকেই জামিন দিবেন।

৩। শিশু আইনের ৪৮ ধারা মোতাবেক জামিনে খালাসপ্রাপ্ত হয়নি এমন শিশুকে আদালতে হাজির না করা পর্যন্ত কোন নিরাপদ স্থানে আটক রাখার জন্য থানার ভারপ্রাপ্ত কর্মকর্তা ব্যবস্থা গ্রহণ করবেন।

৪। শিশুকে গ্রেপ্তারের পর পুলিশ কর্মকর্তা সমাজসেবার প্রবেশন কর্মকর্তাকে বিষয়টি অবিলম্বে অবহিত করবেন।

A subsequent memo issued by the I.G. Police dated 7.3.93 and circulated to all Police provides as follows:

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
পুলিশ হেডকোয়ার্টার্স, ঢাকা

স্মারক নংণ্ড/৩০ণ্ড৯০ (সাধারণ)/৭১৬(৭৭) তাং ৭-৩-৯৩ইং

প্রতি

১। অতিঃ আই,জি, অব পুলিশ, সি, আই, ডি/এস, বি, বাংলাদেশ, ঢাকা।

২। পুলিশ কমিশনার, ডি, এম, পি/সি, এম, পি/কে,এম,পি/আর,এম,পি।

৩। ডি, আই, জি অব পুলিশ, ঢাকা/চট্রগ্রাম/রাজশাহী/খুলনা/বরিশাল রেঞ্জ।

৪। পুলিশ সুপার, (সকল) ।

বিষয়ঃ ১৬ বছরের নিচের কিশোর অপরাধীদের সরাসরি টংগীস্থ কিশোর আদালতে প্রেরণ প্রসঙ্গে।

(ক) একই অপরাধে কিশোর ও প্রাপ্ত বয়স্ক অপরাধী জড়িত থাকলে বয়স্ক ও কিশোরের ক্ষেত্রে থানার তদন্তকারী অফিসার কর্তৃক পৃথক পৃথক অভিযোগপত্র দাখিল করতে হবে এবং একটি অভিযোগপত্রে অপর অভিযোগ সম্পর্কে উল্লেখ করতে হবে;

(খ) কিশোর অপরাধীদেরকে অন্য আদালতে প্রেরণ না করে সরাসরি টংগীস্থ কিশোর আদালতে বিচারের জন্য প্রেরণ করতে হবে;

(গ) কিশোর অপরাধীকে আসামী না বলে প্রতিপক্ষ বলে উল্লেখ করতে হবে।

There is nothing to suggest that the matter of bail or custody at the Kishore Unnayan Kendro, Tongi was at all considered by the OC (Officer in charge). As the children were not granted bail then they ought to have been kept in a place of safety in accordance with section 2 (j) of the Act. In the absence of any explanation we can only presume that the children were kept overnight in the police station."

It is clear that the police authorities were aware about the legal provisions as long ago as 1987, but the failure to implement the provisions persists in the police stations, even after 23 years of that circular. Clearly there is a need for proper training of the police officers. Furthermore, it may be noted that the grounds for refusing bail are very broad and do not promote the minimum use of detention.

4.3 Pre-trial detention in case bail is refused

In the event that the child is not granted bail by the police, he will have to be held in custody in a remand home or place of safety under section 49(1), which provides as follows:

> "49. Custody of child not enlarged on bail. (1) Where a person apparently under the age of sixteen years having been arrested is not released under section 48, the officer in charge of the police station shall cause him to be detained in a remand home or a place of safety until he can be brought before a Court."

Hence, there is no provision to send any child, who has not been granted bail, to be held in any place other than that which is allowed by the law. When a remand home or place of safety is not available, then it is the duty of the officer to find any

other suitable place or institution. So far as the police are concerned, the necessity to find a place of safety is only for a maximum period of 24 hours or simply overnight. Under section 61 of the Cr.P.C., any person arrested by the police is liable to be produced before a Magistrate within 24 hours, not counting the time taken on the journey to the Court from the place of arrest. The same provision exists in our Constitution.[86]

4.3.1 Place of safety

'Place of Safety' is defined in section 2(j) of the Act and provides as follows:

> "(j) "place of safety" includes a remand home, or any other suitable place or institution, the occupier or manager of which is willing temporarily to receive a child or where such remand home or other suitable place or institution is not available, in the case of a male child only, a police station in which arrangements are available or can be made for keeping children in custody separately from the other offenders;"

It is obvious from the decision in ***The State v. Secretary, Ministry of Home Affairs and others,*** quoted above that the officer in charge of the police station was not aware of the internal circular of the I.G. of Police which enjoins the police officer to send child offenders to the Kishore Unnayan Kendro.

4.3.2 Custody of boys overnight

According to the definition of 'place of safety' a male child who is not granted bail may be kept overnight in a Police cell, but only if arrangements are available or can be made for keeping him in custody separately from the other offenders. The aim of the law is to ensure protection of the child and to make sure that he is isolated from any criminal elements. Thus if a police station has one cell which already has an occupant, then even a male child may not be kept in the police station overnight. Alternative arrangements would have to be made.

86 Article 33(2) of the Constitution has a similar provision, See 4.5 below

4.3.3 Custody of girls overnight

There is no provision in our law for keeping any female accused child overnight in a police cell; not even in the company of a female police officer. The law does not provide for any such eventuality.

In the case of ***The State vs. Metropolitan Police Commissioner***,[87] discussed above, a nine year old girl was arrested in possession of drugs. With regard to custody overnight, it was observed as follows:

> "9. It appears from the order sheet of the Court of the learned Chief Metropolitan Magistrate that Arifa was produced before the Court on 21.04.08. It is not apparent where she was kept during the night of 20.04.08.
>
> 10. There is nothing on record to suggest that Arifa was sent to any remand home or place of safety either on the 20.04.2008 or after she was produced before the Magistrate on 21.04.2008."

In the case of ***Fahima Nasrin v Bangladesh and others,***[88] it was observed as follows:

> "23. (....) the deplorable ignorance of the police is also all too apparent, inasmuch as there is no indication that the provisions of sections 13, 48 and 50 were at all considered by the police who arrested the offender."

In the more recent case, ***Suo Motu Rule No.1 of 2010,*** mentioned above,[89] three children aged 14, 9 (later found to be 8½) and 7 years were apprehended. They had in their possession certain quantities of hemp (*ganja*). A total of 3 kg hemp was recovered. The seven year old arrestee was a girl. The First Information Report stated the ages of the children. There is no information as to where the children were kept during the night following their arrest. The children were

87 60 DLR 660

88 61 DLR 232.

89 The State vs. Secretary, Ministry of Home Affairs (unreported)

produced before the learned Magistrate on the next day and were ordered to be kept in safe custody in the 'children' and 'female' sections of the District Jail.

The Police could not have arrested a seven year old child as she is *doli incapax*, i.e. incapable of committing any offence. The learned Magistrate, instead of taking the police to task for arresting a seven year old child, sent her to be held in safe custody in the female wing of the District Jail while sending the boys to be held in 'safe custody' in the children cell of the same jail. On the following day the learned Magistrate granted her bail, which is illegal since she is immune from prosecution.

4.3.4 Alternative place of safety

A question is often posed as to where a child should be kept overnight if no suitable place is available within easy reach of the police station. It may be pointed out that the responsibility should lie squarely with the Department of Social Welfare. These days there are many 'safe homes' available which have been set up either by the Department of Social Welfare or by NGOs. In addition one might suggest that the police appear to have been given a wide discretion in finding a place which is 'suitable'. To that extent, it may be suggested that help may be sought from Local Government officials, such as Upazila and Union Parishad Chairmen, U.P Members, Ward Commissioners and other local elite. This would be one way of involving the community in the welfare of its children. Understandably, most people would be reluctant to keep children, particularly females, in their custody overnight. If all else fails, then the child should be left overnight in the custody of her/his parents, guardian or a relative. In the final analysis, the solution lies with the government in setting up sufficient numbers of safe homes within easy reach of and accessible from every police station.

4.4 Probation Officer

Probation Officers are appointed by the Government for the Department of Social Welfare of the Ministry of Social Welfare.

Their services are required, *inter alia*, in connection with their functions under the Probation of Offenders Ordinance 1960 as well as under the Children Act 1974.

4.4.1 Appointment

Probation Officers are appointed under section 31 of the Act, which provides as follows:

> "31. Appointment of Probation Officers.-(1) The Government may appoint a Probation Officer in each district;

Provided that where there is no person so appointed in a district any other person may be appointed as a Probation Officer from time to time by a Court in that district for any particular case."

It is not clear from which category of persons the Court would appoint a Probation Officer under the proviso and how that person would be remunerated. One might presume that in the absence of any available officer from the Department of Social Welfare, the Court could appoint, for example, any learned advocate of the Bar on an ad-hoc basis until a regular Probation Officer becomes available.

There are 64 districts in the country and only 23 Probation Officers. But where no Probation Officer has been appointed, the Social Welfare Officer is designated to act as Probation Officer. In practical terms this creates an overwhelming burden on the Social Welfare Officer who has a multitude of other tasks and functions. It may be appreciated that the duties of the Probation Officers are multifarious, including those under the Probation of Offenders Ordinance. Thus it is not surprising that Probation Officers are not readily available at times of need, particularly at night and at weekends. Our situation may be contrasted with the case of Japan, for example, where there are 50,000 voluntary Probation Officers. The abundance of Probation Officers allows easy access as and when any child comes into contact with the law, which enables easier monitoring and more individual interaction with and caring for

the needs of offending children. Person to person dealing with the children creates a better working atmosphere and results in more fruitful rehabilitative outcome.

4.4.2 Duties

Duties of the Probation Officers commence with the arrest of the delinquent child or the receipt of information of a neglected, abused or victim child and that duty continues beyond any order passed by any Court in respect of the child. The duties are outlined in section 31(2) and (3), which provide as follows:

> "(2) A Probation Officer, in the performance of his duties under this Act, shall be under supervision and guidance of the Juvenile Court where such Court exists or, where there is no such Court, the Court of Session.
>
> (3) A Probation Officer shall, subject to the rules made under this Act and to the directions of the Court
>
> (a) visit or receive visits from the child at reasonable intervals;
>
> (b) see that the relative of the child or the person to whose care such child is committed observes the conditions of the bond;
>
> (c) report to the Court as to the behaviour of the child;
>
> (d) advise, assist and be friend [of] the child and, where necessary, endeavour to find him suitable employment; and
>
> (e) perform any other duty which may be prescribed."

In addition, duties are detailed in the Children Rules, 1976, of which rule 21 provides as follows:

> "21. Powers and duties of a Probation Officer. A Probation Officer shall subject to the provisions of sub section (3) of section 31,
>
> (a) meet the child frequently and make inquiries about

his home and school conditions, conduct, mode of life, character, health, environment and explain to the child the conditions of his probation;

(b) attend Court regularly and submit report;

(c) maintain dairy, case files and such registers as may be specified by the Director or Court from time to time;

(d) meet the guardian and other relations of the child frequently in the process of correction, reformation and rehabilitation of the child;

(e) issue warning to the person under whose care the child is placed if such person is found to have committed any breach of the terms of the bond;

(f) visit regularly the child placed under his supervision and also places of employment or school attended by such child and to submit regular monthly reports to the Director in Form G;

(g) encourage the child to make use of any opportunity that might be made available from any social welfare organization or agency;

(h) advise the child to disassociate himself from a society which in the opinion of the Probation Officer, may spoil the character of the child;

(i) endeavour to find suitable employment for the child, if such child be out of employment, and strive to improve his conduct and general conditions of living; and perform such other functions as may be assigned to him by the Director or by the Court from time to time."

Due to the very nature of their work, judges are distant from the public and generally remain aloof about the background facts of individual cases other than those stated by the witnesses in their deposition. By and large, criminal trials do little to elicit facts

and circumstances other than those connected to the occurrence which is the subject matter of the trial. Incidents which take place away from the public gaze are not supported by any direct evidence.

In the case of children, there are many invisible forces which play a part in any individual child's actions, such as peer pressure, intimidation from localised gangs, influence from local leaders, isolation from the family, poverty, etc. These matters may not be apparent from the facts of the case in hand. In order to enable the Court to fulfil the requirement of the law to arrive at a decision in the best interests of the child, it is necessary for the Court to find out the reasons behind the action of the child.

The report of the Probation Officer is a most vital component of the justice system for children. Under section 15(c) of the Children Act, the Court is bound to take into account the report of the Probation Officer in order to reach a decision which would reflect consideration of the child's character, health or conduct, or the circumstances in which the child or the parent or guardian of such child is living.

> "15. **Factors to be taken into consideration in passing orders by Court.-** For the purpose of any order which a Court has to pass under this Act, the Court shall have regard to the following factors:-
>
> (a) the character and age of the child;
>
> (b) the circumstances in which the child is living;
>
> (c) the reports made by the probation Officer; and
>
> (d) such other matters as may, in the opinion of the Court, require to be taken into consideration in the interest of the child:
>
> Provided that where a child is found to have committed an offence, the above factors shall be taken into consideration after the Court has recorded a finding against him to that effect."

In this regard it was observed in the ***Metropolitan Police Commissioner*** case[90] it was observed as follows:

> "34. (....) The trial Court or appellate Court is not in a position to ascertain the physical aspects with regard to the family background, character of the accused and the circumstances in which he or she was brought up. For this reason it is imperative that the Court should rely on a report from the probation officer, who will go to the locality, if necessary, to ascertain all the factual aspects necessary for the Court to come to a decision with regard to the child."

4.5 Production before the Magistrates Court

Every person, including a child offender, who is arrested, is liable to be produced before the nearest magistrate within 24 hours of his arrest.[91]

Article 33(2) of the Constitution provides as follows:

> "33. Safeguards as to arrest and detention.
>
> (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate."

Section 61 of the Cr.P.C. specifies that:

> "61. Person arrested not to be detained more than twenty-four hours
>
> No police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period,

90 60 DLR 660.

91 Article 33(2) of the Constitution and section 61 of the Code of Criminal Procedure

shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court."

4.5.1 Determination of the age of the child

The first duty of the Magistrates Court is to determine that the accused before him is a child and hence whether the regime of the Children Act applies. Section 66(1) of the Act provides as follows:

> "66. Presumption and determination of age. (1) 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."

If the accused is found to be a child then the provisions of the Children Act will apply in respect of bail, custody, appointment of Probation Officer etc. If it appears to the Magistrates Court that the accused is a child, the Court has to conduct an inquiry as to her/his age. Thus, only if the person appears to be a child, an inquiry into the age of the child has to be made by the Court. However, the rationale behind the need to ascertain the age of the offender/victim must be considered. Firstly, age determination is crucial because according to the Penal Code, a child can only be held criminally liable if she/he is 9 years or above and in the case of a child between 9 and 12 years only if the child has the capacity to understand the consequences of her/his act. If the child is below 9 years of age or between nine and twelve years and does not have the maturity of understanding the nature and consequence of his act at the time of the occurrence, then the Magistrate has to immediately release the child and drop all proceedings. Chapter III of this

book has extensively dealt with the issue of age and MACR. Secondly, the age of the accused will determine whether he/she will be granted bail in a non-bailable offence under the proviso to section 497 of the Cr.P.C. In the event that bail is not granted he/she will be remanded in custody in a remand home or place of safety. Thirdly, the age of the child, furthermore, serves as the basis for the Magistrate's Court to determine whether it has jurisdiction to try the case or whether it must refer the case to a different Court. Chapter V on Jurisdiction of the Court will discuss the issue of age determination in more detail.

4.5.2 Duty of Magistrates Court to fill gaps left in the procedure by the police

It is the duty of the police as mandated by sections 13(2) and 50 of the Act to inform the parents/guardian of the child and the Probation Officer. Where the police fail in their duty and such failure is apparent when the matter comes before the Court on the day following the arrest, it would become the duty of the Court to ensure that the legal requirements are fulfilled. In other words, if the parents/guardian of the child have not been informed, then the Court should take steps to do so, where the police have failed. The Court must also appoint a probation officer. The importance of appointing a probation officer cannot be over-emphasised since the decision of the Court at every stage of the process and trial will require reference to information and materials about the child and his background to enable the Court to come to a proper decision in respect of the child. Every order passed or decision taken in respect of the child must be done after due consideration of the best interests of the child, taking into account all the surrounding facts in respect of the child.

Although by the time the matter becomes ready for hearing, the parents appear and the need to inform them disappears, but the appointment of probation officer by our Courts is still not in vogue. Only in a very few cases are probation officers engaged, either by the police or by the Court. This unfortunate lapse of the Police and the Court must be remedied.

In the case of ***Fahima Nasrin***[92], cited above it was observed as follows:

> "23. (.....) throughout the whole proceedings we do not find the appointment of any Probation Officer, which is a mandate of section 50 of the Act. Clearly this provision has been overlooked. This is a serious omission by the learned Judge since he is required by section 15 of the Act to consider the report of the Probation Officer when passing any order in respect of the child."

Similarly in the case of ***The State vs. Metropolitan Police Commissioner***[93] it was observed,

> "16. The learned Additional Chief Metropolitan Magistrate did not take any step to appoint a Probation Officer, where the police had failed to do so. No attempt was made to locate the parents of the girl, where the police had failed to do so."

4.5.3 Bail by Magistrates Court

There is no provision in the Act allowing the Court to consider bail. However, section 18 of the Act makes the provisions of the Cr.P.C. applicable where no procedure is expressly provided in the Act or the Rules.

Section 18 of the Act provides as follows:

> "18. Provisions of Criminal Procedure Code, 1898, to apply unless excluded. Except as expressly provided under this Act or the rules made thereunder, the procedure to be followed in the trial of cases and the holding of proceedings under this Act shall be in accordance with the provisions of the Code.

"Thus, the proviso to section 497 of the Cr.P.C. may be adverted to in considering granting bail to a child accused of a non-bailable offence.

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92 61 DLR 232.

93 60 DLR 660.

Section 497 provides as follows:

> "497.(1) When any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life:
>
> **Provided that the Court may direct that any person under the age of sixteen years** or any woman or any sick or infirm person accused of such an offence be released on bail."

In the ***Metropolitan Police Commissioner***[94] case it was observed as follows:

> "25. The underlying theme of international Covenants and instruments relating to children is that they are to be enlarged on bail and to be detained only as a last resort...."

It should be borne in mind that under common law a person is presumed to be innocent until proven guilty. Hence, in the case of child offenders the international instruments enjoin that detention should be a last resort and for the shortest period possible. Other than the most serious offences, there can be little justification for keeping any child confined in any institution pending trial. Confinement in any institution has many negative effects on the child, including physical and mental harm as well as exposure to other deviant elements already existing in those institutions thus increasing her/his propensity to engage in further criminal activity.

4.5.4 Refusal of bail by Magistrates Court

If bail is not granted by the Court, then the child is to be dealt with under section 49(2) of the Act. The child in that case may be detained in a remand home or place of safety. Section 49(2)

94 60 DLR 660.

provides as follows:

> "49(2) A Court, on remanding for trial a child who is not released on bail, shall order him to be detained in a remand home or a place of safety."[95]

Often it is seen that the Court erroneously orders the child to be sent to jail custody or even placed in 'safe custody' inside the jail. Such an order would be absolutely contrary to law. A child may under no circumstances be kept in jail custody pending his trial. The case of ***Fahima Nasrin,***[96] cited above, aptly exemplifies this. It was observed as follows:

> "23. (.....) We find from the records that from the time of his arrest till the time of his bail on 4.3.2004, the offender was kept in jail custody, which is in utter violation of the provisions of the Act.
>
> .....the learned trial Judge, to his credit, has observed that the offender is a child and is required to be dealt with under the provisions of Children Act, but then he failed miserably in not sending him to a remand home or place of safety as required by section 49(2) of the Act..... "

In the case of ***Metropolitan Police Commissioner,***[97] cited above, it was observed as follows:

> "15. (.....) As soon as a child is brought before the Court bells should be ringing in the minds of the Judge to remind him that provisions of the Children Act are applicable. He should immediately consider all possible means of releasing the child, unless there is good reason to keep her/him in detention. Here the learned Additional Chief Metropolitan Magistrate appears to have even forgotten **the proviso to section 497 of the Code of Criminal Procedure,** which allows granting of bail to a child even in cases involving non-bailable offences. The

95 Place of Safety is defined in section 2(j) of the Act. See 4.3.1 and 4.3.4 above.

96 61 DLR 232.

97 60 DLR 660.

> order sheet of the learned Additional Chief Metropolitan Magistrate shows that on 21.04.08 ***** [name of accused withheld] was sent to jail custody with a custody warrant. On 23.04.08 ***** [name of accused withheld] was ordered to be taken to safe custody. No mention was made that she must be kept separate from adult detainees. Also there is nothing on record to indicate that any other steps were taken to ascertain alternative measures regarding her custody."

It was further observed:

> "25. (....)The question is whether there is any such place suitable for a girl just over 9 years old. We are told that there is no place of safety or remand centre or safe home maintained by the Government in Khulna, but that there is such a place in Bagerhat, which is about 18 Kilometres away.
>
> 26. The second possibility is that, if the learned Judge, before whom the matter appears for trial, feels inclined, he may consider the bail matter, particularly bearing in mind the probable unsuitability of the safe home atmosphere for a child of such tender age. However, the bail may be subject to custody of the girl being given to any person considered suitable by the learned Judge. The Court, in all circumstances, must ensure the best interest of the child.
>
> 27. Under normal circumstances any child ordered by the Court to be enlarged on bail would go to the parents; normally the best interest of any child would demand that it be kept in the custody of the parents."

However, in view of the fact that the mother of the girl was herself in custody having been caught in possession of illegal drugs and the father having abused the girl by sending her to be used as a drug mule, the Court observed as follows:

> "30. (.....) The father appears to have abused the girl by

engaging her in carrying illegal drugs as a source of income for him and his family. So, although it would normally be in the best interests of any child to be with the parents, in the circumstances of the present case, it may be felt that her best interests would not be to remain with the parents, at least until the Court becomes satisfied about their suitability to get custody of the accused.

31. On the contrary Article 19.1 provides as follows:[98]

> "19.1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."

32. In such circumstances the Convention enjoins that the State shall provide alternative arrangements, as seen in Article 20, which provides as follows:

> "20.1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
>
> 2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
>
> 3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."

98 The reference is to Articles 19 (1) and 20 of the CRC.

> 33. In view of the above provision, the Court may consider the third alternative, i.e. placement with any close relatives who might be willing to take the girl into their custody. Failing that, the Court would look to other distant relatives/any other benevolent person, who might agree to take the girl into their custody at their risk and responsibility. In this respect fostering might be a realistic alternative."

The relevant provisions and case-law regarding detention pending trial are discussed in more detail in Chapter VIII on Custody and Detention.

CHAPTER V

Jurisdiction Of the Court

Before a Court can take cognizance of a case, it first has to ask itself whether it has jurisdiction. This requires the Court to establish first whether the Court has jurisdiction over the person and secondly whether the Court has jurisdiction over the offence. For any Court to have jurisdiction over the person, the accused must be a person of sound mind and must have attained the MACR of 9 years or above and in cases of children of between 9 and 12 years must have the capacity to be able to understand the consequences of their actions. In case the Court has jurisdiction over the person, the Children Act specifies which Court will have jurisdiction over the offence.

5.1 Jurisdiction over the person

The first question of law that any Court has to consider is whether the Court has jurisdiction over the accused person. In the case of ***Roushan Mondal***[99] it was also observed that deciding jurisdiction over the person is the first and foremost consideration for the Court. It was observed as follows:

> "23. (....) If one looks at the scheme of criminal process and trial, it is seen that, first of all, the jurisdictional aspect with regard to the accused is to be ascertained and established. In other words, it must first be established that the accused person is one who is within the jurisdiction of the Court to be tried. As a matter of fact the very first question to be ascertained before proceeding with the trial is whether the accused has the capacity to be tried. This aspect is generally taken for granted and is so obvious as to defy contemplation. In English Law it is irrebuttably presumed that a child under the age of 10 years is *doli incapax*, i.e. is incapable of committing a crime. [See s.50 Children and Young Persons Act 1933, as amended by s.16 of the Children and Young Persons Act 1963]. We have a similar provision in section 82 of the Penal Code, as amended by Act XXIV of 2004."

99 59 DLR 72.

It was further considered in that case as to whether a child above nine and below 12 years of age would be liable to be prosecuted. The Court observed as follows:

> "23. (...) A child above 9 and below 12 years of age who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion would also be exempt from criminal liability [s.83 Penal Code]. The same applies to the mentally disabled. No Court can assume jurisdiction over any such person as they do not have the capacity to commit any crime. .....
>
> 25. Hence jurisdiction over the person is a precondition to the case proceeding to trial by any Court or Tribunal. Once it is established that a Court has jurisdiction over the accused then only the Court will go on to see whether it has jurisdiction over the offence alleged. Thereafter, the Court will proceed with the trial, if appropriate, and then conclude by passing judgment."

In a later case of the ***Metropolitan Police Commissioner***[100] the Court, while considering section 83 of the Penal Code, observed as follows:

> "22. (...) In the face of such legislation it is the bounden duty of the Court in every case to ascertain whether the accused would fall into the category provided by section 83, quoted above. It would be all the more necessary for the Court to go through this exercise in view of the reality of our society that in the vast majority of the cases the accused persons from the poverty-stricken sector of our society remain undefended or poorly defended.
>
> 23. In the facts of the instant case, for example, where the accused is barely above age of full exemption from criminal prosecution, it would be incumbent upon the Court to ascertain that the accused understood that the item she was carrying was contraband, that what she was

100 60 DLR 660.

doing was illegal, that she appreciated the consequence of supplying the item to others and whether she was at all aware of the effect of drugs and whether or not she was simply obeying the orders of her elders out of deference or fear. The Court must consider whether the accused child is capable of having the *mens rea* to commit the offence alleged. In our view, it is necessary for the Court to visualize the position of the child and to try and appreciate his or her mental state in doing the act for which she or he is being prosecuted. We hasten to add that our comments are meant to be for consideration generally and should not prejudice the Court in any way when dealing with the accused in the instant case. It is for the Court dealing with any particular case to consider all the relevant legal provisions and all the prevailing circumstances before reaching any decision on the issues raised in the case."

5.1.1 Presumption and determination of the age of a child

The duty is cast upon the criminal Court whenever an offender or victim is produced before it and he/she appears to be a child to undertake a determination of the age of the child. The learned Judge may be reminded by means of an application, if necessary, that the age of the accused is required to be assessed.

Section 66(1) of the Act provides as follows:

> "66. Presumption and determination of age. (1) 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.

With regard to this provision of law, it was observed in the ***Roushan Mondal*** [101] case as follows:

> "54. (...) This section is, therefore, the first and foremost procedural consideration when any criminal Court is faced with a person brought before it, who appears to the Court to be a child. It comes even before the consideration of any offence, whether charged or not. In our view, the mandate of the section is indicative of the need to establish jurisdiction of the Court over the accused even before he is charged with any offence."

The first criminal Court before which a child will appear usually is the Magistrates Court. As discussed in chapter IV, it is a mandate of our Constitution[102] and the law as apparent from the Code of Criminal Procedure[103] that *any person* (emphasis added) arrested must be produced before a Court of Magistrate within 24 hours of his arrest, exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court. Thus any person brought before the police would be produced before a Court of Magistrate, which is a criminal Court, on the following day, at the latest.

For the Magistrates Court to take cognizance of the case, it is not essential that the person is a child. The jurisdiction of the Court is over "any person arrested". However, following application of section 66, if it appears to the Magistrates Court that accused is a child, the Court has to conduct an inquiry as to her/his age. Thus, only if the person appears to be a child, a determination of age has to be made by the Court. The question then arises what determines whether a person appears to be a child, i.e. is the assessment of the physical appearance by the judge sufficient or is evidence and hence an inquiry necessary. This will be discussed later in this chapter.

Despite the determination of the age of a child being conditional upon the appearance to the Court that the accused is

101 Op citation.

102 Article 33(2) of the Constitution.

103 Section 61 Cr.P.C.

a child, it is imperative to always conduct an inquiry into the age of the child for various reasons. Firstly, as highlighted above, the jurisdiction of the Magistrates Court is subject to the condition that in the case of children, according to the Penal Code, the child must be above 9 years and in the case of a child between 9 and 12 years, she/he must have the capacity to understand the consequences of his/her act. If the child is below 9 years of age or between nine and twelve years and does not have the maturity of understanding the nature and consequence of her/his act then the Magistrate has to immediately release the child and close all proceedings. Secondly, the age of the accused will determine whether he/she will be granted bail in a non-bailable offence under the proviso to section 497 of the Cr.P.C. In the event that bail is not granted then the age will determine whether he/she will be remanded in custody in jail or in a remand home or place of safety. This was discussed in chapter II. Thirdly, the age of the child furthermore serves as the basis for the Magistrate's Court on which to determine whether it has jurisdiction to try the case or whether it must refer the case to a different Court. This will be discussed later in section 5.2. Failing to determine the age of the child because the accused does not appear to be a child, would lead to grave injustice for children as it may mean that children are unlawfully detained and tried or will be treated under the same regime as adults. Hence, it is contended that it is at this very first instance when the child is brought before the learned Magistrate, which would be the day after the arrest, that the opportunity should be taken to assess the age of the child.

Similarly, if the child is accused of an offence under any special law and the accused is brought in the first instance before a tribunal, then the duty would fall upon the Tribunal Judge, the Tribunal being a criminal Court, to follow the provisions of section 66(1) of the Children Act and to assess the age of the child according to the provisions of that section. If the accused is found to be a child then the provisions of the Children Act will apply in respect of bail, custody, appointment of Probation Officer, mode of trial etc.

5.1.2 Constancy of the age of the child as determined by Court

It has been held that it is the duty of the Court to determine the age of the accused when it appears to the Court that he/she is a child. Conversely, it has been argued that if it appears to the Court that he/she is not a child then no such duty arises and section 66(2) makes that decision final so far as that trial is concerned.

Section 66 (2) of the Act provides as follows:

> "(2) An order or judgement of the Court shall not be invalidated by any subsequent proof that the age of such person has not been correctly stated by the Court, and the age presumed or declared by the Court to be the age of the person so brought before it shall, for the purposes of this Act be deemed to be the true age of that person and where it appears to the Court that the person so brought before it is of the age of sixteen years or upwards, the person shall, for the purpose of this Act, be deemed not to be a child."

Thus, the age as determined by the criminal Court after going through a formal inquiry as envisaged as by section 66 (1) will stand as the correct age throughout the rest of the hearing of the case even though any further or better evidence might be brought on record by a party subsequently. If the Court before whom the child is brought at the first instance concludes that the accused is not a child without taking any evidence or holding an inquiry then it would be open to the accused to make an application, at any later stage upon claiming himself to be a child, to hold the inquiry according section 66 (1) of the Act. The Courts have been reluctant to entertain any claim by an accused at the appeal or revision stage on the ground that such contention should have been raised earlier before the trial Court. Nevertheless, in many cases the High Court Division has sent cases back to the trial Court for assessment of age and even the Supreme Court of India sent the case back to trial Court for age

assessment.[104]

Any accused aggrieved by the age as determined after due inquiry under section 66 (1) has the right to appeal against that order under section 76 of the Act but once the age is finally determined no evidence subsequently produced can lead to further consideration of the age since that would be barred by section 66 (2). Nevertheless, in a number of cases on appeal before the High Court Division, the evidence and materials produced before the trial Court in support of the age have been critically scrutinized and ultimately the High Court has effectively decided which of the evidence produced carries more weight and evidentiary value.[105] These cases will be dealt with below.

5.1.3 Evidence of age found on record

5.1.3.1 Statements as evidence

In the case of ***Tuku Miah v. The State***[106]**,** it was claimed that the accused in their statement made under section 342 of the Cr.P.C. stated their age as 12 years at the time of commission of the offence. It was argued on behalf of the appellants that 'according to the Children Act they could not be convicted and sentenced to transportation for life but ought to have been ordered to be detained in a Certified Institute if not released on probation of good conduct.' However their lordships rejected the contention on the ground that the defence could not show any notification that the Children Act had come into force.[107] Moreover, their lordships held as follows:

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104 See Gopinath Ghosh vs The State of West Bengal,1984 (Supp) SCC 228

105 See cases on evidence needed to prove age: 51 DLR (AD) 1. and 28 DLR 123.

106 (1983) 3 BLD 193.

107 The Children Act, 1974 came into force for the whole of the district of Dhaka on 1st November, 1976 by a notification of the Ministry of Health, Population Control, Labour and Social Welfare vide notification No.S.R.O.315-L/76 dated 11th September, 1976. The said Act came into force for the remaining areas of Bangladesh on 1st June 1980 vide notification No.S.R.O.127-L/80/S.IV/E-9/80 dated 16th May, 1980 of the Ministry of Manpower Development and Social Welfare.

> "23. Besides that merely because the two accused gave their age as 15 years in their 342 statement that cannot be taken as the basis for holding that they were below 16 years while committing the murder when the defence did not put up any case or any evidence in respect of their age."

Thus, the Court was of the view that simply stating in their examination under section 342 that they were below 16 years of age was not sufficient and that they should have put up a claim to that effect during the trial and supported their claim by evidence. Clearly the decision was *per incuriam* because in fact the Act had already come '[into] effect only for Dhaka District vide notification dated 11.09.76, with effect from 01.11.1976 and for all other districts, i.e. for the whole of the rest of Bangladesh it came into effect from 1st of June 1980.'[108]

5.1.3.2 Prosecution evidence

The ***Tuku Miah*** case was cited in the case of ***Shiplu and another vs. The State***.[109] On behalf of the State it was argued that the trial Court did not make an inquiry as to the age of Shiplu because it did not appear to the Court at the time of trial that he was a child. It was observed and held as follows:

> "8. (....) Sub-section (1) of section 66 of the Act shows that such an inquiry is not contemplated under section 66 of the Act unless it appears to the Court that the accused is below the age of 16 years. Mr. Abdus Salam Mamun submits that the question of age of appellant Shiplu was not raised before the trial Court at the time of framing the charge or any subsequent stage of trial. This contention has not been controverted by the learned Advocate for the appellants. It transpires from the evidence of PW 4 Abul Kashem in course of his cross-examination that appellant Shiplu was aged 14/15 years and this evidence was recorded at the time of trial on 3-2-93.

108 Observation in The State vs. Deputy Commissioner Satkhira and others 45 DLR 643

109 49 DLR (1997) 53.

…. we find from the statement recorded under section 342 CR.P.C. that the age of appellant Shiplu was recorded as 14 years. In this connection we may refer to the decision in the of Tuku Miah the State reported in 1983 BLD 193, wherein it was observed by a Division Bench of this Court as follows:

"Besides that merely because the two accused gave their age as 15 years in their 342 statement that cannot be taken as the basis for holding that they were below 16 years while committing the murder when the defence did not put up any case or any evidence in respect of their age."

9. There is no doubt that the proposition of law has been correctly stated in the above decision that simply because the age of the accused was given before the trial Court as below 16 years at the time of the 342 statement that cannot be conclusively accepted for holding that the accused was really below 16 years. The present case, however, stands on a different footing in that it comes from a prosecution witness, namely, PW4 that appellant Shiplu was 14/15 years at the time of the trial.

10. Having considered this question in the light of the evidence on record, we hold that the trial Court failed to apply its judicial mind as to the age of appellant Shiplu, who appears to have been below the age of 16 years at the time of trial. This makes the order of conviction and sentence passed by the trial Court in respect of appellant Shiplu as liable to be set aside for want of jurisdiction.

19. (....) in view of our finding about the age of appellant Shiplu, the order of conviction and sentence passed against him should be set aside."

Thus, it can be seen from the above judgement that when prosecution evidence supports the claim of the accused to be a child then the Court will consider the accused to be a child and the view of the trial judge that the accused did not appear to him to be a child, will be set aside.

5.1.3.3 Documentary evidence

In the case of ***Hossain (Md) and others vs. The State and another***[110] the High Court Division held as follows:

> "9. In the instant case the petitioners were brought before the trial Court and the trial Court on consideration of the materials on record came to a definite finding that the petitioners are not children within the meaning of section 2 sub-section (f) of the Children Act and their age will be above 16 years.
>
> 10. In view of the finding of fact arrived at by the Additional Sessions Judge that the petitioners are not children and in view of the principle of law enunciated in the above mentioned case[111] by their Lordships of the Appellate Division we find nothing to interfere with the impugned order."

The Appellate Division in ***Abdul Munem Chowdhury @ Momen vs. The State***[112] observed as follows:

> "1. (....) On the date of framing of the charge on 31.8.94 an application was filed by the petitioner to discharge him on the ground that he being a minor was liable to be tried only under the Children Act and not under sections 302/34 of the Penal Code along with others. The application was rejected on 17.9.1994. The petitioner took a revision against the said order which has been summarily rejected by the High Court Division by the impugned order dated 4 December 1994.
>
> 2. Mr. A.K.M. Foiz, learned Advocate for the petitioner appearing with the leave of the Court, submits that the application of the petitioner was wrongly rejected ignoring the age of the petitioner as entered in the registration card produced by him."

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110 50 DLR 494.

111 The case referred was Abdul Munem Chowdhury @ Momen vs. The State, 47 DLR (AD) 96

112 Op citation.

Their lordships went on to hold as follows:

> "3. Under section 66 of the Children Act it is for the Court to consider whether a person charged with an offence and brought before it for trial appears to be a child or not and then to proceed accordingly. In the instant case the learned Additional Sessions Judge observed that the age of the petitioner could not be less than 16 years. He also noticed that there was sign of interpolation in the registration card and the certificate issued from the school. Therefore, he could not rely upon the documents produced by the petitioner.
>
> 4. The High Court Division in rejecting the revisional application summarily observed that the trial Court considered all the evidence that were before it and was not in a position to hold that the petitioner was a child on the date of framing of the charge and, as such, it committed no illegality in rejecting the application of the petitioner.
>
> 5. There is thus absolutely no reason to interfere in this matter."

The view of the Appellate Division was more succinctly expressed in the case of ***Bimal Das vs. The State***[113] where it was observed as follows:

> "2. (....) The High Court Division rightly held that the petitioner was more than 16 years of age when the charge was framed and is therefore not entitled to get the benefit of the Children Act."

Their lordships went on to hold by reference to section 66(1) of the Children Act:

> "3. (…) The said section is applicable when it appears to the Court that a person charged with an offence (or not) is a child. If it does not so appear he has no duty to ascertain the age of that person."

113 14 BLD (AD) 218

However, in all the cases referred, the trial Court/Tribunal considered evidence produced in support of the claimed age, but discarded the same due to lack of veracity of the certificates produced. In the case of **Abdul Munem Chowdhury @ Momen**[114], for example, the trial judge found interpolation in the register and hence the claim of the applicant that he was a child was rejected.

5.1.4 Determination of age necessary before assuming jurisdiction

In the case of ***Rahmatullah vs. The State***[115] the accused were charged by the learned Judge of the Speedy Trial Tribunal under sections 302/34, 201 and 34 of the Penal Code. On appeal it was observed by the High Court Division as follows:

> "10. (....) the learned Advocate appearing on behalf of the convict appellants, submits that the convict appellants before the commencement of trial filed an application on 27-10-2004 claiming to be minors and, as such, the learned Speedy Trial Tribunal has no jurisdiction to try them under general law; that the learned Tribunal committed an error of law in not directing an enquiry to ascertain as to whether the accused are children below 16 years of age as contemplated in section 2(f) of the Children Act, 1974 and the same has occasioned miscarriage of justice. Mr. Alam further submits that accused Mr. Rahamatullah submitted his school certificate which speaks that he was below 16 years at the time of framing of charge against him and thus the trial of the convict appellants by the Speedy Trial Tribunal is illegal and without jurisdiction and that consequently, the impugned order of conviction and sentence is liable to be set aside. .....
>
> 11. (…) the learned Deputy Attorney-General, (…) for the prosecution, on the other hand, submits that in view of the

114 Op citation.

115 59 DLR 520.

fact that the defence did not take any objection before conclusion of the trial excepting filing of an application regarding their age to be below of 16 years and there being no evidence on record to prove that the convict appellants are below 16 years of age at the time of trial, the learned Speedy Trial Tribunal committed no error of law in trying them and convicting them on the basis of consistent and corroborated evidence of competent witnesses and, as such, the impugned judgment and order of conviction and sentence calls for no interference by his Court.

14. The pertinent question in this case is, whether the learned Speedy Trial Tribunal has jurisdiction to try the accused persons as they claimed themselves as minors.

15. Before trial, every Court should at first determine as to whether it has jurisdiction to try the case or not.

17. When the accused is below the age of 16 years, he is to be tried by the Juvenile Court and any other Court assuming such jurisdiction would render the trial as void ab initio. The Speedy Trial Tribunal could not lawfully assume the jurisdiction as Juvenile Court since that would be contrary to law which is specifically vested on the Juvenile Court. The Speedy Trial Tribunal cannot take away the rights given to the child accused known as youthful offender under the Children Act, 1974, since those rights were given under the provision of Article 28 (4) of the Constitution. These rights having been given as positive rights derived from Articles 28(4) of the Constitution, which cannot be taken away by a subsequent enactment as that would deprive the youthful offender of his vested right given by the Act, which was enacted under the powers given by the Constitution."

A different view was taken in the case of ***The State vs. Shukur Ali***.[116] It was observed as follows:

116 9 BLC (HCD) 238.

> "39. (....) In this case, the condemned prisoner has not at all raised any point that he being a child is unable to take his defence against the charge either at the time of framing charge or in his application for retracting his confession or in reply to his examination under section 342 Cr.P.C. . (.....) It is well settled that a Tribunal can investigate into the facts relating to the exercise of its jurisdiction when that jurisdictional fact itself is in dispute. When a Tribunal is invested with jurisdiction to determine a particular question, it is competent to determine the existence of the facts collateral to the actual matter, which the tribunal has to try. This power to decide collateral facts is the foundation for the exercise of its jurisdiction. When a Special Tribunal is constituted under a statute, its jurisdiction depends upon the specific provisions of the statute. It may be limited by conditions as to its constitution, as to the persons whom or the offences which it is competent to try, and as to the orders which it is empowered to make, or by other conditions which the law makes essential to the validity of its proceedings and orders."

On the other hand, ***Roushan Mondal*** highlights the mandate of section 66(1) of the Act to ascertain the age with a view to establishing the Court's jurisdiction over the accused even before he is charged with any offence.[117]

In the case of ***Monir Hossain***[118] it was held, referring to the Indian case of ***Sheela Barse and another vs The Union of India,*** AIR (1986) SC 1773 and also the case of ***Baktiar Hossain***[119] that when the age of the accused is claimed to be below 16 years, a duty is cast upon the Court to direct an enquiry to satisfy itself as to whether the accused is a child below 16 years of age. In that case the High Court Division observed that no objection was taken by the accused petitioner

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117 See Roushan Mondal paragraph 54 quoted at 5.1.1 above.

118 Monir Hossain (Md) @ Monir Hossain vs. The State, 53 DLR 411

119 47 DLR 542

before the trial Court on the question of his being a minor below 16 years of age, nor any claim was made to determine the age of the accused. However, the charge sheet showed that the accused was 14-15 years old on the day of submitting the charge sheet against him and a prayer had been made before the Tribunal on the basis of the accused being a minor. So, the question of the accused being a child was before the Tribunal, although not specifically pressed. The High Court Division held,[120]

> "14. (...) Since the conviction against the accused appellant is one for imprisonment for life and the age of the accused appellant on the date of framing charges against him is a matter of great importance touching the jurisdiction of the Court, we find it necessary in the interest of justice that the learned Special Tribunal should direct and enquiry to satisfy himself as to whether accused appellant Md Monir Hossain was a child below 16 years of age on the date of framing charges against him on 31.1.99."

The High Court Division went on to hold further that if the Court on enquiry finds the accused is a child, it loses the jurisdiction to try him in the usual manner.

The ***Shukur Ali*** case was discussed at length in the case of ***Roushan Mondal***. It was observed that the jurisdiction of the Tribunal had already been taken away.

> "55. (....) The case of Shukur Ali, on the other hand observed that section 3 of the Nari-o-Shishu Nirjatan Daman (Bishesh Bidhan) Ain ousted the jurisdiction of any other Court. We would respectfully suggest that the jurisdiction of the Tribunal was already taken away since the jurisdiction over the offender was given to the Juvenile Court. It was first given away in section 29B of the Code of Criminal Procedure with the exception of offences punishable with death or [imprisonment] for life

120 53 DLR 411, at p.413

and then by the Children Act with the exception of offences exclusively triable by the Court of Sessions. When the Children Act came into force the Special Powers Act and the Arms Act, for example, were already in force. But the legislature did not exclude the jurisdiction of the Juvenile Court in respect of offences under these two enactments, as it did for exclusively Sessions triable cases in section 5(3), although the Special Power Act contains a non-obstante clause in section 26."

It was concluded that since the jurisdiction over the offence mentioned in the special law was not specifically excluded by the Children Act, it will be the Juvenile Court which will exercise the jurisdiction.[121]

In the case of ***Bangladesh Legal Aid and Services Trust and another vs. Bangladesh & others***[122] it was observed and held as follows:

"1. Rule was issued calling upon the respondents to show cause as to why the trial, conviction and sentence of the child to imprisonment for life inflicted by the Courts and Tribunal of Bangladesh, not being juvenile Court properly constituted under the law, being violative of the consistent/repeated directions of the High Court Division, should not be declared unconstitutional, illegal and without jurisdiction and is of no legal effect....."

Their lordships referred to the decision in ***The State vs. Deputy Commissioner, Satkhira and others***, cited above, where a Division Bench of this Court held that "no child is to be charged with or tried for any offence together with an adult. The child must be tried in the Juvenile Court and not in the ordinary Court." They also referred to the case of ***Shiplu and another vs. The State***[123] where it was held that any order of conviction and sentence passed by the trial Court not being a Juvenile Court in

121 See also 5.2.3 below

122 7 BLC (HCD) 85

123 49 DLR 53

respect of an accused below the age of 16 years is liable to be set aside for want of jurisdiction in view of the Children Act, 1974.

Their lordships went on to observe as follows:

> "5. (…) the learned Deputy Attorney-General, submitted that age of the petitioner No.2 has not been properly ascertained in the instant case as there was no medical report and, as such, the age of petitioner No.2 should be ascertained by medical test. We are unable to accept the submissions of the learned Deputy Attorney-General in view of the fact that the Tribunal on due consideration and discussion came to the decision that age of petitioner no.2 Alamgir Hossain was 14-15 years at the time of trial. So, the question of medical examination does not arise as the learned Tribunal came to a conclusive decision about the age of petitioner Alamgir Hossain.
>
> 10. In view of the discussions made above and considering the provisions of law and the decisions of the Superior Courts of this Sub-continent we find that the trial of petitioner No.2 Alamgir Hossain which has been held by the Bicharak (Judge), Nari-o-Shishu Nirjatan Daman Bishesh Adalat is without jurisdiction and without lawful authority and, as such, the impugned judgment and order of conviction is void ab initio."

This decision was distinguished in the case of ***Munna***[124] on reasoning similar to that in the ***Shukur Ali***[125] case, i.e. that the decision was effectively *per incuriam* as the non-obstante clause of the special law excluding application of other laws was not considered. Their Lordships observed and held as follows:

> "119. (…) the case of *Monir Hossain vs. State* reported in 21 BLD 511 and in the case of BLAST and another vs Bangladesh and others reported in 7 BLC 85 also cannot

124 BLC 409

125 Op cit

be applicable in the present case under provisions of Children Act 1974 inasmuch as both above two cases were under provisions of Nari-o-Shishu Nirjatan Daman (Bishesh Bidhan) Ain, 1995. On perusal of both the cited decisions it transpires that provisions of sections 3,15 and 16 of above Nari-o-Shishu Nirjatan Ain of 1995 were not brought to the notice of the Court for due consideration before arrival at above decisions.

120. Similarly, cited decision on behalf of appellant in the case of *Md Shamim vs. State* reported in 7 BLT 305 will also not be applicable in the present case under provisions of Children Act inasmuch as the case of the cited decision in a case being under provisions of Arms Act triable under section 26 of the Special Powers Act 1974 in view of clause 3 of the Schedule which includes Arms Act 1878.

121. It appears that section 3 of the Children Act, 1974 and provisions of section 26(1)(2) of Special Powers,1974 were not brought to the notice of the Court for due consideration before arrival at the said cited decision.

125. Special Powers Act 1974 was earlier enacted than the Children Act 1974. Normally subsequent enactment is to prevail over the earlier one. But due to absence of provision like, “or in any other law for the time being in force” along with provision of ” Notwithstanding anything contained in the Code”, in section 3 of the Children Act 1974, it appears to be a debatable issue whether provisions of Children Act will be applicable in the case wherein a minor is involved in an offence punishable under Arms Act being triable under section 26 of the Special Powers Act 1974.

126. Above provisions of section 3 of Children Act 1974 and those of section 26 of Special Powers Act 1974 having not been placed before the Court when decision of cited case reported in 7 BLT 305 was given by the said Court in such context the said decision is also not applicable in the present case.”

However this aspect was covered in the decision in ***Roushan Mondal***, taking support from the Indian decision in the case of ***In Re: Sessions Judge, Kalpetta***[126] case.

A more restrictive view was taken in the case of ***Anarul Islam vs. The State***.[127] Upon an application challenging the jurisdiction of the Tribunal to hear the case of a child, claiming that the case should be transferred to the Juvenile Court, the learned Judge of the Tribunal observed as follows:

> "X-L c¡s¡-e¡ Bp¡j£-L -c¢Mu¡ fËa£uj¡e qu -k, a¡q¡l hup 16 (-o¡m) hvp-ll EÜÑz Hja¡hÙ¹¡u Eš² clM¡Ù¹ ANË¡qÉ Ll¡ qCmz" [In appearance the accused standing in the dock seems to be above 16 years of age as such the said application is rejected]

Their lordships in the High Court Division observed and held as follows:

> "7. (…) The learned Advocate further submits that while pressing the application for transfer of the case to the juvenile Court, two certificates, one from the Head Master of a school and the other from the local Chairman were also produced before the learned Tribunal showing that the appellant was a minor and on the basis of those materials on record, the Tribunal ought to have conducted an inquiry as contemplated under sub-section (1) of section 66 of the Children Act, 1974 and without such inquiry, the Tribunal has acted illegally in holding that the appellant is above 16 years.
>
> 8. Now the moot question, as it appears, to be determined by us in the instant case, is whether under sub-section (1) of section 66 of the Children Act 1974, it was imperative upon the learned Tribunal to go for an inquiry for the purpose of ascertaining age of the appellant. .....

126 1995 CrLJ 330

126 7 BLC (HCD) 614

9. It appears from sub-section (1) of section 66 that the legislature in its wisdom, used the expression in the said sub-section to the effect…."and it appears to the Court.… leaving it to the discretion of the Court to make a presumption as to the age of the accused on his physical appearance, who is standing in the dock before him and can see the accused with his own eyes, so that he needs no evidence. He can deal with it at once.

10. From the above expression in the statute as also the language used in sub-section (2) of section 66 of the said Act, we have no hesitation to hold, that before going for an inquiry, on the very face of the accused who is standing in the dock, if it appears to the Court concerned that he is a child in that case only he should go for an inquiry as contemplated under sub-section (1) of section 66 of the Children Act 1974 and not otherwise, when it appears to the Court that the accused is aged above 16 years. .....

11. From a plain reading of sub-section (2) of section 66 of the Act we further hold that the age of the appellant as presumed by the learned Tribunal is deemed to be the true age of the appellant and is not a child under the Children Act 1974.

13. We have already found that in the instant case the Tribunal in exercise of its judicious discretion, as contemplated under section 66 of the Children Act 1974 rightly held the appellant to be above 16 years, therefore he is not a child, hence no inquiry is called for as contemplated under sub-section (1) of section 66 of the said Act."

In the case of ***The State vs. Mehadi Hasan alias Modern and others***,[128] where the issue of jurisdiction of the trial Court was raised for the first time at the time of appeal before the High Court Division, their lordships held as follows:

128 13 BLD (HCD) 151

> "40. (....) It was too late in the day to raise the contention which is absolutely untenable and cannot, also, be countenanced."

5.1.5 Presumption of age insufficient –Need for Inquiry by the Court

In the case of ***Baktiar Hossain vs. The State***[129] the jurisdiction of the Tribunal was challenged:

> "8. In this case, we also find that the petitioner is charge sheeted along with an adult. So the first task before the Court is to determine the age of the petitioner under section 66 of the Children Act. ....."

Their lordships in the High Court Division went on to observe as follows:

> "From the impugned order dated 17.10.93 we find that no such inquiry has been ordered by the Court to find the correct age of the accused petitioner (…..) In the absence of any finding as to the age of the accused petitioner or determination of the accused petitioner's age by holding an inquiry we are of the opinion that the learned Special Tribunal and Sessions Judge has failed to comply with section 66(1) of the Children Act."

In this context reference may be made to an Article published in a magazine of the Women Judges Association,[130] wherein the author ventured to suggest as follows:

> "...the fate of children accused of having committed an offence should not be left to the vagaries of the learned advocates of the Bar, who often fail in their duties, as they did in the above mentioned case of ***Monir Hossain***. Conversely, it may be suggested that, for the sake of justice, the duty should be cast squarely on the Court to determine in every case whether the accused would stand

129 47 DLR (1995) 542

130 Swaranika 2009, "Are Judges Expert in Determining Age?" page 13, at p.16; also printed in Journal section of 61 DLR (2009)

to benefit from the provisions of the Children Act, and, if so, to enquire as to the age of the accused."

In the said Article, by reference to section 73 of the Evidence Act, it was observed that:

> "Unlike hand writing, seals and finger prints, the law does not give the Court any right or discretion to assess by the Judge's own expertise, the age of any person present in Court as a witness, victim or accused. The law does not recognise such expertise at all."

It was concluded that the issue of age of the accused is of such fundamental importance to the youthful offender that no judge should take the risk of attempting to determine the age from mere physical appearance. The law does not recognise judges as experts in this field.

When dealing with the determination of age, it must always be borne in mind that fundamental rights of children lie hidden behind their ability to prove that they are below the age of 16 years. The right to be tried under the provisions of the Children Act brings in its wake a different and more favourable mode of trial culminating in much more lenient sentence than that envisaged under the Penal Code or other special laws. In this regard support may be sought from the decision of the Indian Supreme Court in the case of ***Gopinath Ghosh vs.The State of West Bengal***[131] where it was observed and held as follows:

> "10. Unfortunately, in this case, appellant Gopinath Ghosh never questioned the jurisdiction of the Sessions Court which tried him for the offence of murder. Even if the appellant had given his age as 20 years when questioned by the learned Additional Sessions Judge. Neither the appellant nor his learned counsel appearing before the learned Additional Sessions Judge as well as at the hearing of his appeal in the High Court ever questioned the jurisdiction of the trial Court to hold the trial of the appellant, nor was it ever contended that he was a juvenile

131 1984 (Supp) SCC 228.

delinquent within the meaning of the Act and therefore, the Court had no jurisdiction to sentence him to suffer imprisonment for life. It was for the first time that this contention was raised before this Court. However, in view of the underlying intendment and beneficial provisions of the Act read with clause (f) of Article 39 of the Constitution which provides that the State shall direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment, we consider it proper not to allow a technical contention that this contention is being raised in this Court for the first time to thwart the benefit the provisions being extended to the appellant, if he was otherwise entitled to do it.

13. (....) Ordinarily this Court would be reluctant to entertain a contention based on factual averments raised for the first time before it. However, the Court is equally reluctant to ignore, overlook or nullify the beneficial provisions of a very socially progressive statute by taking shield behind the technicality of the contention being raised for the first time in this Court. A way has therefore, to be found from this situation not conducive to speedy disposal of cases and yet giving effect to the letter and the spirit of such socially beneficial legislation. We are of the opinion that whenever a case is brought before the Magistrate and the accused appears to be aged 21 years or below, before proceeding with the trial or undertaking an inquiry, an inquiry must be made about the age of the accused on the date of the occurrence. This ought to be more so where special Acts dealing with juvenile delinquent are in force. If necessary, the Magistrate may refer the accused to the Medical Board or the Civil Surgeon, as the case may be, for obtaining creditworthy evidence about age. The Magistrate may as well call upon accused also to lead evidence about his age."

Their lordships allowed the appeal setting aside the conviction and sentence and remitted the case to the learned Magistrate for disposal according to law.

So far as the age and its relevance as on the date of commission of the offence is concerned, our law is different. But the principle behind the determination of age and the favourable nature of the legislation is equally applicable in the context of Bangladesh. The learned Magistrate/Judge should be wary not to impose his own impression from the physical appearance of the accused. There would be less harm likely to be done and less likelihood of injustice being caused if steps were taken by him to ascertain the actual age by means of oral/documentary evidence proved in accordance with law.

5.1.6 Ways of determining age by the Court

Under section 66(1) of the Act it is mandatory for the criminal Court, before whom the offender or victim is brought, to make an inquiry to determine the age of the accused or a victim sent to the Juvenile Court under section 57, if he appears to be a child; to take such evidence as may be forthcoming at the hearing; and to record a finding as to the age as nearly as may be. In other words, the Court must state the approximate age in terms of years. It would not suffice to say that the accused/victim "is not a child" or "is not a minor" or "is adult" or "is above 16" or "is below 16" or "is young, but not a child". He may decide, for example, that the 'accused is approximately fifteen years old'.

There are various types of evidence necessary for determination of age:

(a) Birth Certificate issued by competent authority which recorded the birth contemporaneously.

(b) Birth Certificate issued by competent authority which recorded the birth some time after the birth, i.e. late registration of birth based on an affidavit sworn by a close relative or guardian.

(c) Date of birth appearing in National Identity Cards, passports, electoral registers or other official records.

(d) Certificate issued by a school reflecting the date of birth as recorded in the register at the time of admission into the school.

(e) Records showing date of birth as disclosed to the Board of Education or other official document, such as personal identity card, ration card, immunisation card, etc. showing the date of birth/age of the bearer or his dependents, as the case may be.

(f) Oral evidence from a person in *loco parentis*.

(g) Report of medical examination, i.e. assessment based on bone ossification by means of X-ray of bone joints and observation of physical appearance made by medical experts.

Of course, it is necessary to prove the certificate produced in accordance with the provisions of the Evidence Act. Thus a certificate issued from the office of the Chairman would be required to be proved by production in Court of the Register of Births kept by the Union Parishad/Municipal Corporation. The veracity of the document would be tested in accordance with the law of evidence.

5.1.6.1 Documentary proof

In the ***Metropolitan Police Commissioner***[132] case it was observed as follows:

> "21. (...) We may point out, at this juncture, that the local Union Parishad Chairman, being entrusted by law to keep a record of births and deaths, although it was a belated registration, proved Arifa's birth registration, with supporting records from his office, which carries weight. Only in the absence of such evidence, or where doubt is raised about its authenticity, would it be necessary to turn

115 60 DLR 660.

to other records such as school registers and radiographic plates used to assess age. The last mentioned process, though clearly independent and free from human taint, is accurate only to a certain degree."

Equally, a certificate issued by a school will have to be proved by the production of the school's Admission Register; the medical certificate will be proved by calling the certifying doctor as a witness. It may be mentioned that age assessment based on medical examination, whether upon physical examination or radiographic report based on bone ossification, have been held to be not accurate and hence less acceptable. In the case of ***Prafullah Kamal Bhattacharya Ministry of Home Affairs, Govt. of Bangladesh***[133] evidence of date of birth appearing in the school Admission Register was accepted in preference to age assessed by means of medical examination and those gathered from the horoscope produced by the girl's father. The justification for accepting the record of the school Admission Register was that the entry as to the age was made long before the incident under trial.

In the case of ***Rahmatullah vs. The State***[134] the matter of determination of age was discussed as follows:

> "22. (…) we are of the view that the learned Judge, Speedy Trial Tribunal ought to have decided first the age of the accused persons in order to ascertain his jurisdiction in this case. (…) On the basis of the application, the learned Judge gave a note in the order sheet on 27-10-2004 ordering the office to write a letter to the Civil Surgeon, Khulna for getting a report as regard their age. Accordingly, a letter was written vide Memo No.1382 cri dated 30-12-2004 for determining the age of the accused persons. Two reports are found in the record which were sent from the Department of Forensic Medicine, Khulna Medical College, Khulna vide Memo No. KMC/FM/ML/2004/85 dated 18-11-2004 and No.

133 28 DLR 123.

134 Cited above.

KMC/FM/ML/2004/85 dated 18-11-2004. These reports were not exhibited as the concerned medical officer has not come to the Tribunal to prove these reports and, as such, the reports were not taken into evidence. In these reports, the age of accused Rahamatullah was shown above 19 years and the age of accused Md. Saltu was shown about 16 years and 6 months. As per law, the age of the accused is determined from the date of framing of charges against the accused. .....

23. (.....) the accused Rahamatullah has filed school certificate given by the Head Master in Elangi Mofizuddin Secondary School. As per that certificate, the date of birth of Rahamatullah is on 5-6-1989 and as per that certificate the age of Rahamatullah stands at 15 years 11 months on 29-4-2004 on the date when the charge was framed against him. So, as per that school certificate, the accused Rahamatullah is minor on the date of framing charge on 29-4-2004.

24. It is to be mentioned here that this school certificate has not been exhibited as the head master did not come to prove it. So, this certificate cannot be taken into evidence at this stage of appeal. As per medical report, we find that the age of Rahanatullah stands as 19 years 5 months 20 days as on 29-4-2004 when the charge was framed against him. So, we find two dates of birth of accused Rahamatullah. In this connection, the learned Advocate Alam for the appellants referred to the decision in the case of *Arun Karmaker vs. State* reported in 2002 BLD (AD) 76 in which our appellate Division held that the radiologist's opinion cannot be preferred to positive evidence like school certificate.

25. In view of the above discussion, it is the duty of the trial Court to ascertain first whether the appellants were major or minor in order to arrive at a decision as regard his jurisdiction but the learned Judge of Speedy Trial Tribunal did not apply his judicial mind in determining

this issue first and avoided this issue nor did he mention any thing as regards the age of convict appellants in the order sheet or in his judgment.

26. After getting the report from the medical officer, it was the duty of learned Judge of Speedy Trial Tribunal to serve summons upon him to prove the medical report but he did not do so. It was also his duty to make attempt to prove the school certificate of accused Rahamatullah summoning the head master of the school to prove the certificate given by him. But the learned Judge without performing his legal duty in order to ascertain his jurisdiction he illegally convicted the accused persons under different terms as stated hereinbefore.

27. (....) it appears to us that the learned Judge, Speedy Trial Tribunal committed an error of law in not determining first the age of the accused in order to ascertain his jurisdiction. When his jurisdiction was questioned he ought to have decided this issue first. But the learned Court without ascertaining this issue, illegally proceeded to dispose of the case which is highly irregular also.

28. Since both the medical report and the school certificate has not been proved, so we refrain from passing any comment regarding the major or minor status of the appellants and this issue is to be decided at the trial giving the parties opportunity to adduce their respective evidence on this issue. After ascertainment of this issue, if the accused persons were found to be below 16 years on the date of framing of issue, they are to be tried by the Juvenile Court. If one of them is found minor, then the case should be split up and the minor is to be tried by Juvenile Court and the major one should be tried by the Speedy Trial Tribunal. If both are found majors, Speedy Trial Tribunal is to decide the case giving reasons on the basis of new evidence on the point of age and on the evidence taken earlier. The parties are at liberty to adduce

evidence on the issue of age without reopening the case.

30. In view of the above matter, we have no other alternative but to send the case back on remand to the learned Speedy Trial Tribunal for ascertaining the age of the accused persons and to determine his jurisdiction first and to dispose of the case according to the provision of law and guidelines as stated hereinbefore."

In the case of ***Md. Ruhul Amin Versus Latif Bawani Jute Mills Ltd. and others***[135] where the plaintiff's passport issued by the Deputy Assistant Director, Immigration and Passport, Government of Bangladesh was produced showing his date of birth within, it was held as follows:

"9. (.....) This passport being public document could be accepted as conclusive evidence to prove the date of birth of the plaintiff in the absence of any other reliable, documentary evidence."

5.1.6.2 Other proof

In some cases the admission of the prosecution through, for example, evidence of a prosecution witness, or the uncontroverted statement of accused at the time of making any confession or at the time of his examination under section 342 of the Code of Criminal Procedure, tantamount to positive evidence that the accused is a child. Of course, such claims may be rebutted by evidence which is legally more acceptable, for example documentary evidence of birth.

In the case of ***Saifullah@ Saiful Islam vs. The State***[136] it was observed as follows:

"8. (....) we would like to dispose of the contention of the learned Advocate for the appellant that the appellant was a child being below the age of 16 years on 30-12-88. In this connection he has referred to the confessional

135 14 BLT (HCD) 361.

136 2 BLC 297.

statement of the appellant in which the age of the appellant was recorded as 13/14 years by PW 24 Md. Fazlul Karim, Magistrate, Ist Class on 22-1-89 when the confessional statement was recorded. We have perused the confessional statement which shows that the Magistrate in his hand recorded the age of the appellant on 22.1.89 as being 13/14 years.

10. (....) It is our common knowledge that normally a student of Class VII may be of age of between 12 and 14 years. If the appellant was aged 13 years on the date of occurrence, i.e.30-12-88, he may be aged 14 years and three months on 24-3-90 when the charge was framed by the trial Court. This conforms to the age (13/14 years) recorded by the Magistrate while recording the confessional statement of the appellant on 22-1-89. (..…) We find no reason for not accepting the age recorded by the Magistrate recording the confessional statement and the evidence of father of appellant Saifullah (DW 1) and accordingly, hold that the appellant was below the age of 16 years at the time of framing of the charge on 24-3-90."

In that case the Court considered also the certificate issued by the Headmaster of the School:

"9. DW 1, Md Arshadullah Master is Headmaster of the local primary school. He is father of appellant Saifullah and according to him,1-1-77 was the date of birth of the son. If his evidence is accepted, the appellant was aged 13 years 2 months on the date of framing of the charge on 24-3-90. DW1 has produced a certificate of age issued under the signature of the Head Master of the Local High School showing 1-1-77 as the date of birth of the appellant. This brings the age of the appellant to thirteen years and two months on the date of framing of the charge by the trial Court. DW 1 does not say who wrote and signed the certificate of age marked Ext.K. Being not proved in accordance with the Evidence Act, this certificate of age is not admissible in evidence....."

In the case of ***Solaman vs. The State***[137] a school certificates was produced showing that the accused was in Class VII. Their lordships in the High Court Division observed and held as follows:

> "12. We find from the record that the accused-petitioner filed an application annexing with the tuition fees receipt and other documents that he is a student of Class-VII and a minor aged about 13/14 years and he should be tried by a Juvenile Court. The learned Magistrate as well as the learned Special Tribunal, Khulna without considering the same conducted the trial, though the accused-petitioner should be tried by a juvenile Court. It has been held in the case of Shiplu and another vs State reported in 49 DLR 53 that the trial of a minor should be held by a juvenile Court and that the trial of the accused-petitioner was held in contravention of the provisions of section 6 of the Children Act. In the instant case the Magistrate as well as the trial Court failed to apply their judicial mind as to the determination of the age of the accused-petitioner Solaman who appears to be below the age of a major. The tuition fees receipt and other documents show that the accused-petitioner was a student of Class-VII in the year of 1998 when the alleged occurrence took place on 19.5.99 and, as such, it appears that the accused petitioner was a student of Class–VII at the time of commission of the offence and below 16 years of age. From the above facts and circumstances we find that the accused-petitioner ought to have been tried by a juvenile Court and not by the Special Tribunal and the conviction and sentence passed by the Special Tribunal against the accused petitioner is without jurisdiction and liable to be set aside. Furthermore, we find from the record that while the charge was framed against the accused-petitioner under section 242 of the Penal Code (sic Code of Criminal Procedure) both the accused-petitioners were very much present before the Court but they were not

[137] 58 DLR (2006) 429.

examined nor any answer was recorded by the Special Tribunal and no age was determined."

In the case of ***Tuku Miah vs. The State***[138], it was held that merely because the two accused gave their age as 15 years in their 342 statement cannot be taken as the basis for holding that they were below 16 years while committing the murder when the defence did not put up any case or any evidence in respect of their age. However, in ***The State vs. Khokan Mridha***[139] it was claimed before the High Court that one of the accused was a child and was jointly tried with an adult and therefore the trial was vitiated. Their lordships observed that the point was not raised and considered before the trial Court and no step was taken to ascertain the age as is necessary in resolving the point raised. In the absence of any other evidence, their lordships considered the age of the accused as given in her confessional statement where it was recorded that she was 14 years old. During her examination under section 342 of the Code of Criminal Procedure her age was recorded as 20 years. Their lordships, upon due consideration observed and held as follows:

> "29. (...) The age of the convict appellant as recorded during her examination under section 342 of the Code of Criminal Procedure is normally recorded by the Court on the basis of the look of the accused. Even if such age cannot be taken to be her exact age, but her age as recorded during her examination under section 342 of the Code of Criminal Procedure could be taken to be more reliable than the age given by accused Hosne Ara herself and recorded by the Magistrate. From that standpoint, we find that she was 18 years 8 months old at the time of framing charge on 14-9-1996 which is much above the age of a child under the Children Act. .....In the present case, as stated above, we find the age of accused Hosne Ara above 18 years at the time of trial and as such, her trial jointly with the accused Khokan Mridha was in accordance with law."

138 (1983) 3 BLD 193.

139 7 BLC (2002) 561.

In the case of ***The State vs. Mehadi Hasan alias Modern and others***,[140] the question of lack of jurisdiction of the Court on the ground that the accused were minors was mooted for the first time before the High Court Division. The F.I.R. stated the age of the accused as 19, 20 and 19 years respectively. In their confessional statement made under section 164 of the Code of Criminal Procedure they stated their age as 19, 20 and 16 years respectively. At the time of their examination under section 342 of the Code of Criminal Procedure two of the accused produced their Registration cards of Secondary School Certificate Examination which showed them to be minors at the time of commission of the offence as well as at the time of framing of the charge. They also produced affidavits sworn by their respective parent giving their dates of birth which tended to show that they were minors at the time of framing of charge. However, their lordships discarded the affidavits and Registration card as afterthought and created documents. Their lordships observed as follows:

> "50. (.....) During examination under section 342 of the Code Modern, Shahin and Asha stated their age to be 19, 20 and 19 respectively and admitting the age they put their signature....
>
> 52. (....) Convict-appellants declined to lead any evidence in support of defence plea. Convict –appellants could easily lead evidence, both documentary and ocular, in support of the last time plea to be aged below 16 years.
>
> 53. Plea of convict-appellants being Juvenile is not only an afterthought matter but a concoction of their imagination at a belated stage to thwart the course of Justice by having resort to wrangles of procedures and technicalities of law. Convict-appellants tried to create a smoke screen with respect to their age...
>
> 54. From evidence produced and materials placed before the Court below it is manifestly clear that the convict-appellants neither had been child nor were Juvenile within

140 13 BLT (HCD) 151.

the meaning of Children Act during course of commission of felony and also framing of charge.

Following the decisions in ***Bimal Das***[141] and ***Abdul Momen Chowdhury @ Momen***[142], their lordships went on to hold as follows:

> "54. (....) The crystallized view emerged from the above authorities is that when it does not appear to a Court or Tribunal that a person charged of an offence is below 16 years and above 16 years it got no duty to ascertain the age of that person."

With all due respect, such argument appears to be fallacious. If the learned trial Judge finally concludes that the accused before him is a child, i.e. below 16 years of age, then the remaining procedure of determination of age is superfluous, i.e. he would not need to ascertain the age and would simply declare that the accused being a child will be tried under the provisions of the Children Act. Their lordships went on to observe as follows:

> "55. Learned Sessions Judge being Trial Judge had the opportunity of noticing size, facial appearance and height of convict-appellants and positively held that they were all majors and all of them had been above 18 years of age and, thus, discarded their claim as Juvenile or child."

In this context it should be kept in mind that judges are not recognised as experts in assessing age, far less guesstimating age from the physical appearance of the person standing before them.[143] Needless to say, appearances can be deceptive and the venture by the learned judge in guesstimating age of the accused simply from facial appearance can lead to deprivation of inherent rights of a child offender, which can never be compensated and indeed such adventurism may lead to a disastrous experience for a youthful offender, which would scar him for life.

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141 14 BLD (AD) 218.

142 47 DLR (AD) 96.

143 Reference may be made to the Article titled: "Are Judges Experts in Assessing Age?" printed in (2009) 61 DLR, Journal Section

It should also be remembered that where the provisions of the Act under section 66(1) were not followed by the trial Court and that failure was detected by the High Court Division, it was equally the duty of the latter Court to determine the age in accordance with section 66(1) of the Act, either by calling evidence itself or, as is more apt, by sending the case back to the trial Court for determination of age in accordance with law. From the decisions noted above it can be gleaned that the Court is under a duty to determine the age of an accused if it appears to it that the person before it is below the age of 16 years. However, it is also implied that if evidence is led tending to show that the accused is a child, then the Court must determine the issue of age. The determination of the age of the accused by the Court will decisively grant the accused the rights and benefits of the Children Act or exclude him from receiving them. It may be legitimately argued that even if the learned judge opines that the person before him is not a child, and it is claimed by the accused that he is a child, then the judge's opinion would effectively be under challenge and he would be bound to allow the accused to lead evidence to establish his claim. Not to allow the accused to prove his claim would clearly demonstrate the learned judge's high-handedness. Moreover, personal opinion of the judge based on physical appearance cannot override cogent documentary evidence, which might be forthcoming, if given the opportunity to produce the same.

5.1.7 Hierarchy of evidence

In a different context, the determination of age was discussed in the case of ***Arun Karmaker vs. .The State, represented by the Deputy Commissioner, Satkhira, and another***.[144] Here in a claim by the father for guardianship of his daughter, the victim girl was claimed to be a minor. The Appellate Division observed and held as follows:

> "6.The appellant has asserted in the petition of complaint that the victim girl was about 15 ½ years of age and a

144 22 BLD (AD) 76.

student of Class X of Mazahar Memorial High School and together with the concise statement filed a certificate of the Headmaster of the said School stating that victim Mamota Karmaker, daughter of Arun Karmaker of village Purba Naranyanpur, P.O. and P.S. Kaligonj, District Satkhira was a student of Class X and her date of birth was on 12.11.1984 as per record of the school.

7.(...) It further appears from the mark-sheet from the Secondary School Certificate Examination record supplied to us by the Head Master duly attested by the Additional District Magistrate, Satkhira that the date of birth of Mamota Karmaker was on 12.11.1984 who appeared at the Secondary School Certificate Examination held on 15.11.1999. From the above, it appears that the said Mamota Karmaker is of 17 years two months as on today 3rd of February, 2002. A girl's majority is on attaining 18 years of age and presently prima facie the victim girl is a minor. (.....) But the doctor examining the victim has opined her age to be 17½ or 18½ and while recording the statement under section 164 Cr.P.C. the victim claimed herself to be above 18 years of age. In the case of Md. Sayeedul Arefin v Y.O Gofrin, AIR 1916 Privy Council 242 it has been held that:

> "Doctor's certificate which is only an assertion of opinion and the minor's declaration before the Magistrate as to age are no proof as to age".

8. In the case of Wahed Ali Dewan v The State and others reported in 46 DLR (AD) 10 it has been held that preference cannot be given to other than the testimony of father supported by school certificate.

9. In the case of ***Sree Mangal Chandra Nandi Vs Bangladesh, 17 BLD (AD) 33***, the victim girl was found to be 15-16 years of age as per medical report and she was ordered by the Court below to be kept in custody until she attains 18 years as she refused to go to her father

observing that the observation made by a minor girl must be kept with reservation, it cannot be a factor for not giving the victim to her father and accordingly it was directed to hand over the minor to the father.

11. In the case of Sree Mangal Chandra Nanidi Vs Bangladesh reported in 17 BLD (AD) 33 while directing the superintendent of District Jail, Tangail to release the detenue forthwith and to hand over custody of minor daughter to her father this Division observed that:

> "In an unreported Criminal Petition for Leave to Appeal No.101 of 1996, this Division held that the real welfare of a minor girl should be given to the custody of her father as the father is best well-wisher of a minor child. Any observation made by a minor girl must be taken with reservation and the same cannot be a factor for not giving a victim girl to the lawful guardian of a father."

12. In the case of ***Krishna Pada Dutta vs The Secretary, Ministry of Home Affairs and others*** reported in 42 DLR 297 in an application under section 491 Cr.P.C. it was held that:

> "We are in respectful agreement with the views expressed in Muthu Ibrahim's case ILR 37 Mad 567 and in the case of Sukhendra Chandra Das 42 DLR 79 that for the purpose of custody of the girl age of majority laid down in the Majority Act 1875 read with Guardians and Wards Act, 1890 i.e. the age of 18 years is the determining factor to decide whether the girl is to be given to the custody of the guardian or she is major. It is needless to state that reference to the age of sixteen in case of a female minor in section 361 of the Penal Code is only for the purpose of commission of the offence of kidnapping punishable under section 363 of the Penal Code and not for the purpose of deciding whether the girl is sui juris."

> 13. In view of the above, in the instant case doctor's certificate as to age of the victim at 17½ -18 ½ years of age and an opinion as to the age is no conclusive proof thereof and the declaration in the statement under section 164 Cr.P.C. of the victim that she was a major are no proof of age and that radiologist's opinion cannot be preferred to positive evidence like school certificate."

The Courts in many cases have thus given preference to the evidence of school records instead of medical evidence. In the case of ***Prafullah Kamal Bhattacharya vs. Ministry of Home Affairs, Government of Bangladesh***,[145] it was held as follows:

> "15. (....) in view of the medico-legal opinion that a Radiologist's examination indicates the approximate age of the person examined, his opinion may be accepted subject to variation by two or three years. In the case of a person having quick physical growth such variation is very much likely. The petitioner's statement has been corroborated by at least three official documents, the School Certificate, the Passport and the Declaration. Entries as to age of the detenue in these documents having been made long before the incident in question, they can be reasonably expected to be true."

In the case of ***Abdul Majid Sarker vs. The State***[146], the Court was faced with evidence of age from the Municipal Birth Register, i.e. a birth certificate, date of birth as apparent from the SSC records and 'medical report', i.e. age estimate based on radiological tests. Of course, both the birth certificate and the SSC records are official documents and each is weighty evidence by itself. The date of birth registered with the Municipality was entered in the records within two months of the birth; whereas the date of birth recorded at the school was many years later. The medical assessment gave an age of 17 to 19 years. In the facts of the case, the Appellate Division accepted the age given in the birth certificate issued by the

145 28 DLR 123

146 55 DLR (AD) 1.

Municipality. It can be said, therefore, that the duty of the judge is to take into account all types of evidence relating to age as produced by the parties and then to arrive at a decision based on that evidence.

5.1.8 Appeal against determination of age

As was discussed before, if any party is dissatisfied with or feels aggrieved by the decision, there is a right of appeal or revision provided by section 76 of the Children Act.

It is trite to contemplate that every Court will at the first instance consider whether or not it has jurisdiction to try the accused standing before it. However, that the Court has jurisdiction is taken for granted. In the usual case when an adult accused is brought before the Court the need to consider jurisdiction over the person is obviated. Nevertheless, the learned Judges would certainly be obliged to consider the fitness of an accused to stand trial if it was contended that he suffered from insanity, or was a child. As discussed above, in these cases the capacity of the accused person has to be determined as a preliminary issue. In the case of an accused claiming to be a child, the determination of her/his age can grant or deny the applicability of the beneficial provisions of the Children Act. Hence it is imperative that this determination should take place at the inception of the trial. There is no reason why the assessment should not take place on the very first day when the accused is produced before the Magistrate. The age of the accused will determine whether he will be granted bail in a non-bailable offence under the proviso to section 497 of the Cr.P.C. In the event that bail is not granted then the age will determine whether he will be remanded in custody in jail or in a remand home or place of safety.

5.2 Jurisdiction over the offence

Jurisdiction over the person is a precondition to the case proceeding to trial by any Court or Tribunal. Once it is established the Court has jurisdiction over the accused then only

the Court will go on to examine whether it has jurisdiction over the offence alleged.

5.2.1 Juvenile Courts

Section 5(1) and (2) of the Children Act provide as follows:

> "5. Powers of Juvenile Courts, etc. (1) When a Juvenile Court has been established for any local area, such Court shall try all cases in which a child is charged with the commission of an offence and shall deal with and dispose of all other proceedings under this Act, but shall not have power to try any case in which an adult is charged with any offence mentioned in Part VI of this Act.

This provision has to be read in conjunction with section 3 of the Act which provides:

> "S.3 **Juvenile Courts.-** Notwithstanding anything contained in the Code, the Government may, by notification in the official Gazette, establish one or more Juvenile Courts for any local area."

In spite of the fact that the Children Act is now 35 years old, to date only two Juvenile Courts have been established in Bangladesh, one in Phulerhat, Jessore where there is a Kishore Unnayan Kendro (KUK) (Youth Development Centre) and one at the Kishore Unnayan Kendro at Tongi, Gazipur for boys which also serves the Kishori Unnayan Kendro in Kunabari, Gazipur for girls. The paucity of Juvenile Courts has been supplemented by the empowerment of other Courts to function as Juvenile Courts.

Thus, section 5 (2) of the Act provides:

> (2) When a Juvenile Court has not been established for any local area, no Court other than a Court empowered under section 4 shall have power to try any case in which a child is charged with the commission of an offence or to deal with or dispose of any other proceeding under this Act.

Section 4 provides:

> "4. Courts empowered to exercise powers of Juvenile Court. The powers conferred on a Juvenile Court by this Act shall also be exercisable by-
>
> (a) the High Court Division,
>
> (b) a Court of Session,
>
> (c) a Court of an Additional Sessions Judge and of an Assistant Sessions Judge,
>
> (d) Chief Judicial Magistrate, Chief Metropolitan Magistrate, and Judicial Magistrate of the First Class."[147]

Thus, section 5 of the Act provides that all cases (emphasis added) in which a child is charged with the commission of an offence shall be tried by a Juvenile Court, where such a Court has been established. Where a Juvenile Court has not been established then the Courts which are empowered under section 4 of the Children Act, namely Court of Magistrate 1st Class up to the High Court Division, will try any case in which a child is charged with the commission of an offence. Hence the Juvenile Court or a Court empowered to act as a Juvenile Court (under section 4 of the Act) has exclusive jurisdiction, by operation of law, to try any case where the offender is a child within the definition of the Act. According to the Act all offences where the alleged offender is a child are to be tried by the Juvenile Court.

This is the fundamental essence of the justice delivery system for children. Child offenders alleged to have committed any offence under the Penal Code or any other special law are tried by the especially established Juvenile Courts, or in the absence of such Court, by the Courts empowered by the Act to exercise the powers of the Juvenile Court. Thus, the justice delivery system for children is different and distinct from the traditional criminal justice system.

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147 As amended after separation of the Judiciary by Ordinance No.2 of 2007 w.e.f. 01.11.2007.

5.2.2 Offences triable exclusively by Court of Session

There is one exception to the jurisdiction of the Juvenile Court as specified in section 5(3) of the Act, which provides as follows:

> (3) When it appears to a Juvenile Court or a Court empowered under section 4,
>
> such Court being subordinate to the Court of Session, that the offence with which a child is charged is triable exclusively by the Court of Session, it shall immediately transfer the case to the Court of Session for trial in accordance with the procedure laid down in this Act.

The rationale behind this provision is that under the scheme of the Cr.P.C. serious offences are to be tried exclusively by the Court of Session as provided in Schedule II, column 8. Thus if a child is alleged to have committed an offence which is triable exclusively by the Court of Session, then the Magistrate before whom the matter first appears has no alternative but to send the case for trial by the Court of Session. In this connection, it was observed in ***Roushan Mondal*** as follows:

> "50. (.....) Thus even when it is mandated by law for the trial to be conducted by a Sessions Judge, the proceedings must take place in accordance with the provisions of the Act. In other words, the juvenile will get the benefit of all the rights to which he would be entitled had the proceedings taken place in the Juvenile Court. That, we believe, follows the spirit and intendment of the international instruments which crave for the well-being of the youthful offender and enjoin segregation of youths from adults at all stages from apprehension to incarceration."

5.2.3 Special Tribunals as Juvenile Courts

It is a highly debatable issue as to whether any Tribunal set up under a special law, such as the Special Powers Act, Nari-o-Shishu Nirjatan Daman (Bishesh Bidhan) Ain, 1995, Nari-o-

Shishu Nirjatan Daman Ain 2000, the Acid Aporadh Daman Ain 2002, or the Druta Bichar Adalat Ain 2002 etc. will be competent to act as a Juvenile Court. It is noted that in each of the special laws mentioned above, there is a provision that the Tribunal is deemed to be a Court of Session and is presided by a Sessions Judge. Arguably, therefore, since a Court of Session is empowered under section 4 of the Children Act to act as a Juvenile Court, any tribunal which is deemed to be a Court of Session will be deemed to be empowered to act as a Juvenile Court.

In the case of ***Md Shamim vs. The State***[148], it was held in no uncertain terms that jurisdiction over child offenders was to be exercised by the Juvenile Court:

> "4. (.....) We have already observed that the accused petitioner is aged about 14 years and as such the trial of the accused petitioner must be held by the Juvenile Court according to section 5 of the Children Act 1974 and not by any other Court. The trial held by the Special Tribunal No.3 in respect of the accused petitioner is without jurisdiction and as such the judgement and order passed by the aforesaid Court on 4.2.99 against the accused appellant is illegal. It may be mentioned here that the accused petitioner is in jail hazat since 1.6.98 in association with other adult criminals in contravention of section 49(1) of the Children Act 1974.....
>
> 5. In view of the above discussion we think that the accused petitioner shall be tried by a juvenile Court and the trial held by the special tribunal is without jurisdiction and as such the order of conviction and sentence passed by the said Court on 4.2.99 against the accused petitioner is liable to be set aside.
>
> 6. (.....) The case is sent back to the learned sessions judge, Pirojpur for fresh trial by the juvenile Court in accordance with the provision of the Children Act 1974. The evidence taken or the findings given by the Special

148 19 BLD 542.

> Tribunal No.3 in its judgement dated 2.4.99 will not be binding upon the juvenile Court. The juvenile Court will try the case independently after taking fresh evidence."

On the other hand, a different view was taken in the case of ***Baktiar Hossain vs. The State***[149], where the matter was viewed from a different perspective, and it was stated as follows:

> "6. (.....) The learned advocate for the petitioner has urged before us that the appellant being a child at the time when the offence was committed should have been tried by the Juvenile Court. A close scrutiny of the said section will show that the age referred to in the section relates to the age of the accused when he is "charged with or tried for" and not to the age when the offence was committed. Therefore, once a child offender crosses the age of 16 years and then charged with an offence or tried for the same the statutory requirement of the child being tried by a juvenile Court comes to an end.
>
> 8. (…..) the case is sent back on remand to determine the age of the accused petitioner on the basis of section 66(1) of the Children Act, 1974 in Criminal Miscellaneous Case No. 3534 of 1993 and send the accused petitioner to the juvenile Court if he is found below 16 at the time of framing the charge. If he is found 16 years of age the trial Court will proceed with Special Tribunal Case No.12/93 and dispose it of accordingly

It may be mentioned at this juncture that in ***Roushan Mondal*** it was observed that even offences under the Nari-o-Shishu Nirjatan Daman (Bishesh Bidhan) Ain, 1995 would also be triable by the Juvenile Court. The argument is that had it been the intention of the Nari-o-Shishu Nirjatan Daman Ain to give jurisdiction of a child offender alleged to have committed an offence under that law to the Nari-o-Shishu Tribunal then a simple amendment in the Children Act would have sufficed. It was held as follows:

149 47 DLR 542.

> "52. It may be pointed out at this juncture that there is no provision equivalent to section 5(3) that serious offences under any special laws, such as the Arms Act, 1878 or the Special Powers Act, 1974, both of which predate the Children Act, or Nari-o-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 etc. are to be tried by the appropriate Tribunal in accordance with provisions of Children Act. Until such incorporation juveniles charged with offences falling under special law will have to be dealt with by the Juvenile Court in accordance with provisions of the Children Act, which, in our view, is of universal application and approach, irrespective of the offence alleged, as illustrated by the observations and references made above."

With support from a decision from the Indian supreme Court ***Roushan Mondal*** went on to hold as follows:

> "55. (.....) Hence, we are of the view that since the jurisdiction over the offences contained in the special laws are not specifically excluded by inclusion in section 5(3) of the Children Act, jurisdiction over offences committed by youthful offenders will be exercised by the Juvenile Court. Had the legislature intended otherwise an amendment could easily have been incorporated in section 5(3) giving jurisdiction over offences under the special laws to the respective Tribunals set up under those laws. This not having been done, we are of the view that the Children Act, being a special law in respect of, inter alia, trial of youthful offenders, preserves the jurisdiction over them in respect of all offences under any law, unless specifically excluded.
>
> 56. In this regard support may also be taken from the Indian jurisdiction. In the case of In re: Sessions Judge, Kalpetta, 1995 Cri.L.J. 330 a juvenile below 15 years of age was charged under sections 450, 376 and 506(ii) of the (Indian) Penal Code and section 3(1)(xii) of the Scheduled Castes and Scheduled Tribes (Prevention of

Atrocities) Act, 1989. It appears from the decision that, "Section 20 of the 1989 Act states that save as otherwise provided in the Act, the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force…." The question posed on reference by the Sessions Judge to the High Court was whether this last noted provision would override the provisions of the Juvenile Justice Act, 1986 which states that a juvenile as defined in the 1986 Act who has been brought before the Sessions Court can only be proceeded against by a Juvenile Court established under the 1986 Act. The Court after deliberation reasoned that the 1989 Act aims at giving protection to the Scheduled Caste and Scheduled Tribe communities against whom atrocities are being committed. The Act was concerned with victims of the crimes and not the offenders. In their lordships' view the overriding power given by section 20 of the Act cannot be extended to nullify the provisions contained in the 1986 Act. Their lordships concluded:

> "… it can safely be concluded that Parliament totally excluded the jurisdiction of ordinary Courts in relation to juvenile offenders. In other words, jurisdiction of all other Courts established under law is ousted and it is solely conferred on Juvenile Courts in so far as juvenile offenders are concerned."

It is our view that the same reasoning would apply, and our Nari-o-Shishu Nirjatan Daman Ain would not override the provisions of the Children Act, 1974, so far as it relates to the prosecution of youthful offenders, since it encompasses the spirit of Article 28(4) of the Constitution."

At this juncture Article 28(4) of the Constitution may be reproduced for ease of reference:

> "28(4)- Nothing in this Article shall prevent the State

from making special provision in favour of women or children or for the advancement of any backward section of citizens."

Hence it is evident that the Act is a manifestation of the mandate of Article 28(4) of the Constitution which effectively allows favourable discrimination, which is otherwise prohibited by the Constitution. It will not be out of place to mention that the subsequent remedial legislation over the same matter was enacted in 2000 under the title Nari-o-Shishu Nirjatan Daman Ain where in section 20(7)[150] a provision has been incorporated that in case of a trial where the offender is a child, the provisions of the Children Act 1974 will be applied as far as possible. However, this does not mandate the full use of the provisions of the Act and might result in improper exercise of discretion by the Court. Section 20(7) appears to be vague as to the extent the provisions of the Children Act will be applicable. It is suggested that for proper dispensation of justice to children, it should be ensured that the tribunal applies all the provisions of the Children Act when dealing with child offenders, otherwise the whole scheme of the justice delivery system for children will be defeated. Hence a special Tribunal may act as a juvenile Court and would accordingly apply all the provisions of the Children Act.

5.2.4 Practical issues

Juvenile Courts may be set up by the Government under powers conferred in section 3 of the Act. The creation of only two juvenile Courts and three Youth Development Centres throughout the country creates numerous logistic problems in practical management of cases. The children's cases are set down for hearing in most instances in Courts situated far and wide. As a result disposition of cases is delayed due to inability of the offenders to attend the Court, often for reasons as mundane as the lack of transport. For practical convenience when a child is sent to the KUK during trial, the hearing of his

150 See also section 17 of the Acid Aporadh Daman Ain, 2002

or her case should automatically be transferred to the Juvenile Court situated in that KUK. Of course, this would create the problem of accessibility of the Court to the witnesses in the case. Moreover, the problem will still remain where the case is pending trial by a Sessions Judge or any Tribunal due to the nature or seriousness of the offence alleged. In such a situation the solution would be to house the child in a suitable remand home, place of safety or observation home (presently non-existent, but mentioned in ***Roushan Mondal***) within the vicinity of the Court or tribunal where the trial is to take place. It is also noted that the distance creates difficulty for the parents/guardian to visit the child. One might suggest that, other than the most serious cases where a question of security is in issue, a child should not have to be detained in a Kishore Unnayan Kendro or any other institution pending his trial. Bail should be considered as a matter of course, unless it would put the child in danger or would defeat the ends of justice.

In the interests of expeditious disposal of cases concerning children, as enjoined by the Children Rules, 1976, the Government should either create more juvenile Courts or at the very least identify and designate Courts in every district which will hear cases concerning children on a priority basis. In addition the Government should consider establishment of more remand homes, places of safety or observation homes, at least one in every district with all necessary facilities as demanded by the principle of best interests of the child. This was recommended in the case of ***The State vs. Secretary, Ministry of Law, Justice and Parliamentary Affairs***.[151]

151 29 BLD 656.

CHAPTER VI

Trial Procedures before the Juvenile Court

The Children Act 1974 and the Children Rules 1976 set out the procedural rules that need to be followed by the juvenile Court, any other Court acting as a juvenile Court under section 4 of the Act or the Court of Session in the case of trial of a child in conflict with the law. In addition, the Constitution provides various safeguards some of which have been discussed already in previous chapters which are also fully applicable to children. Finally, the ICCPR in general and the CRC in particular[152] as binding instruments to Bangladesh through ratification, contain various due process guarantees that are meant to ensure that children alleged or accused of having infringed the law receive a fair trial and treatment.[153]

6.1 Separate trial for children

Bangladesh is possibly unique in insisting on separate trial of child offenders, in any and all circumstances. Even in the most developed countries joint trials are permitted where practical exigencies demand that both the child and adult be tried together, e.g. where the child opts for jury trial, or to avoid the same witnesses deposing twice in relation to the same occurrence.

Section 6(1) of the Children Act provides as follows:

> "6. No joint trial of child and adult. (1) Notwithstanding anything contained in section 239 of the Code or any other law for the time being in force, no child shall be charged with, or tried for any offence together with an adult.

152 See in particular Article 14 of the ICCPR and Article 40(2) of the CRC. The Human Rights Committee and the CRC Committee have provided a detailed interpretation of these provisions in their General Comment No.13 (1984) Administration of Justice and No.10 (2007) Children's rights in Juvenile Justice respectively.

153 Article 40 (1) of the CRC sets out the ideal behind the special provisions for children in conflict with the law by providing that "States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society." Article 14 (1) of the ICCPR provides that "All persons shall be equal before the Courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law" and in (4) In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

(2) If a child is accused of an offence for which under section 239 of the Code or any other law for the time being in force such child but for the provisions of sub section (1) could have been tried together with an adult, the Court taking cognizance of the offence shall direct separate trials of the child and the adult."

There are many decisions of the High Court Division and some of the Appellate Division from which it is gleaned that where children are tried jointly with adults, then the whole trial will be vitiated.

In ***Bangladesh Legal Aid and Services Trust vs. Bangladesh and Others,***[154] it was held as follows:

> "10. (...) It is noted that children are entitled to trial before the Juvenile Courts and positive step should have been made to make their trial in accordance with law of Juvenile Court and not to be tried jointly with the adults."

In the case of ***Saifullah @ Saiful Islam vs. The State***[155] it was held as follows:

> "12. Section 6 of the Act forbids joint trial of a child with an adult and in a proper case the Court should direct separate trial of a child and an adult. So, in view of the legal position, the trial of the appellant along with other adults is vitiated by want of jurisdiction and, for this reason alone, the learned judgment and order of conviction and sentence passed by the trial Court is liable to be set aside."

In ***Rahamatullah vs. The State,*** 59 DLR 520 it was held as follows:

> "20. Under our laws there is no chance of joint trials of a youthful offender and an adult. No matter what offence is alleged, irrespective of the seriousness of the act, a juvenile is to be tried separately from an adult in

154 57 DLR 11.

155 2 BLC 297.

accordance with provisions of the Act. If the case is triable by the Court of Sessions only then the case of the juvenile is to be dealt with under section 5(3) of the Act. Our Courts have strictly interpreted this provision in a number of cases including ***The State vs. Deputy Commissioner Satkhira,*** 45 DLR 643."

Their lordships confirmed the legal principle as follows:

> "26. (...) It is the established principle of law that there is no chance of joint trial of youthful offender and an adult. No matter what offence is alleged, irrespective of seriousness of the act, a juvenile is to be tried separately from adults in accordance with provisions of the Children Act."

6.1.1 Mandatory holding of separate trial

In the case of ***Ismail Howlader and others vs. The State***[156] the High Court Division observed as follows:

> "23. The record of the lower Court reveals that the investigating officer in his police report dated 09-08-1993 has specifically stated that accused Waliur Rahman was 11.5 years old at the time of submission of the said report. This fact is also corroborated by PW2, in his deposition recorded on 9-9-1995. He stated that Waliur was a minor. The prosecution has not produced any evidences to the contrary. The learned Additional Sessions Judge is silent about the issue in the impugned judgement and also in the order sheet. Similarly, the defence side did not raise the issue before and during the whole trial except by an indirect reference in cross-examination of PW2. The result is the admitted joint trial of the then "child" Waliur Rahman with other accused persons."

Thus there appears to be no need for the child to apply for separate trial. It appears that it would be sufficient if there was evidence on record to suggest that the accused was a child

156 58 DLR 335.

within the definition of the Children Act. Referring to the provision of section 6(1) of the Act it was held as follows:

> "24. The provision of section 6 is a mandatory provision and it must be followed in any criminal trial unless specifically provided otherwise in a law. The non-compliance of the said provision for the trial of a child has been found by a Division Bench of the Court in the case of ***Kawsar-un-Nessa and another vs. The State*** reported in **1995 BLD 21** to be an illegality vitiating the trial. We fully agree with the view taken in that case.
>
> 26. (...) Intention of section 6 of the Children Act requiring separate trial of a child is to ensure a special procedure and to secure certain legal rights for the accused child only. An adult is not entitled to those rights and the adult accused persons in this case have not been in any way prejudiced because of the joint trial.
>
> 27. So, we hold that the trial, so far it relates to the accused Waliur, a 'child' at that time, was held in violation of the mandatory provision of section 6. This violation is not curable and therefore, the trial has been vitiated to that extent.
>
> 48. The trial in respect of Waliur Rahman, being a 'child' as he was then, has earlier been found to have been vitiated."

With regard to the adult accused, it was held that the trial was not vitiated because of the joint trial with the 'child' accused Waliur.

In ***Kawsarun Nessa and another vs. The State***[157] it was held as follows:

> "32. As per above definition, the accused-appellant Kawsarun Nessa, a minor ought to have been tried separately. So, the trial of the minor accused-appellant, Kawsarun Nessa together with adult accused is hit by want of jurisdiction and, as such, the trial was vitiated."

157 (1995) 15 BLD 21.

In the case of ***Shiplu and another vs. The State***[158]**,** it was held as follows:

> "6. It is clear from the provisions of section 6 of the Act that trial of a child along with an adult is forbidden by law. So, Mr. Jamiruddin Sircar has argued that in view of the legal position, the trial of appellant Shiplu being not held by a juvenile Court, the trial suffers from want of jurisdiction and the judgement and order of conviction and sentence passed by the trial Court cannot be sustained in law....."

Referring to the definition of a child in the Children Act, it was held in the case of ***Md. Nasir @Nasir @ Nasir Ahmed vs. The State,***[159] as follows:

> "22. In view of the above definition the appellant Nasir ought to have been tried by juvenile Court. Trial of child along with adult is forbidden by law. So in view of the legal position the trial of the appellant being not held by juvenile Court is hit by want of jurisdiction and as such the trial stands vitiated. From this point of view also the conviction cannot be sustained."

Similarly in ***Kadu and others vs. The State,***[160] it was observed and held as follows:

> "17. (….) It would appear from the evidence of PW4 Biddya Miah that appellant Sunil was aged about 15 years only at the time of trial. "Child" means a person under age of sixteen years as provided in section 2(f) of the said Act. Hence it is evident that appellant Sunil was under the age of 15 years at the time of trial and we are thus of the view that the joint trial of appellant Sunil with three other adult appellants was illegal. In view of the provisions of sub-section (1) of section 6 of the Children Act....."

158 (1997) 49 DLR 53.

159 42 DLR 89.

160 43 DLR 163 (1991).

Thus, it would appear that in order to get the benefit of the Children Act it would suffice to show that there is evidence on record, e.g. by way of evidence of prosecution witnesses, that the accused was below the age of 16 years.

6.1.2. Split trial

In the case of ***Ismail Howlader***[161] cited above by reference to section 6(1) of the Act, it was held as follows:

> "22. (....) From a plain reading of the section, it is clear that the trial of a child, as defined in section 2 (f) of the Children, 1974 as a person aged 16 years or below, cannot be held along with an adult and the trial is to be split up. The other provisions of Part II of the Act, particularly sections 7 to 18, relate to the procedure to be followed and the factors to be considered in such a trial. Part II requires that trial of a child is to be held by a Juvenile Court established by the Government for a specified area. However, according to section 4, an Additional Sessions Judge, among others, may also exercise the powers of a Juvenile Court."

The provisions of section 8(1) of the Act are quite unambiguous. Hence, where relevant the Court must decide on separate trial.

However, it has been held that the failure to split up the trial will not vitiate the trial of the adult accused. The case of ***Ismail Howlader***[162] decided as follows:

> "25. Now, the question is, whether the entire trial has been vitiated because of the non-compliance of section 6 in relation to one of the 7 (seven) accused persons, when the other 6(six) were adults. This question has not been specifically addressed in Children Act, 1974 or, to our knowledge, in any other law, or even in that case. .....

161 58 DLR 335.

162 Op cit.

> 26. Turning back to the question of legality of the trial of the adult accused persons, it appears from the record that in holding the trial of these adult persons there was no illegality and it was lawfully held. The appellants have not questioned the legality of the trial in relation to them. So, we are of the view that the trial has not been vitiated because of the joint trial with the then "child" accused Waliur. ...."

Although it was held that the trial of the adults with the juveniles did not vitiate the trial of the adults, it would have been a waste of resources to hold the trial together, only to be told that the trial of the child accused was vitiated and would have to take place in accordance with law. All the witnesses would have to be called again for the trial of the children to take place. If the trials had been separated at the initial stage then both trials could have taken place, one in the morning and one in the afternoon. That would have saved the witnesses from having to come back again in order to give evidence about the same incident.

6.1.3 Effect of a vitiated trial

These days a practice has been developed by the investigating police to prepare and file separate charge sheets in respect of child offenders when they are alleged to have been involved in the commission of any offence along with an adult. It is also the practice to indicate that the child offender should be tried in accordance with the provisions of the Children Act, 1974.

Even in cases where no separate charge sheet is prepared for the child offender and the Court comes to a finding that any of the accused is a child, the duty lies with the Court to split the trial and ensure that the child is tried in accordance with the provisions of the Children Act.

Section 8 of the Children Act provides as follows:

> "8. **Adult to be committed to sessions in a case to be committed to sessions**.-(1) When a child is accused along

with an adult of having committed an offence and it appears to the Court taking cognizance of the offence that the case is a fit one for committal to the Court of Session, such Court shall, after separating the case in respect of the child from that in respect of the adult, direct that the adult alone be committed to the Court of Session for trial.

(2) The case in respect of the child shall then be transferred to a Juvenile Court if there is one or to a Court empowered under section 4, if there is no Juvenile Court for the local area, and the Court taking cognizance of the offence is not so empowered:

Provided that the case in respect of the child shall be transferred to the Court of Session under section 5(3) if it is exclusively triable by the Court of Session in accordance with the Second Schedule of the Code."

Although the concept of committal is no longer existent within our law, subsection (2) of section 8 and the proviso to the section thus makes it abundantly clear that the trial of the child offender would in any event be held in accordance with the provisions of the Children Act, 1974.

In the case of ***Ismail Howlader,*** cited above, it was held that since the accused had ceased to be a child, he would not be retried. It was held as follows:

"49. It is to be noted that, according to the charge-sheet, accused Waliur Rahman was a boy of eleven and half years in 1993. Obviously he is no more a child and his retrial as a child is neither possible nor desirable in the facts and circumstances of the case.

51. (...)

(c) The trial of convict appellant Waliur Rahman was in violation of section 6 of the Children Act, 1974 and accordingly it is held that the trial has been vitiated in relation to him, but his retrial would 'not' be proper and he is also acquitted of the charge."

Prayer for a fresh trial was also rejected in the case of ***Md. Nasir***, cited above, where it was held as follows:

> "23. It is submitted by the learned counsel for the State that since the trial was not held in accordance with law the case should be sent back on remand for fresh trial in accordance with law. This submission cannot be accepted in view of the fact that the appellant has already passed several years in detention. If re-trial is ordered he will be required to undergo the ordeal of fresh trial and that will cause immense hardship to him. In view of this fact re-trial cannot be ordered."

6.2 Sittings of the Court

The procedures and mode of trial laid down in sections 7 to 13 set the children's justice system totally apart from the conventional criminal justice system. In a way these sections indicate and reinforce the mandate of the international instruments to treat children differently and to shield them from the rigours of the conventional criminal justice system.[163] Hence the rights and privileges should be jealously guarded. However, financial and logistic constraints and paucity of will preclude us from giving effect to the true intendment of the provisions of the Children Act.

Section 7 of the Children Act provides as follows:

> 7. Sittings, etc. of Juvenile Courts. (1) A Juvenile Court shall hold its sittings at such place, on such days and in such manner as may be prescribed.
>
> (2) In the trial of a case in which a child is charged with an offence a Court shall, 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 sitting of the Court are hold.

163 See Roushan Mondal op cit

Apart from the two specifically established Juvenile Courts, our Court system is not designed to allow child offenders to be tried in buildings separate from those where other criminal trials are held. Paucity of accommodation in the Court buildings does not allow for trials of children to be held in rooms separate from those where trials of adults are held. However, the least that is expected is that trials of children must take place at times different from those of adult trials. Unfortunately any lapses in this regard are seldom agitated before the higher Courts and do not see the limelight.

In the case of ***Munna vs. The State***[164] the failure of the trial Court to follow the procedures laid down in the Children Act was challenged. It was argued by the defence Counsel before the High Court Division in appeal that the trial Court had not followed the mandate of the law as laid down in section 7 of the Children Act. On receipt of the case records for trial the Court did not register the same as a Juvenile Court nor did the trial Judge state that the proceeding was that of a Juvenile Court case nor did he follow or observe the provisions of section 7 of the Act. Referring to the claim of the defence that the accused were under the age of 16 years at the time of the trial, and the various provisions of the Act not having been followed, the trial was vitiated, it was observed by their lordships in the High Court Division as follows:

> "13. (.....) Learned Advocate thus argues that admittedly on the date of occurrence, during trial and even on the date of judgement of the case both the above accused appellants were minors and, as such, the case was triable under the provisions of the Children Act, 1974 by a Juvenile Court.
>
> 14. Learned Advocate does not dispute that Additional Sessions Judge, 4th Court, Mymensingh which held the trial of the case was Juvenile Court as per provisions of section 4 of the Children Act 1974 but he alleges that no

164 7 BLC (HCD) 409

where within the proceeding of the case said Court expressed itself as Juvenile Court nor the provisions of section 7 of the Act were strictly observed and complied with as to the holding of the trial in a specified manner stated therein and, according to him, due to non-compliance of the provisions of section 7 of the Act by the said Court the trial must be vitiated.

15. He expresses his grievances that provisions of sections 51 and 71 of the Act were not at all complied and observed by the trial Court as words "conviction" and "sentenced" were used in the impugned judgment contrary to the provisions of section 71 of the Act and minor accused-appellants were sentenced to imprisonment for life (transportation for life) on which there has been total restriction as punishment of a child under provision of section 51 of the Act.

16. He refers to provisions of section 52 of the Act and contends that trial Court did not properly consider the provisions of said section 52 according to which maximum period for detention of the child has been fixed to be not more than 10 years but in any case such period cannot exceed the age of eighteen years of the child offender.

17. He earnestly contends that due to either violation or non compliance of the specific provisions of the Children Act 1974 as above, the trial of the case must be vitiated and the impugned judgment and order of punishment must be set aside."

Their lordships then referred to the arguments put forward by the learned Attorney-General as follows:

"20. (.....) learned Attorney- General appears and refers to sections 3-8, 51-52 and 71 of the Children Act 1974 and he shows from provisions of sections 5(3) and 8 of the Act that if the child is charged with offence exclusively triable by Court of Sessions then the case record should

be sent there for such trial. He submits that if the child is charged for offence under section 302 and if the charge is proved on evidence at the trial then there will be no scope for the Court to award sentence less than what has been fixed as sentence for the offence he has committed. He contends that in section 51 there is restriction to the effect that "no child shall be sentenced to death, transportation for life or imprisonment.

21. He argues that no child shall be sentenced to death. But he then refers to 1st proviso of section 51 of the Act wherein it has been provided that "if the child is found to have committed an offence of so serious a nature that the Court is of opinion that no punishment, which under the provision of this Act it is authorized to inflict is sufficient….. the Court may sentence the child to imprisonment or order him to be detained in such place and on such conditions as it thinks fit.

22. He submits that no quantum (period) of "imprisonment" appears in 1st proviso as above has been available anywhere within the Act. But he shows from section 52 of the Act which is relating to "commitment of child to certified institute" that period of detention has been stated to be ".....not less than two and not more than ten years, but not in any case extending beyond the time when the child will attain the age of eighteen years.

23. In other words, he shows from sections 51 and 52 of the Act that the Court acting under provisions of this Act may award sentence of imprisonment in some case where it is found by the Court to be necessary in case the nature of offence committed by the child be of "serious nature". His contention is that the order of detention can be given only when the Court thinks it fit and proper to send the child offender to any certified institute or Remand Home as provided by sections 19 and 20 of the Act. He submits clearly that maximum period of 10 years as appears in section 52 of the Act can in no manner be applicable in

case of sentence of "imprisonment" as appears in 1st proviso of section 51 of the Act . He also argues that if after trial child offender is found liable for the offence under section 302 Penal Code the Court will be entitled to sentence him to imprisonment for life which is provided as punishment for the offence committed under section 302 Penal Code besides sentence of death which is prohibited in case of child offender under section 51 of the Act.....

25. (…) learned Additional Attorney-General (…) further argues that unless contrary is proved presumption under section 114(g) Evidence Act may be taken that provisions of section 7 of the Children Act were duly observed and complied with by Additional Sessions Judge 4th Court Mymensingh while holding trial of the case. He contends further that provisions of section 7 of the said Act are found to be as directory in nature and not mandatory in the absence of any penal provision therein. Therefore, according to him, even if there be any non-compliance of the provisions of section 7 of the Act by the Court it will not vitiate the trial of the case.

26. With regard to section 71 of the Children Act 1974 learned Additional Attorney-General argues that (…) there has been no total prohibition or restriction as to the use of words "conviction" and "sentenced" in relation to children or youthful offenders if necessary by the Court while disposing of the case."

Their lordships' observations and their conclusion on the issue were stated as follows:

"29. (…) From the record it appears that charge-sheet was submitted after investigation by the police under sections 302/34 Penal Code against two accused namely, Abdur Rahman Munna and Hamidul Islam both of whom were stated to be minors at the time of occurrence. Such fact about the accused to be minor was disclosed in Exhibits

7, 8, i.e. statements under section 164 Cr.P.C. of both the accused recorded by PW8 Mr Amjad Hossain Khan, Magistrate 1st Class, Mymensingh. So, it is undisputed that the offence of the case alleged to have been committed by the two minor accused as above was exclusively triable by the Court of Sessions and steps as per sections 5(3) and 8 of the Act as above case were rightly taken by the lower Court (Court of Magistrate).....

32. When section 4 of the Children Act 1974 clearly empowers Sessions Judge and Additional Sessions Judge to exercise the powers of Juvenile Court in the case involving child offenders for offence exclusively triable by Court of Sessions registration of the case after receipt of case record as simple Sessions case and non registration of the same as Juvenile Court case separately by the Sessions Judge will expose no gross irregularity in the matter. Similarly, while holding trial of such a case received by transfer from Sessions Judge if the Additional Sessions Judge does not note or mention in the proceeding of the case record fact of the case being Juvenile Court case and also does not describe itself as Juvenile Court while passing judgment of the case, it will also not be gross irregularity and illegality to negative proceeding and its ultimate decision thereon unless it is alleged or shown specifically that there has been miscarriage of Justice or failure of justice causing serious prejudice to the accused. The appellants failed to show any such specific prejudice caused to them for above irregularity as alleged.

33. Provision, of section 7 of the Act apparently shows that the same are directory and not mandatory.....

34. On scrutiny no penal provision as to the consequence of any non-compliance is available in the Act itself.

35. (.....) In Rules 3 and 4 of the said Children Rules 1976

no penal provisions are inserted as to the consequence of non-compliance of the said provisions.

36. In the case of ***Banarasi Das vs Case Commissioner UP*** reported in **AIR 1955 All 86** it has been held that one of the tests for determining the nature of the provision is to see whether it entails any penal consequences and in cases where disobedience of a provision is made penal it can safely be said that the provision is mandatory. If no penalty is provided for non-compliance with the provision of the statute it may be held non mandatory.

37. In the light of above decision it can be said that when no penal provision is provided in section 7 of the Act consequence of non-compliance are to be treated as directory and not mandatory. Therefore if there be any non-compliance it will not vitiate the proceeding of the case in question.

38. (…) In the absence of anything specific it may be presumed that said Court acted properly in holding the trial in compliance with the provisions of section 7 of the Act. Under section 114 (e), Evidence Act presumption can be taken that judicial and official acts have been regularly performed.

39. Even if it is presumed that there was non-compliance of the provisions of section 7 of the Act then also the trial cannot be vitiated unless it is shown that there was either miscarriage of justice or failure of justice or serious prejudices were caused to the appellants by alleged non-compliance as we already noticed earlier....."

With respect it may be pointed out that in principle their lordships' observations and conclusion on this particular issue with regard to section 114(e) of the Evidence Act was correct. Certainly, the presumption provided by section 114(e) of the Evidence Act may be attracted. There was nothing palpably on record to suggest that the relevant provisions were not followed. But it must be pointed out that the provisions of the Children

Act are of a peculiar species, purposely taking trial of children outside the scope of conventional criminal trials. Thus the failure to comply with the provisions regarding mode of trial would defeat the particular aim and goal of the legislation. Hence strict adherence of the provisions must be ensured.

In a more recent case, ***Fahima Nasrin vs Government of Bangladesh and others,***[165] with regard to the application of the provisions of section 7, it was observed:

> "23. (....) we are also not aware that the trial was in contravention of the provision of sections 7 to 13. We can only presume, in the absence of any allegation to the contrary, that the proceedings followed the requirements laid down in the Act."

The accused challenge the procedural irregularities only in very rare cases. Hence it is difficult to gauge whether violations of the provisions are occurring.

On the other hand, the presumption under section 114(e), mentioned in the two cases cited above, may be rebutted in any given case by adverting to action taken by the trial Court which tend to show that the provisions of the Children Act were not followed, e.g. when the offending child is sent to jail custody pending trial of the case or is sentenced to punishment not in accordance with the provisions of the Act. In such cases it may legitimately be argued that the assumption of jurisdiction as a juvenile Court was a purely perfunctory exercise and in essence the child was treated as an adult offender and was tried as such.

In the case of ***Fahima Nasrin***, cited above, it was observed:

> "23. (.....) We find from the records that from the time of his arrest till the time of his bail on 4.3.2004, the offender was kept in jail custody, which is in utter violation of the provisions of the Act.....
>
> .... the learned trial Judge, to his credit, has observed that the offender is a child and is required to be dealt with

165 61 DLR 232

> under the provisions of Children Act, but then he failed miserably in not sending him to a remand home or place of safety as required by section 49(2) of the Act...."

It was observed in ***BLAST vs Bangladesh***[166] as follows:

> "9. (…) So, the provisions of the Children Act, 1974 have provided different processes and modes of arrest, detention and trial of the Juvenile Offenders below the age of 16 years."

In the ***Munna*** case their lordships alluded to the oft-used principle that if there is no consequential sanction provided by the statute, then the use of the word "shall" denotes only a directory measure and failure to comply does not vitiate the trial. With respect, it must be pointed out that the Children Act is a special law and as such, it is all the more necessary that all the provisions are followed. There is no scope for using general principles of law to defeat the special provisions. The cases discussed in this treatise show that in many instances the Courts have held the trial to be vitiated where legal provisions were not followed, e.g., when youthful offenders were tried with adults.

6.3 Mode of trial

The Children Rules, 1976 in Rule 4 set out the mode of trial that needs to be followed. As highlighted above, these rules give details of the procedures that set the juvenile justice trial apart from the adult criminal justice trial.

6.3.1 Home-like atmosphere

> "Rule 4. Procedure to be followed by Court.—-(1) The hearing of all cases and proceeding shall be conducted in as simple a manner as possible without observing any formality grid care shall be taken to ensure that the child against whom the case or proceeding has been instituted feels home-like atmosphere, during the hearing."

166 7 BLC (HCD) 85

The philosophy behind this provision is to ensure a child-sensitive environment within the Court. A Court setting whereby the judge is sitting on the Bench (raised rostrum) and the child is sitting or standing at the dock guarded by police officers can be very intimidating and traumatising for a child, especially for small children. Therefore, in many other countries, special child-friendly courtrooms and facilities have been designed whereby the judge, the child and the other key parties such as the parents/guardians, lawyer, prosecutor and probation officer sit around a roundtable and the trial is held in a more informal manner through discussions between the parties. Alternatively, sometimes children are seated in a separate room and connected to the courtroom through the use of audiovisual aids. This method is often used in case of child victims and witnesses so as not to confront them with the offender. In Bangladesh, only the two permanent Juvenile Courts have a special courtroom reserved solely for children. However, in practice these are not child-friendly and look very much like adult Courts with docks and benches. Hence, UNICEF has been supporting the Juvenile Courts to make the courtrooms more child-friendly. However, most other Courts have only one courtroom and no special facilities for children. Nevertheless, until this situation is addressed, there are still many small things that can be done to ensure a more child-friendly trial such as using the courtroom on certain days exclusively for the child, for the judge to come down from his rostrum, using the chambers of the judge to conduct the trial, not wearing formal Court garb, etc. In Kuala Lumpur, for example, the courtroom has two entrances, one from the main Court compound, and the other directly from the street. On days when trials of children take place the door to the Court compound is kept closed, thus secluding the courtroom from the rest of the Court compound. The parties enter from the street and leave without realising the bustle of the Court arena.

6.3.2 Guarding of the child during trial

> "Rule 4(2) The Court shall see that the child brought before it is not kept under the close guard of a police

officer but sits or stands by himself or in the company of a relative or friend of a Probation Officer at some convenient place."

In the courtroom under no circumstance should children be handcuffed and the police officer/guard should leave the child alone unless warranted otherwise, for security reasons.

6.3.3 Examination of witnesses

> "Rule 4(3) When witnesses are produced for examination, the Court shall freely exercise the powers conferred on it by section 165 of the Evidence Act, 1872, so as to bring out any point that may go in favour of the child."

Rule 4 allows relaxation of the provisions of the Evidence Act and directs that the Court should take certain steps in order to ascertain the true situation of the child so that all necessary information may be gathered before any decision is taken in respect of the child. In the adversarial system of Bangladesh this means that it shall fall upon the Court to ensure that all the relevant and appropriate questions are asked in examination of the witness which may benefit the child in his or her case. It must be noted that Article 40 (2) (b) (iv) of the CRC and Article 14 (3) (e) of the ICCPR go beyond this by providing that children have the right to examine or have examined witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality.

6.3.4 Addressing the child using child-friendly language

> "Rule 4(4) In examining a child and recording his statement, the Court shall be free to address the child in any manner that may seem suitable in order to put the child at ease and to elicit true facts not only in respect of the offence of which the child is accused of but also in respect of the home surroundings and the influence to which the child has been subjected to and the record of the examination shall be in such form as the Court may

consider suitable having regard to the contents of the statement and circumstances in which it was made."

The use of child-friendly language is crucial to ensure the full participation of the child and its right to be heard in the proceedings. A friendly demeanour of the officials, including the judge, and a caring attitude towards the child would put him at ease, as is the mandate of this Rule. Where a child does not speak Bangla, this implies that it is the right of a child to get the free assistance of an interpreter.[167] Equally, even if the child speaks Bangla, but it happens to be one of the many dialects, then the proceedings must be explained to him in a way that he understands. In this regard special provisions must be made for the physically or mentally challenged, including provision of use of sign language, where necessary.

6.3.5 Report by the probation officer

"Rule 4(5) Where a child has pleaded guilty or has been found guilty, the Court, instead of making an order upon such finding, may direct the Probation Officer or such other person as may be deemed fit by the Court in Form A for submission of a report which, among other things, shall contain family background of the child, his character and antecedents. His physical and mental conditions and the circumstances under which the offence was committed or any other information considered important in the interest of the child concerned.

Rule 4(6) After considering the report submitted under sub-rule (5) and hearing persons referred to in clauses (b), (c) and (d) of section 9, the Court may give such direction or order for the detention or otherwise of the child as it considers fit."

In chapter III, the duties of the probation officer were discussed upon arrest of the child. These duties continue throughout the entire juvenile justice process. Rule 4 and section 15 of the Act indicate the necessity for the Judge to engage the services of the

167 Article 40 (2) (vi) of the CRC.

Probation Officer. Where the Court finds the child guilty or the child has pleaded guilty, it has the duty to consider the report of the Probation Officer, which presupposes the engagement of the probation officer for his services in submitting a report on the child. And after consideration of such report the Court may make an order. As such, the report can play a crucial role in the determination of the Court's choice of order to be passed in respect of the child. Although it appears that the Children Rules make it an option for the Court to request for submission of the report, the parent Act in section 15 makes it compulsory to have regard to the report of the Probation Officer. Moreover, the international standards make this a mandatory requirement except for minor offences. Thus, Rule 16 (1) of the Beijing rules provides as follows:

> "16.1 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."

The social report should contain relevant facts about the juvenile, such as social and family background, school career, educational experiences, etc. In Bangladesh, unfortunately, due to ignorance of the legal counsel representing the child, passiveness of the trial judge and lack of manpower due to the limited number of probation officers and social workers assigned with probation officer's duties, often no probation report is formulated.

The role of the probation officer's report in the choice of disposition as part of the sentencing process by the Court will be further discussed in chapter VII.

6.3.6 Presence of persons in the courtroom

The special character of the law relating to trial of child offenders is apparent also from the provisions of sections 9 to

13 of the Act. In a routine criminal trial no one is excluded from the hearing other than for reasons of security. In the trial of children the law provides who shall be present and who may be excluded or withdrawn during the hearing. Section 9 of the Act provides as follows:

> "9. Presence of persons in Juvenile Courts. Save as provided in this Act, no person shall be present at any sitting of a Juvenile Court except-
>
> (a) the members and officers of the Court;
>
> (b) the parties to the case or proceeding before the Court and other persons directly concerned in the case or proceeding including the police officers;
>
> (c) parents or guardians of the child ; and
>
> (d) such other persons as the Court specially authorises to be present."

The reason behind limiting the number of persons present in Court is to minimise the publicity of the child's alleged involvement in crime.[168] Also the closeness of the hearing shields the child from outsiders and makes her/him feel more of the 'home-like atmosphere' which is the intendment of Rule 4 of the Children Rules 1976.

The presence of the parties to the case must be interpreted to infer that the accused child being the primary concerned party has a right to be present at the hearing. It is all too often that this provision is not complied with in practice. There are various reasons for this. There is a lack of understanding of the necessity for the child to be present and be involved in the trial. The international standards expressly provide for the right to be heard and effectively participate in the proceedings. In addition, there are practical limitations such as the distance between the

168 See Article 16 and 40 (2) (b) (vii) of the CRC and Rule 8 of the Beijing Rules which will be discussed later in this chapter. The CRC Committee in its General Comment no. 10 has recommended that Court and other hearings of a child in conflict with the law should be conducted behind closed doors. Exceptions to these rules should be very limited and clearly stated in the law.

Court and the place where the child is being detained pending trial and the lack of transport to ensure presence of the child at the hearings. However, these limitations need to be addressed and solutions need to be found to overcome these problems such as, for example, allowing the trial to take place within the vicinity of the place where the child is detained, or to have mobile Courts or via video link, etc.

6.3.7 Withdrawal of persons

For the sake of protecting the child or in order to enable him to be more relaxed in the Court, persons, particularly strangers may be excluded from the hearing. Under this provision, persons whose presence might have been permitted by the Court may later be excluded, including close relatives of the child. Section 10 of the Act provides:

> "10. Withdrawal of persons from Courts. If at any stage during the hearing of a case or proceeding, the Court considers it expedient in the interest of the child to direct any person, including the parent, guardian or the spouse of the child, or the child himself to withdraw, the Court may give such direction and thereupon such person shall withdraw."

6.3.8 Dispensing with attendance of child

Though rarely used, it is within the power of the Court to dispense with the child's attendance during the hearing. Section 11 of the Act provides as follows:

> "11. Dispensing with attendance of child. If at any stage during the hearing of case or proceeding, the Court is satisfied that the attendance of a child is not essential for the purpose of the hearing of the case or proceeding, the Court may dispense with his attendance and proceed with the hearing of the case or of the proceeding in the absence of the child."

This provision may be used especially when, for example, the regular attendance of the accused in Court is likely to disrupt his

education or where the child is kept confined in a place which is not easily accessible to the Court where the trial takes place and the trial is prolonged due to inability of the child to be present on dates fixed for hearing. This provision, providing wide discretion given to the Court to determine when the attendance of the child is not essential, is in contradiction with the international standards. Article 14 (3) (d) of the ICCPR provides that everyone charged with an offence has the right to be tried in his presence. CRC and the Beijing Rules require that the child is provided with the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly or through a representative or an appropriate body.[169] The CRC Committee has held that the child has the right to be heard directly and not only through a representative or appropriate body.[170] In addition, the CRC and Beijing rules provide that the child has the right to able to effectively participate in the trial.[171] Unfortunately, the Children Act and Rules do not provide for this right explicitly, but implicitly from the provisions it is clear and common sense that this should be a given, and natural for the Court to ensure during the trial proceedings.

6.3.9 Withdrawal of persons at the time of child's deposition

The Children Act also protects the child witness in a public hearing of a criminal case. In order to protect the privacy of a child and also to prevent her or his exposure to embarrassment as well as to prevent any possible intimidation from the relatives of the accused, for example, or any other person present in Court, the Court is empowered to order withdrawal of

169 Article 12 of the CRC provides that "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

170 General Comment no. 10, para. 43-45.

171 Article 40 (2) (b) (iv) of the CRC and Rule 14 of the Beijing Rules. See also Committee on the Rights of the Child, General Comment No.12, Right of the Child to be Heard, CRC/C/GC/12, 2009 which in detail discusses the right to be heard in the context of judicial proceedings.

any person present in the Court, other than parties to the case and lawyers and officials. Section 12 provides as follows:

> "12. Withdrawal of person from Court when child is examined as witness.- If at any stage during the hearing of a case or proceeding in relation to an offence against or any conduct contrary to decency or morality, a child is summoned as a witness, the Court hearing the case or proceeding may direct such persons as it thinks fit, not being parties to the case or proceeding, their legal advisers and the officers concerned with the case or proceeding, to withdraw and thereupon such persons shall withdraw."

This is the only provision affording protection to a child witness. For obvious reasons, the provision is quite ineffective since the witness will have to face the accused which can be inhibiting as well as intimidating. The lack of any witness protection scheme leads to many victims/witnesses not coming forward to depose. As a result, many cases end in acquittal of the accused on technical grounds and justice cannot be ensured. In many countries provisions are in place to take evidence of victims via close circuit television link or video-conferencing. In this way the victim/witness will give evidence sitting in another room and may be seen and observed from the Courtroom by all those present there. The victim/witness is also able to observe the Court proceedings. The arrangement protects the witness/victim from direct physical aggression or contact and also ensures security on departure from the Court premises. Many incidents are reported where the relatives of the accused present in Court intimidate, threaten or even physically attack the witness in the courtroom or in the Court premises or simply hurl abuse at them.

6.3.10 Attendance of child's parent/guardian

The parents of a child are his or her natural care-givers and well-wishers. Every parent however rich or poor strives to provide the best facilities for their offspring to the best of their ability. Equally, when any child goes astray the parent ought to be informed. Every child's activity, particularly wrong-doings,

is the responsibility of her or his parents. Hence, their presence in Court is necessary both in their own interests and in the interests of the child. The CRC provides that throughout the proceedings, children have the right (emphasis added) to have a parent or legal guardian present unless such presence would contravene the best interests of the child.[172] Of course, there may be exceptional cases, as mentioned earlier, where the Court may take the view that their exclusion is necessary for the sake of the child. Section 13(1) provides as follows:

> "13. **Attendance at Court of parent of a child charged with offence, etc.-** (1) Where a child brought before a Court under this Act has a parent or guardian, such parent or guardian may in any case, and shall, if he can be found and if he resides within a reasonable distance, be required to attend the Court before which any proceeding is held under this Act, unless the Court is satisfied that it would be unreasonable to require his attendance."

Again, the final decision lies with the Court, which will decide whether it is in the best interests of the child to have her/his parents/guardian present in Court.

6.3.11 Protection from publicity

Exposure of children, while facing criminal proceedings or undergoing trial, should be kept to the minimum.[173]

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[172] Article 40 (2) (iii) of the CRC provides for the right of the child "To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians."

[173] Article of 40 (2) (vii) CRC provides that a child has the right to have his or her privacy fully respected at all stages of the proceedings. Similarly, see also Article 16 of the CRC. The Beijing Rules provide in Rule 8.1 that the juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labeling and in Rule 8.2 that in principle, no information that may lead to the identification of a juvenile offender shall be published. Article 14 (1) of the ICCPR provides that the press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

It was held in ***Baktiar Hossain***,[174] cited above, as follows:

> "7. Juvenile Courts are created in recognition of special needs of the young offenders so that a child appearing before the Court does not come into contact with adult offenders, or come out of the trial with unnecessary and avoidable stigma to his name or does not pass through the trauma and exposure of a public trial. But this benefit is available to an offender when 16 years of age and not to anyone else."

It is an offence under Section 17 of the Act to name or identify any accused in any media. Such act is punishable under section 46 of the Act.

Section 17 of the Act provides as follows:

"17. Prohibition on publication of report disclosing identity, etc., of child involved in cases. No report in any newspaper, magazine or news sheet nor any news giving agency shall disclose any particular of any case or proceeding in any Court under this Act in which a child is involved and which leads directly or indirectly to the identification of such child, nor shall any picture of such child be published:

Provided that, for reasons to be recorded in writing, the Court trying the case or holding the proceeding may permit the disclosure of any such report if, in its opinion, such disclosure is in the interest of child welfare and is not likely to affect adversely the interest of the child concerned."

Section 46 of the Act provides as follows:

> "46. **Penalty for publication of report or pictures relating to child.-**Whoever publishes any report or picture in contravention of the provisions of section 17 shall be punishable with imprisonment for a term which may extend to two months, or with fine which may extend to Taka two hundred, or with both."

115 47 DLR 542

However, in spite of the above provisions, publicity in the print and electronic media is pervasive and a most common occurrence. In the case of ***Fahima Nasrin***[175] it was stated as follows:

> "39. In view of the fact that the matter involves a child, we wish to remind all concerned that section 17 of the Children Act, 1974 provides that the picture, name and identity of a child offender shall not be published in the media and any such publication would be an offence under the said Act. Hence, the publication of any photograph or the real name, address and identity of the detenu is strictly prohibited in any form or manner whatsoever in any electronic, print or other media."

The point was reiterated in the case of ***The State vs. Secretary, Ministry of Law, Justice and Parliamentary Affairs***[176] and again in the case of ***The State vs. Secretary, Ministry of Home Affairs*** [Suo Motu Rule No.1 of 2010](unreported) [judgement delivered on 02.03.2010].

The aim of the prohibition on publicity is abundantly obvious. Allegation of criminal activity against any person creates stigma, which can often last a lifetime. If children are exposed to such stigma, they may face untold prejudices in every moment of their lives. Moreover, in the context of our predominantly conservative society, the victims of crime, particularly girls who are subjected to rape and abduction, are likely to end up being ostracised. Unmarried girls lose their social integrity and are often demoralised sufficiently to lead them to suicide. Hence the importance of this legal provision cannot be overemphasised.

6.4 Other Constitutional guarantees for a fair trial

As mentioned above, the Children Act does not contain all guarantees for a fair trial. There are a number of Constitutional guarantees which also need to be ensured when dealing with

175 61 DLR 232.

176 29 BLD 656.

children in conflict with the law. A number of the provisions are general in application and apply to all stages of the proceedings. They have been discussed in chapter III and include the principle of non-discrimination (art. 27 and 28) and the right to protection of law (art.31). The more specific provisions that are especially important in the trial stage are discussed below. It must be noted that most of these guarantees apply also to the pre-trial and sentencing stage. Finally, while these provisions are discussed here in relation to children in conflict with the law, many equally apply to all children in contact with the law, in particular child victims and witnesses.

6.4.1 Prompt and direct information of the charges and legal representation

As already mentioned in chapter IV on Arrest, Bail and Pre-Trial detention, Article 33(1) provides for the right to prompt and direct information of the charges and legal counsel at the moment of arrest and onwards. It states as follows:

> "33(1) No person who is arrested shall be detained in custody without being informed, as soon as may be of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice."

The right to be "informed as soon as may be" of the grounds for arrest, implies that this should be done at the stage of arrest by the respective police officer making such arrest. However, in practice, it is the case that many children are not informed why they are arrested and charged with an offence. Therefore, this provision should equally be applied at the trial stage where it falls upon the prosecutor or the judge to inform the child of the charges brought against him. It is crucial that the child is informed in a language he/she understands. It is not sufficient that the legal counsel or the parents of the child understand the charges, they must be explained directly to the child. As children are not familiar with legal jargon, charges will have to be explained in such a manner that the child understands. [177]

[177] See General Comment No. 10, para-47-48.

The right to legal representation starts at the moment of arrest of the child and continues throughout the trial proceedings.[178] It must be noted that whereas adults can defend themselves, children, due to their immaturity and lack of understanding of the law, are not in a position to do so. Therefore, a trial should never be conducted if there is no legal representation for the child. In practice, especially where the parents of the child do not have adequate resources, lawyers are often assigned on a very short notice and are throughout the trial substituted for others. As a result, they are often not prepared and not aware of all the facts of the case. The child and his legal counsel must be given adequate time and facilities for the preparation of his/her defence.[179] Preferably, the same legal counsel, provided he/she is qualified and has in-depth knowledge of the provisions of the Children Act, should assist the child from the moment he/she is arrested until the trial has concluded. It is also necessary to ensure that an advocate of sufficient standing and conversant with the laws and Rules relating to justice for children is appointed to represent her/him. Moreover, at all stages during the proceedings the child should be legally aided which should be ensured by the District Legal Aid Committee which is headed by the District Judge.

6.4.2 Presumption of innocence

The fundamental principle of criminal jurisprudence is that every person shall be presumed to be innocent unless he is proved to be guilty by a competent Court of law. Thus it must be remembered that children who are accused of having committed an offence must be treated in accordance with this principle.[180]

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178 See Article 40 (2) (iii) of the CRC which provides that the child has a right to legal and other appropriate assistance. Similarly, Article 14 (3) (d) of the ICCPR provides that everyone charged with a criminal offence has the right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it. See also General Comment No. 10 para. 49-50.

179 See Article 14 (3) (b) of the ICCPR.

180 See Article 40 (2) (b) (i) of the CRC and Article 14 (2) of the ICCPR.

6.4.3 Speedy trial/prompt decision

Article 35(3) of the Constitution states as follows:

> "Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial Court or tribunal established by law"

Rule 3 of the Children Rules provides that:

> " **3. Sitting and Adjournment of Court.-** A Court shall hold its sittings at least once in a week or as often as may be necessary for the purpose of expeditious disposal of all cases and proceedings instituted under the Act and may adjourn the hearing of a case or proceeding from time to time as may be necessary."

Unfortunately, neither the Constitution nor the Children Act/Rules specify the maximum duration of a trial. In the best interests of the child, the time between the commission of the offence by the child and the final response by the Court to this act should be as short as possible.[181] In practice, due to the backlog of cases pending before the Courts, the period from the beginning of the trial until its conclusion can last several years. Hence, there are cases where children, who are charged with a minor offence such as theft, languish in prison or juvenile development centres for years. This is clearly unacceptable and all efforts should be made to change this practice immediately. Priority must be given by the Courts in dealing with cases with children and ensuring that these cases are disposed of without delay in a manner respecting the due process guarantees.

6.4.4 Protection in respect of trial and punishment

Article 35 of the Constitution on Protection in respect of trial and punishment embodies various rights which can also be found in the international standards.

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[181] Article 40 (2) (b) (iii) of the CRC provides for the right to have the matter determined without delay. Article 37 (d) of the CRC furthermore provides that the child deprived of liberty has the right to a prompt decision on his/her action to challenge the legality of the deprivation of his/her liberty. See also General Comment No.10, para. 51-52 in which the CRC Committee has recommended that State Parties set time and implement limits which are much shorter than those for adults

It provides as follows:

> 35(1) "No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence."

This provision includes the principle of no retroactive justice.[182] Similarly, Article 40 (2) (a) of CRC affirms that the rule stating that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law, at the time it was committed, is also applicable to children (see also Article 15 of ICCPR). It means that no child can be charged with or sentenced under the penal law for acts or omissions which at the time they were committed were not prohibited under national or international law. In addition it means that no heavier penalty shall be imposed than the one that was applicable at the time when the criminal offence was committed, as expressed in Article 15 of ICCPR, which is in the light of Article 41 of CRC, applicable to children in the States parties to ICCPR. No child shall be punished with a heavier penalty than the one applicable at the time of his/her infringement of the penal law. But if a change of law after the act provides for a lighter penalty, the child should benefit from this change.

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182 Article 40 (2) (a) of CRC affirms that the rule that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed is also applicable to children. Similarly, Article 15 of the ICPPR provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

6.4.5 Not to be punished more than once for the same offence

> Article 35(2) "No person shall be prosecuted and punished for the same offence more than once." [183]

A similar provision exists in section 403 of the Code of Criminal Procedure, which provides as follows:

> "403. **Person once convicted or acquitted not to be tried for same offence.-** (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a difference charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237."

However, he may be tried for any different or distinct offence as provided by sub-sections (2), (3) and (4) of section 403.

6.4.6 Right to non-self-incrimination

> Article 35(4). "No person accused of any offence shall be compelled to be a witness against himself."

Section 30 of the Evidence Act permits the Court to take into consideration the confession of an accused. However, it must be noted that this is subject to section 24, which provides that "A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise (...)." With regard to children who are said to have made a confession, the Courts have deviated from the strict rules of evidence.

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183 See Article 14 (7) of ICCPR which provides that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country

In the case of ***Munna*** their lordships considered the retracted confession made by a child accused, and observed as follows:

> "105. (…) the confessional statements Exhibits 7, 8 were obtained through police torture and threat. We already expressed earlier our view on such contentions of the appellants.....
>
> 107. (…) It also appears that Exhibits 7 and 8 were recorded on 16.7.96. Statements under section 342 Cr.P.C. of the accused were recorded on 15.11.97. There is nothing in the record to show that at any time after 16.7.96 the accused made any retraction of their statements under section 164 Cr.P.C. on the very pretext and ground of police torture or threat. In the absence of any such move by the accused, it will be presumed that plea of the police torture and threat disclosed in the statements under section 342 Cr.P.C. was the product of after-thoughts of the accused."

However, their lordships considered the confession *per se*, but did not consider the dynamics of a confession made by a person of tender years, whose maturity of thought may be still deficient.

In the case of ***Bangladesh Legal Aid and Services Trust and another vs. Bangladesh & others***,[184] it was held as follows:

> "12. (....) The confession made by a child is of no legal effect....
>
> (.....) The convict had no maturity to understand the consequence of such confessional statement....."

This is perfectly in line with the fundamental principle of law that actions of a child do not create any binding contract and any legal instrument signed by a person who has not attained the age of majority will be void. The reason is purely and simply that anyone who is a minor does not have the maturity of understanding the consequence of his actions. By the same

[184] 22 BLD 206=7 BLC 85.

analogy, any statement of a child to his detriment should be treated with utmost caution.

In a more recent case of ***Jaibar Ali Fakir vs. The State***[185]**,** the High Court Division recommended changes in the law to include provision to the effect that any confession or statement of a child must be taken in the presence of her/his parent/guardian/friend/legal representative.

Confession by children was discussed at length in that case. It was observed as follows:

> "14. (....) By their nature children are not mature in thought and cannot be expected to have the same level of understanding of legal provisions and appreciation of the gravity of situations in which they find themselves. So much so that it is an accepted phenomenon that children will act impetuously and do not always appreciate the consequences of their actions, criminal or otherwise. In a situation when they are under apprehension they are liable to panic and say and do things which, in their estimation, are likely to gain their early release."

After referring to other authority on the subject from other jurisdictions, it was observed as follows:

> "16. According to child witness expert Richard Leo, "[a] false confession is the natural consequence of police toughness on young adults." Police tactics, including the use of leading questions and the presentation of false evidence, can be extremely persuasive to children, who are naturally susceptible to suggestion. Additionally, false confessions and admissions to inaccurate statements are often a juvenile's reaction to a perceived threat. Children will take the blame for crimes they did not commit just to make the interrogation cease. Finally, inaccurate statements may be the result of comparatively "immature" juvenile thought processes. Experts suggest that adolescents may see different options than an adult would

185 28 BLD 627.

when faced with a decision. Juveniles may also place a different value on their options than adults, such as emphasizing peer approval as a factor in the decision. Furthermore, juveniles differ in their identification of the possible consequences that may follow from the options they are considering. For example, younger adolescents may not be able to think "strategically" when making statements, especially in such emotionally charged circumstances as a police interrogation.

17. In re B.M.B., a 1998 decision of the Supreme Court of Kansas held:

"We cannot ignore the immaturity and inexperience of a child under 14 years of age and the obvious disadvantage such a child has in confronting a custodial police interrogation. In such a case, we conclude that the totality of the circumstances is not sufficient to ensure that the child makes an intelligent and knowing waiver of his rights. Furthermore, it stated that requiring the advice of a parent or counsellor is "relatively simple" and was "well-established as a safeguard against a juvenile's improvident judicial acts."

18. In March 2000, the Supreme Court of New Jersey said in ***The State vs. Presha*** that "special circumstances exist when a juvenile is under the age of fourteen." It held that, in such instances, an adult's absence will render a juvenile's statement inadmissible as a matter of law.

19. In our view juveniles in our country are no different from those in other parts of the world. In fact our youths are at a greater disadvantage, inasmuch as they are deprived of the advanced media and information sources available in developed countries. In most cases they are uneducated."

It was concluded as follows:

"22. We must also bear in mind the age of the accused at

the time of the occurrence and at the time of the alleged confessional statement. It is an accepted phenomenon that children are impressionable, gullible and more ready to admit guilt for other ulterior reasons. Upon research it has been found that children will falsely confess to have committed a crime when they believe that they may get some benefit as a result. This is illustrated by the excerpts of the Article mentioned above.

23. In the facts and circumstances discussed above, we are of the view that it would be entirely unsafe to rely upon the confessional statement of a child, as defined in the Children Act, 1974, without corroboration of the fact that he made the confession voluntarily and knowing the consequence of waiving his right to remain silent. There being no such corroboration in this case, we find that it is unsafe to rely on the confession.....

25. Furthermore, we are of the view that, although our law does not provide for presence of any parent, guardian or custodian at the time of recording confessional statement, the children of our country are no different from the children of any other country and they ought to get the protection of the law so that they do not make false confessions or confessions under threat or coercion. We feel, therefore, that prudence demands that when children are taken to record their confessional statements, they must be accompanied by a parent, guardian, custodian or legal representative. The Constitution in Article 35(4) gives the citizen the right to remain silent and not to incriminate himself. A mature person can assess the pros and cons in waiving that right when making any confessional statement, but the immature child cannot be expected to fully appreciate the outcome of his action in waiving the right to silence. At that age he would be deemed not to have the mental capacity in law to sign any contract, agreement or other document. Can he be deemed to have the mental capacity to sign away his fundamental right to remain silent and not to

incriminate himself? The Children Act, 1974 provides for special consideration for children who come face to face with the law. They are dealt with differently due to their immaturity and vulnerability. By the same token, children who are produced for questioning by the police or for recording their statement by a Magistrate under section 164 of the Cr.P.C., either as a witness or as an accused, must be dealt with differently from adults. They must be accompanied by a parent, guardian, custodian or legal representative."

Accordingly it was recommended that the Ministry of Law, Justice and Parliamentary Affairs should take steps for incorporating within the law a provision to have a parent/guardian, custodian or legal representative of any minor to be present at the time of recording her/his statement either by the police or by any Magistrate. Audio/video recording of the discourse between the accused and the Police/Magistrate would also give a better indication to the Court as to the voluntariness of any confession/statement recorded.

It must be noted that in line with Article 14 (3) (g) of ICCPR, the CRC requires that a child not be compelled to give testimony or to confess or acknowledge guilt. This means in the first place - and self-evidently - that torture, cruel, inhuman or degrading treatment in order to extract an admission or a confession constitutes a grave violation of the rights of the child (art. 37 (a) of CRC) and is wholly unacceptable. No such admission or confession can be admissible as evidence. There are many other less violent ways to coerce or to lead the child to a confession or a self-incriminatory testimony. The term "compelled" should be interpreted in a broad manner and not be limited to physical force or other clear violations of human rights. The age of the child, the child's development, the length of the interrogation, the child's lack of understanding, the fear of unknown consequences or of a suggested possibility of imprisonment may lead him/her to a confession of some act or omission that is not true. The child being questioned must have access to a legal or other appropriate representative, and must

be able to request the presence of his/her parent(s)/guardian during questioning. There must be independent scrutiny of the methods of interrogation to ensure that the evidence is voluntary, not coerced, and is reliable given the totality of the circumstances. The Court or other judicial body, when considering the voluntary nature and reliability of an admission or confession by a child, must take into account the age of the child, the length of custody and interrogation, and the presence of legal or other counsel, parent(s)/guardian, or independent representatives of the child.[186]

6.4.7 Prohibition of torture

> Article 35(5). "No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment."
>
> "(6). Nothing in clause (3) or clause (5) shall affect the operation of any existing law which prescribes any punishment or procedure for trial."

It must be noted that under international law, there is an absolute prohibition of torture or cruel, inhuman and degrading treatment.[187] Physical punishment of children at no stage of the proceedings is allowed.

186 See General Comment No. 10, Para.56-58

187 See Article 37 (a) of the CRC which provides that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment and the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment.

CHAPTER VII

Sentencing by the Juvenile Court

7.1 Special provisions of the Children Act

All cases in which the offender is a child must be tried by the Juvenile Court or any other Court empowered to act as a Juvenile Court.[188] However, all trials of child offenders must take place in accordance with the special procedures laid down in the Children Act. These special procedures can be divided into two categories, i.e. procedures relating to the process of sentencing and penal provisions containing different sentencing options.[189] The special provisions of the Children Act in relation to the procedures to be followed in the process of sentencing exclude the general provisions of the Penal Code and the Code of Criminal Procedure, except where no procedure is provided by the Act, in which case the Code of Criminal Procedure will be applicable. However, the penal provisions applicable to children for offences either under the Penal Code or any special law are provided under the Children Act by sections 51 to 54 and no scope is left for applying penal provisions of the Penal Code or any special laws. Thus sentencing provisions of the Penal Code are not applicable in the cases where the offender is a child since the special forms of punishment are provided in the Children Act for all offences, including the most serious and heinous offences punishable by imposing the sentence of death, imprisonment for life or imprisonment. Once the trial takes place under the provisions of the Children Act the punishment must be in accordance with those provided by that Act.

7.2 Duties and considerations of the Court in coming to a decision

One of the more fundamental themes of the laws, rules, conventions, covenants etc. relating to children is ensuring the best interests of the child. A similar provision can be found in section 15 of the Children Act in relation to the sentencing of children in conflict with the law.

188 See sections 5(1) and 4 of the Children Act.

189 Sentencing/sentences is a term used in the adult criminal justice system and preferably the term dispositioning/dispositions should be used. However, as this terminology is not common in Bangladesh, this book uses the words sentencing and sentences.

"15. Factors to be taken into consideration in passing orders by Court.-For the purpose of any order which a Court has to pass under this Act, the Court shall have regard to the following factors;-

(a) the character and age of the child;

(b) the circumstances in which the child is living;

(c) the reports made by the Probation Officer; and

(d) such other matters as may, in the opinion of the Court, require to be taken into consideration in the interest of the child;

Provided that where a child is found to have committed an offence, the above factors shall be taken into consideration after the Court has recorded a finding against him to that effect."

Thus, in making the decision as to the sentencing of the child the most fundamental consideration for the Court to always keep in mind is the best interests of the child. Section 15 needs to be read in conjunction with Rule 4 (5) Children Rules 1976[190] which was discussed in the previous chapter. No Judge is expected to have any personal knowledge of the facts and circumstances of any case or details relating to any of the parties appearing before him. In order to come to a decision which will take into account the best interests of the child, the Judge must have recourse to information placed before him by the Probation Officer. The report of the Probation Officer is an essential part of the justice delivery system for children. It cannot be over-emphasised that the requirement of the law to engage the services of a Probation Officer is not a fanciful one.

190 Rule 4(5) provides "Where a child has pleaded guilty or has been found guilty, the Court, instead of making an order upon such finding, may direct the Probation Officer or such other person as may be deemed fit by the Court in Form A for submission of a report which, among other things, shall contain family background of the child, his character and antecedents. His physical and mental conditions and the circumstances under which the offence was committed or any other information considered important in the interest of the child concerned." See also Rule 16 of Beijing Rules on social inquiry reports which provides that before imposing a sentence on a juvenile, the background and circumstances in which the juvenile is living and the conditions under which the crime has been committed must be properly investigated.

It is the most efficient way of collecting all the necessary information required for coming to a decision in the best interests of the child. Rule 4 (6) provides that after considering the report submitted under sub-rule (5) and hearing persons referred to in clauses (b), (c) and (d) of section 9, the Court may give such direction or order for the detention or otherwise of the child as it considers fit.

The Act leaves it to the discretion of the judge to determine what is in the best interests of the child and what other factors are to be considered in the interests of the child. The Act does not give any guidelines for the Court on how to use this discretion. In light of the case-law, regard should be had to the following general considerations for sentencing of the child:

i) Rehabilitation of the child

Despite the use of the word punishment under the aim of the Act, the case-law provides clearly that the aim of the Act is not punishment. In the case of child offenders the sentencing is purposely lenient in order to make sure that the sentence awarded is more a treatment than a punishment. In the case of ***Roushan Mondal***, cited above, with regard to juvenile trial, it was observed as follows:

> "44. The overall aim is therefore, not to punish the offender, but to seek out the root of the problem, in other words, not treating the delinquents as criminals, but treating the cause of their criminality and directing them on a path which will be acceptable to mainstream society in order to ensure their rehabilitation. More so, in our case, since our penal policy is basically reformative and not retributive."

We may also mention that in the later case of ***Rahmatullah***, cited above, the same sentiment was echoed as follows:

> "19. The overall aim is therefore, not to punish the offender, but to seek out the root of the problem, in other words, not treating the delinquents as criminals, but

treating the cause of their criminality and directing them on a path which will be acceptable to mainstream society in order to ensure their rehabilitation."

This is in line with the system of sentencing in Bangladesh, as provided by the general law, that is, that the punishment meted out should be rehabilitative/reformative rather than retributive. Of course, any sanction however lenient or harsh has a generally deterrent effect. However, deterrence is specifically contemplated only in some of the especially enacted special laws, such as Nari-o-Shishu Nirjatan Daman Ain, Acid Aporadh Daman Ain etc. The rehabilitative provision can be found in the Probation of Offenders Ordinance, 1960, where the aim of the law is to allow for leniency in awarding sentence to first time offenders and those who have committed a lesser offence. Unfortunately, the ordinance is rarely used. On the other hand, the Penal Code in a way allows discretion to the Court to award lesser punishment in the case of most offences. As the law stands there is no provision for restorative justice apart from the possibility of payment of compensation to victims under the recently enacted special laws relating to acid offences and offences under the Nari-O-Shishu Nirjatan Daman Ain. No such provision exists in the Children Act. The international instruments provide similarly as an aim of the juvenile justice system, the desirability of promoting the child's reintegration and the his/her assumption of a constructive role in society.[191]

ii) Prohibition of the death penalty, imprisonment for life and imprisonment

Section 51(1) sets out the fundamental guiding principle and provides as follows:

> "51. **Restrictions on punishment of child:-** (1) Notwithstanding anything to the contrary contained in any law, no child shall be sentenced to death, transportation or imprisonment:

[191] See Article 40 (1) of the CRC and 1.2 of the Beijing Rules

Regarding section 51 of the Act, it was observed in ***Fahima Nasrin***[192] as follows:

> "25. (....) The purport of the section is that no child shall be sentenced to "death or imprisonment for life or imprisonment" (emphasis added). In our view, this clearly indicates the intention of the legislature to keep children, as far as possible, outside the system of incarceration in prison."

One question that often arises is whether or not a person aged between sixteen and eighteen years can be sentenced to death. The answer clearly is that there is no bar in the law. Although Article 37(a) of the CRC prohibits the death penalty on anyone below the age of eighteen, that provision has not yet been incorporated into our domestic law.[193] The Children Act prohibits imposition of the death penalty on a child, which is defined in the Act as anyone below the age of sixteen. Therefore, theoretically, an offender above the age of sixteen years can be sentenced to death. This was precisely the view taken by the learned Judge, Nari-O-Shishu Nirjatan Daman Tribunal, Sirajgonj, in Nari-O-Shishu Case No.764 of 2006. The learned Judge relied upon the decision of Murshed, J. as he then was, in the case of ***The State vs. Tasiruddin***.[194] However, it may be noted that in that case their lordships referred to many decisions of the Indian subcontinent wherein the sentence of death was commuted to imprisonment for life due to the youthfulness of the offender. Therefore, it may be concluded that although the imposition of the sentence of death on anyone aged above sixteen years would be lawful, in practice the sentence of death would be commuted to imprisonment for life due to the youthfulness of the offender.

iii) Deprivation of liberty as a measure of last resort and for the shortest period of time

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192 61 DLR 232.

193 See also Article 6 of the CRC on the right of the child to life, development and survival and Rule 17.2 of the Beijing Rules and Article 6 (5) of the ICCPR.

194 13 DLR 203.

In line with the aim of rehabilitation of the child, in the case of ***Metropolitan Police Commissioner***[195] it was held that:

> "36. (.....)
>
> > 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"[196]

iv) Proportionality

The Beijing Rules require that any reaction to juvenile offenders must be proportionate to the circumstances of both the offender and the offence (principle of proportionality). The sentence imposed should be proportionate not only to the *gravity of the offence*, but also *the circumstances and needs of the juvenile and of society.* Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a *serious act involving violence against another person or of persistence in committing other serious offences* and unless there is no other appropriate response.

It is always difficult to balance the interests of society, the restoration of the victim and the rights of the child offender. The children justice system by being lenient towards the child offender, and by the attempt of the Court to treat him rather than to punish him and thereby to make him a better citizen, is effectively doing justice to society by minimizing the child's criminality. If the punishment awarded or the lack of punishment has a remedial effect on the child then society has one less liability.

In conclusion, the Judge is required to appreciate the plight of the child and cannot deal with the child in the same way as he would an adult. It is very easy for judges to have hardened

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195 60 DLR 660.

196 a variety of sentencing options, such as care, guidance and supervision orders, counselling, probation, foster care, education and vocational training programmes and other alternatives to institutional care should be available

attitudes towards deviant children, especially if they are confronted regularly by children who engage in criminal activities. In such a situation, ethics demands that the judge should stop and consider why the child behaves badly and ponder on what he would do if the child was someone close to him. He might remind himself that about a hundred years ago the Court of the Lord Chancellor in England representing the King ensured rights of children, being *in loco parentis*. Equally the State should consider itself *in loco parentis* (taking the place of its parents) and ensure the protection of the child's best interests.

7.3. Sentencing Options

Sections 51-54 of the Children Act set out the different sentencing options. The sections 51-53 are interlinked to each other and application of one section is conditional on the non-application of the other. Therefore, it is of the utmost importance that these sections are read together first before individual application.

7.3.1 Imprisonment under exceptional circumstances

As was seen above, section 51 (1) provides that "Notwithstanding anything to the contrary contained in any law, no child shall be sentenced to death, transportation or imprisonment". Thus, the death penalty, imprisonment for life or imprisonment are prohibited and are not a sentencing option. However in the exceptional circumstances detailed in the first proviso to section 51(1) imprisonment only may be considered as an option.

7.3.1.1 Conditions for imprisonment

The first proviso to section 51(1) sets out the exception to this fundamental guiding principle that imprisonment is prohibited, and provides:

> "Provided that when a child is found to have committed an offence of so serious a nature that the Court is of

> opinion that no punishment, which under the provisions of this Act it is authorised to inflict, is sufficient or when the Court is satisfied that the child is of so unruly or of so depraved character that he cannot be committed to a certified institute and that none of the other methods in which the case may legally be dealt with is suitable, the Court may sentence the child to imprisonment or order him to be detained in such place and on such conditions as it thinks fit"

It is an underlying theme of the justice delivery system for children that detention of any kind should be resorted to only in exceptional cases and for the shortest period of time. This is abundantly clear from section 51 of the Act, which in effect prohibits sentences of imprisonment subject only to exceptions in the first proviso to that section. The distinctive character of the justice delivery system for children as compared with the conventional criminal justice system is also exemplified by section 51 of the Act. It was observed in ***Fahima Nasrin*** as follows:

> "26. Clearly the substantive provision of section 51(1) is an exception to the general law. For example, in the case of an offence punishable under section 302 of the Penal Code, the prescribed punishment is a sentence of death or imprisonment for life. However, in case of children such punishment cannot be imposed. But then, there is an exception to the exception. A sentence of imprisonment may be imposed on a child upon conviction, if the Judge conducting the trial forms the opinion that the offence is of so serious in nature that no punishment under the provisions of this Act which he is authorised to inflict (i.e. under sections 52 and 53 of the Act) is sufficient or if the Court is satisfied that the child is of so unruly or so depraved character that he cannot be committed to a certified institute....."

However, it was held in that case that the Court must express its opinion in order for the exception to be applicable. It was held as follows:

> "26. (.....) Thus, the crux of the proviso is that there must be an opinion and/or satisfaction of the Judge. We agree with the submissions of the learned *amici curiae* that in the absence of any clear opinion expressed by the Judge that the offence was so serious and the punishment authorised by the Act was not sufficient, or that he was satisfied that the child was of so unruly or so depraved character that he could not be committed to a certified institute, the sentence of imprisonment is untenable. In our view Mr. Mahmood has most succinctly clarified the matter by submitting that the precondition to passing a sentence of imprisonment is the formation of an opinion by the learned Judge that the offence is so serious and the sentence imposable within the Act is insufficient and/or the character of the child is so unruly or so depraved that he is satisfied that detention in a certified home would not be suitable. In the instant case, the action of the Judge in sentencing the accused under section 52 clearly implies his non-satisfaction with regard to the existence of the exceptions detailed in the first proviso to section 51(1). Section 52 of the Act provides only for detention of the accused in a certified institute for a specified period and does not contemplate any imprisonment. The place of detention referred to in the first proviso is again an alternative to custody in prison and is not the same as detention in a certified institute as mentioned in section 52. Therefore, the sentence of imprisonment mentioned in the judgment and the application of section 52 are self-contradictory. Mr. Islam in his usual manner made very lucid submissions clarifying the relevant provisions. We are inclined to agree with his submissions that the inclusion of the word "Kviv`Û" in the sentencing portion of the judgment is improper or perhaps the learned Judge misconceived the provisions laid down in section 52 of the Act in awarding the sentence."

It may be mentioned that so far we have not come across any cases where the trial judge has imposed a sentence of imprisonment on any offender upon being satisfied that the

offence is so serious and the punishment imposable under the Act is not sufficient. Similarly, no cases have come to our notice where a sentence of imprisonment was imposed by the trial judge upon being satisfied that the child offender is of so unruly or of so depraved character that he cannot be committed to a certified institute. Essentially the second leg of the proviso would apply to a child offender whose presence in the certified institute would create a non-conducive environment and would be detrimental to the other inhabitants.

7.3.1.2 Duration of imprisonment

The second proviso of section 51 (1) sets out the duration of imprisonment:

> "Provided further that no period of detention so ordered shall exceed the maximum period of punishment to which the child could have been sentenced for the offence committed: (emphasis added)"

The above judgement in the ***Fahima Nasrin*** case considered at length the decision on sentencing in the case of ***Munna vs. The State***[197]**.** The latter case came before the High Court Division in a criminal appeal. In that case the trial Court awarded a sentence of life imprisonment on an accused who was indisputably a child within the definition of the Children Act, having found him guilty of an offence under section 302 of the Penal Code. On behalf of the accused, it was argued that the trial Court did not properly consider the provisions of section 52 of the Act, which provides for a child offender the maximum period of detention of 10 years, and in any case not to exceed beyond the age of 18 years of the child offender. On the other hand, the learned Attorney General argued that since the first proviso to section 51 did not specify the number of years for which the child offender could be imprisoned, he could be sentenced to life imprisonment, which is the minimum punishment for the offence of murder. In this regard the High Court Division observed and held as follows:

197 7 BLC 409.

> "42. So it appears that the prohibition or restriction or restriction about sentence of imprisonment on a child offender as appears in section 51 has been slightly modified in the 1st proviso to the effect that if the nature of offence committed by the child be of serious nature "the Court may sentence the child to imprisonment in some convenient case". But the maximum quantum of the sentence of said "imprisonment" has not been fixed or ascertained anywhere within the said Act."

At this juncture it may be pointed out that the substantive part of section 51(1) of the Act prohibits imposition of the sentence of death, imprisonment for life or imprisonment on any child offender. In the first proviso, exception is made only in respect of the imposition of a sentence of imprisonment. No exception has been made allowing imposition of the sentence of death or transportation (which now means imprisonment for life)[198]. Therefore, it can be said that no exception has been made which would allow the imposition of the sentence of imprisonment for life.

The second proviso to section 51(1) limits the maximum the period of 'such detention', as mentioned in the first proviso, inasmuch as such detention cannot exceed the period of sentence to which a child (emphasis added) could be sentenced for that offence. Considering again the provision of section 52, it can be seen that punishment in case of child offenders for all offences (emphasis added) is prescribed in this section and entails detention of 2-10 years and not beyond the age of eighteen years. Thus the quantum of incarceration is clearly circumscribed and limited to 10 years in the case of a child who is found guilty of any offence, be it of grave or less serious nature.[199]

However, in the ***Munna*** case their lordships proceeded thus:

> "44. Punishment as provided under section 302 Penal Code is death or transportation for life. The word

198 "imprisonment for life" substituted by Ordinance No. XLI of 1985, for "transportation"

199 See Fahima Narsin case below.

"transportation for life" was substituted by the word "imprisonment for life" vide Ordinance XLI of 1985.

45. If someone is found guilty of the offence under sections 302 Penal Code by the code on trial sentence or punishment cannot be less than either death imprisonment for life (transportation for life).

46. Both the appellants were found guilty on trial by the Court below under sections 302/34 Penal Code and sentenced both of them to imprisonment of life vide impugned judgment along with fine of taka 2000 in default to suffer RI for 1 year more.

47. It appears that in view of section 51 of the Act there is total prohibition as to sentence of death on any child offender. But under 1st proviso of said section 51 of the Act the Court is also authorized to award sentence of "imprisonment" on the child if the offence committed by him is of serious nature. There is no doubt that offence of murder under section 302 Penal Code is of serious nature. According to the learned Attorney-General, when the maximum quantum (period) of said "imprisonment" as it appears in 1st proviso of section 51 has not been fixed or available in the said Act itself and when the punishment for offence under section 302 Penal Code cannot be less than either death or imprisonment for life and when with regard to child sentence of death is prohibited under section 51 of the Act, then sentence for the offence under section 302 Penal Code must be imprisonment for life in case the child offender be found guilty thereunder on trial. According to the learned Attorney-General, section 52 of the Act is related to commitment of child to certified institute and under such heading it has been provided in section 52 that where a child is convicted of an offence punishable with death, transportation for life or imprisonment, the Court may if it considers expedient so to deal with the child, order him to be committed to a certified institute for detention for a period which shall

not be less than two and not more than ten years but not in any case extending beyond the time when the child will attain the age if eighteen years. His clear interpretation of above provisions of sections 51 and 52 of the Act is that section 52 is only concerned with order of detention of the child found guilty of offence alleged if the Court considers it expedient to send the child offender to any certified institute and in such event the maximum period of detention in the certified institute shall not be more than 10 years which also cannot exceed the time beyond 18 years age of the child. According to him, such maximum period of 10 years cannot be imported to be the maximum period of "imprisonment" as it appears in 1st proviso of section 51 of the Act. His contention is that if the child offender be found guilty for offence under section 302 Penal Code after trial he (child) can be conveniently sentenced to imprisonment for life less than that of which there cannot be the sentence for offence under that section according to law."

With respect, it must be stated that the Children Act takes the justice delivery system for children away from the conventional criminal justice system. The Act provides for a separate set of procedures for the trial of children and for a different mode of punishment in the case of conviction of those children. Therefore, the modes of punishment as prescribed by the Penal Code are excluded by the provision of section 52 of the Children Act. It may perhaps be reiterated that section 51(1) prohibits the imposition of the sentence of death, imprisonment for life (previously termed as 'transportation') and imprisonment. The proviso to the said section provides exception to the prohibition by stating that in the instances mentioned in the first proviso only imprisonment may be imposed upon giving reasons. It can be seen that the imposition of the sentence of imprisonment for life has not been allowed by the proviso. Nevertheless, their lordships went on to agree with the submissions of the learned Attorney General, while overlooking the fact that imposition of 'transportation' (which is

now imprisonment for life) is prohibited. It was observed as follows:

> "48. We agree with above interpretation of learned Attorney-General. It is true that maximum period of "imprisonment" stated in 1st proviso of section 51 of the Act has not been available anywhere within the act itself. When sentence for offence under section 302 Penal Code has no scope to be less than imprisonment for life, such sentence can be conveniently awarded if the child offender is found guilty under section 302 Penal Code after trial. We also agree with above interpretation that maximum period of 10 years appearing in section 52 of the Act is only related to the order of detention of the child in certified institute, such period of 10 years as maximum cannot be said to be the maximum period of "imprisonment" as sentence as per 1st proviso of section 51 of the Act with regard to punishment of the child if he is found guilty of an offence as alleged on trial....."
>
> "56. Provisions of 1st, 2nd and 3rd provisos of section 51 if read together with the provisions of section 52 of the Act then it will be manifestly clear that these are related to order of detention only. Nothing has been stated about the maximum quantum of the sentence of "imprisonment" of the child as mentioned in the 1st proviso of section 51 of the Act. In the absence of any express mention of the maximum quantum or period of sentence of "imprisonment" of the child in the Act itself it may be presumed that the sentence of "imprisonment" of the child offender will be imprisonment for life less than that of which cannot be the sentence "for the offence he committed," inasmuch as at regular trial it appears that both the minor appellants were found liable (guilty) for offence under sections 302/34 Penal Code."

It appears that the second proviso was given a somewhat restricted interpretation. A careful reading of the second proviso

would indicate the broadness of the provision since it clearly qualifies the possible sanction and restricts it to one that could have been imposed on a child for the offence committed. As stated earlier, the sentence that could be imposed on a child for any offence is only in accordance with the Children Act, i.e. section 52. Hence, under normal circumstances, a child convicted of murder, which carries the sentence of death or imprisonment for life, would be liable to be ordered to suffer detention in a certified institute for between two to ten years. Thus ten years is the maximum quantum of sentence which can be imposed on a child for any offence.

However, their lordships in the ***Munna*** case went on to observe as follows:

> "57. (…) under section 22 of the Children Act 1960 of India wherein provision has been made to keep the delinquent child in safe custody under order of the Children Court if the offence committed by the delinquent child is of serious nature and "Maximum period of such detention in safe custody shall not exceed the maximum period of the imprisonment to which the child could have been sentenced for the offence committed." There has been no such provision for keeping the delinquent child in safe custody instead of imprisonment within the Children Act 1974 of Bangladesh as provided under section 51 in 1st proviso already discussed above....
>
> 135. (…) we have restrained ourselves from maintaining order as to imprisonment for life awarded by the Court below. Instead, we are declined to modify the judgment and order of the Court below to award next maximum period of punishment for 14 years under the Code instead of imprisonment for life for both the appellants who from our above scrutiny of the evidence and circumstances have been rightly found liable for offence under sections 302/34 Penal Code....."

On the other hand, the ***Fahima Nasrin*** case clearly held that section 51 of the Act prohibited both death sentence and

sentence of life imprisonment (transportation) and only exceptionally permitted imprisonment on specific grounds, giving reasons showing the opinion and satisfaction of the Court.[200]

The High Court Division in the ***Fahima Nasrin*** case also referred to the provision in the Convention on the Rights of the Child in relation to incarceration of child offenders and the possibility of taking children out of jail to be put into a certified institute. It was observed as follows:

> "28. On the other hand, it is always possible at any time to revert a child from prison, if imprisonment or detention in some other place was ordered under the first proviso to section 51(1), to a certified institute, as provided by the third proviso. This, therefore, fortifies the view that children should not ordinarily be sentenced to imprisonment, unless absolutely necessary where exceptional circumstances exist, and then only as a matter of last resort and for the shortest appropriate period of time.

In this regard reference may be made to Article 37(b) of the UNCRC, which provides as follows:

> "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."

In the ***Munna*** case it was argued that since the term of imprisonment was not specified, even life imprisonment could be given. The Hon'ble Court went on to award imprisonment for 14 years. This was discussed in the ***Fahima Nasrin*** case as follows:

> "28. (....) At this juncture we may also advert to the second proviso to section 51(1), which is quoted above. With all due respect, we are constrained to observe that it

200 Discussed at 7.2 above

appears that this provision was not considered in its proper context and perspective in the case of **Munna**, cited above. (...) Our view is that 'detention' in the second and third provisos refers to 'detained' (in such place) in the first proviso. What it means is that when the Court is satisfied that the child is of so unruly or so depraved character that he cannot be committed to a certified institute, then he may be sent to prison or be 'detained' in such place and on such conditions as it thinks fit. As mentioned above, the third proviso contemplates sending the youthful offender back to a certified institute after a period of detention in the place where he was sent under the first proviso, to be detained there until he attains the age of eighteen years.

29. The second proviso to section 51(1) mandates that the detention as mentioned in the first proviso shall not exceed the maximum period of punishment to which the child could have been sentenced for the offence committed. For proper appreciation of this provision one must keep in view the fact that the offender is a child to whom the provisions of the Children Act, 1974 apply and that the substantive sentencing provision is contained in sections 52 and 53. As we have discussed above, section 52 permits a child to be sentenced to detention in a certified institute, even in cases where the offence is punishable with death or imprisonment for life or imprisonment. All penal offences are, therefore, covered. But at the same time all other penal sanctions are excluded. Thus, it follows that upon conviction of any offence under any law the sentence must be awarded in accordance with the sentencing provisions of the Children Act, 1974 and the maximum sentence that could have been imposed on a child upon conviction of any offence would have been detention in a certified institute for 10 years or up to the date of his attaining the age of 18 years, whichever is earlier. In exceptional circumstances a sentence of imprisonment may be imposed under the first

> proviso to section 51(1) of the Act. It follows, therefore, that on conviction under section 302, for example, if the learned Judge expresses his view that the first proviso is attracted, an offender may be sentenced to imprisonment or detention in some place other than a certified institute but that order of detention cannot be in excess of 10 years. Likewise, if the learned Judge chose to impose a sentence of imprisonment, then that also could not exceed 10 years, since the reason for imposing the sentence of imprisonment or detention in some place other than a certified institute would have been based on the same opinion/satisfaction. The law provides that in the event of such detention the learned Judge may direct that the child be returned from that place of detention to be detained in a certified institute up to the age of 18 years. However, with all due respect to all concerned, we fully agree with the learned amici curiae that the sentence of imprisonment for 14 years in the ***Munna*** case does not stand to reason. Moreover, although both the appellants were children at the time of the trial, the case was not tried following the provisions of the Children Act, 1974 and, therefore, there was no question of the learned trial Judge's formation or expression of opinion/satisfaction as required by the first proviso to section 51(1)."

It was held that the sentence passed by the learned Sessions Judge and Judge of the Juvenile Court, Kushtia does not reflect a correct interpretation of the provisions of the Children Act, 1974, and the sentence of imprisonment passed in respect of Md. Zahidul Hasan, alias Rony, son of Md. Nowshad Ali Mondal is erroneous. It was held that Md. Zahidul Hasan, alias Rony was not liable to be sent to prison upon attaining the age of 18 years and that the impugned order of the Ministry of Social Welfare was erroneous and without lawful authority. It was further held that the Ministry of Social Welfare, in not considering the release of the detenu under the provisions of section 67 of the Children Act, failed in its duty to implement the provisions of the Children Act, 1974 and the Children Rules, 1976.

It is imperative that the concerned Ministry consider the provisions of law in their correct perspective. Section 67 of the Act will be dealt with later in Chapter VIII.

7.3.1.3 Reversal of order of imprisonment

The third proviso of section 51 (1) provides for reversal of the order of imprisonment:

> "Provided further that at any time during the period of such detention the Court may, if it thinks fit, direct that in lieu of such detention the youthful offender be kept in a certified institute until he has attained the age of eighteen years."

The third proviso is yet another example of the law relating to children being exceptional and different from the conventional criminal justice system. Generally under the conventional criminal procedure there is no scope for the trial Judge to revisit the judgement. Once it is signed, the Judge becomes *functus officio* and cannot make any alterations in the conviction or sentence. However, the third proviso to section 51 of the Act allows the Judge to replace the sentence of imprisonment or detention awarded under the first proviso and substitute the same with detention in a certified institute. This is in line with the mandate of Article 37(b) of the CRC.[201]

7.3.2 Commitment of a child to a certified institute

Before the Court can make an order for imprisonment, it has to be of the opinion that "no punishment, which under the provisions of this Act it is authorised to inflict, is sufficient, or when the Court is satisfied that the child is of so unruly or of so depraved character that he cannot be committed to a certified institute and that none of the other methods in which the case may legally be dealt with is suitable". Hence, this requires that first the sentencing options of sections 52 and 53 are considered. Effectively, these sections are the substantive

201 Quoted above.

sentencing provisions in case of children found guilty of commission of any offence.

Section 52 provides as follows:

> "52. **Commitment of child to certified institute:** Where a child is convicted of an offence punishable with death, transportation or imprisonment, the Court may, if it considers expedient so to deal with the child, order him to be committed to a certified institute for detention for a period which shall be not less than two and not more than ten years, but not in any case extending beyond the time when the child will attain the age of eighteen years."

The leniency of the Act is highlighted by the Court's observation in relation to section 53, as follows:

> "25. (.....) section 52 is the substantive provision of law which provides for punishment of a child upon conviction of an offence and section 53 provides an even more lenient alternative at the discretion of the Court in a fit case."

7.3.3 Discharge or probation for good conduct

Instead of considering committing the child to a certified institute, the Court may discharge the child or release him/her on probation for good conduct as provided under section 53 of the Act, which states as follows:

> "53. Power to discharge youthful offenders or to commit him to suitable custody. (1) A Court may, if it thinks fit, instead of directing any youthful offender to be detained in a certified institute under section 52 order him to be-
>
> (a) discharged after due admonition, or
>
> (b) released on probation of good conduct and committed to the care of his parent or guardian or other adult relative or other fit person on such parent, guardian, relative or person executing a bond, with or without sureties, as the Court may

require, to be responsible for the good behaviour of the youthful offender for any period not exceeding three years, and the Court may also order that the youthful offender be placed under the supervision of a Probation Officer.

(2) If it appears to the Court on receiving a report from the Probation Officer or otherwise that the youthful offender has not been of good behaviour during the period of his probation, it may, after making such inquiry as it deems fit, order the youthful offender to be detained in a certified institute for the unexpired of probation."

Although, it must be stressed, the Children Act is self-contained so far as sentencing is concerned, on close scrutiny it will be apparent that section 53 of the Act has been taken from the Probation of Offenders Ordinance, 1960, of which sections 4 and 5 are reproduced below:

"4.- Conditional discharges, etc.-(1) Where a Court by which a person, not proved to have been previously convicted, is convicted of an offence punishable with imprisonment for not more than two years is of opinion, having regard to:

(a) the age, character, antecedents or physical or mental condition of the offender, and

(b) the nature of the offence or any extenuating circumstances attending the c ommission of the offence,that it is inexpedient to inflict punishment and that a probation order is not appropriate, the Court may, after recording its reasons in writing, make an order discharging him after admonition, or, if the Court thinks fit, it may likewise make an order discharging him subject to the condition that he enters into a bond, with or without sureties, for committing no offence and being of good behaviour during such period not exceeding one year from the date of the order as may be specified therein.

(2) An order discharging a person subject to such condition as aforesaid is hereafter in this Ordinance referred to as "an order for conditional discharge", and the period specified in any such order as "the period of conditional discharge".

(3) Before making an order for conditional discharge, the Court shall explain to the offender in ordinary language that if he commits any offence or does not remain of good behaviour during the period of conditional discharge he will be liable to be sentenced for the original offence.

(4) Where a person conditionally discharged under this section is sentenced for the offence in respect of which the order for conditional discharge was made, that order shall cease to have effect.

5.-Power of Court to make a probation order in certain cases.-(1) Where a Court by which-

(a) any male person is convicted of an offence not being an offence under Chapter VI or Chapter VII of the Penal Code, or under Sections 216A,328,382,386,387,388,389,392, 393,397, 398,399,401,402,455, or 458 of that Code, or an offence punishable with death or transportation for life, or

(b) any female person is convicted of any offence other than an offence punishable with death,

is of opinion that, having regard to the circumstances including the nature of the offence and the character of the offender, it is expedient to do so, the Court may, for reasons to be recorded in writing, instead of sentencing the person at once, make a probation order, that is to say, an order requiring him or her to be under the supervision of a probation officer for such period, not being less than one year or more than three years, as may be specified in the order;

Provided that the Court shall not pass a probation order unless the offender enters into a bond, with or without sureties, to commit no offence and to keep the peace and be of good behaviour during the period of the bond and to appear and receive sentence if called upon to do so during that period;

Provided further that the Court shall not pass a probation order under this section unless it is satisfied that the offender or one of his sureties, if any, has a fixed place of abode or a regular occupation within the local limits of its jurisdiction and is likely to continue in such place of abode or such occupation, during the period of the bond.

(2) While making a probation order, the Court may also direct that the bond shall contain such conditions as in the opinion of the Court may be necessary for securing supervision of the offender by the probation officer and also such additional conditions with respect to residence, environment, abstention from intoxicants and any other matter which the Court may, having regard to the particular circumstances of the case, consider necessary for preventing a repetition of the same offence or a commission of other offences by the offender and for rehabilitating him as an honest, industrious and law-abiding citizen.

(3) When an offender is sentenced for the offence in respect of which a probation order was made, that probation order shall cease to have effect."

Section 53 of the Act, therefore, shows that in the case of child offenders the beneficial and rehabilitative provisions of the Probation of Offenders Ordinance have been adopted by the Children Act and are effectively made less restrictive and more favourable in the case of child offenders.

As can be seen, one obvious difference between the Ordinance and section 53 of the Act is that section 4 of the Ordinance applies to first-time offenders and those convicted of offences

punishable with imprisonment up to two years, whereas there is no such restriction apparent in section 53. Effectively, this provision appears to be a combination of sections 4 and 5 of the Ordinance. But yet again there is a difference; section 5 of the Ordinance does not apply in the case of male offenders convicted of offences punishable with the death penalty or imprisonment for life as well as those offences of the Penal Code listed in that section, and in the case of female offenders it does not apply to those women convicted of offences punishable with death. On the other hand, no such restriction exists in section 53 of the Act in case of child offenders. In other words, the provision for discharge with warning and release on probation may be applied in the case of conviction of any youthful offender, who is found guilty of any offence. Nevertheless, the use of section 53 by our trial Courts is very rare, possibly due to the punitive attitude of the learned Judges which appears to be prevalent across the country.

Of course, it should always be borne in mind that the principle of proportionality in sentencing should not be overlooked. The concept of 'the best interests of the child, being a primary consideration' stands as a pillar of the CRC, which is equally applicable in criminal cases; yet, it should not totally eclipse the rights to justice as expected by the victim and the intention of the penal system to protect the interests of the State.

7.3.4 Interpretation of the sentencing provisions

The matter of interpretation of the sentencing provision came up for consideration in the ***Fahima Nasrin***[202] case. The Court had also to deal with an earlier decision in the case of ***Munna.***[203] The ***Fahima Nasrin*** case being dealt with under the Writ jurisdiction of the High Court Division, the Court went into great detail with regard to the interpretation of the sentencing provisions of the Children Act. In the ***Fahima Nasrin*** case it was observed as follows:

202 61 DLR 232.

203 7 BLC 409.

> "24. (....) Sections 52 and 53 of the Act are the substantive provisions of law which provide for sentencing a child offender upon conviction of an offence punishable with death, transportation (which is now imprisonment for life, viz. Ordinance No.XLI of 1985) or imprisonment. (….)"
>
> " 25. Hence section 52 is the substantive provision of law which provides for punishment of a child upon conviction of an offence and section 53 provides an even more lenient alternative at the discretion of the Court in a fit case. Perhaps, these two sections should have been placed in the statute before section 51 which is a non-obstante provision. On the other hand, section 51 has perhaps been placed before the substantive sentencing provisions because of its very fundamentally important character, i.e. the modes of punishment which are not permissible to be inflicted upon children. (….)"

In view of the above, it may be concluded that the application of the provisions of sections 51(1) and 52 are mutually exclusive. Awarding a sentence of imprisonment in any exceptional case by utilising the proviso to section 51(1) means that detention in a certified institute under section 52 was not felt to be suitable. Equally, if detention in a certified institute is ordered under section 52, then it can be presumed that the imposition of a sentence of imprisonment was not felt necessary.

It is true that section 51 with its prohibition of the death penalty, imprisonment for life and imprisonment is of fundamental importance, and this principle should be observed in the first place. However, the observation of the Court that it would have been better had the legislator decided to place first sections 52 and 53 in the Act and then section 51 deserves support. In the best interests of the child, deprivation of liberty should always be used as a measure of last resort and for the shortest appropriate period of time possible. Hence, section 53 which provides the most lenient options, i.e. discharge or release on

probation for good conduct, is the preferable option over section 52 which provides for the commitment of a child to a certified institute. Hence section 53 should be considered preferably first over 52. The current order of the sections is confusing and in practice Courts tend to look only at sections 51 and 52 without taking into consideration section 53. However, a correct application of the Children Act requires that first the most lenient option be considered before all the other options. The discretion to award a lenient sentence must be exercised judiciously, keeping in mind the gravity of the offence and applying the proportionality test.

7.3.5 Imposition of a fine

Although there are only a very few offences which are punishable with fine only, section 54 of the Act deals with such offences:

"54. Power to order to pay fine, etc. (1) Where a child is convicted of an offence punishable with fine the Court shall order that the fine be paid by the parent or guardian of the child, unless the Court is satisfied that the parent or guardian cannot be found or that he has not conduced to the commission of the offence by neglecting to exercise due care of the child.

(2) Where a parent or guardian is directed to pay a fine under sub-section (1), the amount may be recovered in accordance with the provision of the Code."

See also Rule 4 (7) of the Children Rules:

> "Rule 4 (7) After considering the report submitted under sub-rule (5) and hearing or order for the detention or otherwise of the child as it considers fit."

It may be mentioned here that the imposition of the fine to be paid by the parents, in a subtle way serves the intendment of the CRC in making the parents of offending children aware that their children are their responsibility, and taking care of them is their duty.

7.4 Avoidance of stigmatising words in judgements

The philosophy of Juvenile trial is also such that the system is meant for protection of the children from stigma. So much so, that the law itself provides in section 71 that the words "conviction" and "sentenced" shall not be used in the judgements in relation to children who are found to have committed any offence.

Section 71 of the Act provides as follows:

> **"**71**. Words 'conviction' and 'sentenced' not to be used in relation to children.** Save as provided in this Act, the words 'conviction' and 'sentenced' shall cease to be used in relation to children or youthful offenders dealt with under this Act, and any reference in any enactment to a person convicted, a conviction or a sentence shall, in the case of a child or youthful offender be construed as a reference to a person found guilty of an offence a finding of guilty or an order made upon such a finding, as the case may be."

It was held in the ***Bablu*** case cited above, as follows:

> "10. Undoubtedly the accused appellant was a youthful offender as contemplated in the Children Act, 1974. So, the learned Sessions judge, in view of the provisions made in the Children Act, 1974 as stated above ought not to have used the words "conviction" and "sentenced" in his judgement and he also ought not to have passed sentence of imprisonment on the accused appellant. He ought to have passed an order as contemplated under section 53 of the Children Act after finding the accused appellant guilty.
>
> 11. As such, the appeal is allowed. The order of conviction and sentence passed by the learned Sessions Judge is set –aside and the case is sent back on remand to the trial Court for passing a judgement taking in view the provision made under section 71 of the Children Act,

1974 and pass an order as contemplated under section 53 of the Children Act, 1974."

In the case of ***Munna***, however, a more stringent view was taken. It was observed as follows:

> " 58. As to the interpretation of section 71 of the Children Act 1974 with regard to restriction about use of words "conviction" and "sentenced" in relation to children it has been argued by learned Additional Attorney-General that due to the saving clause like "save as provided in this Act….." in the section itself the Court if necessary can use word "conviction" and "sentence" while finally disposing of the case by pronouncement of judgment. (…) We agree with learned Additional Attorney-General and hold that due to existence of saving clause in the section as above, if necessary, the Court may use those two words in the judgment.

Again, with respect, it must be stated that the purpose of section 71 is to ensure the protection of child offenders, and the interpretation in the ***Munna*** case stands to defeat that purpose.

7.5 Protection from stigma in future life of child

Another example of protection of the child appears in section 70 of the Act, which seeks to prevent the child from being stigmatised as a result of any conviction and sentence. Section 70 of the Act provides as follows:

"70. Removal of disqualification attaching to conviction. When a child is found to have committed any offence, the fact that he has been so found shall not have any effect under section 75 of the Penal Code (XLV of 1860), or section 565 of the Code or operate as a disqualification for any office, employment or election under any law."

CHAPTER VIII

Custody and Detention

8.1 Provisions and types of detention for children in conflict with the law

As discussed in the previous chapters, the Children Act provides for two types of custody/detention for children in conflict with the law:

1. Custody/Detention upon arrest and pending trial of children who are accused is regulated by section 49 of the Act.

   " 49. Custody of child not enlarged on bail.-

   (1) Where a person apparently under the age of sixteen years having been arrested is not released under section 48 the officer-in-charge of the police-station shall cause him to be detained in a **remand home or a place of safety** until lie can be brought before a Court.

   (2) A Court on remanding for trial a child who is not released on bail, shall order him to be detained in a **remand home or a place of safety**."

2. Post-trial detention of children who are found guilty of having committed an offence is regulated under sections 51 (first and third provisos), 52, and 53 of the Act. Section 51 (1), first proviso, provides:

   "Provided that when a child is found to have committed an offence of so serious a nature that the Court is of opinion that no punishment, which under the provisions of this Act it is authorised to inflict, is sufficient or when the Court is satisfied that the child is of so unruly or of so depraved character that he cannot be committed to a certified institute and that none of the other methods in which the case may legally be dealt with is suitable, the Court may sentence the child to **imprisonment** or order him to be detained **in such place** and on such conditions **as it thinks fit**"

   And in the third proviso:

"Provided further that at any time during the period of such detention the Court may, if it thinks fit, direct that in lieu of such detention the youthful offender be kept in a **certified institute** until he has attained the age of eighteen years"

Section 52 provides as follows:

"52. Commitment of child to certified institute:

Where a child is convicted of an offence punishable with death, transportation or imprisonment, the Court may, if it considers expedient so to deal with the child, order him to be committed to a **certified institute** for detention for a period which shall be not less than two and not more than ten years, but not in any case extending beyond the time when the child will attain the age of eighteen years."

Section 53 (2) provides as follows:

"(2) If it appears to the Court on receiving a report from the Probation Officer or otherwise that the youthful offender has not been of good behaviour during the period of his probation, it may, after making such inquiry as it deems fit, order the youthful offender to be detained in a **certified institute** for the unexpired of probation."

8.2 General principles

Various principles have been discussed in the previous chapters, which are relevant and should be applied in cases of detention of children in conflict with the law, irrespective of whether they are detained pre- and pending trial or post-trial.

First of all, it is fundamental that every juvenile deprived of liberty must be treated with humanity and respect for their inherent dignity, and in a manner which takes into account the needs of persons of his or her age.[204] Fundamental rights such as the right to legal assistance, the right to education and the

[204] See Article 40 (1) of the CRC.

right to maintain contact with his/her parents should be respected also when the child is deprived of his/her liberty.

Secondly, as has been highlighted in the case-law to which this book has referred on several occasions, the aim of the juvenile justice system is rehabilitation of the offender and not punishment of the offender.[205] Hence, as emphasized in ***Metropolitan Police Commissioner***[206], it must be remembered that deprivation of liberty should be used as a measure of last resort and for the shortest period of time.

It is clear, however, that custody of children in prison is not contemplated by the law. In this regard reference may be made to the High Court Decision in ***Suo Moto Order No.248 of 2003.***[207] From the judgement, it is noted that at that time there were many children aged between 12 and 16 years held in jails across the country pending their trial in different Courts. After getting a detailed report from the Inspector General of Prisons, their lordships gave the following directions:

> (1) Trial, if any, of all juvenile accused to be completed with utmost expedition by the juvenile Courts and the concerned law enforcing agencies, Prosecuting agencies and legal Aid committees be directed to take immediate steps in the matter.
>
> (2) Taking into consideration of the provisions of Section 82 and 83 of the Penal Code, it is directed that the Government do consider making prayers to the Courts concerned for discharging the Juvenile accused in appropriate cases.
>
> (3) The Government also do consider withdrawal of Juvenile accused from prosecution under Section 494 of the Code of Criminal Procedure in appropriate cases especially from the cases charged under ordinary penal laws.

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205 See the cases of Roushan Mondal, Para 44. and Rahmatullah para.19

206 The State vs. Metropolitan Police Commissioner, 60 DLR 660.

207 Suo Moto Order No.248 of 2003, 11 BLT (HCD) 281

(4) The local Legal Aid committees formed by the Government be instructed to move the Courts for bail of the Juvenile accused.

(5) Juvenile accused in Jail must be kept apart from other prisoners.

(6) Non-official Jail visitors should include Human Rights Activists specially the representatives of children organisations of the country.

(7) Juvenile accused are to be transferred to correction Homes and other Approved Homes with utmost expedition."

It may be pointed out that as a result of the above directions a high-powered committee was set up by the Government, which has resulted in the removal of under trial and convicted youthful offenders from the prisons. Nevertheless, some judges still fall into the error of sending children to jail pending trial, as was evident in the cases of ***The State vs. Metropolitan Police Commissioner*** and ***Munna***[208]**.**

Thirdly, every child deprived of their liberty shall be separated from adults unless it is considered in the best interests of the child not to do so. Section 51(2) of the Children Act provides as follows:

"(2) A youthful offender sentenced to imprisonment shall not be allowed to associate with adult prisoners."

The Act only provides for separate treatment of children who have been sentenced to prison and not for separate treatment of children who, upon order of the police following arrest, or the Court in case of non-bailable offences, are committed to a remand home or place of safety or have been sentenced by the Court to be committed in a certified institute. However, it is clear from the Act that these places of detention are specifically designated for children as will be discussed and hence the issue of separation of adults, at least in theory, should not arise.

208 Munna vs. State, 7 BLC (HCD) 409

However, in practice it does, and therefore the principle of separation should equally apply under these circumstances.[209]

Fourthly, it must be remembered that juveniles who are detained under arrest or are awaiting trial, are presumed innocent as a general principle of law, and shall be treated as such. Hence, detention before trial shall be avoided to the maximum extent possible and limited to exceptional circumstances. In addition, children detained under arrest and awaiting trial must be kept separate from other children who have been found guilty. Although Article 37 (c) of the CRC itself does not explicitly state so, the CRC Committee has interpreted the right of children deprived of their liberty to be separated from adults as meaning that "a child deprived of his/her liberty shall not be placed in an adult prison or other facility for adults."[210]

8.3 Places of custody and detention

According to the Children Act, there are three places of detention that a child in conflict with the law can be sent to.

8.3.1 Remand home or place of safety

First, children that are arrested or have been denied bail and are awaiting trial can be sent to a remand home or place of safety. The Children Act does not define what institutions qualify as a remand home. Instead section 20 of the Act just specifies that "the Government may establish and maintain remand homes for the purposes of detention, diagnosis and classification of children committed to custody by any Court or Police." Sections 21-29 set out the conditions for certification or

209 Article 37 (c) of the CRC provides that every child deprived of liberty shall be separated from adults. Hence, regardless at which stage of the proceedings a child is deprived of his/her liberty, this principle must be applied

210 General Comment No. 10, para. 85. In its General Comment No.10, the CRC Committee notes that "there is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate. The permitted exception to the separation of children from adults stated in Article 37(c) of the CRC, unless it is considered in the best interests not to do so, should be interpreted narrowly; the child's best interest does not mean for the convenient of the State Parties. State Parties should establish separate facilities for children deprived of their liberty, which include distinct, child-centred staff, personnel, policies and practices."

recognition of institutes. Section 2 (j) defines a place of safety as including "a remand home, or any other suitable place or institution, the occupier or manager of which is willing temporarily to receive a child, or where such remand home or other suitable place or institution is not available, in the case of a male child only, a police-station in which arrangements are available or can be made for keeping children in custody separately from the other offenders".

8.3.2 Certified institute: child development centre (KUK)

Second, children that are sentenced under section 52, or those for whom the order of imprisonment is converted under section 51 (1) third proviso, are to be committed to a certified institute. Section 2(d) defines a certified institute as "a training institute established or any training institute, industrial school or educational institution certified by the Government under section 19.

The Government has established three separate facilities, so-called child development centres, for children in Jessore and Tongi for boys and Konabari for girls. These centres fall under the responsibility of the Department of Social Services of the Ministry of Social Welfare.

The capacity of each of the centres is around 150-200 children, but most of the time the centres operate under this capacity.[211] The majority of the population of the centres consists of children who have been arrested and are awaiting trial/are under trial, followed by those who have been sentenced, and children who have been placed there for protection purposes, some of whom are referred by their parents. In practice, it is difficult to ensure that offenders found guilty are kept separate from those under trial and/or put in detention for protection. The fact remains that they all share the playground and other common facilities during the daytime, which effectively defeats the purpose of the segregation.

211 See Juvenile Justice in South-Asia: Improving Protection for Children in Conflict with the Law, UNICEF (2006, p.46

Moreover, there is no scope for keeping the children segregated according to age. The need to keep older children separate from younger children is patent if we consider their physique. It is a common phenomenon that younger children may be exposed to psychological abuse and bullying by older peers and more importantly, they may be sexually abused, which would leave them distraught and scarred for life.

In 2009, UNICEF together with the Ministry of Social Welfare, as well as other concerned Ministries, started a pilot-project to promote diversion and the use of alternatives to deprivation of liberty for children who are currently residing at the child development centre (KUK) in Jessore. Currently, at the first phase of the project, an operational case-management team has been formed, consisting of different professionals, to review the cases of children in the detention facility and to see whether some of the children can be released and can be reintegrated into society. In addition, under the project, activities are undertaken to improve the conditions for the children that are detained. Finally, the project in the long term aims to ensure that the law enforcement authorities will increasingly use diversion to community alternatives that will be established as part of the project instead of resorting to deprivation of liberty of the children in the KUK.

8.3.3 Prison

Third, section 51 (1) provides for imprisonment of children who have been found guilty. It must be noted that imprisonment here means prison, and in particular the designated area for children. This is a rather unfortunate provision in our law. Children do not belong in prison and in Bangladesh the prisons by and large are not equipped to keep children in custody separately from adults. In the recent unreported case of ***Secretary, Ministry of Home Affairs (Suo Motu Rule No.1 of 2010)***, it was found that three minor children were illegally placed by the learned Magistrate in the women and children wings of a District Jail terming it as a ‘place of safety’.

The physical capacity and financial constraints preclude total separation. In only a few of the Central Jails are there any separate facilities for housing youthful offenders. Moreover, the prisons have no facilities to cater for the special needs of child detainees, including education and recreation facilities. Hence, any length of detention puts them at a disadvantage and hampers rehabilitation.

In this regard the High Court Division in the case of ***Munna*** observed as follows:

> "134. Jail Code also contains similar provisions and directive to be followed in such regard. There has been no positive objection taken anywhere by the appellants that provisions of section 51(2) of the Act were not followed by the Jail Authority. In the absence of any objection in such regard presumption under section 114(2), Evidence Act may be taken that Jail Authority followed the said provisions of section 51(2) of the Act and Jail Code in that regard."

However, this observation does not reflect the reality that the prisons in Bangladesh do not generally provide such segregation facilities for youthful offenders. Even if separate sleeping arrangements may be made in accordance with the provisions of the Jail Code, there is in practice no scope for keeping the youthful offenders segregated from the adult offenders during their daily activities.

The Ministry of Home Affairs and the Bangladesh Prison Directorate in 2009 have embarked on a project titled "Improvement of the Real Situation of Overcrowding of Prisons". Partners include the Police, the Courts, the prisons, social services, lawyers, the Ministry and NGOs. The project is supported by the German Government through the Deutsche Gesellschaft fur Technische Zusammenarbeit (GTZ) GmbH. The project is currently working in three prisons, namely Dhaka Central Jail, Bogra Prison and Madaripur District Prison. It is conducting training and deploying paralegals in 3 pilot sites, is conducting a census through paralegals in 3 pilot prisons and is

setting up Case Coordination Committees in 3 pilot districts. In addition, it is educating trial prisoners on the law and supporting camp courts in prisons to bring the Court to prisoners rather than prisoners to Court.

8.3.4 Other places

Fourth, the provisions allow the Court, instead of ordering the child to be sent to prison, to send the child to such place as it sees fit. In practice, the institutions that children in conflict with the law are sent to are usually the child development centre and prison. Girls are also sometimes sent to safe homes.

8.4. Specific rules regarding custody and detention

The specific rules governing the detention of the child are set out in the Children Rules 1976. For an international perspective on how children in detention should be treated, the CRC, Beijing Rules and in particular the United Nations Guidelines on Juveniles Deprived of Liberty (Havana Rules) should be consulted. The JDLs set out detailed guidelines which establish minimum standards for the protection of juveniles deprived of their liberty with a view to counteracting the detrimental effects of all types of detention, and fostering integration in society. Thus, they apply to detention of a child in conflict with the law at any stage of the proceedings.

The relevant provisions under the Children Rules can be categorized as follows:

8.4.1 Management, record-keeping and classification

Rule 9 is concerned with the management of certified institutes. It provides that the Superintendent shall maintain a case file for each inmate separately, containing detailed information about the family background, character, aptitude, performance in education, training and such other matters as he may consider necessary. Record keeping is essential as it forms the basis of any case-management system.[212] Rule 13 details the records

[212] See Rule 19-23 of the Havana Rules on records, admission, registration movement and transfer.

which should be maintained. Rule 22 sets out the division of inmates into three grades i.e. penal grade, general grade and star grade. [213]

8.4.2 Medical care, dietary needs and education

Rule 15 is concerned with medical facilities of the inmates whereas Rule 16 specifically deals with children suffering from dangerous diseases.[214] Rule 17 provides for special provisions for the diet, clothing, etc., of inmates.[215] Rule 18 regulates arrangements of primary education for inmates and in special circumstances they may be given facilities to pursue higher education outside the premises of the certified institute or approved home. In addition, it provides that vocational training for the inmates as suitable for their economic rehabilitation shall be provided. It may be noted here that providing children with education, during the time that they are deprived of their liberty, whether awaiting trial or sentence, is crucial in order to ensure that when they are released they can resume their lives. Hence, for as many children as possible in conflict with the law, who are older, secondary education should be provided as a general rule.[217] Rule 23 provides that juveniles will remain engaged in recreational activities for one hour daily. [217]

8.4.3 Forbidden acts, working hours, punishments

Rule 23 sets out the acts that are forbidden to be committed by inmates. Rule 24 sets out the different punishments for these acts, namely a) formal warning b) deprivation of any of the privileges of the grade, c) reduction in grade, d) separate confinement, e) caning not exceeding ten stripes.[218] Sub-rule 2 specifies that only the superintendent or in his absence the

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213 Rule 27 of the Havana Rules on classification and placement.

214 See Rule 49-55 of the Havana Rules on Medical care.

215 See Rule 31-37 of the Havana Rules on physical environment and accommodation.

216 See Rule 38 and 39 of the Havana Rules.

217 See Rule 47 of the Havana Rules. In light of this provision, one hour would seem to be insufficient to foster the child's development.

218 See Rules 66-71 of the Havana Rules on disciplinary procedures.

officer appointed by him shall award punishment. Sub-rule 4 specifies that caning shall be on the palm of the hand or on the buttocks. It must be noted here that Havana Rules prohibit solitary confinement.[219] In addition, the CRC and Beijing Rules and Havana Rules specifically prohibit corporal punishment.[220] Rule 25 provides that inmates that are medically fit shall be required to work eight hours per week and divides these hours up accordingly into drill and physical exercise, literary institutions and manual work (including agriculture).[221] The Havana Rules provide that all protective national and international standards applicable to child labour and young workers apply to juveniles.[222]

8.4.4 Oversight

Rule 10 provides for the establishment of a committee of visitors for the training institute which under Rule 11 shall be responsible for the management of the training institute and shall discharge such duties and exercise such functions as specified by the Director. Rule 20 provides that the Chief Inspector shall be responsible for the control and supervision of the certified institutes or approved homes.[223]

8.4.5 Leave of absence and release

Rule 19 deals with leave of absence of juvenile offenders. The Children Rules do not contain any relevant provisions relating to release. These can be found in the Children Act and will be discussed later in this chapter.

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219 Rule 67 of the Havana Rules.

220 Rule, 17.3 Beijing Rules, Rule 63 and 67 Havana Rules. However Rule 63 specifies that the prohibition of physical restraint and the use of force is subject to an exception as specified in Rule 64. Rule 64 specifies that instruments of restraint and force can only be used in exceptional cases where all other control methods have been exhausted.

221 Rule 67 specifically provides that labour should always be viewed as an educational tool and as a means of promoting the self-respect of the juvenile in preparing him or her for return to the community and should not be imposed as a penalty for infraction.

222 Rule 44 of the Havana Rules.

223 See Rules 72-78 on Inspection and complaints of the Havana Rules.

8.4.6 Duties and responsibilities of staff

The responsibilities of the Chief Inspector are set out in Rule 20. However, in particular, it is important here to draw attention to the responsibilities of the probation officer under the Rules. Rule 21 sets out the responsibilities of the probation officer subject to section 31 (3) of the Children Act. The responsibilities as described below mainly relate to the role of the probation officer where the child has been sentenced to be released on probation under section 53, in particular sub-section 1(b). However, they also relate to children who are pending or post trial detained in an institution such as remand home, place of safety or certified institute. It is clear from the rules that whereas the duties of other professionals discontinue upon release of the child, this is not the case for the probation officer who is required to support the child in the process of reintegration and rehabilitation into society.

Section 21 provides as follows:

> "21. **Powers and duties of a Probation Officer.**-A Probation Officer shall, subject to the provisions of subsection (3) of section 31,—
>
> (a) meet the child frequently and make inquiries about his home and school conditions, conduct, mode of life, character, health, environment and explain to the child the conditions of his probation;
>
> (b) attend Court regularly and submit report;
>
> (c) maintain diary, case files, and such registers as may be specified by the Director or Court from time to time;
>
> (d) meet the guardian and other relations of the child frequently in the process of correction, reformation and rehabilitation of the child ;
>
> (e) issue warning to the person under whose care the child is placed if such person is found to have committed any breach of the terms of the bond ;

(f) visit regularly the child placed under his supervision and also place of employment or school attended by such child and to submit regular monthly reports to the Director in Form G;

(g) encourage the child to make use of any opportunity that might be made available from any social welfare organisation or agency;

(h) advise the child to disassociate himself from a society which in the opinion of the Probation Officer, may spoil the character of the child;

(i) endeavour to find suitable employment for the child. if such child be out of employment, and strive to improve his conduct and general conditions of living; and

(ii) perform such other functions as may be assigned to him by the Director or by the Court from time to time."

The rules do not provide explicitly for periodic review of cases of children by the probation officer to assess whether the child offender is making progress and could be discharged or released on probation. However, it is clear that a Court will only act under section 53 (1) (b) if the probation officer submits an application to the Court for release on probation of the child, which is supported by a report detailing the progress of the child. Similarly, the Rules do not provide for periodic review of cases of children who have been sentenced to imprisonment or to be committed to a certified institute. Once a child is sentenced to imprisonment or is committed to a certified institute there is no option of probation, but there are options for the child to be sent to detention instead of imprisonment under section 51(1) first proviso, to be considered for release from custody by executive order by the Government under section 67, and release on licence by the detaining institute under Rule 12. However, it is clear that these options will only be considered on the basis of the application and report of the

probation officer suggesting such release, which would require periodic review. As such a lot depends on the initiative and pro-activeness of the probation officer.

8.5 Detention in lieu of imprisonment and release

8.5.1 Detention in lieu of imprisonment

It must be remembered that section 51 third proviso allows the Court at any time during the detention [imprisonment], if it thinks fit, to direct that in lieu of such detention the youthful offender be kept in a certified institute until he has attained the age of eighteen years. Again as highlighted above, it would be for the probation officer in the prison to prepare a report and make an application on the basis of the report reviewing the case of the child.

8.5.2 Release from custody by executive order

When the accused is sentenced to a period of detention in a certified institute under section 52 of the Act, there does not appear to be any further function for the Court. However, the Government may order the discharge of a child from a certified institute or approved home. Section 67 of the Act provides as follows:

> "67. Discharge. (1) The Government may, at any time, order a child or youthful offender to be discharged from a certified institute or approved home, either absolutely or on such condition as the Government may specify.
>
> (2) The Government may, at any time, discharge a child from the care of any person to whose care he is committed under this Act, either absolutely or on such conditions as the Government may specify."

In the case of ***Fahima Nasrin*** reference was made to Rule 9 of the Children Rules, which provides as follows:

> "9. **Management of certified institutes**.-(1) The Superintendent shall maintain case file for each inmate

separately containing detailed information about the family background, character, aptitude, performance in education, training and such other matters as he may consider necessary.

(2) The governing body of a certified institute shall exercise such powers and shall conduct its, business in such manner as the Director may determine, and the decisions of the governing body shall require approval of the Director."

In light of the said Rule, it was observed,

"30. (....) It appears to us, therefore, that the intention of the legislature is to ensure assessment of the children who are sentenced to detention in order to gauge the improvement in their character and behaviour with the view to setting them at liberty either conditionally or without condition. This reflects the general intention of the legislature promulgating laws relating to children, that children are to be treated for their behaviour rather than punished for it, and whenever it is found that the behaviour of the offending children has improved sufficiently to be released into mainstream society, then the question of detaining them further does not arise. They should be released invoking the provisions of section 67 of the Act."

It was held as follows:

"31. (....) In our view, any offender who shows sufficient improvement in his character and behaviour in the assessment of those who are given the duty to assess his development may be discharged before the completion of his sentence of detention. That is the purpose of the law.....

The authority of the government under section 67 of the Act has no connection with the sentence imposed by the Court. The discharge contemplated by this provision is based on totally

different considerations which are reckoned after the offender starts residing in any certified institute or approved home, and are fully in consonance with the aims and purpose of the Children Act, 1974 and the Children Rules, 1976."

8.5.3 Release on licence

The power to release a detainee is given to the detaining institute under the Children Rules. Rule 12 provides for releasing children detained in the certified institutes to the custody of any trustworthy or respectable person:

> "12. Placing out on licence. (1) A youthful offender or child may be permitted by licence to live with any trustworthy or respectable person named in the licence on condition that-
>
> (a) he shall faithfully obey the instructions of the person to whom he is licensed to live;
>
> (b) he shall keep himself away from bad associations and abstain from taking intoxicants; and
>
> (c) he shall not leave the place of his residence or area without the prior permission of the person under whose care he has been placed."

The provisions of section 67 and Rules 9 and 12 are not within the purview of the Court. Nevertheless, the ***Fahima Nasrin*** case indicates that the failure of the concerned authority to exercise the power may be challenged under the judicial review proceedings as provided by the Constitution. It must be noted that the Beijing Rules provide that conditional release from an institution shall be used by the appropriate authority to the greatest extent possible, and shall be granted at the earliest possible time. It must always be borne in mind that detention is not a good solution, particularly for children who are developing their social, human and survival skills. Conversely, detention can have serious negative effects of creating opportunities for children to form gangs while institutionalised. Often they receive training in criminal activities from their

peers in the institutions, which they utilise on release. Hence, alternative sanctions should be devised, e.g. community service, and alternative detention should be organised, e.g. with families so that exposure to other offending children can be minimised.

8.6 Custody of child victims

8.6.1 Custody of child victims of offences under the Children Act

Sections 55 and 56 of the Act deal with detention of victims of offences which are detailed in Part VI of the Children Act. Sections 55 and 56 provide as follows:

> "55. Detention of child in place of safety. (1) Any Probation Officer or police officer not bellow the rank of Assistant Sub Inspector or a person authorised by the Government in this behalf may take to a place of safety any child in respect of whom there is reason to believe that an offence has been or is likely to be committed.
>
> (2) A child so taken to a place of safety and also any child who seeks refuge in a place of safety may be detained until he can be brought before a Court:
>
> > Provided that such detention shall not, in the absence of a special order of the Court, exceed a period of twenty-four hours exclusive of the time necessary for journey from the place of detention to the Court.
>
> (3) The Court may thereupon make such order as hereinafter provided."
>
> 56. Court's power for care and detention of child. (1) Where it appears to the Court that there is reason to believe that an offence as stated in section 55 has been committed or is likely to be committed in respect of any child who is brought before it and that it is expedient in the interest of the child that action should be taken under this Act, the Court may make such order as circumstances

may admit and require for the care and detention of the child until a reasonable time has elapsed for the institution of proceedings against the person for having committed the offence in respect of the child or for the purpose of taking such other lawful action as may be necessary.

(2) The order of detention made under sub section (1) shall remain in force until such time as the proceedings instituted against any person for an offence referred to in sub section (1) terminate in either conviction, discharge or acquittal."

8.6.2 Custody of child victims of offences under other laws

Sections 57 and 58 deal with detention of victims of offences committed against children under the general or special laws. The sections provide as follows:

"57. Victimised child to be sent to Juvenile Court. Any Court by which a person is convicted of having committed an offence in respect of a child or before which a person is brought for trial for any such offence shall direct the child concerned to be produced before a Juvenile Court or where there is no Juvenile Court, a Court empowered under section 4 for making such orders as it may deem proper.

58. Order for committal of victimised children. The Court before which child is produced in accordance with section 57 may order the child

(a) to be committed to a certified institute or an approved home until such child attains the age of eighteen years or, in exceptional cases, for a shorter period, the reasons for such shorter period to be recorded in writing, or

(b) to be committed to the care of a relative or other fit person on such bond, with or without surety, as the Court

may require, such relative or fit person being willing and capable of exercising proper care, control and protection of the child and of observing such other conditions including, where necessary, supervision for any period not exceeding three years, as the Court may impose in the interest of the child:

Provided that, if the child has parent or guardian fit and capable, in the opinion of the Court, of exercising proper care, control sad protection, the Court may allow the child to remain in his custody or may commit the child to his care on bond, with or without surety, in the prescribed form and for the observance of such conditions as the Court may impose in the interest of the child."

It is to be noted that the proviso to section 58 is the dominant or over-riding provision, inasmuch as if a parent or guardian exists and is fit and capable to exercise proper care, control and protection, then the Court need look no further. Only in the absence of a fit and capable parent or guardian would the Court need to consider the alternatives provided in section 58 (a) or (b).[224] When a child is given to the custody of a parent, guardian or fit person, in addition, the Court may pass an order of supervision under section 59, which provides as follows:

"59. Supervision of victimised children. The Court which makes an order committing a child to the care of his parent, guardian or other fit person under the foregoing provisions may, in addition, order that he be placed under supervision."

In the case of ***The State vs. Secretary, Ministry of Law, Justice and Parliamentary Affairs and others***[225] a seven year old girl, the victim of rape by her neighbour, was sent to safe custody in a Safe Home run by the Department of Social Welfare. Upon a Suo Motu Rule issued by the High Court Division, it was observed as follows:

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224 See The State vs. Secretary, Ministry of Law, Justice and Parliamentary Affairs and others 29 BLD 656.

225 29 BLD 656.

> "Upon a careful reading of the relevant section of law it appears to us that the proviso has an over-riding effect, inasmuch as if the child has a parent or guardian fit and capable in the opinion of the Court of exercising proper care, control and protection, then the custody of the victim girl is to be given to her parents and that would obviate the need for the Court even to consider the other two alternatives, namely committing her to a certified institute or approved home or committing her to care of a relative or other fit person. We do not find from the above mentioned section of the Children Act that there is any requirement for an application to be made by the parents. On the contrary, in view of the age of the victim girl, who was seven years old at the relevant time, and had been brutally raped, we feel that the learned Judge should have realised that it would be inhuman to separate such a tender-aged girl from her parents and send her to a safe home."

In the above case reference was made to Article 12 of the CRC and it was observed that in view of the decisions in the cases of ***Hussain Muhammad Ershad Bangladesh and others,*** **21 BLD (AD) 69** and ***The State vs. Metropolitan Police Commissioner,*** **60 DLR 660** the provisions of international instruments, to which Bangladesh is a signatory, should be implemented.

Also reference was made in that case to Article 3 of the CRC and it was observed as follows:

> "In the facts of the instant case, had the best interests of the child been considered then the learned Senior Judicial Magistrate, Sylhet should have realised that **the best interests of a seven year old girl demands** (emphasis added) that she be allowed to remain with her parents. The learned Magistrate, if he had any sense of common humanity in his dealings with a child and if he had applied a humane attitude, then he would have searched out the girl's parents in order to ascertain that they are fit

and capable of retaining her custody. Moreover, had the learned Magistrate properly appreciated the law, then he could not have torn the girl away from her parents and sent her to safe custody in the safe home. Clearly the option that he had applied is a subservient provision of the law, the proviso being the dominant provision, that is to say, if the parent/guardian of a child is fit and capable of providing proper care, control and protection, then the custody of the child should have been given to the said parent or guardian."

It was further observed as follows:

> "There is nothing on record to suggest that the learned Magistrate at all considered the views of the child which shows abject ignorance of the international provisions, which are meant to be for the welfare and wellbeing of children. Moreover, the tearing away of a seven year old female child from the bosom of her mother can be nothing other than cruel and inhuman treatment which is contrary to Article 27 of the CRC as well as Article 35(5) of our Constitution."

The matter of custody of a minor girl has come up for decision in numerous cases. Many such cases were discussed the case of ***Sumati Begum vs. Rafiqueullah***.[226] Possibly for the first time in a case of this nature, their lordships discussed the provisions of the Children Act, including sections 2(f), 55, 56, 57 and 58. In addition, section 552 of the Code of Criminal Procedure was considered. The latter section provides for the restoration of a female child under the age of sixteen years to her husband, parent, etc. Their lordships observed that the section does not provide for keeping a female child (woman) above 16 years of age in custody. In conclusion their lordships held as follows:

> "22. (.....) We are of the opinion that if an offence is committed against a child before attaining 16 years of age, the Court has the power to keep that child in custody

226 44 DLR 500.

till that child attains the age of 18years, or till the proceeding in respect of the crime committed against the child is terminated in either conviction, discharge or acquittal."

The end result was that, although the girl wanted to be free to go to her husband, she was directed to be given to the custody of her mother.

In ***Krishna Pada Dutta vs Bangladesh,***[227] their lordships relying upon the views expressed in the case of ***Muthu Ibrahim Vs Emperor, ILR 37 Mad 567*** and ***Sukhendra Chandra Das, 42 DLR 79*** held that 'for the purpose of custody of the girl age of majority laid down in the Majority Act 1875 read with Guardians and Wards Act, 1890, i.e. the age of 18 years is the determining factor to decide whether the girl is to be given to the custody of the guardian or she is major. It is needless to state that the reference to the age of sixteen in case of a female minor in section 361 of the Penal Code is only for the purpose of commission of the offence of kidnapping punishable under section 363 of the Penal Code and not for the purpose of deciding whether the girl is *sui juris*.'

In a number of other cases[228] it has been consistently held by the Appellate Division that when the girl is a minor, then she must go to the custody of her parent and that the girl's statement is of no relevance.

On the other hand in the case of ***Rehana Begum and another vs Govt. of Bangladesh,*** **18 BLD 410** the High Court Division upon finding the girl to be above 16 years of age, and being neither an accused nor a witness, ordered her to be released from judicial custody. Their lordships referred to the decision in ***Jahanara Begum alias Jotsna Rani Saha vs. The State,*** **15 DLR 148** wherein it was held as follows:

"15. (....) if the person concerned brought before the Magistrate, even when section 100 of the Criminal

227 42 DLR 297.

228 55 DLR (AD) 1; 5 BLT (AD) 1.

> Procedure Code is applicable, is aged 16 years or over, though will of the victim must be allowed to be prevail. The position of such a person is at the most, that of a witness and, therefore, not being an accused he or she cannot be detained. (.....) the person detained, if major, cannot be kept anywhere against his or her free will."

Rehana Begum was ordered to be released forthwith from the High Court.

In the case of ***Badiur Rahman Chowdhury vs. Nazrul Islam and another,***[229] the victim was a girl aged 15½ years. It was alleged by her father that she had been kidnapped. The girl maintained that she had an affair with the alleged kidnapper and willingly went with him and married him according to Muslim Sharia. She refused to go with her father. The learned Magistrate passed an order sending her to judicial custody (Central Jail, Dhaka). The High Court Division set aside the order of judicial custody and directed that she be set at liberty forthwith allowing her to go wherever and with whoever she likes. The Appellate Division observed as follows:

> "6. (....) It is common knowledge that in cases as in the present the statement made by a girl while living with the accused after alleged offence is generally the result of influence which is brought to bear upon her and meant to encounter the case of the lawful guardian and therefore should be taken with reservation. The Court should give more importance to the words of the parents than to those of a wayward daughter who is currently enamoured."

However, the order of custody was not altered due to the fact that the girl had been living with the victim for more than six months (minus the period of judicial custody) and the doctor reported that she might be pregnant. Also her college examinations were near and her study might suffer due to dislocation of study.

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229 16 BLD (AD) 263.

In the case of ***Abdul Majid Sarker vs. The State,***[230] it was held as follows:

> "14. (....) when prima facie she is a minor it is right and proper that the girl should stay with her parents and as she is not an accused she cannot be kept in judicial custody. In such a situation the opinion of the girl who is a minor is irrelevant. The minor's refusal to go with her father the appellant is not at all a material consideration. The father being the best well-wisher of the minor is entitled to her custody and for her own interest she should be given to her father's custody."

In an unreported case [Jail Appeal No.557 of 2007] a 10 year old victim girl, who had been raped by her father, was ordered by the trial judge to be kept in safe custody till her majority. At the time of admission of the father's appeal, the High Court Division ordered for the production of the girl and her mother or other guardian. When they appeared before the High Court, it transpired that the mother and the maternal uncle were not suitable for having the girl's custody. The place of safe custody at the 'Nirapod Abasan Kendra' in Barisal was felt to be not suitable in view of the age and background of the victim concerned. Accordingly, with the consent of the girl and her mother, she was ordered to reside at the 'Prashanti' Shelter Home in Dhaka run by the Bangladesh National Women Lawyers Association. There she would be with other girls of her age and would receive appropriate education and training. The measures adopted by the High Court, although seemingly contrary to the requirement of Article 9 of the CRC, demonstrates that the Court will act in the best interests of the child even if it means that s/he is deprived of the benefits of living with the natural parents. In similar vein custody pending trial of the offending girl in the case of ***The State vs. Metropolitan Police Commissioner***[231] was not given to her parents. In that case the trial Court allowed the girl to reside

230 55 DLR (AD) 1.

231 60 DLR 660.

with her paternal grandfather while her paternal uncle agreed to bear the costs for her maintenance till she reached the age of majority.

The Children Act basically treats child victims in the same manner as it does child offenders by providing for their custody in a place of safety or certified home until they have attained the age of eighteen. Despite the exception in section 58 which provides that if a parent or guardian exists and is fit and capable to exercise proper care, control and protection, the child victim may be committed to his or her care, the reality is that most child victims are unnecessarily sent to places of safety and certified homes for long periods of time. This is in particular the case for girls. These places of safety and certified homes usually do not differ much from juvenile development centres and children do not have freedom to leave them. The facilities in terms of education and care are minimal and there is little scope for regular contact with the parents of the child. In effect, child victims are made to suffer the brunt by institutionalising and depriving them of their liberty instead of making sure that the accused is restrained and cannot harm the victim.

It must be noted that the regime as foreseen in the Children Act is not in line with the international standards regarding child victims. Article 39 of the CRC provides that:

> "States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child. "

Thus, the emphasis of this provision is on recovery and reintegration in an environment beneficial to the child. Naturally, this is in the first place the family environment, i.e., with the parents or direct relatives of the child. Institutionalisation of children takes them away from this

natural family environment and prevents them from carrying on their normal lives by attending school, interacting with friends etc. Institutionalisation of children should always be used as a measure of last resort in those circumstances where staying with the direct family or a guardian would be harmful to the child and it should always be for the shortest period possible until a better solution is found.

The *Guidelines on Justice in Matters Involving Child Victims and Witnesses* furthermore contain more detailed standards and set out a completely different regime from the provisions of the Children Act. The guidelines describe the rights that must be protected and ensured of child victims and witnesses during the different stages of the justice process. It should be noted that the in relation to the right to safety, child victims or witnesses should be protected against intimidation, threats and harm by (a) Avoiding direct contact between child victims and witnesses and the alleged perpetrators at any point in the justice process; (b) Using Court-ordered 'restraining orders' supported by a registry system; (c) Ordering pre-trial detention of the accused and setting special "no contact" bail conditions; (d) Placing the accused under house arrest; (e) Wherever possible and appropriate, giving child victims and witnesses protection by the police or other relevant agencies and safeguarding their whereabouts from disclosure. Institutionalisation of the child is not even suggested. The Guidelines have been discussed in detail in chapter II of this book.

8.7 Custody of destitute, neglected and uncontrollable children

Part V of the Act deals with "measures for the care and protection of destitute and neglected children". Section 32 provides as follows:

> "32. **Children found homeless, destitute etc.-**A Probation Officer or a Police Officer not below the rank of Sub-Inspector of Police or any other person authorised by the Government in this behalf may bring before a

Juvenile Court or a Court empowered under section 4 any person who, in his opinion, is a child and who-

(a) has no home, settled place of abode or visible means of subsistence, or no parent or guardian exercising regular and proper guardianship ; or

(b) is found begging or is found doing for a consideration any act under circumstances contrary to the wellbeing of the child ; or

(c) is found destitute and his parent or other guardian is undergoing transportation or imprisonment ; or

(d) is under the care of a parent or guardian who habitually neglects or cruelly ill-treats the child ; or

(e) is generally found in the company of any reputed criminal or prostitute not being his parent or guardian ; or

(f) is residing in or frequenting a house used by a prostitute for the purpose of prostitution and is not the child of that prostitute ; or

(g) is otherwise likely to fall into bad association or to be exposed to moral danger or to enter upon a life of crime.

(2) The Court before which a child referred to in sub-section (1) is brought shall examine the information and record the substance of suet examination, and, if it thinks there are sufficient grounds for making further inquiry, it shall fix a date for the purpose.

(3) On the date fixed for the inquiry under sub-section (2) or on an} subsequent date to which the proceeding may be adjourned, the Court shall hear and record all relevant evidence which may be adduced for and again, any action that may be taken under this Act and may make any further inquiry it thinks fit.

(4) if the Court is satisfied on such inquiry that such person is a child as described in sub-section (1) and that it is expedient so to deal with him the Court may order him to be sent to a certified institute or approved home or may order him to be committed in the prescribed manner to the care of i relative or other fit person named by the Court and willing to undertake such care, until such child attains the age of eighteen years, or for any shorter period

(5) The Court which makes an order committing a child to the care of i relative or other fit person may, when making such order, require such relative or other person to execute a bond, with or without sureties, as the Court mad require, to be responsible for the good behaviour of the child and for the observance of such other conditions as the Court may impose for securing that the child may lead an honest and industrious life.

(6) The Court which makes an order committing a child to the care of a relative or other fit person under this section may, in addition order that he be placed under the supervision of a Probation Officer or other fit person named by the Court.

(33) Un-controllable children.-(l) Where the parent or guardian of a child complains to a Juvenile Court or to a Court empowered under section 4 'that he is unable to control the child the Court may, if satisfied on inquiry that it is expedient so to deal with the child, order the child to be committed to a certified institute or an approved home for a period not exceeding three years.

(2) The Court may also, if satisfied that home conditions are satisfactory and what is needed is supervision, instead of committing the child to a certified institute or approved home, place him under the supervision of a Probation Officer for a period not exceeding three years."

There are almost no cases of destitute and neglected children under section 32 or uncontrollable children under section 33 coming to the High Court. As such there is little or no jurisprudence developed in this area. However, a number of observations are in place here.

First of all, it must be noted that the children listed in section 32 under (a)-(g) and uncontrollable children under section 33 are children who are in need of care and protection, which is evidenced by the title of Part V. Hence, they should be treated as such and not be treated in the same way as children who are in conflict with the law. This is what sections 32 (4) and 33 do by allowing the child to be committed to a certified institute until the child attains the age of eighteen years or in case of uncontrollable children for a maximum period of three years. In effect, this is a form of deprivation of liberty which as was discussed, should always be used as a measure of last resort and for the shortest appropriate time. In practice, destitute, neglected and uncontrollable children are often sent to one of three child development centres (KUKs). As these are children who are innocent and have not been accused of any crime or offence; they should not be allowed to be sent to a certified institute where they will mingle with children in conflict with the law who have been committed to such an institute under sections 52 or 51 third proviso of the Act. Furthermore, destitute, neglected and uncontrollable children need psycho-social care and counselling and certified institutes are not in a position to provide children with these forms of care

Secondly, there seems to be a contradiction in the law between section 32 of the Act which is supposedly aimed at the care and protection of these children and the Vagrancy Act which gives the police wide discretionary powers to arrest children on grounds similar to those listed in section 32, i.e. of begging, living on the street etc. Hence, under the Vagrancy Act these children are in effect treated as child offenders who fall under the regime of the Children Act and to which the relevant provisions relating to child offenders apply. It must be noted that efforts are on the way by the Ministry of Social Welfare to

amend the Vagrancy Act making the Act applicable only to adults and not to children. The trend of the international instruments is that children should not be punished for what may be termed 'status offences'.

Thirdly, as emphasised throughout this book, children belong in the first place with their parents. Institutionalisation should only be used as a measure of last resort and for the shortest appropriate period of time. Where possible, children should be kept with their parents, and parents should be given support in the care of their child. In most cases, lack of parental guidance and care has led children to become destitute, neglected or uncontrollable. Where this is not possible, alternative care should be provided in the form of placing the child in the care of an extended family member or a guardian. Sections 32 (3) and (4) effectively, instead of committing the child to a certified institute, allow for the placement of the child with a relative or other fit person, and section 32 (5) and section 33 (2) allow, in addition, for the child to be placed under probation. In practice, however, in many cases, these provisions are not used, and children are immediately placed within a certified institute. In sum, Judges should be discouraged from passing orders institutionalising the recalcitrant children. More should be done by way of providing counselling for the parents and motivating them to engender a more child-friendly atmosphere in the home.

There are various international instruments which provide for detailed minimum standards as regards the protection and care of children in need of such care and protection. These include, in the first place, the CRC and the Decision of the CRC Committee on Children without Parental Care[232], the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children and the Guidelines on Alternative Care[233]. They have been briefly touched upon in Chapter II of this book, however it falls beyond the scope of this book to discuss them further.

232 Committee on the Rights of the Child, Decision on Children without Parental Care, 2004

233 GA A/HRC/11/L.13 15 June 2009 Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development 11/ ... Guidelines for the Alternative Care of Children.

CHAPTER IX

Conclusion

This book has attempted to provide guidance to the various professional groups working with children on the interpretation and application of the provisions of the Children Act 1974 and Children Rules 1976, and the case-law relating to children in contact with the law, in particular those that are in conflict with the law. I hope that it will be of use to the various professionals working with children and will assist them in carrying out their duties and responsibilities under the law, with the ultimate aim of ensuring that children who come for whatever reason in contact with the law receive better treatment and services under the regime of the Children Act.

The Constitution in Article 28 (4) provides: ”Nothing in this Article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.” The legislator by virtue of enacting the Children Act has made such special provision for children. The aim of the Children Act, Children Rules and the supporting case-law is to set out a separate justice regime for children who come into contact with the law, whether as a child in conflict with the law (child offender), child victim or a destitute and neglected child. This regime for children is different from the adult justice system, in particular the adult criminal justice system. In this conclusion, I would like to once more draw upon the reasoning behind the special treatment of children, the main provisions and principles that need to be applied when dealing with children in contact with the law, and I would like to end with a number of suggestions on how we can move towards a justice delivery system for children.

Justice for children

The chapters in this book in various instances have highlighted the view of the Courts that the laws relating to children are special laws, meant for the beneficial treatment of deviant, neglected and victim children. This may be exemplified by the observation in the ***Fahima Nasrin*** case[234], as follows:

234 Fahima Nasrin vs. Bangladesh and others, 61 DLR 232.

“32. (....) we are of the view that the children who resort to offending or who deviate from the acceptable behaviour or norms, do so not through their own fault but through the neglect or fault of their parents and their immediate surroundings as well as the failure of society to provide for their basic needs. It is a fact that we are frequently finding children engaging in more and more serious offences. That is a sad reflection of the lack of provision which the State makes available to these children and their parents or guardians. We note more and more that the more notorious criminals are engaging children in criminal activities and that the children are becoming easy targets as potential accomplices due to their impoverished background. We have come across some cases where even the parents push their own children into criminal activity in order that they may earn and sustain the family members. That again, is a sad reflection of our impoverished society and lack of facilities provided by the State. Nevertheless, we feel that the children may not be blamed and castigated for their wrong-doing and that it is our duty as part of the society to ensure that the children are protected from such criminal activities. It is very easy to say that a child has committed a serious offence and must be severely dealt with and sent to prison for the protection of the public, but under the laws of our country as well as international instruments covenants and norms, it is also our duty to ensure that we act with equanimity when dealing with cases of children. Efforts must be made to explore the root causes of the children’s deviant behaviour and to remedy that. They are to be given all the benefit that our Constitution and the law of the land provide for them. We are also obliged to implement various beneficial provisions of international conventions, covenants and treaties, such as the UN Convention on the Rights of the Child (UNCRC) and International Covenant on Civil and Political Rights (ICCPR), of which Bangladesh is a signatory. We note also that our Constitution allows for

special laws to be enacted in favour of children as well as other specified communities as detailed in Article 28(4) of the Constitution. Therefore, the rights of the child are not only protected by the Children Act, 1974, but are mandated by the UNCRC. Above all, the favourable provision of the law and of the covenants and conventions are to be applied to the benefit of the child as provided by Article 28(4) of the Constitution.....

34. (....) We can only reiterate that the laws have been developed over the years in a purposive way upon realisation of the need to protect children for their acts of indiscretion committed due to immaturity and impetuosity. To even consider any form of retributive or deterrent punishment in the guise of protection of society would be a regressive step shutting our eyes to our obligation to provide a congenial environment in which our children may grow and flourish into worthy citizens. At all times the welfare and the best interest of the child must be kept in the mind."

The ***Roushan Mondal*** case[235] also aptly reflects the view of the Court:

"46. (....) Thus the thrust of the International Declarations, Rules, Covenants and other instruments is towards reformation and rehabilitation of youthful offenders and for establishment of facilities for proper education and upbringing of youths so that they are prevented from coming into conflict with the law. In the event that a child or juvenile does come into conflict with the law, then the aim is to provide a system of justice which is 'child-friendly' and which does not leave any psychological scar or stigma on the child, and, on the contrary, prepares him for a fruitful future."

"42. (....) The preamble also recognises the special needs of the children of the world who are growing up in hostile and unfriendly surroundings, viz. "Recognizing that, in all

235 State v. Roushan Mondal alias Hashem, 59 DLR 72.

countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration," This last recognition leads us back to the concept that the plight of the children who face difficulties within the family community is not a creation of their own, but a creation of the community of which the children are mere victims, and hence, they need protection. They are the victims of the circumstances created by the lack of adequate care and failure to provide a congenial atmosphere for the proper upbringing of the child."

Finally, I must not forget the trend in recent years of the increase in delinquent behaviour and of youth becoming more and more violent. This aspect was adverted to in the case of ***Fahima Nasrin***. In an article published in January 2009 in the Chronicle of the International Association of Youth and Family Judges and Magistrates[236], the President of the association, Justice Renate Winter wrote:

> "It seems to be a very typical reaction of governments, individuals and the media that in times of economic hardship justice becomes more retributive, especially in regard to children in conflict with the law. Is it because tolerance and understanding for those causing problems are decreasing when financial problems are on the rise? Is it because it is easier to save from the marginalized ones? Is it because hardship creates harder people?"

Indeed these are very poignant questions which are posed in the wake of hardened attitudes adopted by judges. In the same article, while paying a birthday tribute to Horst Schüler-Springorum, she recalled his advice in respect of the increasing retributive attitude towards punishment of child offenders, in these words:

> "If you look at the history of juvenile justice [....] you will see that politicians as well as people in general react like

236 Justice Renate Winter, News from the President & birthday tribute to Horst Sch?ler-Springorum, Chronicle of the International Association of Youth and Family Judges and Magistrates, January 2009 Edition, at page 3,5 ,

> a pendulum to human behaviour outside the norms. They go from one extreme to the other. From retributive principles to the tutelary system; from assistance to punishment; from responsibilising children to not attributing them any responsibility; from holding persons accountable only when adult to holding children accountable at a very young age. Back and forward, all the time. This was never and is of no consequence for the development of a better juvenile justice system. What is of consequence, is, if you change or if you stick to what you believe is the right approach, even if people call you naive or old fashioned or not understanding the necessities of today's world. This is what matters."

I would also like to refer to an article of mine published in another edition of the said Chronicle[237] where I quoted from the decision of the Indian Supreme Court in the ***Sheela Barse***[238] case and wrote as follows:

> "A similar observation may be made in respect of all children who are brought before the authorities. They are meek and vulnerable and in need of protection from all who come across them. Their behaviour at a moment of indiscretion or the unfortunate situation in which they find themselves are not of their own making, but they are the victims of our failure, either as parents or those who stand in loco parentis. Countries all over the world are striving to give children all the benefits of systems evolved to help children in need. Let us not deny them their inalienable right to protection, nurturing and development into worthy citizens."

Finally, I would like to refer to the way that I conclude my lectures:

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237 Justice M. Imman Ali, Justice System for Children in Bangladesh, Chronicle of the International Association of Youth and Family Judges and Magistrates, July 2009 Edition, at page 43

238 Sheela Barse v. Secretary, Children's Aid Society and others, 1987 (3) SCC 50

> "The aim of the Children's laws and the international treaties, covenants, conventions, rules and protocols is to see that children are guided away from crime and rehabilitated as worthy citizens. At the same time the modern trend is to involve the victim in the decision-making process so that there will be an element of reparation and feeling that justice has been done. The ultimate aim is to create a situation by involving the State and the Community in order to minimise deviant behaviour."

Special provisions for children

The different treatment that is afforded to children under the Children Act is evidenced through the special provisions for children. Here, I would like once more to highlight the main provisions and principles that have been discussed throughout this book.

Age determination

First of all, to ensure that a child receives the beneficial treatment under the Act, it must first be established that he or she is a child under the section 2(f) definition of the Children Act, i.e. a person below 16 years. In addition, for children suspected or accused of having committed an offence, it must first be established that the child can be held criminally liable by verifying whether he or she has reached the minimum age of criminal responsibility, i.e. is 9 years or above, in accordance with section 82 of the Penal Code, and in case of children between the ages of 9-12 years, has the capacity to understand the nature and consequences of their actions, in accordance with section 83 of the Penal Code. The duty to determine the age first arises when the child comes into contact with the police, and the police have to use their discretion whether or not to arrest the child. This requires the police to make a preliminary assessment regarding the age. If the police officer decides to arrest the child, he/she then has to inform the parents of the child as well as the probation officer. The child will then have

to be brought before a Magistrates Court within 24 hours, according to the Code of Criminal Procedure and the Constitution. In accordance with section 66(1) of the Children Act, the Court will then have the duty, if the person brought before the Court appears to be a child, to make an inquiry as to the age of the person. This determination will serve as the basis for the decision as to whether to grant him bail under section 497 of the Cr.P.C., or to refuse bail and place him in a remand home or a place of safety. In case the Court refuses bail, age determination will furthermore determine whether the Court has the jurisdiction to take cognizance of the case itself as a Juvenile Court, or whether it needs to refer the case to the Court of Sessions or any Court which is empowered by section 4 to act as Juvenile Court.

Deprivation of liberty as a measure of last resort

A fundamental principle that has transpired through the case-law is that deprivation of liberty should always be used as a measure of last resort and for the shortest appropriate period of time. Where possible, alternatives to deprivation of liberty should be sought. The Children Act provides for several of these alternatives. First, the police must grant bail as of right if the offence is bailable, as described in Schedule II of the Code of Criminal Procedure. In case of a non-bailable offence, the police under section 48 of the Children Act may release the child on bail, if sufficient security is forthcoming, unless this would bring him into association with any reputed criminal, or expose him to moral danger, or where his release would defeat the ends of justice. If the child is not released on bail, the police shall cause him to be detained in a remand home or a place of safety until he can be brought before a Court. Second, the Court must grant bail in case of a bailable offence and may grant bail in case of a non-bailable offence under the proviso to section 497 of the Cr.P.C. In case the child is not granted bail, as per section 49(2) of the Act, the Court on remanding the child for trial shall order him to be detained in a remand home or a place of safety. Third, the Juvenile Court, or any other Court acting as

a juvenile Court, in sentencing the child has the option to discharge the child or release the child on probation under section 53 instead of committing the child to a certified institute. Unfortunately, the Act also provides for imprisonment of children albeit only when no other punishment under the Act is, in the opinion of the Judge, sufficient, or the child is of so unruly or depraved character and the Court is satisfied that he/she cannot be committed to a certified institute, and none of the methods in which the case may be legally dealt with is suitable. However, from the case-law it is abundantly clear that children should not be in jail, and in cases of deprivation of liberty, should be referred to the child development centres. Similarly, for child victims and destitute, neglected and uncontrollable children, deprivation of liberty in the form of institutionalisation of the child under sections 55-58 and 32-33 of the Act should only be used if there are no other alternatives available. Preference should always be given in the first place to keeping the child with his or her parents and providing them as well as the child with the required support. The Act under sections 32 (5) and (6) in the case of destitute and neglected children and 33 (2) for uncontrollable children also provides for the alternative of committing the child to the care of a relative or other fit person, or the probation officer, instead of ordering him/her to be committed to a certified institute or approved home.

Separation of children from adults

Although children do not belong in jail, the reality unfortunately is that many children are there. For those children, it is crucial that at least the principle set out in section 51(2) of the Act, that children should be separated from adults, should be applied and respected. This principle should not be limited only to prisons but all places of detention. Moreover, serious consideration should be given to ensuring that younger children are kept separate from older children. In addition, the general principle of law, that a person is presumed to be innocent until found guilty, warrants that the children arrested and accused of an

offence should be kept separate from children who have been found guilty and should be given different treatment.

Best Interests of the child and respect for the views of the child

In all instances when dealing with children, in particular when applying the provisions of the Children Act, it must at all times be remembered that the best interests of the child must be kept at heart. As a starting point to understand what that best interests are, the views of the child should be sought and those views should be given due consideration. The ***State vs. Metropolitan Police Commissioner***[239] case also reflects the view of the Court in this regard, as follows:

> "34. Thus at all times the Court must bear in mind the best interests of the child. In the facts of the instant case it appears that a probation officer has been appointed by the Court, who has duties as detailed in Section 16 and 31 of the Act, 1974 and Rule 21 of the Children Rules 1976 (the Rules, 1976). The trial Court or appellate Court is not in a position to ascertain the physical aspects with regard to the family background, character of the accused and the circumstances in which he or she was brought up. For this reason it is imperative that the Court should rely on a report from the probation officer, who will go to the locality, if necessary, to ascertain all the factual aspects necessary for the Court to come to a decision with regard to the child. He would also speak to the accused as provided by the UNCRC. Article 12 provides as follows:
>
> > "12.1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

239 State vs Metropolitan Police Commissioner, 60 DLR 660.

> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."
>
> 35. (....) However, the Court dealing with the custody of the child would have recourse to the report of the probation officer who in turn would ascertain from the locality as well as from the persons involved in the case and the relatives of Arifa and Arifa herself, and will then decide as to what may be in the best interest of the child. We feel that it is important to point out that Arifa's views on the issue of her custody must be sought and respected, so far as practicable and reasonable keeping in mind her age and mental development. This is in consonance with the international covenants and treaties dealing with children and juveniles. At the end of the day it will be up to the learned Judge/Magistrate conducting the trial to decide what will be in the best interests of the child, bearing in mind all the circumstances reported to him and brought before him by way of evidence and report, particularly of the probation officer."

Towards a justice delivery system for children

As discussed above, the Children Act and Rules as well as the case-law set out various beneficial provisions and principles for children. However, until and unless these provisions are implemented and put into practice children will not benefit from them. Hence, I would like to make a number of suggestions here regarding the measures that need to be taken to enable full implementation of the Act, Rules and case-law with the aim of moving towards a justice delivery system for children.

First of all, we need a change of mindset. Justice for children is not about the mechanical application of the law. It requires us to look beyond an individual provision of law at the larger picture

and the aim of the separate justice system for children as highlighted above. Justice for children also requires us to understand that justice is a right of a child and not a favour that we, as professionals dealing with children, are obliged to protect and ensure through the delivery of legal services. To ensure justice for children is to ensure that children are better served and protected by the justice system.

Secondly, if we have this understanding, we must also accept that in order to create a functioning justice delivery system, we need to move away from the current practice whereby often we only look at the provisions of the law that are directly relevant to us in isolation as they form part of our mandate as police, probation officers, lawyers, judges etc., and start looking at the Act as a whole in the light of its aim. Hence, we need to know the law in its entirety including the duties and responsibilities of others so that we can ensure smooth transitioning of the child from one phase to the other in the justice process. In addition, this allows us to hold others accountable where they have failed in their duties. Apart from knowing the law in its entirety, we need to move away from working in isolation as is the current practice, to working more closely together as part of a functioning system. To give an example, in the UNICEF-LETI training programme on Child Rights and Justice for Children, it often happens that police and probation officers of a district meet each other for the first time during the training and do not have each other's contact details. There is no real sense of concerted effort. This raises the question of how we can implement a provision such as section 50 of the Act where the police officer is obliged to inform the probation officer immediately upon arrest of the child. The training being multi-disciplinary in nature not only ensures that the different professionals have a common understanding of the law but also facilitates further cooperation beyond the class-room.

Thirdly, I would like to underline the fundamental importance of the different professionals acquainting themselves with the Children Act and Children Rules and the relevant case-law as discussed in this book. In order to protect the rights of children,

we need dedicated qualified and trained professionals, e.g. special police officers, lawyers and probation officers who are specialised in dealing with children. This requires that they are familiar with the provisions of the Act, Rules and case-law so as to ensure correct application of the law. In practice, however this is often not the case as professionals have not been given appropriate training, and copies of the Act, Rules, and case-law have not been disseminated. It falls upon the Government to ensure that professional education, in-service training, refresher courses and other modes of instruction are utilised to establish and maintain the necessary professional competence of all personnel dealing with cases involving children. Various professional organizations in Bangladesh such as the Legal Education and Training Institute of the Bangladesh Bar Council have taken the initiative to establish and conduct training programmes on child rights. Also, the Judicial Administration Training Institute (JATI) undertakes training of newly appointed Judges and Magistrates in laws and rules relating to children. It is essential that the different professionals are given time off their daily work to attend these programmes for the benefit of children. Furthermore, these programmes should be institutionalised and be made mandatory upon entering the profession. Equally it is important to conduct refresher courses to keep up to date with the developments in the law and practices.

Fourthly, it must be recognized that for the proper implementation of the Children Act regime, there are various obstacles relating to human and financial resources that the different professionals including Police, Lawyers, Probation Officers, Judges and Detention staff face while carrying out their responsibilities under the Children Act and Rules, and these obstacles need to be addressed by the Government. Thus, despite all good intentions of many professionals who are extremely dedicated and work very hard for the cause of children, it is difficult to implement the provisions of the Act relating to a separate trial of children in conflict with the law before the Juvenile Court when there are no separate courtrooms for children, which should be geared for the ‘home-

like atmosphere' mentioned in the Rules. Similarly, children are not able to attend their hearings because there are no financial resources to take them to the Court in another district. As more than half or our population consists of persons below the age of 18, children are the future of this country and therefore they deserve to be invested in.

Fifthly, the Children Act and Rules, although innovative for their time and containing many beneficial provisions for children, need to be brought in line with the CRC and other international standards that Bangladesh has ratified and hence is bound to incorporate into its domestic legislation. In the case of ***Metropolitan Police Commissioner*** it was held that,

> 30. "The Legislature should consider amending the Children Act, 1974 or formulating new laws giving effect to the provisions of the UNCRC, as is the mandate of that Convention upon the signatories."

The current initiative of the Ministry of Social Welfare to amend the provisions of the current Act and to enact a Children Act 2010 is highly praise-worthy. In addition, apart from the Act and Rules, there is now a vast body of case-law giving specific guidance on the interpretation of provisions of the Act and Rules as well as developing new principles of law that are binding on the lower Courts. However, to ensure uniform application of this body of jurisprudence, it is crucial that these cases are in the first place disseminated and made available to the Courts, lawyers and other professionals, and in the second place that these cases are incorporated in statutory law through amendment of relevant laws and the issuing of guidelines based on the case-law. The case-law at various instances over the last decade has appealed to the Government to take action. See for example ***Roushan Mondal*** where in the penultimate paragraph a direction was given as follows:

> "Let a copy of this judgement to be sent to the Ministry of Law, Justice and Parliamentary Affairs for recommending legislation in line with the views expressed by us in this judgment."

Until this is done and these principles are taken up justice for children cannot be uniformly ensured.

Finally, I shall wind up as I do in my lectures by reproducing the final slide of my PowerPoint presentation:

"LET US ALL STRIVE TO ENSURE THAT THE BEST INTERESTS OF THE CHILD ARE ASSURED"

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ANNEX I

Children Act, 1974 and Children Rules, 1976

GOVERNMENT OF THE PEOPLE'S REPUPLIC OF BANGLADESH DEPARTMENT OF SOCIAL SERVICES

THE CHILDREN ACT, 1974

BANGLADESH PARLIAMENT

Dacca, the 22nd June, 1974.

The following Act of Parliament received the assent of the President on the 21st June, 1974, and is hereby published for general information :—

Act No. XXXIX of 1974

An Act to consolidate and amend the law relating to the custody, protection and treatment of children and trial and punishment of youthful offenders.

WHEREAS it is expedient to consolidate and amend the law relating to the custody, protection and treatment of children and trial and punishment of youthful offenders;

It is hereby enacted as follows:—

PART I

PRELIMINARY

1. Short title and commencement.-(1) This Act may be called the Children Act, 1974.

(2) It shall come into force in such areas and on such dates as the Government may, by notification in the official Gazette, specify.

2. Definitions.- In this Act, unless there is anything repugnant in the subject or context,--

(a) "adult" means a person who is not a child;

(b) "approved home" means any institution which is established by any association or body of individuals and

recognised by the Government for the reception or protection of, or prevention of cruelty to, children and which undertakes to bring up, or give facilities for bring up, any child entrusted to its care in conformity with the religion of his birth;

(c) "begging" means-

(i) soliciting or receiving alms in public place, whether or not under any pretence such as singing, dancing, fortune-telling, reciting holy verse or performing tricks;

(ii) entering in any private premises for the purpose of soliciting or receiving alms;

(iii) exposing or exhibiting with the object of obtaining or extoring alms any sore, wound, injury, deformity or disease;

(iv) having no visible means of subsistence and wandering about and remaining in any public place in such condition or manner as makes it likely that the person doing so exists by soliciting or receiving alms; and

(v) allowing oneself to be used as an exhibit for the purpose of soliciting or receiving alms;

(d) "certified institute" means a training institute established or any training institute, industrial school or educational institution certified by the Government under section 19;

(e) "Chief Inspector" means Chief Inspector of certified institutes appointed under section 30;

(f) "Child" means a person under the age of sixteen years, and when use with reference to a child sent to certified institute or approved home or committed by a Court to the custody of a relative or other fit person means that child during the whole period of his detention notwithstanding that he may have attained the age of sixteen years during the period;

(g) “Code” means the Code of Criminal Procedure, 1898 (V of 1898);

(h) “guardian”, in relation to a child or youthful offender includes any person who, in the opinion of the Court having cognizance of and proceeding in relation to the child or youthful offender, has for the time being the actual charge of, or control over, the said child or youthful offend er includes any person who, in the opinion of the Court having cognizance of and proceeding in relation to the child or youthful offender, has for the time being the actual charge of, or control over, the said child or youthful offender;

(i) “Juvenile Court” means a Court establish under section 3;

(j) “place of safety” includes a remand home, or any other suitable place or institution, the occupier or manager of which is willing temporarily to receive a child or where such remand home or other suitable place or institution is not available, in the case of the male child only, a police-station in which arrangements are available or can be made for keeping children in custody separately form the other offenders;

(k) “prescribed” means prescribed by rules made under this Act;

(l) “ Probation Officer” means a Probation Officer appointed under section 31;

(m) “supervision” means the placing of a child under the control of a Probation Officer or other person for the purpose of securing proper care and protection of the child by his parent, guardian, relation or any other fit person to whose care the child has been committed; and

(n) “youthful offender” means any child who has been found to have committed an offence.

PART II

POWERS AND FUNCTIONS OF COURTS HAVING JURISDICTION UNDER THE ACT

3. Juvenile Court.- Notwithstanding anything contained in the Code, the Government may, by notification in the official Gazette, establish one or more Juvenile Courts for any local area.

4. Courts empowered to exercise powers of Juvenile Court.- The powers conferred on a Juvenile Court by this Act shall also be exercisable by—

(a) the High Court Division,

(b) a Court of Session,

(c) a Court of an Additional Sessions Judge and of an Assistant Sessions Judge,

(d) a Sub-Divisional Magistrate, and

(e) a Magistrate of the first class, whether trying any case originally or on appeal or in revision.

5. Powers of Juvenile Courts, etc.- (1) When a Juvenile Court has been established for any local area, such Court shall try all cases in which a child is charged with the commission of an offence and shall deal with and dispose of all other proceedings under this Act, but shall not have power to try any case in which an adult is charge with any offence mentioned in Part VI of this Act.

(2) When a Juvenile Court has not been established for any local area, no Court other than a Court empowered under section 4 shall have power to try any case in which a child is charged with the commission of an offence or to deal with or dispose of any other proceeding under this Act.

(3) When it appears to a Juvenile Court or a Court empowered under section 4, such Court being subordinate to the Court of

Session, that the offence with which a child is charged is triable exclusively by the Court of Session, it shall immediately transfer the case to the Court of Session for trial in accordance with the procedure laid down in this Act.

6. No. joint trial of child and adult.- (1) Notwithstanding anything contained in section 239 of the Code or any other law for the time being in force, no child shall be charged with, or tried for any offence together with an adult.

(2) If a child is accused of an offence for which under section 239 of the Code or any other law for the time being in force such child but the provisions of sub-section (1) could have been tried together with an adult, the Court taking cognizance of the offence shall direct separate trials of the child and the adult.

7. Sittings, etc. of Juvenile Courts.- (1) A Juvenile Court shall hold its sittings at such place, on such days and in such manner as may be prescribed.

(2) In the trial of a case in which a child is charged with an offence a Court shall, 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 sitting of the Court are held.

8. Adult to be committed in a case to be committed to sessions.- (1) When a child is accused along with an adult of having committed an offence and it appears to the Court taking cognizance of the offence that the case is a fit one for committal to the Court of Session, such Court shall, after separating the case in respect of the child from that in respect of the adult, direct that the adult alone be committed to the Court of Session for trial.

(2) The case in respect of the child shall then be transferred to a Juvenile Court if there is one or to a Court empowered under section 4, if there is no Juvenile Court for the local area, and the Court taking cognizance of the offence is not so empowered:

Provided that the case in respect of the child shall be transferred to the Court of Session under section 5 (3) if it is exclusively triable by the Court of Session in accordance with the Second Schedule of the Code.

9. Presence of persons in Juvenile Courts.- Save as provided in this Act, no person shall be present at any sitting of a Juvenile Court except --

(a) the members and officers of the Court;

(b) the parties to the case or proceeding before the Court and other persons directly concerned in the case or proceeding including the police officers;

(c) parents or guardians of the child; and

(d) such other persons as the Court specially authorises to be present.

10. Withdrawal of persons from Courts.- If at any stage during the hearing of a case or proceeding, the Court considers it expedient in the interest of the child to direct any person, including the parent, guardian or the spouse of the child, or the child himself to withdraw, the Court may give such direction and thereupon such person shall withdraw.

11. Dispensing with attendance of child.- If at any stage during the hearing of case or proceeding, the Court is satisfied that the attendance of a child is not essential for the purpose of the hearing of the case or proceeding, the Court may dispense with his attendance and proceed with the hearing of the case or of the proceeding in the absence of the chil**d.**

12. Withdrawal of person from Court when child is examined as witness.- If at any stage during the hearing of a case or proceeding in relation to an offence against or any conduct contrary to decency or mortality, a child is summoned as a witness, the Court hearing the case or proceeding may direct such persons as it thinks fit, not being parties to the case or proceeding, their legal advisers and the officers concerned

with the case or proceeding, to withdraw and thereupon such persons shall withdraw.

13. Attendance at Court of parent of a child charged with offence, etc.- (1) Where a child brought before a Court under this Act has a parent or guardian, such parent or guardian may in any case, and shall, if he can be found and if he resides within a reasonable distance, be required to attend the Court before which any proceeding is held under this Act, unless the Court is satisfied that it would be unreasonable to require his attendance.

(2) Where the child is arrested, the officer in charge of the police-station to which he is brought shall forthwith inform the parent or guardian, if he can be found, of such arrest, and shall also cause him to be directed to attend the Court before which the child will appear and shall specify the date of such appearance.

(3) The parent or guardian whose attendance shall be required under this section shall be the parent or guardian having the actual charge of or control over, the child:

Provided that if such parent or guardian is not the father, the attendance of the father may also be required.

(4) The attendance of the parent of a child shall not be required under this section in any case where the child was, before the institution of the proceeding, removed from the custody or charge of his parent by an order of a Court.

(5) Nothing in this section shall be deemed to required the attendance of the mother or female guardian of a child, but any such mother or female guardian may appear before the Court by an advocate or agent.

14. Committal to approved place of child suffering from dangerous disease.- (1) When a child who has brought before a Court under any of the provisions of this Act, is found to be suffering from a disease requiring prolonged medical treatment, or a physical or mental complaint that is likely to respond to

treatment, the Court, may send the child to a hospital or to any other place recognised to be an approved place in accordance with the rule made this Act for such period as it may think necessary for the required treatment.

(2) Where a Court has taken action under sub-section (1) in the case of child suffering from an infection or contagious disease, the Court, before restoring the said child to his partner in marriage, if there is one, or to the guardian, as the case may be, shall, where it is satisfied that such action will be in the interest of the said child, call upon his partner in marriage or the guardian, as the case may be, to satisfy the Court by submitting to medical examination that such partner or guardian will not re-infect the child in respect of whom the order has been passed.

15. Factors to be taken into consideration in passing orders by Court.- For the purpose of any order which a Court has to pass under this Act, the Court shall have regard to the following factors: --

(a) the character and age of the child;

(b) the circumstances in which the child is living;

(c) the reports made by the Probation Officer; and

(d) such other matters as may, in the opinion of the Court, require to be taken into consideration in the interest of the child:

Provided that where a child is found to have committed an offence, the above factors shall be taken into consideration after the Court has recorded a finding against him to that effect.

16. Reports of Probation Officers and other reports to be treated confidential.- The report of the Probation Officer or any other report considered by the Court under section 15 shall be treated as confidential:

Provided that if such report relates to the character, health or conduct of, or the circumstances in which, the child or the parent or guardian of such child is living, the Court may, if it

thinks expedient, communicate the substance thereof to the child, or the parent or guardian concerned and may give the child or the parent or guardian of such child an opportunity to produce evidence as may be relevant to the matters stated in the report.

17. Prohibition on publication of report disclosing identity, etc., of the child involved in cases.- No report in any newspaper, magazine or news-sheet nor any news giving agency shall disclose any particular of any case or proceeding in any Court under this Act in which a child is involved and which leads directly or indirectly to the identification of such child, nor shall any picture of such child be published:

Provided that, for reasons to be recorded in writing, the Court trying the case or holding the proceeding may permit the disclosure of any such report, if, in its opinion, such disclosure is in the interest of child welfare and is not likely to affect adversely the interest of the child concerned.

18. Provisions of Criminal Procedure Code, 1898, to apply unless excluded.- Except as expressly provided under this Act or the rules made thereunder, the procedure to be followed in the trial of cases and the holding of proceedings under this Act shall be in accordance with the provisions of the Code.

PART III

CERTIFIED INSTITTUTES AND OTHER INSTITUTIONS

19. Establishment and certification of Institutes.- (1) The Government may establish and maintain training institute for the reception of children and youthful offenders.

(2) The Government may certify that any training institute not established under sub-section (1) or any industrial school or other educational institution is fit for the reception of children or youthful offenders.

20. Remand Homes.- The Government may establish and maintain remand homes for the purposes of detention, diagnosis and classification of children committed to custody by any Court or Police.

21. Conditions for certification or recognition of institutes, etc.- The Government may prescribe conditions subject to which any training institute, industrial school, educational institution or approved home shall be certified or recognised, as the case may be, for the purposes of this Act.

22. Management of certificate institutes.- (1) For the control and management of every training institute established under section 19 (1), a superintendent and a committee of visitors shall be appointed by the Government, and such superintendent and committee shall be deemed to be managers of the institute for the purposes of this Act.

(2) Every institute, school or institution certified under section 19 (2) shall be under the management of its governing body, the members of which shall be deemed to be the mangers of the institute, school or institution for the purpose of this Act.

23. Consultation with managers.- The managers of the certified institute shall be consulted by the Court before any child is committed to it.

24. Medical inspection of certified institutes and approved homes.- Any registered medical practitioner empowered in this behalf by the Government may visit any certified institute or approved home at any time with or without notice to its managers or other persons in charge thereof in order to report to the Chief Inspector on the health of the inmates and the sanitary condition of the certified institute or approved home.

25. Power of the Government to withdraw certificate.- The Government if dissatisfied with the management of a certified institute, may at any time by notice served on the managers of the institute declare that the certificate of the institute is withdrawn as from a date specified in the notice and on such

date the withdrawal of the certificate shall take effect and the institute shall cease to be certified institute:

Provided that before the issue of such notice a reasonable opportunity shall be given to the managers of the certified institute to show cause why the certificate shall not be withdrawn.

26. Registration of certificate by managers.- The managers of a certified institute may, on giving six months' notice in writing to the Government through the Chief Inspector of their intention so to do, resign the certificate of the institute and accordingly at the expiration of six months from the date of notice, unless before that time the notice is withdrawn the resignation of the certificate shall take effect and the institute shall cease to be certified institute.

27. Effect of withdrawal or resignation of certificate.- A child or youthful offender shall not be received into a certified institute under this Act after the date of receipt by the managers of the institute of a notice of withdrawal of the certificate or after the date of a notice of registration of the certificate:

Provided that the obligation of the managers to teach, train, lodge, cloth and feed any child or youthful offender detained in the institute at the respective dates aforesaid shall, except so far as the Government otherwise directs, continue until the withdrawal or resignation of the certificate takes effect.

28. Disposal of inmates on withdrawal or resignation of certificate.- When an institute ceases to be certified institute children or youthful offenders detained therein shall be either discharged absolutely or on such conditions as the Government may impose or may be transferred by order of the Chief Inspector to some other certified institute in accordance with the provisions of this Act relating to discharge and transfer.

29. Inspection of certified institute and approved homes.- Every certified institute and approved home shall be liable to inspection at all times and in all its departments by the Chief

Inspector, Inspector or Assistant Inspector of institutes and shall be so inspected at least once in every six months:

Provided that where any such certified institute is for the reception of girls only and such inspection is not made by the Chief Inspector, the inspection shall, wherever practicable be made by a woman authorised by the Chief Inspector in that behalf.

PART IV

OFFICERS AND THEIR POWERS AND DUTIES

30. Appointment of Chief Inspector, etc.- (1) The Government may appoint a Chief Inspector of certified institutes and such number of Inspectors and Assistant Inspectors of certified institutes as it thinks fit to assist the Chief Inspector.

(2) The Chief Inspector shall have such powers and duties as this Act specifies and as may be prescribed.

(3) Every Inspector or Assistant Inspector shall have such of the powers and duties of Chief Inspector as the Government may direct and shall act under the direction of the Chief Inspector.

31. Appointment of Probation Officers.- (1) The Government may appoint a Probation Officer in each district:

Provided that where there is no person so appointed in a district any other person may be appointed as a Probation Officer from time to time by a Court in that district for any particular case.

(2) A Probation Officer, in the performance of his duties under this Act, shall be under supervision and guidance of the Juvenile Court where such Court exists or, where there is no such Court, the Court of Session.

(3) A Probation Officer shall, subject to the rules made under this Act and to the directions of the Court-

(a) visit or receive visits from the child at reasonable intervals;

(b) see that the relative of the child or the person to whose care such child is committed observes the conditions of the bond;

(c) report to the Court as to the behaviour of the child;

(d) advise, assist and befriend the child and, where ecessary, endeavour to find him suitable employment; and

(e) perform any other duty which may be prescribed.

PART V

MEASURES FOR THE Care AND PROTECTION OF DESTITUTE AND NEGLECTED CHILDREN

32. Children found homeless, destitute etc.- (1)A Probation Officer or a Police Officer not below the rank of Sub-Inspector of Police or any other person authorised by the Government in this behalf may brink before a Juvenile Court or a court empowered under section 4 any person who, in his opinion, is a child and who --

(a) has no home, settled place of abode or visible means of subsistence, or no parent or guardian exercising regular and proper guardianship; or

(b) is found begging or is found doing for a consideration any act under circumstances contrary to the well-being of the child; or

(c) is found destitute and his parent or other guardian is undergoing transportation or imprisonment; or

(d) is under the care of a parent or guardian who habitually neglects or cruelly ill-treats the child; or

(e) is generally found in the company of any reputed criminal or prostitute not being his parent or guardian; or

(f) is residing in or frequenting a house used by a prostitute for the purpose of prostitution and is not the child of that prostitution; or

(g) is otherwise likely to fall into bad association or to be exposed to moral danger or to enter upon a life of crime.

(2) The Court before which a child referred to in sub-section (1) is brought shall examine the information and record the substance of such examination, and, if it thinks there are sufficient grounds for making further inquiry, it shall fix a date for the purpose.

(3) On the date fixed for the inquiry under sub-section (2) or on any subsequent date to which the proceeding may be adjourned, the Court shall hear and record all relevant evidence which may be adduced for and against any action that may be taken under this Act and may make any further inquiry it thinks fit.

(4) If the Court is satisfied on such inquiry that such person is a child as described in sub-section (1) and that it is expedient so to deal with him, the Court may order him to be sent to a certified institute or approved home or may order him to be committed in the prescribed manner to the care of relative or other fit person named by the Court and willing to undertake such care, until such child attains the age of eighteen years, or for any shorter period.

(5) The Court which makes an order committing a child to the care of relative or other fit person may, when making such order, require such relative or other person to execute a bond, with or without sureties, as the Court may require, to be responsible for the good behaviour of the child and for the observance of such other conditions as the Court may lead an honest and industrious life.

(6) The Court which makes an order committing a child to the care of a relative or other fit person under this section may, in addition order that he be placed under the supervision of a Probation Officer or other fit person named by the Court.

33. Uncontrollable children.- (1) Where the parent or guardian of a child complains to a Juvenile Court or to a Court empowered under section 4 that he is unable to control the child the Court may, if satisfied on inquiry that it is expedient so to

deal with the child, order the child to be committed to a certified institute or an approved home for a period not exceeding three years.

(2) The Court may also, if satisfied that home conditions are satisfactory and what is needed is supervision, instead of committing the child to a certified institute or approved home, place him under the supervision of a Probation Officer for a period not exceeding three years.

PART VI

SPECIAL OFFENCES IN RESPECT OF CHILDREN

34. Penalty for cruelty to child.- If any person over the age of sixteen years, who has the custody, charge or care of any child assaults, ill-treats, neglects, abandons or exposes such child or causes such child to be assaulted, ill-treated, neglected, abandoned or exposed in a manner likely to cause such child unnecessary suffering or injury to his health, including loss of sight or hearing or injury to limb or organ of the body and any mental derangement, such person shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to Taka one thousand or with both.

35. Penalty for employing children for begging.- Whoever employs any child for the purpose of begging, or causes any child to beg, or whoever having the custody, charger or care of a child, connives at or encourages his employment for the purpose of begging, or whoever uses a child as an exhibit for the purpose of begging, shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to Take three hundred, or with both.

36. Penalty for being drunk while in charge of child.- If any person is found drunk in any public place, whether a building or not, gives or causes to be given to any child any intoxicating liquor or dangerous drug except upon the order of a duly qualified medical practitioner in case of sickness or other urgent cause shall be punishable with imprisonment for a term which

may extend to one year, or with fine which may extend to Taka five hundred, or with both.

38. Penalty for permitting child to enter places where liquor or dangerous drugs are sold.- Whoever takes a child to any place where intoxication liquor or dangerous drugs are sold, or being the proprietor, owner or a person in charge of such place, permits a child to enter such place, or whoever causes or procure a child to go to such place, shall be punishable with find which may extend to Taka five hundred.

39. Penalty for inciting child to bet or borrow.- Whoever by words either spoken or written or by signs or otherwise incites or attempts to incite a child to make any bet or wager or to enter into or take any share or interest in any betting or wagering transaction or so incites a child to borrow money or to enter into any transaction involving the borrowing of money shall be punishable with imprisonment for a term which may extend to six months, or with find which may extend to Taka two hundred, or with both.

40. Penalty for taking on pledge or purchasing article from child.- Whoever takes an article on pledge from a child, whether offered by that child on his own behalf or on behalf of any person, shall be punishable with imprisonment for a term which may extend to one year, or with find which may extend to Taka five hundred, or with both.

41. Penalty for allowing child to be in brothel.- Whoever allows or permit a child over the age of four years to reside in or frequently to go to a brothel shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to Taka one thousand, or with both.

42. Penalty for causing or encouraging seduction.- Whoever having the actual charge of, or control over, a girl under the age of sixteen years causes or encourages the seduction or prostitution of that girl or causes or encourages any person other than her husband to have sexual intercourse with her shall be punishable with imprisonment for a term which may extend

to two years, or with find which may extend to Taka one thousand, or with both.

Explanation: -- For the purposes of this section a person shall be deemed to have caused or encouraged the seduction or prostitution of a girl if he has knowingly allowed the girl to consort with, or to enter or continue in the employment of, any prostitute or person of known immoral character.

43. Young girls exposed to risk of seduction.- If it appears to a Court on the complaint of any person that a girl under the age of sixteen years is with or without the knowledge of her parent or guardian, exposed to the risk of seduction or prostitution, the Court may direct the parent or guardian to enter into a recognisance to exercise due care and supervision in respect of such girl.

44. Penalty for exploitation of child employees.- (1) Whoever secures a child ostensibly for the purpose of manual employment or for labour in a factory or other establishment, but in fact exploits the child for his own end, withholds or lives on his earning, shall be punishable with find which may extend to Taka one thousand.

(2) Whoever secures a child ostensibly for any of the purposes mentioned in sub-section (1), but exposes such child to the risk of seduction, sodomy, prostitution or other immoral conditions shall be punishable with imprisonment for a term which may extend to two years, or with find which may extend to Taka one thousand, or with both.

(3) Any person who avails himself of the labour of a child exploited in the manner referred to in sub-section (1) or sub-section (2), or for whose immoral gratification such child is used, shall be liable as an abettor.

45. Penalty for abetting escape of child or youthful offender.- Whoever --

(a) Knowingly assists or induces, directly or indirectly, a child or youthful offender detained in or placed out on

license from a certified institute or approved home to escape from the institute or home or from any person with whom he is placed out on license or nay child to escape from the person to whose custody he is committed under this Act; or

(b) Knowingly harbours, conceals or prevents from returning to certified institute or approved home or to any person with whom he is placed out on license or to the person to whose custody he is committed under this Act a child or youthful offender who has so escaped, or knowingly assist in so doing.

shall be punishable with imprisonment for a term which may extend to two months, or with find which may extend to Taka two hundred, or with both.

46. Penalty for publication of report or pictures relating to child.- Whoever publishes any report or picture in contravention of the provisions of section 17 shall be punishable with imprisonment for a term which may extend to two months, or with fine which may extend to Taka two hundred, or with both.

47. Offence under this part cognizable.- Notwithstanding anything contained in the Code all offences under this part shall be cognizable.

PART VII

YOUTHFUL OFFENDERS

48. Bail of child arrested.- Where a person apparently under the age of sixteen years is arrested on a charge of anon-bailable offence and cannot be brought forthwith before a Court, the officer-in-charge of the police station to which such person is brought may release him on bail, if sufficient security is forthcoming, but shall not do so where the release of the person shall bring him into association with any reputed criminal or

expose him to moral danger or where his release would defeat the ends of justice.

49. Custody of child not enlarged on bail.- (1) Where a person apparently under the age of sixteen years having been arrested is not released under section 48, the officer-in-charge of the police-station shall cause him to detained in a remand home or a place of safety until he can be brought before a Court.

(2) A Court, on remanding for trial a child who is not released on bail, shall order him to be detained in a remand home or a place of safety.

50. Submission of information to Probation Officer by police after arrest.- Immediately after the arrest of a child, it shall be the duty of the police-officer or any other person affecting the arrest to inform the Probation Officer of such arrest in order to enable the said Probation Officer to proceed forthwith in obtaining information regarding his antecedents and family history and other material circumstances likely to assist the Court in making its order.

51. Restrictions on punishment of child.- (1) Notwithstanding anything to the contrary contained in any law, no child shall be sentenced to death, transportation or imprisonment:

Provided that when a child is found to have committed an offence of so serious a nature that the Court is of opinion that no punishment, which under the provisions of this Act it is authorised to inflict, is sufficient or when the Court is satisfied that the child is of so unruly or of so, depraved character that he cannot be committed to a certified institute and that non of the other methods in which the case may legally be dealt with its suitable, the Court may sentence the child to imprisonment or order him to be detained in such place and on such conditions as it thinks fit:

Provided further that no period of detention so ordered shall exceed the maximum period of punishment to which the child could have been sentenced for the offence committed:

Provided further that at any time during the period of such detention the Court may, if it thinks fit, direct the lieu of such detention the youthful offender be kept in a certified institute until he has attained the age of eighteen years.

(2) A youthful offender sentenced to imprisonment shall not be allowed to associate with adult prisoners.

52. Commitment of child to certified institute.- Where a child is convicted of an offence punishable with death, transportation or imprisonment, the Court may, if it considers expedient so to deal with the child, order him to be committed to a certified institute for detention for a period which shall be not less than two and not more than ten years, but not in any case extending beyond the time when the child will attain the age of eighteen years.

53. Power to discharge youthful offenders or to commit him to suitable custody.- (1) A Court may, if it thinks fit, instead of directing any youthful offender to be detained in a certified institute under section 52 order him to be-

(a) discharged after due admonition, or

(b) released on probation of good conduct and committed to the care of his parent or guardian or other adult relative or other fit person on such parent, guardian, relative or person executing a bond, with or without sureties, as the Court may require to be responsible for the good behaviour of the youthful offender for any period not exceeding three years, and the Court may also order that the youthful offender be placed under the supervision of a Probation Officer.

(2) If it appears to the Court on receiving a report from the Probation Officer or otherwise that the youthful offender has not been of good behaviour during the period of his probation, it may, after making such inquiry as it deems fit, order the youthful offender to be detained in a certified institute for the non expired of probation

54. Power to order parent to pay find, etc.- (1) Where a child is convicted of an offence punishable with fine the Court shall order that the fine be paid by the parent or guardian of the child, unless the Court is satisfied that the parent or guardian cannot be found or that he has not conduced to the commission of the offence by neglecting to exercise due care of the child.

(2) Where a parent or guardian is directed to pay a find under sub-section (1), the amount may be recovered in accordance with the provision of the Code.

PART VIII

MEASURES FOR DETENTION, ETC., OF CHILDREN AND YOUTHFUL OFFENDERS

55. Detention of child in place of safety.- (1) Any Probation Officer or police officer not below the rank of Assistant Sub-Inspector or a person authorised by the Government in this behalf may take to a place of safety any child in respect of whom there is reason to be believe that an offence has been or is likely to be committed.

(2) A child so taken to place of custody and also any child who seeks refuge in a place of safety may be detained until he can be brought before a Court:

Provided that such detention shall not, in the absence of a special order of the Court, exceed a period of twenty-four hours exclusive of the time necessary for journey from the place of detention to the Court.

(3) The Court may thereupon make such order as hereinafter provided.

56. Court's power for care and detention of child.- (1) Where it appears to the Court that there is reason to believe that an offence as stated in section 55 has been committed or is likely to be committed in respect of any child who is brought before it and that it is expedient in the interest of the child that action

should be taken under this Act, the Court may make such order as circumstances may admit and require for the care and detention of the child until a reasonable time has elapsed for the institution of proceedings against the person for having committed the offence in respect of the child or for the purpose of taking such other lawful action as may be necessary.

(2) The order of detention made under sub-section (1) shall remain in force until such time as the proceedings instituted against any person for an offence referred to in sub-section (1) terminate in either conviction, discharge or acquittal.

(3) An order passed under this section shall be given effect to notwithstanding that any person claims the custody of the child.

57. Victimised child to be sent to Juvenile Court.- Any Court by which a person is convicted of having committed an offence in respect of a child or before which a person is brought for trial for any such offence shall direct the child concerned to be produced before a Juvenile Court or where there is no Juvenile Court, a Court empowered under section 4 for making such orders as it may deem proper.

58. Order for committal of victimised children.- The Court before which child is produced in accordance with section 57 may order the child-

(a) to be committed to a certified institute or an approved home until such child attains the age of eighteen years or, in exceptional cases, for a shorter period, the reasons for such shorter period to be recorded in writing, or

(b) to be committed to the care of a relative or other fit person on such bond, with or without surety, as the Court may require, such relative or fit person being willing and capable of exercising proper care, control and protection of the child and of observing such other conditions including, where necessary, supervision for any period not exceeding three years, as the Court may impose in the interest of the child:

Provided that, if the child has a parent or guardian fit and capable, in the opinion of the Court, of exercising proper care, control and protection, the Court may allow the child to remain in his custody or may commit the child to his care on bond, with or without surety, in the prescribed form and for the observance of such conditions as the Court may impose in the interest of the child.

59. Supervision of victimised children.- The Court which makes an order committing a child to the care of his parent, guardian or other fit person under the foregoing provisions may, in addition, order that he be placed under supervision.

60. Breach of supervision.- If it appears to the Court on receiving a report from the Probation Officer or otherwise that there has been a breach of the supervision order relating to the child in respect of whom the supervision order had been passed, it may, after making such inquiries as it deems fit, order the child to be detained in a certified institute.

61. Warrant to search for child.- (1) If it appears to a Juvenile Court or a Court empowered under section 4 from information on oath or solemn affirmation laid by any person who, in its opinion, is acting in the interest of the child that there is reasonable cause to suspect that an offence has been or is being committed or unless immediate steps be taken will be committed in respect of the child, the Court may issue a warrant authorising any police officer named therein to search for such child and if it is found that he has been or is being wilfully ill-treated or neglected in the manner hereinbefore stated or that any offence has been or is being committed in respect of the child, to take him to and detain him in a place of safety until he can be brought before it and the Court before which the child is brought may, in the first instance, remain him in the prescribed manner to a place of safety.

(2) The Court issuing a warrant under this section may, by the same warrant, direct that any person accused of any offence in respect of the child be apprehended and brought before it or direct that if such person executes a bond with sufficient

sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court the officer to whom the warrant is directed shall take such security and shall release such person from custody.

(3) The police officer executing the warrant shall be accompanied by the person laying the information if such person so desires and may also, if the Court by which the warrant is issued so directs, be accompanied by a duly qualified medical practitioner.

(4) In any information or warrant under this section the name of the child shall be given, if known.

PART IX

MAINTENANCE AND TREATMENT OF OMMITTED CHILDREN

62. Contribution of parent.- (1) The Court which makes an order for the detention of a child or youthful offender in a certified institute or approved home or for the committal of a child or youthful offender to the care of a relative or fit person may make an order on the parent or other person liable to maintain the child or youthful offender, to contribute to his maintenance, if able to do so, in the prescribed manner.

(2) The Court before making any order under sub-section (1) shall enquire into the circumstances of the parent or other person liable to maintain the child or youthful offender and shall record evidence, if any, in the presence of the Parent or such other person, as the case may be.

(3) Any order made under this section may be varied by the Court on an application made to it by the party liable or otherwise.

(4) The person liable to maintain a child or youthful offender shall, for the purpose of sub-section (1), include in the case of illegitimacy his putative father:

Provided that, where the child or youthful offender is illegitimate and an order for maintenance has been made under section 488 of the Code, the Court shall not ordinarily make an order for contribution against the putative father but may order the whole or any part of the sums accruing due under the said order for maintenance to be paid to such person as may be named by the Court and such sums shall be applied by him towards the maintenance of the child or youthful offender.

(5) Any order under this section may be enforced in the same manner as an order under section 488 of the Code.

63. Provision as to religion.- (1) In determining the certified institute, approved home or fit person or other person to whose custody a child is to be committed under this Act, the Court shall ascertain the religious denomination of the child and shall, if possible, in selecting such certified institute, approved home or fit person have regard to the facilities which are afforded for instruction in his religion.

(2) When a child is committed to the care of a certified institute or approved home in which facilities for instruction in his religion are not afforded, or is entrusted to the care of a fit person who has no special facilities for the bringing up of the child in his religion, the authorities of such certified institute or approved home, or such fit person shall not bring the child up in any religion other than his own.

(3) Where it is brought to the notice of the Chief Inspector that a breach of sub-section (2) has been committed, the Chief Inspector may transfer the child from the custody of such certified institute, approved home or fit person to any other certified institute or fit person to any other certified institute or approved home as he may deem proper.

64. Placing out on license.- (1) When a youthful offender or child is detained in a certified institute or approved home, the managers of the institute or home may, at any time with the consent in writing of the Chief Inspector, by licence, permit the youthful offender or child, on such conditions as my be

prescribed, to live with any trustworthy and respectable person named in the licence, permit the youthful offender or child, on such conditions as may be some useful trade or calling.

(2) Any licence so granted shall be in force until revoked or forfeited for the breach of any of the conditions on which it was granted.

(3) The managers of the certified institute or approved home may, at any time by order in writing, revoke any such licence and order the youthful offender or child to return to the institute or home, as the case may be, and shall do so at the desire of the person to whom the youthful offender or child is licensed.

(4) If the youthful offender or child refuses or fails to return to the certified institute or approved home, the managers of the institute, or home as the case may be, may, if necessary, arrest him, or cause him to be arrested, and may take him, or cause him to be taken, back to the institute or home, as the case may be.

(5) The time during which a youthful offender or child is absent from a certified institute or approved home in pursuance of a licence under this section shall be deemed to be part of the time of his detention in the institute or home as the case may be:

Provided that, when a youthful offender or child has failed to return to the institute or home, as the case may be, on the licence being revoked or forfeited, the time which elapses after his failure so to return shall be excluded in computing the time during which he is to be detained in the institute or home, as the case may be.

65. Action by police with escaped children.- (1) Notwithstanding anything to the contrary contained in any law for the time being in force, any police officer may arrest without a warrant a child or youthful offender who has escaped from a certified institute or approved home or from the supervision of a person under who supervision he was directed to remain, and shall send the child or youthful offender back to the certified institute or approved home or the person, as the

case may be, without registering any offence or prosecuting the child or youthful offender and the said child or youthful offender shall not be deemed to have committed any offence by reason of such escape.

(2) When a child absconding from a certified institute or approved home has been arrested, he shall be detained in a place of safety pending his removal to the certified institute or approved home as the case may be.

PART X

MISCELLANEOUS

66. Presumption and determination of age.- (1) 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.

(2) An order or judgement of the Court shall not be invalidated by any subsequent proof that the age of such person has not been correctly stated by the Court, and the age presumed or declared by the Court to be the age of the person so brought before it shall, for the purposes of this Act be deemed to be the true age of that person and where it appears to the Court that the person so brought before it is of the age of sixteen years or onwards, the person shall, for the purpose of this Act, be deemed not be a child.

67. Discharge.- (1) The Government may, at any time, order a child or youthful offender to be discharged from a certified institute or approved home, either absolutely or on such conditions as the Government may specify.

(2) The Government may, at any time, discharge a child from the care of any person to whose care he is committed under this

Act, either absolutely or on such conditions as the Government may specify.

68. Transfer between institutions.- (1) The Government may order any child or youthful offender to be transferred from one certified institute or approved home to another.

(2) The Chief Inspector may order any child to be transferred from one certified institute or approved home to another.

69. Compensation for false information.- (1) If in any case in which information has been laid by any person under the provisions of section 61, the Court after such inquiry as it may deem necessary is of opinion that such information is false and either frivolous or vexatious, the Court may, for reasons to be recorded in writing, direct that compensation to such an amount not exceeding Taka one hundred as it may determine be paid by such informer to the person against whom the information was laid.

(2) Before making any order for the payment of the compensation, the Court shall call upon the informer to show-cause why he should not pay compensation and shall consider any cause which such informer may show.

(3) The Court may by the order directing payment of the compensation further order that in default of payment the person ordered to pay such compensation shall suffer simple imprisonment for a term not exceeding thirty days.

(4) When any person is imprisoned under sub-section (3), the provisions of sections 68 and 69 of the Penal Code (XLV of 1860), shall so far as may be applied.

(5) No person who has been directed to pay compensation under this section shall by reason of such order be exempted from any civil liability in respect of the information, but any amount paid as compensation shall be taken into account in any subsequent civil suit relating to such matter.

70. Removal of disqualification attaching to conviction.- When a child is found to have committed any offence, the fact that he has been so found shall not have any effect under section 75 of the Penal Code (XLV of 1860), or section 565 of the Code or operate as a disqualification for any office, employment or election under any law.

71. Words 'convictions' and 'sentenced' not to be in relation to children.- Save as provided in this Act, the words 'conviction' and 'sentenced' shall cease to be used in relation to children or youthful offenders dealt with under this Act, and any reference in any enactment to a person convicted, a conviction or a sentence shall, in case of a child or youthful offender be construed as a reference to a person found guilty of an offence a finding of guilty or an order made upon such a finding, as the case may be.

72. Custodian's control over child.- Any person to whose care a child is committed under the provisions of this Act shall, while the order is in force, have the like control over the Child as if he were his parent, and shall be responsible for his maintenance, and the child shall continue in his care for the period stated by the Court notwithstanding that he is claimed by his parent or any other person.

73. Bonds taken under the Act.- The provisions of Chapter XLII of the Code shall, so far as may be apply to bonds taken under this Act.

74. Chief Inspector, Probation Officers, etc. to be public servants.- The Chief Inspector, Inspectors, Assistant Inspectors, Probation Officers and other persons authorised or entitled to act under any of the provision of this Act shall be deemed to be public servants within the meaning of section 21 of the Penal Code (XLV of 1860).

75. Protection of action taken under the Act.- No suit, prosecution or other legal proceedings shall be instituted against any person for anything which is in good faith done or intended to be done under this Act.

76. Appeals and revisions.- (1) Notwithstanding anything contained in the Code, an appeal from an order remade by a Court under the provision of this Act shall lie-

(a) if the order passed by a Juvenile Court or a Magistrate empowered under section 4, to the Court of Session; and

(b) if, the order is passed by a Court of Session or Court of an Additional Sessions Judge or of an Assistant Sessions Judge, to the High Court Division.

(2) Nothing in this Act shall affect the powers of the High Court Division to revise any order passed by a court under this Act.

77. Power to make rules.- (1) The Government may make rules for carrying out the purposes of this act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for-

(a) the procedure to be followed by Juvenile Courts and other Courts empowered under section 4 in the trial of cases and the hearing of proceedings under this Act;

(b) the places at which, dates on which and the manner in which a Juvenile Court shall hold is sitting under section 7 (1);

(c) the conditions subject to which institutions, industrial schools or other educational institutions shall be certified or approved home shall be recognised for the purposes of this Act;

(d) the establishment, certification, management, maintenance, records and accounts of certified institutes;

(e) the education and training of inmates of certified institutes and the leave of absence of such inmates;

(f) the appointment of visitors and their tenure of office;

(g) the inspection of certified institutes and approved homes;

(h) the internal management and discipline of certified institutes and approved homes;

(i) the conditions subject to which institutions shall be recognised as approved places for the purpose of section 14 (1);

(j) the powers and duties of the Chief Inspector and Probation Officers;

(k) the manner of authorising persons for the purposes of section 32 and 55;

(l) the form of bond under the provision to section 58;

(m) the manner in which a child shall be remanded to a place of safety under section 61 (1);

(n) the manner in which contribution for the maintenance of child may be ordered to be paid under section 62 (1);

(o) the condition under which a child may be released on license and the form of such license under section 64;

(p) the conditions subject to which a child may be committed to the care of any person under this Act and the obligations of such person towards the child so committed; and

(q) the manner of detention of a child under arrest or remanded to police custody or committed for trial.

78. Repeals etc.- (1) The Bengal Children Act, 1922 (Ben. Act II of 1922), is hereby repealed.

(2) The Reformatory Schools Act, 1897 (VIII of 1897), shall be deemed to be repealed in any area in which this Act is brought into force under section 1 (3) from the date of such enforcement.

(3) The provisions of section 29-B and 399 of the Code shall cease to apply to any area in which this Act shall be brought into force.

The Children Rules, 1976

GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BANGLADESH MINISTRY OF HEALTH, POPULATION CONTROL AND LABOUR

Labour and Social Welfare Division, Section IV

NOTIFICATION

Dhaka, the 11th March, 1976.

NNo. S.R.O. 103 L/76. In exercise of the powers conferred by section 77 of the Children Act, 1974 (XXXIX of 1974), the Government is pleased to make the following rules, namely:

1. Short title.- These rules may be called the Children Rules, 1976.

2. Definitions.- In these rules, unless there is anything repugnant in the subject or context,

(a) "Act" means the Children Act, 1974 (XXXIX of 1974);

(b) "Director" means the head of the Department of Social Welfare;

(c) "Form" means form appended to these rules;

(d) "Inmate" means an inmates of a certified institute or approved home;

(e) "Medical Officer" means a medical practitioner empowered by the Government under section 24 to visit any certified institute or approved home;

(f) "Section" means a section of the Act;

(g) "Superintendent" means the Superintendent of training institute established under sub section (i) of section.19 and includes the principal "officer in charge" of a certified institute or an approved home.

3. Sitting and adjournment of Court.- A Court shall hold its sittings at least once in a week or as often as may be necessary for the purpose of expeditions disposal of all cases and proceedings instituted under the Act and may adjourn the hearing of a case or proceeding from time as may be necessary.

4. Procedure to be followed by Court.- (1) The hearing of all cases and proceeding shall be conducted in as simple a manner as possible without observing any formality and care shall be taken to ensure that the child against whom the case or proceeding has been instituted feels home like atmosphere, during the hearing.

(2) The court shall see that the child brought before it is not kept under the close guard of a police officer but sits or stands by himself or in the company of a relative or friend or a Probation Officer at some convenient place.

(3) When witnesses are produced for examination, the Court shall freely exercise the powers conferred on it by section 165 of the Evidence Act, 1872 so as to bring out any point that may go in favour of the child.

(4) In examining a child and recording his statement, the Court shall be free to address the child in any manner that may seem suitable in order to put the child at case and to elicit true facts not only in respect of the offence of which the child is accused of but also in respect of the home surroundings and the influence to which the child has been subjected to and the record of the examination shall be in such form as the Court may consider suitable having regard to the contents of the statement and circumstances in which it was made.

(5) Where a child has pleaded guilty or has been found guilty, the Court, instead of making an order upon such finding, may direct the Probation officer or such other person as may be deemed fit by the Court in Form A for submission of a report which, among other things, shall contain family background 'of the child, his character and antecedents, his physical and mental conditions and the circumstances under which the offence was

committed or any other information considered important in the interest of the child concerned.

(6) After considering the report submitted under sub rule (5) and hearing persons referred to in clauses (b), (c) and (d) of section 9, the Court may give such direction or order for the detention or otherwise of the child as it considers fit.

(7) While giving the order, the Court shall fix-

(a) the amount of contribution, if any, to be made by the parent or other person liable to maintain the child f9r his maintenance; and

(b) the mode of payment of such contribution.

5. Certification or recognition of institute.- No training institute industrial school, educational institution or approved home shall he certified or recognised, as the case may be, for the purposes of the Act unless the Government is satisfied that

(a) the object of such institute, school, institution or home is the welfare of children;

(b) there is suitable accommodation for using such institute, school, institution or home as dormitory and for conducting training programmes for the children or youthful offenders;

(c) the management of such institute, school, institution or home is efficient and it has adequate fund to conduct the programmes;

(d) it has adequate number of trained personnel for running its programmes.

6. Procedure for certification or recognition of institutes, etc.- (1) The managers of a training institute, industrial school, educational institute or approved home may, for the purpose of obtaining certificate or recognition, as the case may be, apply to the Director in Form B.

(2) On receipt of an application under sub rule (1), the Director shall, after getting the institute, school, institution or home

inspected, forward the application to the Government with his recommendation, whereupon the certificate or, as the case may be, recognition may be granted to such institute, school, institution or home.

(3) The certificate or, as the case may be, recognition shall be granted in Form C.

7. Committing destitute, neglected or victimised children to the care of a relative or other fit person.- (1) If the Court is satisfied that a child brought before it under sub section (1) of section 32 should be committed to the care of a relative or other fit person, such relative or fit person shall be directed in writing to express his willingness to take care of the child on such conditions as may be specified by the Court.

(2) On receipt in writing of the willingness, the Court shall direct the relative or fit person to execute a bond in Form D.

(3) The Court may, if it thinks fit in the interest of the child, withdraw the child from the care of the relative or fit person any time before the expiry of the period for which the child was committed to his care and make an order for committing the child to a certified institute or approved home for the unexpired period.

(4) When a child is committed to the care of a relative or other fit person and the Court deems it expedient to place the child under the supervision of a Probation Officer, it shall issue an order in that behalf in Form E.

8. Observation of the inmate.- (1) After admission into the certified institute or approved home, an inmate shall be kept under observation for at least fourteen days during which period he shall be carefully observed and studied with special reference to his mental disposition, conduct, aptitude and other related matters for formulating an effective treatment plan.

(2) On the basis of the Assessment made under sub rule (1), an inmate shall be assigned one or more trades or vocation or he

may be recommended suitable for general education, religious instructions or moral guidance.

9. Management of certified institutes.- (1) The Superintendent shall maintain case file for each inmate separately containing detailed information about the family background, character, aptitude, performance in education, training and such other matters as he may consider necessary.

(2) The governing body of a certified institute shall exercise such powers and shall conduct its, business in such manner as the Director may determine, and the decisions of the governing body shall require approval of the Director.

10. Committee of Visitors.- (1) The Committee of visitors for a training institute shall consist of six members who shall be appointed by the Government from amongst the following category of persons namely:-

(a) reputed social workers;

(b) medical practitioners;

(c) retired police or prison officers.

(2) The members of the committee shall elect one from amongst them as Chairman of the committee and the Superintendent of the training institute shall act as the Secretary of the Committee.

(3) The tenure of office of the members of the committee shall, unless the committee is earlier dissolved by the Director, be three years.

(4) The committee shall sit at least once in three months for conducting its business.

(5) The Government may remove any member of the committee so appointed.

(6) A casual vacancy caused, by death, resignation or removal shall he filled by appointment by the Government and the person appointed to fill the vacancy shall hold office for the remainder of the term of his predecessor.

(7) No business shall be transacted at the meeting of the committee unless the Superintendent and two members are present.

11. Functions of the Committee of Visitors.- The committee of visitors shall be responsible for the management of a training institute established under sub section (1) of section 19 and shall discharge such duties and perform such functions as may be specified in writing by the Director.

12. Placing out on licence.- (1) A youthful offender or child may be permitted by licence to live with any trustworthy or respectable person named in the licence on condition that-

(a) he shall faithfully obey the instructions of the person to whom he is licensed to live;

(b) he shall keep himself away from bad associations and abstain from taking intoxicants; and

(c) he shall not leave the place of his residence or area without the prior permission of the person under whose care he has been placed.

(2) The licence to be granted for the purpose of this rule shall be in Form F.

13. Maintenance of records.- Every certified institute and approved home shall maintain, besides such other records or registers as the Director may specify from time to time, the following records and registers, namely:

(a) Admission and Discharge register for the inmates;

(b) Attendance register for the inmates;

(c) Leave register of the inmates;

(d) Register for the sick inmates;

(e) Case file for each inmate;

(f) Punishment register;

(g) Register showing the personal effects of the inmates;

(h) Cash book;

(i) Voucher file;

(j) Bank accounts book;

(k) Stock register;

(l) Daily consumption register;

(m) Inspection book;

(n) Visitor's book;

(o) Attendance register for the staff;

(p) Leave register of the staff,

(q) Notice book for meeting of the committee of visitors or governing body, as the case may be;

(r) Proceeding book of the committee of visitors or governing body, as the case may be.

14. Accounts and audit.- (1) An Annual statement of the accounts shall be prepared by each certified institute or approved home after the close of every financial year and shall be forwarded to the Director.

(2) The accounts of the certified institute or approved home shall be audited every by an auditor, being a chartered account and within the meaning of the Bangladesh Chartered Accountants Order, 1973, who shall be appointed by the managers of the certified institute or approved home.

15. Medical facilities of the inmates.- (1) An inmate shall, immediately after his detention in certified institute or approved home, be medically examined in such manner and by such physician as may he specified by the Director.

(2) An inmate suffering from any contiguous disease shall be 'kept in segregation from other inmates and special arrangement shall be made for his treatment by the Superintendent or by the managers of the certified institute or approved home, as the case may be.

(3) Arrangement shall also be made for medical check up of the inmates at regular intervals.

16. Children suffering from dangerous disease.- (1) A child suffering from a disease requiring prolonged medical treatment, or a physical or mental complaint that is likely to respond to treatment, shall ordinarily be sent to Government hospitals.

(2) Any private clinic or hospital offering specialised treatment not available in Government hospitals and having reasonable security arrangements may also be selected for the treatment of the child and recognised to be an approved place for the purposes of the Act.

17. Diet, clothing, etc. of inmates.- (1) The inmates shall he supplied with such scale of diet and clothing as laid down in the Schedule.

(2) Special diets, according to the suggestion of the attending physician, shall be supplied to the inmates during their illness.

(3) Arrangement for supply of improved diet to the inmates may, with the prior approval of the Director, be made on the occasion of festivals.

(4) Inmates in the star grade may be allowed such extra food as the Director may decide.

(5) The inmates shall be provided with necessary toilet articles.

18. Education and training of inmates.- (1) Arrangement shall be made for providing the inmates with primary standard of education and, in special cases, they may be given facilities to prosecute higher education outside the premises of the certified institute or approved home.

(2) There shall be arrangements for such vocational training for the inmates as may be suitable for their economic rehabilitation.

19. Leave of absence of inmates.- The inmates of a certified institute or approved, home may be granted leave in such manner and in such scale as may be specified by the Director:

Provided that no inmate shall normally be granted any leave within six months of his admission into the certified institute or approved home except on emergent circumstances, such as, serious illness or death of his very near relations.

20. Powers and duties of Chief Inspector.- (1) The Chief Inspector shall be responsible for the control and supervision of the certified institutes or approved homes.

(2) The Chief Inspector, if he thinks fit in the interest of any child, may order any inmate to be transferred from one certified institute or approved home to another.

(3) Subject to such general or special order as may be given by the Director from time to time, the Chief Inspector shall

(a) supervise and exercise general control over the work of the Inspectors, Assistant Inspectors, Superintendents and other officers and staff of the certified institutes or approved homes;

(b) visit and inspect certified institutes and approved homes at least once in two months;

(c) perform such other duties as may he assigned to him by the Director from time to time.

21. Powers and duties of a Probation Officer.- A Probation Officer shall subject to the provisions of sub section (3) of section 31,

(a) meet the child frequently and make inquires about his home and school conditions, conduct, mode of life, character, health, environment and explain to the child the conditions of his probation;

(b) attend court regularly and submit report;

(c) maintain dairy, case files and such registers as may be specified by the Director or Court from time to time;

(d) meet the guardian and other relations of the child frequently in the process of correction, reformation and rehabilitation of the child;

(e) issue warning to the person under whose care the child is placed if such person is found to have committed any breach of the terms of the bond;

(f) visit regularly the child placed under his supervision and also places of employment or school attended by such child and to submit regular monthly reports to the Director in Form G;

(g) encourage the child to make use of any opportunity that might be made available from any social welfare organization or agency;

(h) advise the child to disassociate himself from a society which in the opinion of the Probation Officer, may spoil the character of the child;

(i) endeavour to find suitable employment for the child, if such child be out of employment, and strive to improve his conduct and general conditions of living; and perform such other functions as may be assigned to him by the Director or by the Court from time to time.

22. Division of inmates into grades.- (1) The inmates of the certified institute shall be divided into three grades, namely:

(a) the penal grade;

(b) the general grade; and

(c) the star grade.

The privileges of each grade in the above order shall be higher than those of the immediately preceding grade.

(2) All the inmates after admission into a certified institute or approved home shall be placed in the general grade.

(3) Promotion to the star grade shall be regulated by close personal observation of the inmates, attention being specially paid to their general behaviour, amenability to discipline and performance in general education, vocational training and other activities organized for them from time to time.

(4) When the Superintendent on the basis of close observation as mentioned above is satisfied that an inmate in the general grade may be safely placed in a position of special trust, he may be promoted to the star grade with the previous approval of the Chief Inspector. Such inmate shall wear a distinctive dress and may act as monitor in different capacities and may be placed in authority over other inmates in parade, in the workshop, in recreation and in other situations where he can assist the administration in various ways.

(5) An inmate in the general grade, subject to good behaviour, shall be allowed to write and receive one letter and to have two interviews with his parents or guardians in a month.

(6) An inmate in the star grade shall be allowed to write and receive two letters and to have an interview with his parents or guardians once in every ten days. He can by exemplary conduct earn badge money of Tk., 10.00 (Taka ten) only per month.

(7) The badge money awarded to the inmates in the star grade may be spent by them in such manner as may be approved by the Superintendent.

(8) Where an inmate is believed to be exercising a bad influence, he shall be placed by the Superintendent in the penal grade for such period as the Superintendent considers necessary in the interest of the inmate himself and of other inmates. An inmate in the penal grade shall be employed in hard and labourious work and he shall forfeit all privileges. The Superintendent shall record in the punishment register the particulars of the case of every inmate ordered by him to be placed in the penal grade, with the reasons for such order and stating the period during which the inmate is to remain so placed:

Provided that no inmate shall be placed in the penal grade for a period exceeding three months without the previous sanction of the Director.

(9) If an inmate is, in the opinion of the Superintendent, guilty of any act or omission referred to in Rule 23, the

Superintendent may place him, for such period as he may deem necessary in the penal grade; but if he previously been in the star grade such inmate may be placed either in the general grade or in the penal grade.

(10) Inmates in the penal grade shall be kept separate at night from those in the other grades.

(11) Inmates over the age of 14 years of age shall be kept separate at night from those of and below 14 years of age.

23. Forbidden acts.- The inmate of a certified institute or approved home committing any of these acts shall render himself liable to punishment, namely:

i) omitting to do or refusing to learn, any work or to do it improperly or neglecting the lessons or refusing to avail of the facilities for education and training;

ii) doing and omitting to do anything with intent to cause to himself or to others any illness injury or disability;

iii) causing or omitting to assist in suppressing insubordination, disorderly conduct, violence or rioting of any kind;

iv) taking part in any attack upon any inmate or officer;

v) omitting or refusing to help any officer in preventing attempted escape or attack upon an officer or another inmate;

vi) omitting to report any plot to escape or of conspiracy against the authorities;

vii) refusing to submit to counting by officers whenever required;

viii) instigating others to break the rules or regulations;

ix) disobeying any lawful order of the officer or

omitting or refusing to perform duties in the manner directed;

x) indecent behaviour and using objectionable or filthy language towards anybody or doing or saying anything which may be calculated to wound or offend the feelings of a fellow inmate;

xi) doing any act calculated to create unnecessary alarm in the minds of other inmates or officers;

xii) refusing to submit to medical examination or vaccination or inoculation, or to take any other medical treatment, wherever required;

xiii) throwing away food or refusing to eat food prepared according to the diet scale or appropriating any food not assigned to him or disobeying any order as to the issue or distribution of food and drink or mixing any undesirable foreign matter to food while being cooked or distributed;

xiv) omitting or refusing to wear the clothing given to him or losing, discarding, damaging or altering any part of it;

xv) removing or defacing any distinctive number, mark or badge attached to or required to be worn on the clothing issued;

xvi) omitting or refusing to keep himself clean or disobeying any order regulating the cutting of hair or nails or the washing of clothing;

xvii) omitting or refusing to keep clean and properly arrange his clothing, blanket, beddings and other articles issued to him;

xviii) tempering with any property of the certified institute or approved home;

xix) committing nuisance or soiling any part of the certified institute or approved home or spitting

anywhere except in the places provided for the purposes;

xx) wilfully befouling the walls of latrines, washing and bathing places and the buildings and the compound;

xxi) washing water or other articles or use

xxii) quarrelling with or assaulting any other inmate;

xxiii) showing disrespect towards any officer or visitor or assaulting or attempting to assault any of them;

xxiv) stealing of any article;

xxv) making groundless or frivolous complains;

xxvi) answering untruthfully any question put by an officer or a visitor;

xxvii) communicating (written or otherwise) with an outsider or with an inmate of another certified institute or approved home without permission of the Superintendent;

xxviii) talking unnecessarily loudly when at work or at latrine or when bathing, feeding and counting parades; and

xxix) talking or singing at night after 9 P.M.

24. Punishments.- (1) An inmate committing any of the acts specified in rule 23 shall be liable to any or combination of these punishments, namely:

(a) formal warning;

(b) deprivation of any of the privileges of the grade;

(c) reduction in grade;

(d) separate confinement;

(e) caning not exceeding ten stripes.

(2) No punishment shall be awarded to any inmate by any officer except the Superintendent of the certified institute or approved home, or in his absence, the officer appointed to act for him.

(3) An inmate shall not be placed in separate confinement unless the medical officer has certified that he is in a fit state or health to undergo such punishment.

(4) Caning shall be on the palm of the hand or on the buttocks. The medical officer shall be present at the time when an inmate is caned. The number of stripes shall very according to the age and nature of offence of the inmate. The medical officer may stop the caning on medical grounds.

25. Working hours.- All inmates, provided they are medically fit, shall be required to work for eight hours every working day. The days work shall ordinarily be divided as follows:

Drill and physical exercise	...	...1 hour.
Literary institutions	...	...3 hours.
Manual work (including agriculture)	...	...4 hours.

(besides, they will remain engaged in recreational activities for one hour daily):

Provided that in the case of an inmate who is a candidate for the Secondary School Certificate Examination, the periods of literary instructions and manual work for eight months immediately proceeding the examination shall be 5 hours and 2 hours respectively.

FORM A

[See Rule 4(5)]

Order requiring a Probation Officer to make enquiries.

To

PROBATION OFFICER,

.....

Whereas

(1) a report/complaint under section ..... of the Children Act, 1974, has been received from ..... in respect of ..... son of/daughter of .....

(Name of the child) residing at .....
.....

or,

(2) ..... son of/daughter of .....

(Name of the child) residing at .....

has been produced before the Court under sub-section (1) of section 32 of the Children Act. 1974

Now, therefore, you are hereby directed to inquire into the character and Social antecedents of the said child and submit your report of social enquiries on or before …..…….. or within such further time as may be allowed to you by the Court.

Date this ..... day of ..... 19 .....

SEAL

.....
Signature

..... Juvenile Court

FORM B

[See Rule 6(l)]

Application form for certification/recognition of an institute

To
THE DIRECTOR,
Department of Social Welfare,
Government of the People's Republic of Bangladesh.

Sir,

We, the undersigned, on behalf of ..... beg to request you kindly to certify/recognise our institute/school/ institution/ home for the reception of children and/or youthful offenders.

The detail information in respect of our institute/school /institution/home are as under:

1. Name:
2. Date of establishment:
3. Address:
4. Accommodation

   (please specify types of accommodation and size in square feet) -

   (a) Dormitory:

   (b) School section:

   (c) Training section:

   (d) Administration section
5. Capacity

   (please state number of inmates who can be accommodated):

6. Number of personnel:

   (a) Designation:

   (b) Qualification:

   (c) Pay:

7. Members of the governing body

   (please state name, designation, address and experience of the members) ;

8. Sources of income:

9. Training programmes

   (please specify the number of trades and the standard of the training):

10. Other facilities (recreation, etc):

We do hereby affirm that we shall abide by the provisions of the Children Act, 1974, and the rules made thereunder and also such other directions as the Government may give in respect of management and control of the certified institute and approved homes.

A copy of the constitution of our institute/school/institution/home is appended herewith for favour of kind consideration.

Yours obediently,

Chairman.

Secretary.

For and on behalf o f the Governing body.

FORM C

[See Rule 6(3)]

Certificate

This is to certify that ..... of ..... in the district of ..... is certified recognised as a fit institution/home for the reception of ..... children and/or youthful offenders under the Children Act, 1974.

Given under my hand and seal this ..... day of ..... Nineteen hundred and .....

Secretary,

Ministry of Labour and Social Welfare,

Government of the People's Republic of Bangladesh.

FORM D

[See Rule 7 (2)]

Bond to be executed by relation or fit person.

Whereas ..... son of .....

of ..... P.S ..... District ..... has been ordered to be placed/committed in or to my care by the Court for a period of ..... under rule ..... of the Children Act, 1974, on the condition of my entering into a bond with/without sureties, I hereby bind myself as follows:-

(1) that I shall maintain him in a wholesome atmosphere according to his own religious belief;

(2) that I shall make every endeavour to keen him away from bad associations and make him law-abiding and productive citizen ;

(3) that I shall provide him with facilities for his gainful occupations and development of potentialities ;

(4) that I shall produce him before the Court in case of his wilful violation of law or breach of peace for taking such appropriate actions against him as the Court may deem fit.

In case of my making default in any of the above conditions, I hereby bind myself to forfeit to the Government a sum of Taka. ……...……

Date this day of ..... 19 .....

Signature .....

Full address .....

Sureties

(Where bond with sureties is to be executed)

I/We ..... do hereby declare myself/ ourselves as surety/ sureties for the above named ..... son of ..... of ....., P.S ....., District ..... and undertake :

that he will maintain the child in a wholesome atmosphere and observe the conditions as laid down by the Court in this respect.

In case of his making default therein I/We bind myself/ourselves jointly/severally to pay to the Government a sum of Taka ..... on demand by the Court.

Signature .....

Dated this day of ..... 19 .....

Full Address .....

FROM E

(See Rule 7(4)]

Supervision order

Case No ..... of ..... 19 .....

Whereas ..... has this day been found to have committed child ……. under section of the Children Act, 1974, and has been placed under the care of (name) ……..…… address ..... on executing a bond by the said ..... ;

And whereas the Court is satisfied that it is expedient to deal with the said child by making an order placing him under supervision;

Now, therefore, it is hereby ordered that the said child be placed under the supervision of ....., a Probation Officer, for period of ..... subject to the following conditions, namely:-

(1) that the child along with copies of the order and the bond executed by the said …… will be produced before the Probation Officer named therein;

(2) that the child will he submitted to the supervision of the Probation Officer;

(3) that the child will reside at .....for a period of .....

(4) that the child will not be allowed to quit the Jurisdiction of ..... without the written permission of the Probation Officer;

(5) that the child will not be allowed to associate with bad character;

(6) that the child will live honestly and peacefully;

(7) that the person under whose care the child is placed will arrange for the proper care, education and welfare of the child;

(8) that preventive measures will be taken by the person under whose care the child is placed to see that the child does not commit any offence punishable by law in force in Bangladesh;

(9) that the child' will be prevented from taking intoxicants

(10)*

(11)*

(12)** that the directions given by the Probation Officer from time to time, for the due observance of the conditions mentioned above will be carried out.

Dated ..... day of ..... 19 ….....…

Juvenile Court.

.....

* Additional conditions, if any, may be inserted by the Court

** To be renumbered, if necessary.

FORM F

[See Rule 12(2)]

Form of License

We, the Managers of the Certified Institute/Approved Home, with the consent in writing of the Chief Inspector, do by this license permit …..... detained/committed at/to ..... under section ..... of the Children Act, 1974, for a period of ..... years/months with effect from ..... to be discharged from the said institute/home on condition that he be placed under the care, supervision and guidance of ..... during the remaining portion of the aforesaid detention/commitment.

This license is granted subject to the conditions endorsed hereon, upon the breach of any of which it will be liable to he revoked or forfeited.

For and on behalf of the Managers.

CONDITIONS

(1) That I shall faithfully obey the instructions of the person to whom I have been licensed;

(2) that I shall keep myself away from bad associations And abstain from taking intoxicants;

(3) that shall abstain from any violation of the law and shall lead a sober and industrious life; and

(4) that I shall not leave the place of my residence or area without the prior permission of the person under whose care I have been licensed.

I do hereby solemnly affirm that I have clearly understood the above conditions which have been explained to me in simple language.

Signature of Inmate/Certified
Institute/Approval Home.

FORM G

[See Rule 21(f)]

Monthly Report of Progress

PART I

Name of the Probation officer

Name of the month

Register No.

Name of the Juvenile Court

Case No.

Name of the child

Date of supervision order

Address of the child

Period of supervision

PART II

Places of interview

……..

……..

1. Where the child is residing
2. Progress made, if any, in educational/ training course.
3. What work he is doing and his monthly average earning, if employed.
4. Savings kept in the Post Office Saving Bank Account in his name.
5. Health of the child
6. Remarks on his general conduct and progress.
7. Whether properly cared for

PART III

8. Any proceeding before the Court for

   (a) variation of condition of bond

   (b) change of residence

   (c) other matters

9. Period of supervision completed on

10. Result of supervision with remarks (if any).

11. Name and address of the parent or guardian or fit person under whose care the child is to live after the supervision period is over Date of Report.

Signature of the Probation officer.

SCHEDULE

For Children aged 12 and below

Early morning meal	Chira or muri	...	1 ch.
	Gur	...	½ ch.
Mid-day and evening	Rice or Atta	...	6 ch.
	Meat or Fish	...	1 ch.
	Dal	...	1 ½ ch.
	Potato and green	…	4 ch.
	vegetables	…	1 ch.
	Mustard oil	…	$^{4}/_{15}$ ch.
	Salt	as	may be necessary
	Condiment	...	½ ch.
	Tamarind, Lemon	not exceeding	
	etc.	2 ½ pieces	
	Wood fuel	as	may be necessary

For Children above 12 years

Early morning meal	Chira or muri	...	1 ch.
	Gur	...	½ ch.
Mid-day and evening	Rice or Atta	...	8 ch.
	Fish or Meat	...	1 ½ ch.
	Potato and green	…	4 ch.
	vegetables		
	Dal	...	2 ½ ch.
	Mustard oil	…	$^{5}/_{15}$ ch.
	Salt	as	may be necessary
	Condiment	...	½ ch.
	Ante-scorbuties	…	½ ch.
	Wood fuel	as	may be necessary

Seals of Clothing

Penal Grade:

Name of articles.	Number	Period
Khaki Jacket	1 pair	One year.
Khaki shorts or trousers	1 pair	One year.
Name of articles.	Number	Period
Khaki half pant (for those who have no shorts)	1 pair	One year.
Gamcha	1 pair	One year.
Underwear	1 pair	One year.
Banyans	1 pair	One year.
Woolen jersey/Court (during winter)	One	Two Years.
Lungi	1 pair	One year.
Durri	1 pair	One year.
Blanket (ordinary)	1 pair	One year.
Mosquito net	One	Two years
Pillow with cover	1 pair	One year.

General Grade:

Khaki Cap	1 pair	One year.
Khaki jacket	1 pair	One year.
Khaki shorts or trouser	1 pair	One year.
Khaki half pant (for those who have no shorts)	1 pair	One year.
Gamcha	1 pair	One year.
Underwears	1 pair	One year.
Banyans	1 pair	One year.
Woollen Jersey/Coat (during winter)	One	Two years
Lungi	1 pair	One year.
Coir Mat/Mattress	One	Three years
Pillow	One	One year.

Pillow Cover	1 pair	One year.
Bed sheet	1 pair	One year.
Blanket	1 pair	Three years
Mosquito net	One	One years
P.T. Shose (Canvas)	2 pair	One year.
Socks	2 pair	One year.
Shoe Polish	4 packets	One year.
Chappals	2 pair	One year.

Star Grade:

White cap	1 pair	One year.
White Jacket with brass star on the left breast	1 pair	One year.
Khaki short or trousers	1 pair	One year.
Name of articles.	Number	Period
Khaki half pant (for those who have no shorts)	1 pair	One year.
Towel	1 pair	One year.
Underwear	1 pair	One year.
Banyans (Ganji)	1 pair	One year.
Panjabi	1 pair	Two year.
Pajama	1 pair	Two year.
Woollen Jersey or Coat (during winter)	1 pair	Two year.
Lungi	1 pair	One year.
Handkerchief	1 pair	One year.
Coir mat/mattress	One	Three year.
Pillow	One	One year.
Pillow cover	1 pair	One year.
Bed sheet	1 pair	One year.
Bed cover	One	One year.
Blanket	One	Three year.
Quilt with cover	One	Three year.

Mosquito net	One	Two year.
Shoes	1 pair	One year.
P.T. Shoes (canvas)	2 pair	One year.
Socks, woolen	1 pair	One year.
Socks, nylon	2 pair	One year.
Boot polish	3 tins	One year.
Shoe polish (canvas)	4 packets	One year.
Chappals	2 pair	One year.

By order of the President

S. H. CHOWDHURY
Deputy Secretary.

ANNEX II

International Covenant on Civil and Political Rights (1966)

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI)

of 16 December 1966

Entry into force 23 March 1976, in accordance with Article 49

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures

as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the

Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3.

(a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It

shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so

requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1 . No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

   (a) For respect of the rights or reputations of others;

   (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.

2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

   (a) Twelve members shall constitute a quorum;

   (b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

   (b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its

reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

   (a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

   (b) If the matter is not adjusted to the satisfaction of both

States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is

not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph I of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1.

(a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three

months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on tie basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

(d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant

sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

PART V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART VI

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes. 3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

1. Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 48;

(b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

ANNEX III

Convention on the Rights of the Child (1989)

Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989

Entry into force 2 September 1990, in accordance with article 49

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth”,

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and

harmonious development of the child, Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

PART I

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or

her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. 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.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such

restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

To this end, States Parties shall:

(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;

(b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

(c) Encourage the production and dissemination of children's books;

(d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;

(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason , as set forth in the present Convention.

Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance

and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development

4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and

to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

   (a) Make primary education compulsory and available free to all;

   (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

   (c) Make higher education accessible to all on the basis of capacity by every appropriate means;

   (d) Make educational and vocational information and guidance available and accessible to all children;

   (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:

   (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

   (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

   (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

   (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

   (e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the

requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 37

States Parties shall ensure that:

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

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into

account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

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

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

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

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

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

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State.

PART II

Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.

2. The Committee shall consist of eighteen experts of high moral standing and recognized competence in the field covered by this Convention.*1/* The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.

3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective

performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights

   (a) Within two years of the entry into force of the Convention for the State Party concerned;

   (b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

PART III

Article 46

The present Convention shall be open for signature by all States.

Article 47

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 48

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 50

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all

States. Such notification shall take effect on the date on which it is received by the Secretary-General

Article 52

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 53

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 54

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations. In witness thereof the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

1/ The General Assembly, in its resolution 50/155 of 21 December 1995 , approved the amendment to article 43, paragraph 2, of the Convention on the Rights of the Child, replacing the word “ten” with the word “eighteen”. The amendment entered into force on 18 November 2002 when it had been accepted by a two-thirds majority of the States parties (128 out of 191).

ANNEX IV

General Comment No. 10 Children's rights in juvenile justice (2007)

Distr.

GENERAL

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COMMITTEE ON THE RIGHTS OF THE CHILD

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I. INTRODUCTION

1. In the reports they submit to the Committee on the Rights of the Child (hereafter: the Committee), States parties often pay quite detailed attention to the rights of children alleged as, accused of, or recognized as having infringed the penal law, also referred to as "children in conflict with the law". In line with the Committee's guidelines for periodic reporting, the implementation of articles 37 and 40 of the Convention on the Rights of the Child (hereafter: CRC) is the main focus of the information provided by the States parties. The Committee notes with appreciation the many efforts to establish an administration of juvenile justice in compliance with CRC. However, it is also clear that many States parties still have a long way to go in achieving full compliance with CRC, e.g. in the areas of procedural rights, the development and implementation of measures for dealing with children in conflict with the law without resorting to judicial proceedings, and the use of deprivation of liberty only as a measure of last resort.

2. The Committee is equally concerned about the lack of information on the measures that States parties have taken to prevent children from coming into conflict with the law. This may be the result of a lack of a comprehensive

policy for the field of juvenile justice. This may also explain why many States parties are providing only very limited statistical data on the treatment of children in conflict with the law.

3. The experience in reviewing the States parties' performance in the field of juvenile justice is the reason for the present general comment, by which the Committee wants to provide the States parties with more elaborated guidance and recommendations for their efforts to establish an administration of juvenile justice in compliance with CRC. This juvenile justice, which should promote, inter alia, the use of alternative measures such as diversion and restorative justice, will provide States parties with possibilities to respond to children in conflict with the law in an effective manner serving not only the best interests of these children, but also the short and long-term interest of the society at large.

II. THE OBJECTIVES OF THE PRESENT GENERAL COMMENT

4. At the outset, the Committee wishes to underscore that CRC requires States parties to develop and implement a comprehensive juvenile justice policy. This comprehensive approach should not be limited to the implementation of the specific provisions contained in articles 37 and 40 of CRC, but should also take into account the general principles enshrined in articles 2, 3, 6 and 12, and in all other relevant articles of CRC, such as articles 4 and 39. Therefore, the objectives of this general comment are:

   - To encourage States parties to develop and implement a comprehensive juvenile justice policy to prevent and address juvenile delinquency based on and in compliance with CRC, and to seek in this regard advice and support from the Interagency Panel on Juvenile Justice, with representatives of the Office of

the United Nations High Commissioner for Human Rights (OHCHR), the United Nations Children's Fund (UNICEF), the United Nations Office on Drugs and Crime (UNODC) and non-governmental organizations (NGO's), established by ECOSOC resolution 1997/30;

- To provide States parties with guidance and recommendations for the content of this comprehensive juvenile justice policy, with special attention to prevention of juvenile delinquency, the introduction of alternative measures allowing for responses to juvenile delinquency without resorting to judicial procedures, and for the interpretation and implementation of all other provisions contained in articles 37 and 40 of CRC;

- To promote the integration, in a national and comprehensive juvenile justice policy, of other international standards, in particular, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules"), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the "Havana Rules"), and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the "Riyadh Guidelines").

III. JUVENILE JUSTICE: THE LEADING PRINCIPLES OF A COMPREHENSIVE POLICY

3. Before elaborating on the requirements of CRC in more detail, the Committee will first mention the leading principles of a comprehensive policy for juvenile justice. In the administration of juvenile justice, States parties have to apply systematically the general principles contained in articles 2, 3, 6 and 12 of CRC, as well as the fundamental principles of juvenile justice enshrined in articles 37 and 40.

Non-discrimination (art. 2)

6. States parties have to take all necessary measures to ensure that all children in conflict with the law are treated equally. Particular attention must be paid to de facto discrimination and disparities, which may be the result of a lack of a consistent policy and involve vulnerable groups of children, such as street children, children belonging to racial, ethnic, religious or linguistic minorities, indigenous children, girl children, children with disabilities and children who are repeatedly in conflict with the law (recidivists). In this regard, training of all professionals involved in the administration of juvenile justice is important (see paragraph 97 below), as well as the establishment of rules, regulations or protocols which enhance equal treatment of child offenders and provide redress, remedies and compensation.

7. Many children in conflict with the law are also victims of discrimination, e.g. when they try to get access to education or to the labour market. It is necessary that measures are taken to prevent such discrimination, inter alia, as by providing former child offenders with appropriate support and assistance in their efforts to reintegrate in society, and to conduct public campaigns emphasizing their right to assume a constructive role in society (art. 40 (1)).

8. It is quite common that criminal codes contain provisions criminalizing behavioural problems of children, such as vagrancy, truancy, runaways and other acts, which often are the result of psychological or socio-economic problems. It is particularly a matter of concern that girls and street children are often victims of this criminalization. These acts, also known as Status Offences, are not considered to be such if committed by adults. The Committee recommends that the States parties abolish the provisions on status offences in order to establish an equal treatment under the law for children

and adults. In this regard, the Committee also refers to article 56 of the Riyadh Guidelines which reads: “In order to prevent further stigmatization, victimization and criminalization of young persons, legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person.”

9. In addition, behaviour such as vagrancy, roaming the streets or runaways should be dealt with through the implementation of child protective measures, including effective support for parents and/or other caregivers and measures which address the root causes of this behaviour.

Best interests of the child (art. 3)

10. In all decisions taken within the context of the administration of juvenile justice, the best interests of the child should be a primary consideration. Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.

The right to life, survival and development (art. 6)

11. This inherent right of every child should guide and inspire States parties in the development of effective national policies and programmes for the prevention of juvenile delinquency, because it goes without saying that

delinquency has a very negative impact on the child's development. Furthermore, this basic right should result in a policy of responding to juvenile delinquency in ways that support the child's development. The death penalty and a life sentence without parole are explicitly prohibited under article 37 (a) of CRC (see paragraphs 75 77 below). The use of deprivation of liberty has very negative consequences for the child's harmonious development and seriously hampers his/her reintegration in society. In this regard, article 37 (b) explicitly provides that deprivation of liberty, including arrest, detention and imprisonment, should be used only as a measure of last resort and for the shortest appropriate period of time, so that the child's right to development is fully respected and ensured (see paragraphs 78-88 below).[1]

The right to be heard (art. 12)

12. The right of the child to express his/her views freely in all matters affecting the child should be fully respected and implemented throughout every stage of the process of juvenile justice (see paragraphs 43-45 below). The Committee notes that the voices of children involved in the juvenile justice system are increasingly becoming a powerful force for improvements and reform, and for the fulfilment of their rights.

Dignity (art. 40 (1))

13. CRC provides a set of fundamental principles for the treatment to be accorded to children in conflict with the law:

    - *Treatment that is consistent with the child's sense of dignity and worth*. This principle reflects the fundamental human right enshrined in article 1 of UDHR, which stipulates that all human beings are

[1] Note that the rights of a child deprived of his/her liberty, as recognized in CRC, apply with respect to children in conflict with the law, and to children placed in institutions for the purposes of care, protection or treatment, including mental health, educational, drug treatment, child protection or immigration institutions.

born free and equal in dignity and rights. This inherent right to dignity and worth, to which the preamble of CRC makes explicit reference, has to be respected and protected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies and all the way to the implementation of all measures for dealing with the child;

– *Treatment that reinforces the child's respect for the human rights and freedoms of others*. This principle is in line with the consideration in the preamble that a child should be brought up in the spirit of the ideals proclaimed in the Charter of the United Nations. It also means that, within the juvenile justice system, the treatment and education of children shall be directed to the development of respect for human rights and freedoms (art. 29 (1) (b) of CRC and general comment No. 1 on the aims of education). It is obvious that this principle of juvenile justice requires a full respect for and implementation of the guarantees for a fair trial recognized in article 40 (2) (see paragraphs 40-67 below). If the key actors in juvenile justice, such as police officers, prosecutors, judges and probation officers, do not fully respect and protect these guarantees, how can they expect that with such poor examples the child will respect the human rights and fundamental freedom of others?;

– *Treatment that takes into account the child's age and promotes the child's reintegration and the child's assuming a constructive role in society*. This principle must be applied, observed and respected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies all the way to the implementation of all measures for dealing with the child. It requires that all professionals involved in the administration of juvenile justice be knowledgeable about child development, the dynamic

and continuing growth of children, what is appropriate to their well-being, and the pervasive forms of violence against children;

– *Respect for the dignity of the child requires that all forms of violence in the treatment of children in conflict with the law must be prohibited and prevented*. Reports received by the Committee show that violence occurs in all phases of the juvenile justice process, from the first contact with the police, during pretrial detention and during the stay in treatment and other facilities for children sentenced to deprivation of liberty. The committee urges the States parties to take effective measures to prevent such violence and to make sure that the perpetrators are brought to justice and to give effective follow-up to the recommendations made in the report on the United Nations Study on Violence Against Children presented to the General Assembly in October 2006 (A/61/299).

14. The Committee acknowledges that the preservation of public safety is a legitimate aim of the justice system. However, it is of the opinion that this aim is best served by a full respect for and implementation of the leading and overarching principles of juvenile justice as enshrined in CRC.

IV. JUVENILE JUSTICE: THE CORE ELEMENTS OF A COMPREHENSIVE POLICY

15. A comprehensive policy for juvenile justice must deal with the following core elements: the prevention of juvenile delinquency; interventions without resorting to judicial proceedings and interventions in the context of judicial proceedings; the minimum age of criminal responsibility and the upper age-limits for juvenile justice; the guarantees for a fair trial; and deprivation of liberty including pretrial detention and post-trial incarceration.

A. Prevention of juvenile delinquency

16. One of the most important goals of the implementation of CRC is to promote the full and harmonious development of the child's personality, talents and mental and physical abilities (preamble, and articles 6 and 29). The child should be prepared to live an individual and responsible life in a free society (preamble, and article 29), in which he/she can assume a constructive role with respect for human rights and fundamental freedoms (arts. 29 and 40). In this regard, parents have the responsibility to provide the child, in a manner consistent with his evolving capacities, with appropriate direction and guidance in the exercise of her/his rights as recognized in the Convention. In the light of these and other provisions of CRC, it is obviously not in the best interests of the child if he/she grows up in circumstances that may cause an increased or serious risk of becoming involved in criminal activities. Various measures should be taken for the full and equal implementation of the rights to an adequate standard of living (art. 27), to the highest attainable standard of health and access to health care (art. 24), to education (arts. 28 and 29), to protection from all forms of physical or mental violence, injury or abuse (art. 19), and from economic or sexual exploitation (arts. 32 and 34), and to other appropriate services for the care or protection of children.

17. As stated above, a juvenile justice policy without a set of measures aimed at preventing juvenile delinquency suffers from serious shortcomings. States parties should fully integrate into their comprehensive national policy for juvenile justice the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) adopted by the General Assembly in its resolution 45/112 of 14 December 1990.

18. The Committee fully supports the Riyadh Guidelines and agrees that emphasis should be placed on prevention

policies that facilitate the successful socialization and integration of all children, in particular through the family, the community, peer groups, schools, vocational training and the world of work, as well as through voluntary organizations. This means, inter alia that prevention programmes should focus on support for particularly vulnerable families, the involvement of schools in teaching basic values (including information about the rights and responsibilities of children and parents under the law), and extending special care and attention to young persons at risk. In this regard, particular attention should also be given to children who drop out of school or otherwise do not complete their education. The use of peer group support and a strong involvement of parents are recommended. The States parties should also develop community-based services and programmes that respond to the special needs, problems, concerns and interests of children, in particular of children repeatedly in conflict with the law, and that provide appropriate counselling and guidance to their families.

19. Articles 18 and 27 of CRC confirm the importance of the responsibility of parents for the upbringing of their children, but at the same time CRC requires States parties to provide the necessary assistance to parents (or other caretakers), in the performance of their parental responsibilities. The measures of assistance should not only focus on the prevention of negative situations, but also and even more on the promotion of the social potential of parents. There is a wealth of information on home- and family-based prevention programmes, such as parent training, programmes to enhance parent-child interaction and home visitation programmes, which can start at a very young age of the child. In addition, early childhood education has shown to be correlated with a lower rate of future violence and crime. At the community level, positive results have been achieved

with programmes such as Communities that Care (CTC), a risk-focused prevention strategy.

20. States parties should fully promote and support the involvement of children, in accordance with article 12 of CRC, and of parents, community leaders and other key actors (e.g. representatives of NGOs, probation services and social workers), in the development and implementation of prevention programmes. The quality of this involvement is a key factor in the success of these programmes.

21. The Committee recommends that States parties seek support and advice from the Interagency Panel on Juvenile Justice in their efforts to develop effective prevention programmes.

B. Interventions/diversion (see also section E below)

22. Two kinds of interventions can be used by the State authorities for dealing with children alleged as, accused of, or recognized as having infringed the penal law: measures without resorting to judicial proceedings and measures in the context of judicial proceedings. The Committee reminds States parties that utmost care must be taken to ensure that the child's human rights and legal safeguards are thereby fully respected and protected.

23. Children in conflict with the law, including child recidivists, have the right to be treated in ways that promote their reintegration and the child's assuming a constructive role in society (art. 40 (1) of CRC). The arrest, detention or imprisonment of a child may be used only as a measure of last resort (art. 37 (b)). It is, therefore, necessary - as part of a comprehensive policy for juvenile justice - to develop and implement a wide range of measures to ensure that children are dealt with in a manner appropriate to their well-being, and proportionate to both their circumstances and the offence committed. These should include care, guidance and

supervision, counselling, probation, foster care, educational and training programmes, and other alternatives to institutional care (art. 40 (4)).

Interventions without resorting to judicial proceedings

24. According to article 40 (3) of CRC, the States parties shall seek to promote measures for dealing with children alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings, whenever appropriate and desirable. Given the fact that the majority of child offenders commit only minor offences, a range of measures involving removal from criminal/juvenile justice processing and referral to alternative (social) services (i.e. diversion) should be a well-established practice that can and should be used in most cases.

25. In the opinion of the Committee, the obligation of States parties to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings applies, but is certainly not limited to children who commit minor offences, such as shoplifting or other property offences with limited damage, and first-time child offenders. Statistics in many States parties indicate that a large part, and often the majority, of offences committed by children fall into these categories. It is in line with the principles set out in article 40 (1) of CRC to deal with all such cases without resorting to criminal law procedures in court. In addition to avoiding stigmatization, this approach has good results for children and is in the interests of public safety, and has proven to be more cost-effective.

26. States parties should take measures for dealing with children in conflict with the law without resorting to judicial proceedings as an integral part of their juvenile justice system, and ensure that children's human rights and legal safeguards are thereby fully respected and protected (art. 40 (3) (b)).

27. It is left to the discretion of States parties to decide on the exact nature and content of the measures for dealing with children in conflict with the law without resorting to judicial proceedings, and to take the necessary legislative and other measures for their implementation. Nonetheless, on the basis of the information provided in the reports from some States parties, it is clear that a variety of community-based programmes have been developed, such as community service, supervision and guidance by for example social workers or probation officers, family conferencing and other forms of restorative justice including restitution to and compensation of victims. Other States parties should benefit from these experiences. As far as full respect for human rights and legal safeguards is concerned, the Committee refers to the relevant parts of article 40 of CRC and emphasizes the following:

- Diversion (i.e. measures for dealing with children, alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings) should be used only when there is compelling evidence that the child committed the alleged offence, that he/she freely and voluntarily admits responsibility, and that no intimidation or pressure has been used to get that admission and, finally, that the admission will not be used against him/her in any subsequent legal proceeding;

- The child must freely and voluntarily give consent in writing to the diversion, a consent that should be based on adequate and specific information on the nature, content and duration of the measure, and on the consequences of a failure to cooperate, carry out and complete the measure. With a view to strengthening parental involvement, States parties may also consider requiring the consent of parents, in particular when the child is below the age of 16 years;

- The law has to contain specific provisions indicating in which cases diversion is possible, and the powers of the police, prosecutors and/or other agencies to make decisions in this regard should be regulated and reviewed, in particular to protect the child from discrimination;

- The child must be given the opportunity to seek legal or other appropriate assistance on the appropriateness and desirability of the diversion offered by the competent authorities, and on the possibility of review of the measure;

- The completion of the diversion by the child should result in a definite and final closure of the case. Although confidential records can be kept of diversion for administrative and review purposes, they should not be viewed as "criminal records" and a child who has been previously diverted must not be seen as having a previous conviction. If any registration takes place of this event, access to that information should be given exclusively and for a limited period of time, e.g. for a maximum of one year, to the competent authorities authorized to deal with children in conflict with the law.

Interventions in the context of judicial proceedings

28. When judicial proceedings are initiated by the competent authority (usually the prosecutor's office), the principles of a fair and just trial must be applied (see section D below). At the same time, the juvenile justice system should provide for ample opportunities to deal with children in conflict with the law by using social and/or educational measures, and to strictly limit the use of deprivation of liberty, and in particular pretrial detention, as a measure of last resort. In the disposition phase of the proceedings, deprivation of liberty must be used only as a measure of last resort and for the shortest appropriate

period of time (art. 37 (b)). This means that States parties should have in place a well-trained probation service to allow for the maximum and effective use of measures such as guidance and supervision orders, probation, community monitoring or day report centres, and the possibility of early release from detention.

29. The Committee reminds States parties that, pursuant to article 40 (1) of CRC, reintegration requires that no action may be taken that can hamper the child's full participation in his/her community, such as stigmatization, social isolation, or negative publicity of the child. For a child in conflict with the law to be dealt with in a way that promotes reintegration requires that all actions should support the child becoming a full, constructive member of his/her society.

C. Age and children in conflict with the law

The minimum age of criminal responsibility

30. The reports submitted by States parties show the existence of a wide range of minimum ages of criminal responsibility. They range from a very low level of age 7 or 8 to the commendable high level of age 14 or 16. Quite a few States parties use two minimum ages of criminal responsibility. Children in conflict with the law who at the time of the commission of the crime are at or above the lower minimum age but below the higher minimum age are assumed to be criminally responsible only if they have the required maturity in that regard. The assessment of this maturity is left to the court/judge, often without the requirement of involving a psychological expert, and results in practice in the use of the lower minimum age in cases of serious crimes. The system of two minimum ages is often not only confusing, but leaves much to the discretion of the court/judge and may result in discriminatory practices. In the light of this wide range of minimum ages for criminal responsibility the Committee

feels that there is a need to provide the States parties with clear guidance and recommendations regarding the minimum age of criminal responsibility.

31. Article 40 (3) of CRC requires States parties to seek to promote, inter alia, the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law, but does not mention a specific minimum age in this regard. The committee understands this provision as an obligation for States parties to set a minimum age of criminal responsibility (MACR). This minimum age means the following:

- Children who commit an offence at an age below that minimum cannot be held responsible in a penal law procedure. Even (very) young children do have the capacity to infringe the penal law but if they commit an offence when below MACR the irrefutable assumption is that they cannot be formally charged and held responsible in a penal law procedure. For these children special protective measures can be taken if necessary in their best interests;

- Children at or above the MACR at the time of the commission of an offence (or: infringement of the penal law) but younger than 18 years (see also paragraphs 35-38 below) can be formally charged and subject to penal law procedures. But these procedures, including the final outcome, must be in full compliance with the principles and provisions of CRC as elaborated in the present general comment.

32. Rule 4 of the Beijing Rules recommends that the beginning of MACR shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity. In line with this rule the Committee has recommended States parties not to set a MACR at a too low level and to increase the existing low MACR to an internationally acceptable level. From these recommendations, it can be concluded that a minimum

age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are encouraged to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level.

33. At the same time, the Committee urges States parties not to lower their MACR to the age of 12. A higher MACR, for instance 14 or 16 years of age, contributes to a juvenile justice system which, in accordance with article 40 (3) (b) of CRC, deals with children in conflict with the law without resorting to judicial proceedings, providing that the child's human rights and legal safeguards are fully respected. In this regard, States parties should inform the Committee in their reports in specific detail how children below the MACR set in their laws are treated when they are recognized as having infringed the penal law, or are alleged as or accused of having done so, and what kinds of legal safeguards are in place to ensure that their treatment is as fair and just as that of children at or above MACR.

34. The Committee wishes to express its concern about the practice of allowing exceptions to a MACR which permit the use of a lower minimum age of criminal responsibility in cases where the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible. The Committee strongly recommends that States parties set a MACR that does not allow, by way of exception, the use of a lower age.

35. If there is no proof of age and it cannot be established that the child is at or above the MACR, the child shall not be held criminally responsible (see also paragraph 39 below).

The upper age-limit for juvenile justice

36. The Committee also wishes to draw the attention of States parties to the upper age-limit for the application of the rules of juvenile justice. These special rules - in terms both of special procedural rules and of rules for diversion and special measures - should apply, starting at the MACR set in the country, for all children who, at the time of their alleged commission of an offence (or act punishable under the criminal law), have not yet reached the age of 18 years.

37. The Committee wishes to remind States parties that they have recognized the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in accordance with the provisions of article 40 of CRC. This means that every person under the age of 18 years at the time of the alleged commission of an offence must be treated in accordance with the rules of juvenile justice.

38. The Committee, therefore, recommends that those States parties which limit the applicability of their juvenile justice rules to children under the age of 16 (or lower) years, or which allow by way of exception that 16 or 17-year-old children are treated as adult criminals, change their laws with a view to achieving a non-discriminatory full application of their juvenile justice rules to all persons under the age of 18 years. The Committee notes with appreciation that some States parties allow for the application of the rules and regulations of juvenile justice to persons aged 18 and older, usually till the age of 21, either as a general rule or by way of exception.

39. Finally, the Committee wishes to emphasize the fact that it is crucial for the full implementation of article 7 of CRC requiring, inter alia, that every child shall be registered immediately after birth to set age-limits one way or another, which is the case for all States parties. A

child without a provable date of birth is extremely vulnerable to all kinds of abuse and injustice regarding the family, work, education and labour, particularly within the juvenile justice system. Every child must be provided with a birth certificate free of charge whenever he/she needs it to prove his/her age. If there is no proof of age, the child is entitled to a reliable medical or social investigation that may establish his/her age and, in the case of conflict or inconclusive evidence, the child shall have the right to the rule of the benefit of the doubt.

D. The guarantees for a fair trial

40. Article 40 (2) of CRC contains an important list of rights and guarantees that are all meant to ensure that every child alleged as or accused of having infringed the penal law receives fair treatment and trial. Most of these guarantees can also be found in article 14 of the International Covenant on Civil and Political Rights (ICCPR), which the Human Rights Committee elaborated and commented on in its general comment No. 13 (1984) (Administration of justice) which is currently in the process of being reviewed. However, the implementation of these guarantees for children does have some specific aspects which will be presented in this section. Before doing so, the Committee wishes to emphasize that a key condition for a proper and effective implementation of these rights or guarantees is the quality of the persons involved in the administration of juvenile justice. The training of professionals, such as police officers, prosecutors, legal and other representatives of the child, judges, probation officers, social workers and others is crucial and should take place in a systematic and ongoing manner. These professionals should be well informed about the child's, and particularly about the adolescent's physical, psychological, mental and social development, as well as about the special needs of the most vulnerable children, such as children with disabilities, displaced

children, street children, refugee and asylum-seeking children, and children belonging to racial, ethnic, religious, linguistic or other minorities (see paragraphs 6-9 above). Since girls in the juvenile justice system may be easily overlooked because they represent only a small group, special attention must be paid to the particular needs of the girl child, e.g. in relation to prior abuse and special health needs. Professionals and staff should act under all circumstances in a manner consistent with the child's dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others, and which promotes the child's reintegration and his/her assuming a constructive role in society (art. 40 (1)). All the guarantees recognized in article 40 (2), which will be dealt with hereafter, are minimum standards, meaning that States parties can and should try to establish and observe higher standards, e.g. in the areas of legal assistance and the involvement of the child and her/his parents in the judicial process.

No retroactive juvenile justice (art. 40 (2) (a))

41. Article 40 (2) (a) of CRC affirms that the rule that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed is also applicable to children (see also article 15 of ICCPR). It means that no child can be charged with or sentenced under the penal law for acts or omissions which at the time they were committed were not prohibited under national or international law. In the light of the fact that many States parties have recently strengthened and/or expanded their criminal law provisions to prevent and combat terrorism, the Committee recommends that States parties ensure that these changes do not result in retroactive or unintended punishment of children. The Committee also wishes to remind States parties that the rule that no heavier penalty

shall be imposed than the one that was applicable at the time when the criminal offence was committed, as expressed in article 15 of ICCPR, is in the light of article 41 of CRC, applicable to children in the States parties to ICCPR. No child shall be punished with a heavier penalty than the one applicable at the time of his/her infringement of the penal law. But if a change of law after the act provides for a lighter penalty, the child should benefit from this change.

The presumption of innocence (art. 40 (2) (b) (i))

42. The presumption of innocence is fundamental to the protection of the human rights of children in conflict with the law. It means that the burden of proof of the charge(s) brought against the child is on the prosecution. The child alleged as or accused of having infringed the penal law has the benefit of doubt and is only guilty as charged if these charges have been proven beyond reasonable doubt. The child has the right to be treated in accordance with this presumption and it is the duty of all public authorities or others involved to refrain from prejudging the outcome of the trial. States parties should provide information about child development to ensure that this presumption of innocence is respected in practice. Due to the lack of understanding of the process, immaturity, fear or other reasons, the child may behave in a suspicious manner, but the authorities must not assume that the child is guilty without proof of guilt beyond any reasonable doubt.

The right to be heard (art. 12)

43. Article 12 (2) of CRC requires that a child be provided with the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly or through a representative or an appropriate body in a manner consistent with the procedural rules of national law.

44. It is obvious that for a child alleged as, accused of, or recognized as having infringed the penal law, the right to be heard is fundamental for a fair trial. It is equally obvious that the child has the right to be heard directly and not only through a representative or an appropriate body if it is in her/his best interests. This right must be fully observed at all stages of the process, starting with pretrial stage when the child has the right to remain silent, as well as the right to be heard by the police, the prosecutor and the investigating judge. But it also applies to the stages of adjudication and of implementation of the imposed measures. In other words, the child must be given the opportunity to express his/her views freely, and those views should be given due weight in accordance with the age and maturity of the child (art. 12 (1)), throughout the juvenile justice process. This means that the child, in order to effectively participate in the proceedings, must be informed not only of the charges (see paragraphs 47-48 below), but also of the juvenile justice process as such and of the possible measures.

45. The child should be given the opportunity to express his/her views concerning the (alternative) measures that may be imposed, and the specific wishes or preferences he/she may have in this regard should be given due weight. Alleging that the child is criminally responsible implies that he/she should be competent and able to effectively participate in the decisions regarding the most appropriate response to allegations of his/her infringement of the penal law (see paragraph 46 below). It goes without saying that the judges involved are responsible for taking the decisions. But to treat the child as a passive object does not recognize his/her rights nor does it contribute to an effective response to his/her behaviour. This also applies to the implementation of the measure(s) imposed. Research shows that an active engagement of the child in this implementation will, in most cases, contribute to a positive result.

The right to effective participation in the proceedings (art 40 (2) (b) (iv))

46. A fair trial requires that the child alleged as or accused of having infringed the penal law be able to effectively participate in the trial, and therefore needs to comprehend the charges, and possible consequences and penalties, in order to direct the legal representative, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed. Article 14 of the Beijing Rules provides that the proceedings should be conducted in an atmosphere of understanding to allow the child to participate and to express himself/herself freely. Taking into account the child's age and maturity may also require modified courtroom procedures and practices.

Prompt and direct information of the charge(s) (art. 40 (2) (b) (ii))

47. Every child alleged as or accused of having infringed the penal law has the right to be informed promptly and directly of the charges brought against him/her. Prompt and direct means as soon as possible, and that is when the prosecutor or the judge initially takes procedural steps against the child. But also when the authorities decide to deal with the case without resorting to judicial proceedings, the child must be informed of the charge(s) that may justify this approach. This is part of the requirement of article 40 (3) (b) of CRC that legal safeguards should be fully respected. The child should be informed in a language he/she understands. This may require a presentation of the information in a foreign language but also a "translation" of the formal legal jargon often used in criminal/juvenile charges into a language that the child can understand.

48. Providing the child with an official document is not enough and an oral explanation may often be necessary.

The authorities should not leave this to the parents or legal guardians or the child's legal or other assistance. It is the responsibility of the authorities (e.g. police, prosecutor, judge) to make sure that the child understands each charge brought against him/her. The Committee is of the opinion that the provision of this information to the parents or legal guardians should not be an alternative to communicating this information to the child. It is most appropriate if both the child and the parents or legal guardians receive the information in such a way that they can understand the charge(s) and the possible consequences.

Legal or other appropriate assistance (art. 40 (2) (b) (ii))

49. The child must be guaranteed legal or other appropriate assistance in the preparation and presentation of his/her defence. CRC does require that the child be provided with assistance, which is not necessarily under all circumstances legal but it must be appropriate. It is left to the discretion of States parties to determine how this assistance is provided but it should be free of charge. The Committee recommends the State parties provide as much as possible for adequate trained legal assistance, such as expert lawyers or paralegal professionals. Other appropriate assistance is possible (e.g. social worker), but that person must have sufficient knowledge and understanding of the various legal aspects of the process of juvenile justice and must be trained to work with children in conflict with the law.

50. As required by article 14 (3) (b) of ICCPR, the child and his/her assistant must have adequate time and facilities for the preparation of his/her defence. Communications between the child and his/her assistance, either in writing or orally, should take place under such conditions that the confidentiality of such communications is fully respected in accordance with the guarantee provided for in article

40 (2) (b) (vii) of CRC, and the right of the child to be protected against interference with his/her privacy and correspondence (art. 16 of CRC). A number of States parties have made reservations regarding this guarantee (art. 40 (2) (b) (ii) of CRC), apparently assuming that it requires exclusively the provision of legal assistance and therefore by a lawyer. That is not the case and such reservations can and should be withdrawn.

Decisions without delay and with involvement of parents (art. 40 (2) (b) (iii))

51. Internationally there is a consensus that for children in conflict with the law the time between the commission of the offence and the final response to this act should be as short as possible. The longer this period, the more likely it is that the response loses its desired positive, pedagogical impact, and the more the child will be stigmatized. In this regard, the Committee also refers to article 37 (d) of CRC, where the child deprived of liberty has the right to a prompt decision on his/her action to challenge the legality of the deprivation of his/her liberty. The term "prompt" is even stronger - and justifiably so given the seriousness of deprivation of liberty - than the term "without delay" (art. 40 (2) (b) (iii) of CRC), which is stronger than the term "without undue delay" of article 14 (3) (c) of ICCPR.

52. The Committee recommends that the States parties set and implement time limits for the period between the commission of the offence and the completion of the police investigation, the decision of the prosecutor (or other competent body) to bring charges against the child, and the final adjudication and decision by the court or other competent judicial body. These time limits should be much shorter than those set for adults. But at the same time, decisions without delay should be the result of a process in which the human rights of the child and legal safeguards are fully respected. In this decision-making

process without delay, the legal or other appropriate assistance must be present. This presence should not be limited to the trial before the court or other judicial body, but also applies to all other stages of the process, beginning with the interviewing (interrogation) of the child by the police.

53. Parents or legal guardians should also be present at the proceedings because they can provide general psychological and emotional assistance to the child. The presence of parents does not mean that parents can act in defence of the child or be involved in the decision-making process. However, the judge or competent authority may decide, at the request of the child or of his/her legal or other appropriate assistance or because it is not in the best interests of the child (art. 3 of CRC), to limit, restrict or exclude the presence of the parents from the proceedings.

54. The Committee recommends that States parties explicitly provide by law for the maximum possible involvement of parents or legal guardians in the proceedings against the child. This involvement shall in general contribute to an effective response to the child's infringement of the penal law. To promote parental involvement, parents must be notified of the apprehension of their child as soon as possible.

55. At the same time, the Committee regrets the trend in some countries to introduce the punishment of parents for the offences committed by their children. Civil liability for the damage caused by the child's act can, in some limited cases, be appropriate, in particular for the younger children (e.g. below 16 years of age). But criminalizing parents of children in conflict with the law will most likely not contribute to their becoming active partners in the social reintegration of their child.

Freedom from compulsory self-incrimination (art. 40 (2) (b) (iii))

56. In line with article 14 (3) (g) of ICCPR, CRC requires that a child be not compelled to give testimony or to confess or acknowledge guilt. This means in the first place - and self-evidently - that torture, cruel, inhuman or degrading treatment in order to extract an admission or a confession constitutes a grave violation of the rights of the child (art. 37 (a) of CRC) and is wholly unacceptable. No such admission or confession can be admissible as evidence (article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

57. There are many other less violent ways to coerce or to lead the child to a confession or a self-incriminatory testimony. The term “compelled” should be interpreted in a broad manner and not be limited to physical force or other clear violations of human rights. The age of the child, the child’s development, the length of the interrogation, the child’s lack of understanding, the fear of unknown consequences or of a suggested possibility of imprisonment may lead him/her to a confession that is not true. That may become even more likely if rewards are promised such as: “You can go home as soon as you have given us the true story”, or lighter sanctions or release are promised.

58. The child being questioned must have access to a legal or other appropriate representative, and must be able to request the presence of his/her parent(s) during questioning. There must be independent scrutiny of the methods of interrogation to ensure that the evidence is voluntary and not coerced, given the totality of the circumstances, and is reliable. The court or other judicial body, when considering the voluntary nature and reliability of an admission or confession by a child, must take into account the age of the child, the length of

custody and interrogation, and the presence of legal or other counsel, parent(s), or independent representatives of the child. Police officers and other investigating authorities should be well trained to avoid interrogation techniques and practices that result in coerced or unreliable confessions or testimonies.

Presence and examination of witnesses (art. 40 (2) (b) (iv))

59. The guarantee in article 40 (2) (b) (iv) of CRC underscores that the principle of equality of arms (i.e. under conditions of equality or parity between defence and prosecution) should be observed in the administration of juvenile justice. The term "to examine or to have examined" refers to the fact that there are distinctions in the legal systems, particularly between the accusatorial and inquisitorial trials. In the latter, the defendant is often allowed to examine witnesses although he/she rarely uses this right, leaving examination of the witnesses to the lawyer or, in the case of children, to another appropriate body. However, it remains important that the lawyer or other representative informs the child of the possibility to examine witnesses and to allow him/her to express his/her views in that regard, views which should be given due weight in accordance with the age and maturity of the child (art. 12).

The right to appeal (art. 40 (2) (b) (v))

60. The child has the right to appeal against the decision by which he is found guilty of the charge(s) brought against him/her and against the measures imposed as a consequence of this guilty verdict. This appeal should be decided by a higher, competent, independent and impartial authority or judicial body, in other words, a body that meets the same standards and requirements as the one that dealt with the case in the first instance. This guarantee is similar to the one expressed in article 14 (5)

of ICCPR. This right of appeal is not limited to the most serious offences.

61. This seems to be the reason why quite a few States parties have made reservations regarding this provision in order to limit this right of appeal by the child to the more serious offences and/or imprisonment sentences. The Committee reminds States parties to the ICCPR that a similar provision is made in article 14 (5) of the Covenant. In the light of article 41 of CRC, it means that this article should provide every adjudicated child with the right to appeal. The Committee recommends that the States parties withdraw their reservations to the provision in article 40 (2) (b) (v).

Free assistance of an interpreter (art. 40 (2) (vi))

62. If a child cannot understand or speak the language used by the juvenile justice system, he/she has the right to get free assistance of an interpreter. This assistance should not be limited to the court trial but should also be available at all stages of the juvenile justice process. It is also important that the interpreter has been trained to work with children, because the use and understanding of their mother tongue might be different from that of adults. Lack of knowledge and/or experience in that regard may impede the child's full understanding of the questions raised, and interfere with the right to a fair trial and to effective participation. The condition starting with "if", "if the child cannot understand or speak the language used", means that a child of a foreign or ethnic origin for example, who - besides his/her mother tongue - understands and speaks the official language, does not have to be provided with the free assistance of an interpreter.

63. The Committee also wishes to draw the attention of States parties to children with speech impairment or other disabilities. In line with the spirit of article 40 (2) (vi),

and in accordance with the special protection measures provided to children with disabilities in article 23, the Committee recommends that States parties ensure that children with speech impairment or other disabilities are provided with adequate and effective assistance by well-trained professionals, e.g. in sign language, in case they are subject to the juvenile justice process (see also in this regard general comment No. 9 (The rights of children with disabilities) of the Committee on the Rights of the Child.

Full respect of privacy (arts. 16 and 40 (2) (b) (vii))

64. The right of a child to have his/her privacy fully respected during all stages of the proceedings reflects the right to protection of privacy enshrined in article 16 of CRC. "All stages of the proceedings" includes from the initial contact with law enforcement (e.g. a request for information and identification) up until the final decision by a competent authority, or release from supervision, custody or deprivation of liberty. In this particular context, it is meant to avoid harm caused by undue publicity or by the process of labelling. No information shall be published that may lead to the identification of a child offender because of its effect of stigmatization, and possible impact on his/her ability to have access to education, work, housing or to be safe. It means that a public authority should be very reluctant with press releases related to offences allegedly committed by children and limit them to very exceptional cases. They must take measures to guarantee that children are not identifiable via these press releases. Journalists who violate the right to privacy of a child in conflict with the law should be sanctioned with disciplinary and when necessary (e.g. in case of recidivism) with penal law sanctions.

65. In order to protect the privacy of the child, most States parties have as a rule - sometimes with the possibility of

exceptions - that the court or other hearings of a child accused of an infringement of the penal law should take place behind closed doors. This rule allows for the presence of experts or other professionals with a special permission of the court. Public hearings in juvenile justice should only be possible in well-defined cases and at the written decision of the court. Such a decision should be open for appeal by the child.

66. The Committee recommends that all States parties introduce the rule that court and other hearings of a child in conflict with the law be conducted behind closed doors. Exceptions to this rule should be very limited and clearly stated in the law. The verdict/sentence should be pronounced in public at a court session in such a way that the identity of the child is not revealed. The right to privacy (art. 16) requires all professionals involved in the implementation of the measures taken by the court or another competent authority to keep all information that may result in the identification of the child confidential in all their external contacts. Furthermore, the right to privacy also means that the records of child offenders should be kept strictly confidential and closed to third parties except for those directly involved in the investigation and adjudication of, and the ruling on, the case. With a view to avoiding stigmatization and/or prejudgements, records of child offenders should not be used in adult proceedings in subsequent cases involving the same offender (see the Beijing Rules, rules 21.1 and 21.2), or to enhance such future sentencing.

67. The Committee also recommends that the States parties introduce rules which would allow for an automatic removal from the criminal records of the name of the child who committed an offence upon reaching the age of 18, or for certain limited, serious offences where removal is possible at the request of the child, if necessary under certain conditions (e.g. not having committed an offence within two years after the last conviction).

E. Measures (see also chapter IV, section B, above)

Pretrial alternatives

68. The decision to initiate a formal criminal law procedure does not necessarily mean that this procedure must be completed with a formal court sentence for a child. In line with the observations made above in section B, the Committee wishes to emphasize that the competent authorities - in most States the office of the public prosecutor - should continuously explore the possibilities of alternatives to a court conviction. In other words, efforts to achieve an appropriate conclusion of the case by offering measures like the ones mentioned above in section B should continue. The nature and duration of these measures offered by the prosecution may be more demanding, and legal or other appropriate assistance for the child is then necessary. The performance of such a measure should be presented to the child as a way to suspend the formal criminal/juvenile law procedure, which will be terminated if the measure has been carried out in a satisfactory manner.

69. In this process of offering alternatives to a court conviction at the level of the prosecutor, the child's human rights and legal safeguards should be fully respected. In this regard, the Committee refers to the recommendations set out in paragraph 27 above, which equally apply here.

Dispositions by the juvenile court/judge

70. After a fair and just trial in full compliance with article 40 of CRC (see chapter IV, section D, above), a decision is made regarding the measures which should be imposed on the child found guilty of the alleged offence(s). The laws must provide the court/judge, or other competent, independent and impartial authority or judicial body, with a wide variety of possible alternatives to institutional care

and deprivation of liberty, which are listed in a non-exhaustive manner in article 40 (4) of CRC, to assure that deprivation of liberty be used only as a measure of last resort and for the shortest possible period of time (art. 37 (b) of CRC).

71. The Committee wishes to emphasize that the reaction to an offence should always be in proportion not only to the circumstances and the gravity of the offence, but also to the age, lesser culpability, circumstances and needs of the child, as well as to the various and particularly long term needs of the society. A strictly punitive approach is not in accordance with the leading principles for juvenile justice spelled out in article 40 (1) of CRC (see paragraphs 5-14 above). The Committee reiterates that corporal punishment as a sanction is a violation of these principles as well as of article 37 which prohibits all forms of cruel, inhuman and degrading treatment or punishment (see also the Committee's general comment No. 8 (2006) (The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment)). In cases of severe offences by children, measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered, including considerations of the need of public safety and sanctions. In the case of children, such considerations must always be outweighed by the need to safeguard the well-being and the best interests of the child and to promote his/her reintegration.

72. The Committee notes that if a penal disposition is linked to the age of a child, and there is conflicting, inconclusive or uncertain evidence of the child’s age, he/she shall have the right to the rule of the benefit of the doubt (see also paragraphs 35 and 39 above).

73. As far as alternatives to deprivation of liberty/institutional care are concerned, there is a wide range of experience with the use and implementation of such measures. States parties should benefit from this experience, and develop

and implement these alternatives by adjusting them to their own culture and tradition. It goes without saying that measures amounting to forced labour or to torture or inhuman and degrading treatment must be explicitly prohibited, and those responsible for such illegal practices should be brought to justice.

74. After these general remarks, the Committee wishes to draw attention to the measures prohibited under article 37 (a) of CRC, and to deprivation of liberty.

Prohibition of the death penalty

75. Article 37 (a) of CRC reaffirms the internationally accepted standard (see for example article 6 (5) of ICCPR) that the death penalty cannot be imposed for a crime committed by a person who at that time was under 18 years of age. Although the text is clear, there are States parties that assume that the rule only prohibits the execution of persons below the age of 18 years. However, under this rule the explicit and decisive criteria is the age at the time of the commission of the offence. It means that a death penalty may not be imposed for a crime committed by a person under 18 regardless of his/her age at the time of the trial or sentencing or of the execution of the sanction.

76. The Committee recommends the few States parties that have not done so yet to abolish the death penalty for all offences committed by persons below the age of 18 years and to suspend the execution of all death sentences for those persons till the necessary legislative measures abolishing the death penalty for children have been fully enacted. The imposed death penalty should be changed to a sanction that is in full conformity with CRC.

No life imprisonment without parole

77. No child who was under the age of 18 at the time he or she committed an offence should be sentenced to life

without the possibility of release or parole. For all sentences imposed upon children the possibility of release should be realistic and regularly considered. In this regard, the Committee refers to article 25 of CRC providing the right to periodic review for all children placed for the purpose of care, protection or treatment. The Committee reminds the States parties which do sentence children to life imprisonment with the possibility of release or parole that this sanction must fully comply with and strive for the realization of the aims of juvenile justice enshrined in article 40 (1) of CRC. This means inter alia that the child sentenced to this imprisonment should receive education, treatment, and care aiming at his/her release, reintegration and ability to assume a constructive role in society. This also requires a regular review of the child's development and progress in order to decide on his/her possible release. Given the likelihood that a life imprisonment of a child will make it very difficult, if not impossible, to achieve the aims of juvenile justice despite the possibility of release, the Committee strongly recommends the States parties to abolish all forms of life imprisonment for offences committed by persons under the age of 18.

F. Deprivation of liberty, including pretrial detention and post-trial incarceration

78. Article 37 of CRC contains the leading principles for the use of deprivation of liberty, the procedural rights of every child deprived of liberty, and provisions concerning the treatment of and conditions for children deprived of their liberty.

Basic principles

79. The leading principles for the use of deprivation of liberty are: (a) 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; and (b) no child shall be deprived of his/her liberty unlawfully or arbitrarily.

80. The Committee notes with concern that, in many countries, children languish in pretrial detention for months or even years, which constitutes a grave violation of article 37 (b) of CRC. An effective package of alternatives must be available (see chapter IV, section B, above), for the States parties to realize their obligation under article 37 (b) of CRC to use deprivation of liberty only as a measure of last resort. The use of these alternatives must be carefully structured to reduce the use of pretrial detention as well, rather than "widening the net" of sanctioned children. In addition, the States parties should take adequate legislative and other measures to reduce the use of pretrial detention. Use of pretrial detention as a punishment violates the presumption of innocence. The law should clearly state the conditions that are required to determine whether to place or keep a child in pretrial detention, in particular to ensure his/her appearance at the court proceedings, and whether he/she is an immediate danger to himself/herself or others. The duration of pretrial detention should be limited by law and be subject to regular review.

81. The Committee recommends that the State parties ensure that a child can be released from pretrial detention as soon as possible, and if necessary under certain conditions. Decisions regarding pretrial detention, including its duration, should be made by a competent, independent and impartial authority or a judicial body, and the child should be provided with legal or other appropriate assistance.

Procedural rights (art. 37 (d))

82. Every child deprived of his/her liberty has the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the

deprivation of his/her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

83. Every child arrested and deprived of his/her liberty should be brought before a competent authority to examine the legality of (the continuation of) this deprivation of liberty within 24 hours. The Committee also recommends that the States parties ensure by strict legal provisions that the legality of a pretrial detention is reviewed regularly, preferably every two weeks. In case a conditional release of the child, e.g. by applying alternative measures, is not possible, the child should be formally charged with the alleged offences and be brought before a court or other competent, independent and impartial authority or judicial body, not later than 30 days after his/her pretrial detention takes effect. The Committee, conscious of the practice of adjourning court hearings, often more than once, urges the States parties to introduce the legal provisions necessary to ensure that the court/juvenile judge or other competent body makes a final decision on the charges not later than six months after they have been presented.

84. The right to challenge the legality of the deprivation of liberty includes not only the right to appeal, but also the right to access the court, or other competent, independent and impartial authority or judicial body, in cases where the deprivation of liberty is an administrative decision (e.g. the police, the prosecutor and other competent authority). The right to a prompt decision means that a decision must be rendered as soon as possible, e.g. within or not later than two weeks after the challenge is made.

Treatment and conditions (art. 37 (c))

85. Every child deprived of liberty shall be separated from adults. A child deprived of his/her liberty shall not be placed in an adult prison or other facility for adults. There

is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate. The permitted exception to the separation of children from adults stated in article 37 (c) of CRC, "unless it is considered in the child's best interests not to do so", should be interpreted narrowly; the child's best interests does not mean for the convenience of the States parties. States parties should establish separate facilities for children deprived of their liberty, which include distinct, childcentred staff, personnel, policies and practices.

86. This rule does not mean that a child placed in a facility for children has to be moved to a facility for adults immediately after he/she turns 18. Continuation of his/her stay in the facility for children should be possible if that is in his/her best interest and not contrary to the best interests of the younger children in the facility.

87. Every child deprived of liberty has the right to maintain contact with his/her family through correspondence and visits. In order to facilitate visits, the child should be placed in a facility that is as close as possible to the place of residence of his/her family. Exceptional circumstances that may limit this contact should be clearly described in the law and not be left to the discretion of the competent authorities.

88. The Committee draws the attention of States parties to the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by the General Assembly in its resolution 45/113 of 14 December 1990. The Committee urges the States parties to fully implement these rules, while also taking into account as far as relevant the Standard Minimum Rules for the Treatment of Prisoners (see also rule 9 of the Beijing Rules). In this regard, the Committee recommends that the States parties incorporate these rules into their national laws and regulations, and make them available,

in the national or regional language, to all professionals, NGOs and volunteers involved in the administration of juvenile justice.

89. The Committee wishes to emphasize that, inter alia, the following principles and rules need to be observed in all cases of deprivation of liberty:

- Children should be provided with a physical environment and accommodations which are in keeping with the rehabilitative aims of residential placement, and due regard must be given to their needs for privacy, sensory stimuli, opportunities to associate with their peers, and to participate in sports, physical exercise, in arts, and leisure time activities;
- Every child of compulsory school age has the right to education suited to his/her needs and abilities, and designed to prepare him/her for return to society; in addition, every child should, when appropriate, receive vocational training in occupations likely to prepare him/her for future employment;
- Every child has the right to be examined by a physician upon admission to the detention/correctional facility and shall receive adequate medical care throughout his/her stay in the facility, which should be provided, where possible, by health facilities and services of the community;
- The staff of the facility should promote and facilitate frequent contacts of the child with the wider community, including communications with his/her family, friends and other persons or representatives of reputable outside organizations, and the opportunity to visit his/her home and family;
- Restraint or force can be used only when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have

been exhausted. The use of restraint or force, including physical, mechanical and medical restraints, should be under close and direct control of a medical and/or psychological professional. It must never be used as a means of punishment. Staff of the facility should receive training on the applicable standards and members of the staff who use restraint or force in violation of the rules and standards should be punished appropriately;

- Any disciplinary measure must be consistent with upholding the inherent dignity of the juvenile and the fundamental objectives of institutional care; disciplinary measures in violation of article 37 of CRC must be strictly forbidden, including corporal punishment, placement in a dark cell, closed or solitary confinement, or any other punishment that may compromise the physical or mental health or well-being of the child concerned;

- Every child should have the right to make requests or complaints, without censorship as to the substance, to the central administration, the judicial authority or other proper independent authority, and to be informed of the response without delay; children need to know about and have easy access to these mechanisms;

- Independent and qualified inspectors should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative; they should place special emphasis on holding conversations with children in the facilities, in a confidential setting.

V. THE ORGANIZATION OF JUVENILE JUSTICE

90. In order to ensure the full implementation of the principles and rights elaborated in the previous paragraphs, it is necessary to establish an effective

organization for the administration of juvenile justice, and a comprehensive juvenile justice system. As stated in article 40 (3) of CRC, States parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children in conflict with the penal law.

91. What the basic provisions of these laws and procedures are required to be, has been presented in the present general comment. More and other provisions are left to the discretion of States parties. This also applies to the form of these laws and procedures. They can be laid down in special chapters of the general criminal and procedural law, or be brought together in a separate act or law on juvenile justice.

92. A comprehensive juvenile justice system further requires the establishment of specialized units within the police, the judiciary, the court system, the prosecutor's office, as well as specialized defenders or other representatives who provide legal or other appropriate assistance to the child.

93. The Committee recommends that the States parties establish juvenile courts either as separate units or as part of existing regional/district courts. Where that is not immediately feasible for practical reasons, the States parties should ensure the appointment of specialized judges or magistrates for dealing with cases of juvenile justice.

94. In addition, specialized services such as probation, counselling or supervision should be established together with specialized facilities including for example day treatment centres and, where necessary, facilities for residential care and treatment of child offenders. In this juvenile justice system, an effective coordination of the activities of all these specialized units, services and facilities should be promoted in an ongoing manner.

95. It is clear from many States parties' reports that non-governmental organizations can and do play an important role not only in the prevention of juvenile delinquency as such, but also in the administration of juvenile justice. The Committee therefore recommends that States parties seek the active involvement of these organizations in the development and implementation of their comprehensive juvenile justice policy and provide them with the necessary resources for this involvement.

VI. AWARENESS-RAISING AND TRAINING

96. Children who commit offences are often subject to negative publicity in the media, which contributes to a discriminatory and negative stereotyping of these children and often of children in general. This negative presentation or criminalization of child offenders is often based on misrepresentation and/or misunderstanding of the causes of juvenile delinquency, and results regularly in a call for a tougher approach (e.g. zero-tolerance, three strikes and you are out, mandatory sentences, trial in adult courts and other primarily punitive measures). To create a positive environment for a better understanding of the root causes of juvenile delinquency and a rights-based approach to this social problem, the States parties should conduct, promote and/or support educational and other campaigns to raise awareness of the need and the obligation to deal with children alleged of violating the penal law in accordance with the spirit and the letter of CRC. In this regard, the States parties should seek the active and positive involvement of members of parliament, NGOs and the media, and support their efforts in the improvement of the understanding of a rights-based approach to children who have been or are in conflict with the penal law. It is crucial for children, in particular those who have experience with the juvenile justice system, to be involved in these awareness-raising efforts.

97. It is essential for the quality of the administration of

juvenile justice that all the professionals involved, inter alia, in law enforcement and the judiciary receive appropriate training on the content and meaning of the provisions of CRC in general, particularly those directly relevant to their daily practice. This training should be organized in a systematic and ongoing manner and should not be limited to information on the relevant national and international legal provisions. It should include information on, inter alia, the social and other causes of juvenile delinquency, psychological and other aspects of the development of children, with special attention to girls and children belonging to minorities or indigenous peoples, the culture and the trends in the world of young people, the dynamics of group activities, and the available measures dealing with children in conflict with the penal law, in particular measures without resorting to judicial proceedings (see chapter IV, section B, above).

VII. DATA COLLECTION, EVALUATION AND RESEARCH

98. The Committee is deeply concerned about the lack of even basic and disaggregated data on, inter alia, the number and nature of offences committed by children, the use and the average duration of pretrial detention, the number of children dealt with by resorting to measures other than judicial proceedings (diversion), the number of convicted children and the nature of the sanctions imposed on them. The Committee urges the States parties to systematically collect disaggregated data relevant to the information on the practice of the administration of juvenile justice, and necessary for the development, implementation and evaluation of policies and programmes aiming at the prevention and effective responses to juvenile delinquency in full accordance with the principles and provisions of CRC.

99. The Committee recommends that States parties conduct regular evaluations of their practice of juvenile justice, in

particular of the effectiveness of the measures taken, including those concerning discrimination, reintegration and recidivism, preferably carried out by independent academic institutions. Research, as for example on the disparities in the administration of juvenile justice which may amount to discrimination, and developments in the field of juvenile delinquency, such as effective diversion programmes or newly emerging juvenile delinquency activities, will indicate critical points of success and concern. It is important that children are involved in this evaluation and research, in particular those who have been in contact with parts of the juvenile justice system. The privacy of these children and the confidentiality of their cooperation should be fully respected and protected. In this regard, the Committee refers the States parties to the existing international guidelines on the involvement of children in research.

ANNEX V

United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), (1989)

Adopted by General Assembly resolution 40/33 of 29 November 1985

Part one

GENERAL PRINCIPLES

1. Fundamental perspectives

1.1 Member States shall seek, in conformity with their respective general interests, to further the well-being of the juvenile and her or his family.

1.2 Member States shall endeavour to develop conditions that will ensure for the juvenile a meaningful life in the community, which, during that period in life when she or he is most susceptible to deviant behaviour, will foster a process of personal development and education that is as free from crime and delinquency as possible.

1.3 Sufficient attention shall be given to positive measures that involve the full mobilization of all possible resources, including the family, volunteers and other community groups, as well as schools and other community institutions, for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law.

1.4 Juvenile justice shall be conceived as an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles, thus, at the same time, contributing to the protection of the young and the maintenance of a peaceful order in society

1.5 These Rules shall be implemented in the context of economic, social and cultural conditions prevailing in each Member State.

1.6 Juvenile justice services shall be systematically developed and coordinated with a view to improving and sustaining the competence of personnel involved in the services, including their methods, approaches and attitudes.

Commentary

These broad fundamental perspectives refer to comprehensive social policy in general and aim at promoting juvenile welfare to the greatest possible extent, which will minimize the necessity of intervention by the juvenile justice system, and in turn, will reduce the harm that may be caused by any intervention. Such care measures for the young, before the onset of delinquency, are basic policy requisites designed to obviate the need for the application of the Rules.

Rules 1.1 to 1.3 point to the important role that a constructive social policy for juveniles will play, inter alia , in the prevention of juvenile crime and delinquency. Rule 1.4 defines juvenile justice as an integral part of social justice for juveniles, while rule 1.6 refers to the necessity of constantly improving juvenile justice, without falling behind the development of progressive social policy for juveniles in general and bearing in mind the need for consistent improvement of staff services.

Rule 1.5 seeks to take account of existing conditions in Member States which would cause the manner of implementation of particular rules necessarily to be different from the manner adopted in other States.

2. Scope of the Rules and definitions used

2.1 The following Standard Minimum Rules shall be applied to juvenile offenders impartially, without distinction of any kind, for example as to race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status.

2.2 For purposes of these Rules, the following definitions shall be applied by Member States in a manner which is

compatible with their respective legal systems and concepts:

(a) A juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult;

(b) An offence is any behaviour (act or omission) that is punishable by law under the respective legal systems;

(c) A juvenile offender is a child or young person who is alleged to have committed or who has been found to have committed an offence.

2.3 Efforts shall be made to establish, in each national jurisdiction, a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice and designed:

(a) To meet the varying needs of juvenile offencers, while protecting their basic rigths;

(b) To meet the need of society;

To implement the following rules thoroughly and fairly.

Commentary

The Standard Minimum Rules are deliberately formulated so as to be applicable within different legal systems and, at the same time, to set some minimum standards for the handling of juvenile offenders under any definition of a juvenile and under any system of dealing with juvenile offenders. The Rules are always to be applied impartially and without distinction of any kind.

Rule 2.1 therefore stresses the importance of the Rules always being applied impartially and without distinction of any kind. The rule follows the formulation of principle 2 of the Declaration of the Rights of the Child.

Rule 2.2 defines “juvenile” and “offence” as the components of

the notion of the "juvenile offender", who is the main subject of these Standard Minimum Rules (see, however, also rules 3 and 4). It should be noted that age limits will depend on, and are explicitly made dependent on, each respective legal system, thus fully respecting the economic, social, political, cultural and legal systems of Member States. This makes for a wide variety of ages coming under the definition of "juvenile", ranging from 7 years to 18 years or above. Such a variety seems inevitable in view of the different national legal systems and does not diminish the impact of these Standard Minimum Rules.

Rule 2.3 is addressed to the necessity of specific national legislation for the optimal implementation of these Standard Minimum Rules, both legally and practically.

3. Extension of the Rules

3.1 The relevant provisions of the Rules shall be applied not only to juvenile offenders but also to juveniles who may be proceeded against for any specific behaviour that would not be punishable if committed by an adult.

3.2 Efforts shall be made to extend the principles embodied in the Rules to all juveniles who are dealt with in welfare and care proceedings.

3.3 Efforts shall also be made to extend the principles embodied in the Rules to young adult offenders.

Commentary

Rule 3 extends the protection afforded by the Standard Minimum Rules for the Administration of Juvenile Justice to cover:

(a) The so-called "status offences" prescribed in various national legal systems where the range of behaviour considered to be an offence is wider for juveniles than it is for adults (for example, truancy, school and family disobedience, public drunkenness, etc.) (rule 3.1);

(b) Juvenile welfare and care proceedings (rule 3.2);

(c) Proceedings dealing with young adult offenders, depending of course on each given age limit (rule 3.3).

The extension of the Rules to cover these three areas seems to be justified. Rule 3.1 provides minimum guarantees in those fields, and rule 3.2 is considered a desirable step in the direction of more fair, equitable and humane justice for all juveniles in conflict with the law.

4 . Age of criminal responsibility

4.1 In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.

Commentary

The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.).

Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally.

5. Aims of juvenile justice

5. 1 The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.

Commentary

Rule 5 refers to two of the most important objectives of juvenile justice. The first objective is the promotion of the well-being of the juvenile. This is the main focus of those legal systems in which juvenile offenders are dealt with by family courts or administrative authorities, but the well-being of the juvenile should also be emphasized in legal systems that follow the criminal court model, thus contributing to the avoidance of merely punitive sanctions. (See also rule 14.)

The second objective is "the principle of proportionality". This principle is well-known as an instrument for curbing punitive sanctions, mostly expressed in terms of just deserts in relation to the gravity of the offence. The response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances. The individual circumstances of the offender (for example social status, family situation, the harm caused by the offence or other factors affecting personal circumstances) should influence the proportionality of the reactions (for example by having regard to the offender's endeavour to indemnify the victim or to her or his willingness to turn to wholesome and useful life).

By the same token, reactions aiming to ensure the welfare of the young offender may go beyond necessity and therefore infringe upon the fundamental rights of the young individual, as has been observed in some juvenile justice systems. Here, too, the proportionality of the reaction to the circumstances of both the offender and the offence, including the victim, should be safeguarded.

In essence, rule 5 calls for no less and no more than a fair reaction in any given cases of juvenile delinquency and crime. The issues combined in the rule may help to stimulate development in both regards: new and innovative types of reactions are as desirable as precautions against any undue widening of the net of formal social control over juveniles.

6. Scope of discretion

6.1 In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions.

6.2 Efforts shall be made, however, to ensure sufficient accountability at all stages and levels in the exercise of any such discretion.

6.3 Those who exercise discretion shall be specially qualified or trained to exercise it judiciously and in accordance with their functions and mandates.

Commentary

Rules 6.1, 6.2 and 6.3 combine several important features of effective, fair and humane juvenile justice administration: the need to permit the exercise of discretionary power at all significant levels of processing so that those who make determinations can take the actions deemed to be most appropriate in each individual case; and the need to provide checks and balances in order to curb any abuses of discretionary power and to safeguard the rights of the young offender. Accountability and professionalism are instruments best apt to curb broad discretion. Thus, professional qualifications and expert training are emphasized here as a valuable means of ensuring the judicious exercise of discretion in matters of juvenile offenders. (See also rules 1.6 and 2.2.) The formulation of specific guidelines on the exercise of discretion and the provision of systems of review, appeal and the like in order to permit scrutiny of decisions and accountability are emphasized in this context. Such mechanisms are not specified here, as they do not easily lend themselves to incorporation into international standard minimum rules, which cannot possibly cover all differences in justice systems.

7 . Rights of juveniles

7.1 Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.

Commentary

Rule 7.1 emphasizes some important points that represent essential elements for a fair and just trial and that are internationally recognized in existing human rights instruments (See also rule 14.). The presumption of innocence, for instance, is also to be found in article 11 of the Universal Declaration of Human rights and in article 14, paragraph 2, of the International Covenant on Civil and Political Rights.

Rules 14 seq. of these Standard Minimum Rules specify issues that are important for proceedings in juvenile cases, in particular, while rule 7.1 affirms the most basic procedural safeguards in a general way.

8. Protection of privacy

8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.

8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.

Commentary

Rule 8 stresses the importance of the protection of the juvenile's right to privacy. Young persons are particularly susceptible to stigmatization. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as "delinquent" or "criminal".

Rule 8 stresses the importance of protecting the juvenile from the adverse effects that may result from the publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted). The interest of the individual should be protected and upheld, at least in principle. (The general contents of rule 8 are further specified in rule 2 1.)

9. Saving clause

9.1 Nothing in these Rules shall be interpreted as precluding the application of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations and other human rights instruments and standards recognized by the international community that relate to the care and protection of the young.

Commentary

Rule 9 is meant to avoid any misunderstanding in interpreting and implementing the present Rules in conformity with principles contained in relevant existing or emerging international human rights instruments and standards-such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, and the Declaration of the Rights of the Child and the draft convention on the rights of the child. It should be understood that the application of the present Rules is without prejudice to any such international instruments which may contain provisions of wider application. (See also rule 27.)

Part two

INVESTIGATION AND PROSECUTION

10. Initial contact

10.1 Upon the apprehension of a juvenile, her or his parents or guardian shall be immediately notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter.

10.2 A judge or other competent official or body shall, without delay, consider the issue of release.

10.3 Contacts between the law enforcement agencies and a juvenile offender shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to her or hi m, with due regard to the circumstances of the case.

Commentary

Rule 10.1 is in principle contained in rule 92 of the Standard Minimum Rules for the Treatment of Prisoners.

The question of release (rule 10.2) shall be considered without delay by a judge or other competent official. The latter refers to any person or institution in the broadest sense of the term, including community boards or police authorities having power to release an arrested person. (See also the International Covenant on Civil and Political Rights, article 9, paragraph 3.)

Rule 10.3 deals with some fundamental aspects of the procedures and behaviour on the part of the police and other law enforcement officials in cases of juvenile crime. To “avoid harm” admittedly is flexible wording and covers many features of possible interaction (for example the use of harsh language, physical violence or exposure to the environment). Involvement in juvenile justice processes in itself can be “harmful” to

juveniles; the term “avoid harm” should be broadly interpreted, therefore, as doing the least harm possible to the juvenile in the first instance, as well as any additional or undue harm. This is especially important in the initial contact with law enforcement agencies, which might profoundly influence the juvenile’s attitude towards the State and society. Moreover, the success of any further intervention is largely dependent on such initial contacts. Compassion and kind firmness are important in these situations.

11. Diversion

11.1 Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority, referred to in rule 14.1 below.

11.2 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 and also in accordance with the principles contained in these Rules.

11.3 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.

11.4 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.

Commentary

Diversion, involving removal from criminal justice processing and, frequently, redirection to community support services, is commonly practised on a formal and informal basis in many legal systems. This practice serves to hinder the negative effects

of subsequent proceedings in juvenile justice administration (for example the stigma of conviction and sentence). In many cases, non-intervention would be the best response. Thus, diversion at the outset and without referral to alternative (social) services may be the optimal response. This is especially the case where the offence is of a non-serious nature and where the family, the school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner.

As stated in rule 11.2, diversion may be used at any point of decision-making-by the police, the prosecution or other agencies such as the courts, tribunals, boards or councils. It may be exercised by one authority or several or all authorities, according to the rules and policies of the respective systems and in line with the present Rules. It need not necessarily be limited to petty cases, thus rendering diversion an important instrument.

Rule 11.3 stresses the important requirement of securing the consent of the young offender (or the parent or guardian) to the recommended diversionary measure(s). (Diversion to community service without such consent would contradict the Abolition of Forced Labour Convention.) However, this consent should not be left unchallengeable, since it might sometimes be given out of sheer desperation on the part of the juvenile. The rule underlines that care should be taken to minimize the potential for coercion and intimidation at all levels in the diversion process. Juveniles should not feel pressured (for example in order to avoid court appearance) or be pressured into consenting to diversion programmes. Thus, it is advocated that provision should be made for an objective appraisal of the appropriateness of dispositions involving young offenders by a "competent authority upon application". (The "competent authority," may be different from that referred to in rule 14.)

Rule 11.4 recommends the provision of viable alternatives to juvenile justice processing in the form of community-based diversion. Programmes that involve settlement by victim restitution and those that seek to avoid future conflict with the

law through temporary supervision and guidance are especially commended. The merits of individual cases would make diversion appropriate, even when more serious offences have been committed (for example first offence, the act having been committed under peer pressure, etc.).

12 . Specialization within the police

12.1 In order to best fulfil their functions, police officers who frequently or exclusively deal with juveniles or who are primarily engaged in the prevention of juvenile crime shall be specially instructed and trained. In large cities, special police units should be established for that purpose.

Commentary

Rule 12 draws attention to the need for specialized training for all law enforcement officials who are involved in the administration of juvenile justice. As police are the first point of contact with the juvenile justice system, it is most important that they act in an informed and appropriate manner.

While the relationship between urbanization and crime is clearly complex, an increase in juvenile crime has been associated with the growth of large cities, particularly with rapid and unplanned growth. Specialized police units would therefore be indispensable, not only in the interest of implementing specific principles contained in the present instrument (such as rule 1.6) but more generally for improving the prevention and control of juvenile crime and the handling of juvenile offenders.

13 . Detention pending trial

13.1 Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.

13.2 Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or .

13.3 Juveniles under detention pending trial shall be entitled to all rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations.

13.4 Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.

13.5 While in custody, juveniles shall receive care, protection and all necessary individual assistance-social, educational, vocational, psychological, medical and physical-that they may require in view of their age, sex and personality.

Commentary

The danger to juveniles of "criminal contamination" while in detention pending trial must not be underestimated. It is therefore important to stress the need for alternative measures. By doing so, rule 13.1 encourages the devising of new and innovative measures to avoid such detention in the interest of the well-being of the juvenile.

Juveniles under detention pending trial are entitled to all the rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners as well as the International Covenant on Civil and Political Rights, especially article 9 and article 10, paragraphs 2 (b) and 3.

Rule 13.4 does not prevent States from taking other measures against the negative influences of adult offenders which are at least as effective as the measures mentioned in the rule.

Different forms of assistance that may become necessary have been enumerated to draw attention to the broad range of particular needs of young detainees to be addressed (for example females or males, drug addicts, alcoholics, mentally ill juveniles, young persons suffering from the trauma, for example, of arrest, etc.).

Varying physical and psychological characteristics of young detainees may warrant classification measures by which some are kept separate while in detention pending trial, thus contributing to the avoidance of victimization and rendering more appropriate assistance.

The Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in its resolution 4 on juvenile justice standards, specified that the Rules, inter alia , should reflect the basic principle that pre-trial detention should be used only as a last resort, that no minors should be held in a facility where they are vulnerable to the negative influences of adult detainees and that account should always be taken of the needs particular to their stage of development.

Part three

ADJUDICATION AND DISPOSITION

14. Competent authority to adjudicate

14.1 Where the case of a juvenile offender has not been diverted (under rule 11), she or he shall be dealt with by the competent authority (court, tribunal, board, council, etc.) according to the principles of a fair and just trial.

14.2 The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely.

Commentary

It is difficult to formulate a definition of the competent body or person that would universally describe an adjudicating authority. "Competent authority" is meant to include those who preside over courts or tribunals (composed of a single judge or of several members), including professional and lay magistrates as well as administrative boards (for example the Scottish and Scandinavian systems) or other more informal community and conflict resolution agencies of an adjudicatory nature.

The procedure for dealing with juvenile offenders shall in any case follow the minimum standards that are applied almost universally for any criminal defendant under the procedure known as "due process of law". In accordance with due process, a "fair and just trial" includes such basic safeguards as the presumption of innocence, the presentation and examination of witnesses, the common legal defences, the right to remain silent, the right to have the last word in a hearing, the right to appeal, etc. (See also rule 7.1.)

15. Legal counsel, parents and guardians

15.1 Throughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country.

15.2 The parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile. They may, however, be denied participation by the competent authority if there are reasons to assume that such exclusion is necessary in the interest of the juvenile.

Commentary

Rule 15.1 uses terminology similar to that found in rule 93 of the Standard Minimum Rules for the Treatment of Prisoners. Whereas legal counsel and free legal aid are needed to assure the juvenile legal assistance, the right of the parents or guardian to participate as stated in rule 15.2 should be viewed as general psychological and emotional assistance to the juvenile-a function extending throughout the procedure.

The competent authority's search for an adequate disposition of the case may profit, in particular, from the co-operation of the legal representatives of the juvenile (or, for that matter, some other personal assistant who the juvenile can and does really trust). Such concern can be thwarted if the presence of parents or guardians at the hearings plays a negative role, for instance, if they display a hostile attitude towards the juvenile, hence, the possibility of their exclusion must be provided for.

16. Social inquiry reports

16.1 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.

Commentary

Social inquiry reports (social reports or pre-sentence reports) are an indispensable aid in most legal proceedings involving juveniles. The competent authority should be informed of relevant facts about the juvenile, such as social and family background, school career, educational experiences, etc. For this purpose, some jurisdictions use special social services or personnel attached to the court or board. Other personnel, including probation officers, may serve the same function. The rule therefore requires that adequate social services should be available to deliver social inquiry reports of a qualified nature.

17. Guiding principles in adjudication and disposition

17.1 The disposition of the competent authority shall be guided by the following principles:

(a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society;

(b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;

(c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;

(d) The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.

17.2 Capital punishment shall not be imposed for any crime committed by juveniles.

17.3 Juveniles shall not be subject to corporal punishment.

17.4 The competent authority shall have the power to discontinue the proceedings at any time.

Commentary

The main difficulty in formulating guidelines for the adjudication of young persons stems from the fact that there are unresolved conflicts of a philosophical nature, such as the following:

(a) Rehabilitation versus just desert;

(b) Assistance versus repression and punishment;

(c) Reaction according to the singular merits of an individual case versus reaction according to the protection of society in general;

(d) General deterrence versus individual incapacitation.

The conflict between these approaches is more pronounced in juvenile cases than in adult cases. With the variety of causes and reactions characterizing juvenile cases, these alternatives become intricately interwoven.

It is not the function of the Standard Minimum Rules for the Administration of Juvenile Justice to prescribe which approach is to be followed but rather to identify one that is most closely in consonance with internationally accepted principles. Therefore the essential elements as laid down in rule 17.1, in particular in subparagraphs (a) and (c), are mainly to be understood as practical guidelines that should ensure a common starting point; if heeded by the concerned authorities (see also rule 5), they could contribute considerably to ensuring that the fundamental rights of juvenile offenders are protected, especially the fundamental rights of personal development and education.

Rule 17.1 (b) implies that strictly punitive approaches are not appropriate. Whereas in adult cases, and possibly also in cases

of severe offences by juveniles, just desert and retributive sanctions might be considered to have some merit, in juvenile cases such considerations should always be outweighed by the interest of safeguarding the well-being and the future of the young person.

In line with resolution 8 of the Sixth United Nations Congress, rule 17.1 (b) encourages the use of alternatives to institutionalization to the maximum extent possible, bearing in mind the need to respond to the specific requirements of the young. Thus, full use should be made of the range of existing alternative sanctions and new alternative sanctions should be developed, bearing the public safety in mind. Probation should be granted to the greatest possible extent via suspended sentences, conditional sentences, board orders and other dispositions.

Rule 17.1 (c) corresponds to one of the guiding principles in resolution 4 of the Sixth Congress which aims at avoiding incarceration in the case of juveniles unless there is no other appropriate response that will protect the public safety.

The provision prohibiting capital punishment in rule 17.2 is in accordance with article 6, paragraph 5, of the International Covenant on Civil and Political Rights.

The provision against corporal punishment is in line with article 7 of the International Covenant on Civil and Political Rights and the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the draft convention on the rights of the child.

The power to discontinue the proceedings at any time (rule 17.4) is a characteristic inherent in the handling of juvenile offenders as opposed to adults. At any time, circumstances may become known to the competent authority which would make a complete cessation of the intervention appear to be the best disposition of the case.

18. Various disposition measures

18.1 A large variety of disposition measures shall be made available to the competent authority, allowing for flexibility so as to avoid institutionalization to the greatest extent possible. Such measures, some of which may be combined, include:

(a) Care, guidance and supervision orders;

(b) Probation;

(c) Community service orders;

(d) Financial penalties, compensation and restitution;

(e) Intermediate treatment and other treatment orders;

(f) Orders to participate in group counselling and similar activities;

(g) Orders concerning foster care, living communities or other educational settings;

(h) Other relevant orders.

18.2 No juvenile shall be removed from parental supervision, whether partly or entirely, unless the circumstances of her or his case make this necessary.

Commentary

Rule 18.1 attempts to enumerate some of the important reactions and sanctions that have been practised and proved successful thus far, in different legal systems. On the whole they represent promising opinions that deserve replication and further development. The rule does not enumerate staffing requirements because of possible shortages of adequate staff in some regions; in those regions measures requiring less staff may be tried or developed.

The examples given in rule 18.1 have in common, above all, a reliance on and an appeal to the community for the effective

implementation of alternative dispositions. Community-based correction is a traditional measure that has taken on many aspects. On that basis, relevant authorities should be encouraged to offer community-based services.

Rule 18.2 points to the importance of the family which, according to article 10, paragraph l, of the International Covenant on Economic, Social and Cultural Rights, is "the natural and fundamental group unit of society". Within the family, the parents have not only the right but also the responsibility to care for and supervise their children. Rule 18.2, therefore, requires that the separation of children from their parents is a measure of last resort. It may be resorted to only when the facts of the case clearly warrant this grave step (for example child abuse).

19. Least possible use of institutionalization

19.1 The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.

Commentary

Progressive criminology advocates the use of non-institutional over institutional treatment. Little or no difference has been found in terms of the success of institutionalization as compared to non-institutionalization. The many adverse influences on an individual that seem unavoidable within any institutional setting evidently cannot be outbalanced by treatment efforts. This is especially the case for juveniles, who are vulnerable to negative influences. Moreover, the negative effects, not only of loss of liberty but also of separation from the usual social environment, are certainly more acute for juveniles than for adults because of their early stage of development.

Rule 19 aims at restricting institutionalization in two regards: in quantity ("last resort") and in time ("minimum necessary period"). Rule 19 reflects one of the basic guiding principles of resolution 4 of the Sixth United Nations Congress: a juvenile

offender should not be incarcerated unless there is no other appropriate response. The rule, therefore, makes the appeal that if a juvenile must be institutionalized, the loss of liberty should be restricted to the least possible degree, with special institutional arrangements for confinement and bearing in mind the differences in kinds of offenders, offences and institutions. In fact, priority should be given to "open" over "closed" institutions. Furthermore, any facility should be of a correctional or educational rather than of a prison type.

20. Avoidance of unnecessary delay

20.1 Each case shall from the outset be handled expeditiously, without any unnecessary delay.

Commentary

The speedy conduct of formal procedures in juvenile cases is a paramount concern. Otherwise whatever good may be achieved by the procedure and the disposition is at risk. As time passes, the juvenile will find it increasingly difficult, if not impossible, to relate the procedure and disposition to the offence, both intellectually and psychologically.

21. Records

21.1 Records of juvenile offenders shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the case at hand or other duly authorized persons.

21.2 Records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the same offender.

Commentary

The rule attempts to achieve a balance between conflicting interests connected with records or files: those of the police, prosecution and other authorities in improving control versus

the interests of the juvenile offender. (See also rule 8.) "Other duly authorized persons" would generally include, among others, researchers.

22. Need for professionalism and training

22.1 Professional education, 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 juvenile cases.

22.2 Juvenile justice personnel shall reflect the diversity of juveniles who come into contact with the juvenile justice system. Efforts shall be made to ensure the fair representation of women and minorities in juvenile justice agencies.

Commentary

The authorities competent for disposition may be persons with very different backgrounds (magistrates in the United Kingdom of Great Britain and Northern Ireland and in regions influenced by the common law system; legally trained judges in countries using Roman law and in regions influenced by them; and elsewhere elected or appointed laymen or jurists, members of community-based boards, etc.). For all these authorities, a minimum training in law, sociology, psychology, criminology and behavioural sciences would be required. This is considered as important as the organizational specialization and independence of the competent authority.

For social workers and probation officers, it might not be feasible to require professional specialization as a prerequisite for taking over any function dealing with juvenile offenders. Thus, professional on-the job instruction would be minimum qualifications.

Professional qualifications are an essential element in ensuring the impartial and effective administration of juvenile justice.

Accordingly, it is necessary to improve the recruitment, advancement and professional training of personnel and to provide them with the necessary means to enable them to properly fulfil their functions.

All political, social, sexual, racial, religious, cultural or any other kind of discrimination in the selection, appointment and advancement of juvenile justice personnel should be avoided in order to achieve impartiality in the administration of juvenile justice. This was recommended by the Sixth Congress. Furthermore, the Sixth Congress called on Member States to ensure the fair and equal treatment of women as criminal justice personnel and recommended that special measures should be taken to recruit, train and facilitate the advancement of female personnel in juvenile justice administration.

Part four

NON-INSTITUTIONAL TREATMENT

23. Effective implementation of disposition

23.1 Appropriate provisions shall be made for the implementation of orders of the competent authority, as referred to in rule 14.1 above, by that authority itself or by some other authority as circumstances may require.

23.2 Such provisions shall include the power to modify the orders as the competent authority may deem necessary from time to time, provided that such modification shall be determined in accordance with the principles contained in these Rules.

Commentary

Disposition in juvenile cases, more so than in adult cases, tends to influence the offender's life for a long period of time. Thus, it is important that the competent authority or an independent body (parole board, probation office, youth welfare institutions or others) with qualifications equal to those of the competent authority that originally disposed of the case should monitor the implementation of the disposition. In some countries, a juge de l'exécution des peines has been installed for this purpose.

The composition, powers and functions of the authority must be flexible; they are described in general terms in rule 23 in order to ensure wide acceptability.

24 . Provision of needed assistance

24.1 Efforts shall be made to provide juveniles, at all stages of the proceedings, with necessary assistance such as lodging, education or vocational training, employment or any other assistance, helpful and practical, in order to facilitate the rehabilitative process.

Commentary

The promotion of the well-being of the juvenile is of paramount consideration. Thus, rule 24 emphasizes the importance of providing requisite facilities, services and other necessary assistance as may further the best interests of the juvenile throughout the rehabilitative process.

25. Mobilization of volunteers and other community services

25.1 Volunteers, voluntary organizations, local institutions and other community resources shall be called upon to contribute effectively to the rehabilitation of the juvenile in a community setting and, as far as possible, within the family unit.

Commentary

This rule reflects the need for a rehabilitative orientation of all work with juvenile offenders. Co-operation with the community is indispensable if the directives of the competent authority are to be carried out effectively. Volunteers and voluntary services, in particular, have proved to be valuable resources but are at present underutilized. In some instances, the co-operation of ex-offenders (including ex-addicts) can be of considerable assistance.

Rule 25 emanates from the principles laid down in rules 1.1 to 1.6 and follows the relevant provisions of the International Covenant on Civil and Political Rights.

Part five

INSTITUTIONAL TREATMENT

26. Objectives of institutional treatment

26.1 The objective of training and treatment of juveniles placed in institutions is to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society.

26.2 Juveniles in institutions shall receive care, protection and all necessary assistance-social, educational, vocational, psychological, medical and physical-that they may require because of their age, sex, and personality and in the interest of their wholesome development .

26.3 Juveniles in institutions shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.

26.4 Young female offenders placed in an institution deserve special attention as to their personal needs and problems. They shall by no means receive less care, protection, assistance, treatment and training than young male offenders. Their fair treatment shall be ensured.

26.5 In the interest and well-being of the institutionalized juvenile, the parents or guardians shall have a right of access.

26.6 Inter-ministerial and inter-departmental co-operation shall be fostered for the purpose of providing adequate academic or, as appropriate, vocational training to institutionalized juveniles, with a view to ensuring that they do no leave the institution at an educational disadvantage.

Commentary

The objectives of institutional treatment as stipulated in rules 26.1 and 26.2 would be acceptable to any system and culture. However, they have not yet been attained everywhere, and much more has to be done in this respect.

Medical and psychological assistance, in particular, are extremely important for institutionalized drug addicts, violent and mentally ill young persons.

The avoidance of negative influences through adult offenders and the safeguarding of the well-being of juveniles in an institutional setting, as stipulated in rule 26.3, are in line with one of the basic guiding principles of the Rules, as set out by the Sixth Congress in its resolution 4. The rule does not prevent States from taking other measures against the negative influences of adult offenders, which are at least as effective as the measures mentioned in the rule. (See also rule 13.4.)

Rule 26.4 addresses the fact that female offenders normally receive less attention than their male counterparts. as pointed out by the Sixth Congress. In particular, resolution 9 of the Sixth Congress calls for the fair treatment of female offenders at every stage of criminal justice processes and for special attention to their particular problems and needs while in custody. Moreover, this rule should also be considered in the light of the Caracas Declaration of the Sixth Congress, which, inter alia , calls for equal treatment in criminal justice administration, and against the background of the Declaration on the Elimination of Discrimination against Women and the Convention on the Elimination of All Forms of Discrimination against Women.

The right of access (rule 26.5) follows from the provisions of rules 7.1, 10.1, 15.2 and 18.2. Inter-ministerial and inter-departmental co-operation (rule 26.6) are of particular importance in the interest of generally enhancing the quality of institutional treatment and training.

27. Application of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations

27.1 The Standard Minimum Rules for the Treatment of Prisoners and related recommendations shall be applicable as far as relevant to the treatment of juvenile offenders in institutions, including those in detention pending adjudication.

27.2 Efforts shall be made to implement the relevant principles laid down in the Standard Minimum Rules for the Treatment of Prisoners to the largest possible extent so as to meet the varying needs of juveniles specific to their age, sex and personality.

Commentary

The Standard Minimum Rules for the Treatment of Prisoners were among the first instruments of this kind to be promulgated by the United Nations. It is generally agreed that they have had a world-wide impact. Although there are still countries where implementation is more an aspiration than a fact, those Standard Minimum Rules continue to be an important influence in the humane and equitable administration of correctional institutions.

Some essential protections covering juvenile offenders in institutions are contained in the Standard Minimum Rules for the Treatment of Prisoners (accommodation, architecture, bedding, clothing, complaints and requests, contact with the outside world, food, medical care, religious service, separation of ages, staffing, work, etc.) as are provisions concerning punishment and discipline, and restraint for dangerous offenders. It would not be appropriate to modify those Standard Minimum Rules according to the particular characteristics of institutions for juvenile offenders within the scope of the Standard Minimum Rules for the Administration of Juvenile Justice.

Rule 27 focuses on the necessary requirements for juveniles in institutions (rule 27.1) as well as on the varying needs specific to their age, sex and personality (rule 27.2). Thus, the objectives and content of the rule interrelate to the relevant provisions of the Standard Minimum Rules for the Treatment of Prisoners.

28. Frequent and early recourse to conditional release

28.1 Conditional release from an institution shall be used by the appropriate authority to the greatest possible extent, and shall be granted at the earliest possible time.

28.2 Juveniles released conditionally from an institution shall be assisted and supervised by an appropriate authority and shall receive full support by the community.

Commentary

The power to order conditional release may rest with the competent authority, as mentioned in rule 14.1, or with some other authority. In view of this, it is adequate to refer here to the "appropriate" rather than to the "competent" authority.

Circumstances permitting, conditional release shall be preferred to serving a full sentence. Upon evidence of satisfactory progress towards rehabilitation, even offenders who had been deemed dangerous at the time of their institutionalization can be conditionally released whenever feasible. Like probation, such release may be conditional on the satisfactory fulfilment of the requirements specified by the relevant authorities for a period of time established in the decision, for example relating to "good behaviour" of the offender, attendance in community programmes, residence in half-way houses, etc.

In the case of offenders conditionally released from an institution, assistance and supervision by a probation or other officer (particularly where probation has not yet been adopted) should be provided and community support should be encouraged.

29. Semi-institutional arrangements

29.1 Efforts shall be made to provide semi-institutional arrangements, such as half-way houses, educational s, day-time training centres and other such appropriate arrangements that may assist juveniles in their proper reintegration into society.

Commentary

The importance of care following a period of institutionalization should not be underestimated. This rule emphasizes the necessity of forming a net of semi-institutional arrangements.

This rule also emphasizes the need for a diverse range of facilities and services designed to meet the different needs of young offenders re-entering the community and to provide guidance and structural support as an important step towards successful reintegration into society.

Part six

RESEARCH, PLANNING, POLICY FORMULATION AND EVALUATION

30. Research as a basis for planning, policy formulation and evaluation

30.1 Efforts shall be made to organize and promote necessary research as a basis for effective planning and policy formulation.

30.2 Efforts shall be made to review and appraise periodically the trends, problems and causes of juvenile delinquency and crime as well as the varying particular needs of juveniles in custody.

30.3 Efforts shall be made to establish a regular evaluative research mechanism built into the system of juvenile justice administration and to collect and analyse relevant data and information for appropriate assessment and future improvement and reform of the administration.

30.4 The delivery of services in juvenile justice administration shall be systematically planned and implemented as an integral part of national development efforts.

Commentary

The utilization of research as a basis for an informed juvenile justice policy is widely acknowledged as an important mechanism for keeping practices abreast of advances in knowledge and the continuing development and improvement of the juvenile justice system. The mutual feedback between research and policy is especially important in juvenile justice. With rapid and often drastic changes in the life-styles of the young and in the forms and dimensions of juvenile crime, the societal and justice responses to juvenile crime and delinquency quickly become outmoded and inadequate.

Rule 30 thus establishes standards for integrating research into the process of policy formulation and application in juvenile justice administration. The rule draws particular attention to the need for regular review and evaluation of existing programmes and measures and for planning within the broader context of overall development objectives.

A constant appraisal of the needs of juveniles, as well as the trends and problems of delinquency, is a prerequisite for improving the methods of formulating appropriate policies and establishing adequate interventions, at both formal and informal levels. In this context, research by independent persons and bodies should be facilitated by responsible agencies, and it may be valuable to obtain and to take into account the views of juveniles themselves, not only those who come into contact with the system.

The process of planning must particularly emphasize a more effective and equitable system for the delivery of necessary services. Towards that end, there should be a comprehensive and regular assessment of the wide-ranging, particular needs and problems of juveniles and an identification of clear-cut priorities. In that connection, there should also be a co-ordination in the use of existing resources, including alternatives and community support that would be suitable in setting up specific procedures designed to implement and monitor established programmes.

ANNEX VI

United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), (1990)

Adopted by General Assembly resolution 45/113 of 14 December 1990

I. Fundamental perspectives

1. The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort.

2. Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules and in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.

3. The Rules are intended to establish minimum standards accepted by the United Nations for the protection of juveniles deprived of their liberty in all forms, consistent with human rights and fundamental freedoms, and with a view to counteracting the detrimental effects of all types of detention and to fostering integration in society.

4. The Rules should be applied impartially, without discrimination of any kind as to race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability. The religious and cultural beliefs, practices and moral concepts of the juvenile should be respected.

5. The Rules are designed to serve as convenient standards of reference and to provide encouragement and guidance to professionals involved in the management of the juvenile justice system.

6. The Rules should be made readily available to juvenile justice personnel in their national languages. Juveniles who are not fluent in the language spoken by the personnel of the detention facility should have the right to the services of an interpreter free of charge whenever necessary, in particular during medical examinations and disciplinary proceedings.

7. Where appropriate, States should incorporate the Rules into their legislation or amend it accordingly and provide effective remedies for their breach, including compensation when injuries are inflicted on juveniles. States should also monitor the application of the Rules.

8. The competent authorities should constantly seek to increase the awareness of the public that the care of detained juveniles and preparation for their return to society is a social service of great importance, and to this end active steps should be taken to foster open contacts between the juveniles and the local community.

9. Nothing in the Rules should be interpreted as precluding the application of the relevant United Nations and human rights instruments and standards, recognized by the international community, that are more conducive to ensuring the rights, care and protection of juveniles, children and all young persons.

10. In the event that the practical application of particular Rules contained in sections II to V, inclusive, presents any conflict with the Rules contained in the present section, compliance with the latter shall be regarded as the predominant requirement.

II. Scope and application of the rules

11. For the purposes of the Rules, the following definitions should apply:

(a) A juvenile is every person under the age of 18. The

age limit below which it should not be permitted to deprive a child of his or her liberty should be determined by law;

(b) The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.

12. The deprivation of liberty should be effected in conditions and circumstances which ensure respect for the human rights of juveniles. Juveniles detained in facilities should be guaranteed the benefit of meaningful activities and programmes which would serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society.

13. Juveniles deprived of their liberty shall not for any reason related to their status be denied the civil, economic, political, social or cultural rights to which they are entitled under national or international law, and which are compatible with the deprivation of liberty.

14. The protection of the individual rights of juveniles with special regard to the legality of the execution of the detention measures shall be ensured by the competent authority, while the objectives of social integration should be secured by regular inspections and other means of control carried out, according to international standards, national laws and regulations, by a duly constituted body authorized to visit the juveniles and not belonging to the detention facility.

15. The Rules apply to all types and forms of detention facilities in which juveniles are deprived of their liberty. Sections I, II, IV and V of the Rules apply to all detention facilities and institutional settings in which juveniles are detained, and section III applies specifically to juveniles under arrest or awaiting trial.

16. The Rules shall be implemented in the context of the economic, social and cultural conditions prevailing in each Member State.

III. Juveniles under arrest or awaiting trial

17. Juveniles who are detained under arrest or awaiting trial ("untried") are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures. When preventive detention is nevertheless used, juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention. Untried detainees should be separated from convicted juveniles.

18. The conditions under which an untried juvenile is detained should be consistent with the rules set out below, with additional specific provisions as are necessary and appropriate, given the requirements of the presumption of innocence, the duration of the detention and the legal status and circumstances of the juvenile. These provisions would include, but not necessarily be restricted to, the following:

(a) Juveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications;

(b) Juveniles should be provided, where possible, with opportunities to pursue work, with remuneration, and continue education or training, but should not be required to do so. Work, education or training should not cause the continuation of the detention;

(c) Juveniles should receive and retain materials for their leisure and recreation as are compatible with the interests of the administration of justice.

IV. The management of juvenile facilities

A. Records

19. All reports, including legal records, medical records and records of disciplinary proceedings, and all other documents relating to the form, content and details of treatment, should be placed in a confidential individual file, which should be kept up to date, accessible only to authorized persons and classified in such a way as to be easily understood. Where possible, every juvenile should have the right to contest any fact or opinion contained in his or her file so as to permit rectification of inaccurate, unfounded or unfair statements. In order to exercise this right, there should be procedures that allow an appropriate third party to have access to and to consult the file on request. Upon release, the records of juveniles shall be sealed, and, at an appropriate time, expunged.

20. No juvenile should be received in any detention facility without a valid commitment order of a judicial, administrative or other public authority. The details of this order should be immediately entered in the register. No juvenile should be detained in any facility where there is no such register.

B. Admission, registration, movement and transfer

21. In every place where juveniles are detained, a complete and secure record of the following information should be kept concerning each juvenile received:

(a) Information on the identity of the juvenile;

(b) The fact of and reasons for commitment and the authority therefor;

(c) The day and hour of admission, transfer and release;

(d) Details of the notifications to parents and guardians on every admission, transfer or release of the juvenile in their care at the time of commitment;

(e) Details of known physical and mental health problems, including drug and alcohol abuse.

22. The information on admission, place, transfer and release should be provided without delay to the parents and guardians or closest relative of the juvenile concerned.

23. As soon as possible after reception, full reports and relevant information on the personal situation and circumstances of each juvenile should be drawn up and submitted to the administration.

24. On admission, all juveniles shall be given a copy of the rules governing the detention facility and a written description of their rights and obligations in a language they can understand, together with the address of the authorities competent to receive complaints, as well as the address of public or private agencies and organizations which provide legal assistance. For those juveniles who are illiterate or who cannot understand the language in the written form, the information should be conveyed in a manner enabling full comprehension.

25. All juveniles should be helped to understand the regulations governing the internal organization of the facility, the goals and methodology of the care provided, the disciplinary requirements and procedures, other authorized methods of seeking information and of making complaints and all such other matters as are necessary to enable them to understand fully their rights and obligations during detention.

26. The transport of juveniles should be carried out at the expense of the administration in conveyances with adequate ventilation and light, in conditions that should in

no way subject them to hardship or indignity. Juveniles should not be transferred from one facility to another arbitrarily.

C. Classification and placement

27. As soon as possible after the moment of admission, each juvenile should be interviewed, and a psychological and social report identifying any factors relevant to the specific type and level of care and programme required by the juvenile should be prepared. This report, together with the report prepared by a medical officer who has examined the juvenile upon admission, should be forwarded to the director for purposes of determining the most appropriate placement for the juvenile within the facility and the specific type and level of care and programme required and to be pursued. When special rehabilitative treatment is required, and the length of stay in the facility permits, trained personnel of the facility should prepare a written, individualized treatment plan specifying treatment objectives and time-frame and the means, stages and delays with which the objectives should be approached.

28. The detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations. The principal criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being.

29. In all detention facilities juveniles should be separated from adults, unless they are members of the same family. Under controlled conditions, juveniles may be brought

together with carefully selected adults as part of a special programme that has been shown to be beneficial for the juveniles concerned.

30. Open detention facilities for juveniles should be established. Open detention facilities are those with no or minimal security measures. The population in such detention facilities should be as small as possible. The number of juveniles detained in closed facilities should be small enough to enable individualized treatment. Detention facilities for juveniles should be decentralized and of such size as to facilitate access and contact between the juveniles and their families. Small-scale detention facilities should be established and integrated into the social, economic and cultural environment of the community.

D. Physical environment and accommodation

31. Juveniles deprived of their liberty have the right to facilities and services that meet all the requirements of health and human dignity.

32. The design of detention facilities for juveniles and the physical environment should be in keeping with the rehabilitative aim of residential treatment, with due regard to the need of the juvenile for privacy, sensory stimuli, opportunities for association with peers and participation in sports, physical exercise and leisure-time activities. The design and structure of juvenile detention facilities should be such as to minimize the risk of fire and to ensure safe evacuation from the premises. There should be an effective alarm system in case of fire, as well as formal and drilled procedures to ensure the safety of the juveniles. Detention facilities should not be located in areas where there are known health or other hazards or risks.

33. Sleeping accommodation should normally consist of small group dormitories or individual bedrooms, while

bearing in mind local standards. During sleeping hours there should be regular, unobtrusive supervision of all sleeping areas, including individual rooms and group dormitories, in order to ensure the protection of each juvenile. Every juvenile should, in accordance with local or national standards, be provided with separate and sufficient bedding, which should be clean when issued, kept in good order and changed often enough to ensure cleanliness.

34. Sanitary installations should be so located and of a sufficient standard to enable every juvenile to comply, as required, with their physical needs in privacy and in a clean and decent manner.

35. The possession of personal effects is a basic element of the right to privacy and essential to the psychological well-being of the juvenile. The right of every juvenile to possess personal effects and to have adequate storage facilities for them should be fully recognized and respected. Personal effects that the juvenile does not choose to retain or that are confiscated should be placed in safe custody. An inventory thereof should be signed by the juvenile. Steps should be taken to keep them in good condition. All such articles and money should be returned to the juvenile on release, except in so far as he or she has been authorized to spend money or send such property out of the facility. If a juvenile receives or is found in possession of any medicine, the medical officer should decide what use should be made of it.

36. To the extent possible juveniles should have the right to use their own clothing. Detention facilities should ensure that each juvenile has personal clothing suitable for the climate and adequate to ensure good health, and which should in no manner be degrading or humiliating. Juveniles removed from or leaving a facility for any purpose should be allowed to wear their own clothing.

37. Every detention facility shall ensure that every juvenile receives food that is suitably prepared and presented at normal meal times and of a quality and quantity to satisfy the standards of dietetics, hygiene and health and, as far as possible, religious and cultural requirements. Clean drinking water should be available to every juvenile at any time.

E. Education, vocational training and work

38. Every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society. Such education should be provided outside the detention facility in community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty. Special attention should be given by the administration of the detention facilities to the education of juveniles of foreign origin or with particular cultural or ethnic needs. Juveniles who are illiterate or have cognitive or learning difficulties should have the right to special education.

39. Juveniles above compulsory school age who wish to continue their education should be permitted and encouraged to do so, and every effort should be made to provide them with access to appropriate educational programmes.

40. Diplomas or educational certificates awarded to juveniles while in detention should not indicate in any way that the juvenile has been institutionalized.

41. Every detention facility should provide access to a library that is adequately stocked with both instructional and recreational books and periodicals suitable for the juveniles, who should be encouraged and enabled to make full use of it.

42. Every juvenile should have the right to receive vocational training in occupations likely to prepare him or her for future employment.

43. With due regard to proper vocational selection and to the requirements of institutional administration, juveniles should be able to choose the type of work they wish to perform.

44. All protective national and international standards applicable to child labour and young workers should apply to juveniles deprived of their liberty.

45. Wherever possible, juveniles should be provided with the opportunity to perform remunerated labour, if possible within the local community, as a complement to the vocational training provided in order to enhance the possibility of finding suitable employment when they return to their communities. The type of work should be such as to provide appropriate training that will be of benefit to the juveniles following release. The organization and methods of work offered in detention facilities should resemble as closely as possible those of similar work in the community, so as to prepare juveniles for the conditions of normal occupational life.

46. Every juvenile who performs work should have the right to an equitable remuneration. The interests of the juveniles and of their vocational training should not be subordinated to the purpose of making a profit for the detention facility or a third party. Part of the earnings of a juvenile should normally be set aside to constitute a savings fund to be handed over to the juvenile on release. The juvenile should have the right to use the remainder of those earnings to purchase articles for his or her own use or to indemnify the victim injured by his or her offence or to send it to his or her family or other persons outside the detention facility.

F. Recreation

47. Every juvenile should have the right to a suitable amount of time for daily free exercise, in the open air whenever weather permits, during which time appropriate recreational and physical training should normally be provided. Adequate space, installations and equipment should be provided for these activities. Every juvenile should have additional time for daily leisure activities, part of which should be devoted, if the juvenile so wishes, to arts and crafts skill development. The detention facility should ensure that each juvenile is physically able to participate in the available programmes of physical education. Remedial physical education and therapy should be offered, under medical supervision, to juveniles needing it.

G. Religion

48. Every juvenile should be allowed to satisfy the needs of his or her religious and spiritual life, in particular by attending the services or meetings provided in the detention facility or by conducting his or her own services and having possession of the necessary books or items of religious observance and instruction of his or her denomination. If a detention facility contains a sufficient number of juveniles of a given religion, one or more qualified representatives of that religion should be appointed or approved and allowed to hold regular services and to pay pastoral visits in private to juveniles at their request. Every juvenile should have the right to receive visits from a qualified representative of any religion of his or her choice, as well as the right not to participate in religious services and freely to decline religious education, counselling or indoctrination.

H. Medical care

49. Every juvenile shall receive adequate medical care, both preventive and remedial, including dental, ophthalmological and mental health care, as well as pharmaceutical products and special diets as medically indicated. All such medical care should, where possible, be provided to detained juveniles through the appropriate health facilities and services of the community in which the detention facility is located, in order to prevent stigmatization of the juvenile and promote self-respect and integration into the community.

50. Every juvenile has a right to be examined by a physician immediately upon admission to a detention facility, for the purpose of recording any evidence of prior ill-treatment and identifying any physical or mental condition requiring medical attention.

51. The medical services provided to juveniles should seek to detect and should treat any physical or mental illness, substance abuse or other condition that may hinder the integration of the juvenile into society. Every detention facility for juveniles should have immediate access to adequate medical facilities and equipment appropriate to the number and requirements of its residents and staff trained in preventive health care and the handling of medical emergencies. Every juvenile who is ill, who complains of illness or who demonstrates symptoms of physical or mental difficulties, should be examined promptly by a medical officer.

52. Any medical officer who has reason to believe that the physical or mental health of a juvenile has been or will be injuriously affected by continued detention, a hunger strike or any condition of detention should report this fact immediately to the director of the detention facility in question and to the independent authority responsible for safeguarding the well-being of the juvenile.

53. A juvenile who is suffering from mental illness should be treated in a specialized institution under independent medical management. Steps should be taken, by arrangement with appropriate agencies, to ensure any necessary continuation of mental health care after release.

54. Juvenile detention facilities should adopt specialized drug abuse prevention and rehabilitation programmes administered by qualified personnel. These programmes should be adapted to the age, sex and other requirements of the juveniles concerned, and detoxification facilities and services staffed by trained personnel should be available to drug- or alcohol-dependent juveniles.

55. Medicines should be administered only for necessary treatment on medical grounds and, when possible, after having obtained the informed consent of the juvenile concerned. In particular, they must not be administered with a view to eliciting information or a confession, as a punishment or as a means of restraint. Juveniles shall never be testees in the experimental use of drugs and treatment. The administration of any drug should always be authorized and carried out by qualified medical personnel.

I. Notification of illness, injury and death

56. The family or guardian of a juvenile and any other person designated by the juvenile have the right to be informed of the state of health of the juvenile on request and in the event of any important changes in the health of the juvenile. The director of the detention facility should notify immediately the family or guardian of the juvenile concerned, or other designated person, in case of death, illness requiring transfer of the juvenile to an outside medical facility, or a condition requiring clinical care within the detention facility for more than 48 hours. Notification should also be given to the consular authorities of the State of which a foreign juvenile is a citizen.

57. Upon the death of a juvenile during the period of deprivation of liberty, the nearest relative should have the right to inspect the death certificate, see the body and determine the method of disposal of the body. Upon the death of a juvenile in detention, there should be an independent inquiry into the causes of death, the report of which should be made accessible to the nearest relative. This inquiry should also be made when the death of a juvenile occurs within six months from the date of his or her release from the detention facility and there is reason to believe that the death is related to the period of detention.

58. A juvenile should be informed at the earliest possible time of the death, serious illness or injury of any immediate family member and should be provided with the opportunity to attend the funeral of the deceased or go to the bedside of a critically ill relative.

J. Contacts with the wider community

59. Every means should be provided to ensure that juveniles have adequate communication with the outside world, which is an integral part of the right to fair and humane treatment and is essential to the preparation of juveniles for their return to society. Juveniles should be allowed to communicate with their families, friends and other persons or representatives of reputable outside organizations, to leave detention facilities for a visit to their and family and to receive special permission to leave the detention facility for educational, vocational or other important reasons. Should the juvenile be serving a sentence, the time spent outside a detention facility should be counted as part of the period of sentence.

60. Every juvenile should have the right to receive regular and frequent visits, in principle once a week and not less than once a month, in circumstances that respect the need of the juvenile for privacy, contact and unrestricted communication with the family and the defence counsel.

61. Every juvenile should have the right to communicate in writing or by telephone at least twice a week with the person of his or her choice, unless legally restricted, and should be assisted as necessary in order effectively to enjoy this right. Every juvenile should have the right to receive correspondence.

62. Juveniles should have the opportunity to keep themselves informed regularly of the news by reading newspapers, periodicals and other publications, through access to radio and television programmes and motion pictures, and through the visits of the representatives of any lawful club or organization in which the juvenile is interested.

K. Limitations of physical restraint and the use of force

63. Recourse to instruments of restraint and to force for any purpose should be prohibited, except as set forth in rule 64 below.

64. Instruments of restraint and force can only be used in exceptional cases, where all other control methods have been exhausted and failed, and only as explicitly authorized and specified by law and regulation. They should not cause humiliation or degradation, and should be used restrictively and only for the shortest possible period of time. By order of the director of the administration, such instruments might be resorted to in order to prevent the juvenile from inflicting self-injury, injuries to others or serious destruction of property. In such instances, the director should at once consult medical and other relevant personnel and report to the higher administrative authority.

65. The carrying and use of weapons by personnel should be prohibited in any facility where juveniles are detained.

L. Disciplinary procedures

66. Any disciplinary measures and procedures should maintain the interest of safety and an ordered community life and should be consistent with the upholding of the inherent dignity of the juvenile and the fundamental objective of institutional care, namely, instilling a sense of justice, self-respect and respect for the basic rights of every person.

67. All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned. The reduction of diet and the restriction or denial of contact with family members should be prohibited for any purpose. Labour should always be viewed as an educational tool and a means of promoting the self-respect of the juvenile in preparing him or her for return to the community and should not be imposed as a disciplinary sanction. No juvenile should be sanctioned more than once for the same disciplinary infraction. Collective sanctions should be prohibited.

68. Legislation or regulations adopted by the competent administrative authority should establish norms concerning the following, taking full account of the fundamental characteristics, needs and rights of juveniles:

    (a) Conduct constituting a disciplinary offence;

    (b) Type and duration of disciplinary sanctions that may be inflicted;

    (c) The authority competent to impose such sanctions;

    (d) The authority competent to consider appeals.

69. A report of misconduct should be presented promptly to the competent authority, which should decide on it

without undue delay. The competent authority should conduct a thorough examination of the case.

70. No juvenile should be disciplinarily sanctioned except in strict accordance with the terms of the law and regulations in force. No juvenile should be sanctioned unless he or she has been informed of the alleged infraction in a manner appropriate to the full understanding of the juvenile, and given a proper opportunity of presenting his or her defence, including the right of appeal to a competent impartial authority. Complete records should be kept of all disciplinary proceedings.

71. No juveniles should be responsible for disciplinary functions except in the supervision of specified social, educational or sports activities or in self-government programmes.

M. Inspection and complaints

72. Qualified inspectors or an equivalent duly constituted authority not belonging to the administration of the facility should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative, and should enjoy full guarantees of independence in the exercise of this function. Inspectors should have unrestricted access to all persons employed by or working in any facility where juveniles are or may be deprived of their liberty, to all juveniles and to all records of such facilities.

73. Qualified medical officers attached to the inspecting authority or the public health service should participate in the inspections, evaluating compliance with the rules concerning the physical environment, hygiene, accommodation, food, exercise and medical services, as well as any other aspect or conditions of institutional life that affect the physical and mental health of juveniles.

Every juvenile should have the right to talk in confidence to any inspecting officer.

74. After completing the inspection, the inspector should be required to submit a report on the findings. The report should include an evaluation of the compliance of the detention facilities with the present rules and relevant provisions of national law, and recommendations regarding any steps considered necessary to ensure compliance with them. Any facts discovered by an inspector that appear to indicate that a violation of legal provisions concerning the rights of juveniles or the operation of a juvenile detention facility has occurred should be communicated to the competent authorities for investigation and prosecution.

75. Every juvenile should have the opportunity of making requests or complaints to the director of the detention facility and to his or her authorized representative.

76. Every juvenile should have the right to make a request or complaint, without censorship as to substance, to the central administration, the judicial authority or other proper authorities through approved channels, and to be informed of the response without delay.

77. Efforts should be made to establish an independent office (ombudsman) to receive and investigate complaints made by juveniles deprived of their liberty and to assist in the achievement of equitable settlements.

78. Every juvenile should have the right to request assistance from family members, legal counsellors, humanitarian groups or others where possible, in order to make a complaint. Illiterate juveniles should be provided with assistance should they need to use the services of public or private agencies and organizations which provide legal counsel or which are competent to receive complaints.

N. Return to the community

79. All juveniles should benefit from arrangements designed to assist them in returning to society, family life, education or employment after release. Procedures, including early release, and special courses should be devised to this end.

80. Competent authorities should provide or ensure services to assist juveniles in re-establishing themselves in society and to lessen prejudice against such juveniles. These services should ensure, to the extent possible, that the juvenile is provided with suitable residence, employment, clothing, and sufficient means to maintain himself or herself upon release in order to facilitate successful reintegration. The representatives of agencies providing such services should be consulted and should have access to juveniles while detained, with a view to assisting them in their return to the community.

V. Personnel

81. Personnel should be qualified and include a sufficient number of specialists such as educators, vocational instructors, counsellors, social workers, psychiatrists and psychologists. These and other specialist staff should normally be employed on a permanent basis. This should not preclude part-time or volunteer workers when the level of support and training they can provide is appropriate and beneficial. Detention facilities should make use of all remedial, educational, moral, spiritual, and other resources and forms of assistance that are appropriate and available in the community, according to the individual needs and problems of detained juveniles.

82. The administration should provide for the careful selection and recruitment of every grade and type of personnel, since the proper management of detention facilities depends on their integrity, humanity, ability and

professional capacity to deal with juveniles, as well as personal suitability for the work.

83. To secure the foregoing ends, personnel should be appointed as professional officers with adequate remuneration to attract and retain suitable women and men. The personnel of juvenile detention facilities should be continually encouraged to fulfil their duties and obligations in a humane, committed, professional, fair and efficient manner, to conduct themselves at all times in such a way as to deserve and gain the respect of the juveniles, and to provide juveniles with a positive role model and perspective.

84. The administration should introduce forms of organization and management that facilitate communications between different categories of staff in each detention facility so as to enhance cooperation between the various services engaged in the care of juveniles, as well as between staff and the administration, with a view to ensuring that staff directly in contact with juveniles are able to function in conditions favourable to the efficient fulfilment of their duties.

85. The personnel should receive such training as will enable them to carry out their responsibilities effectively, in particular training in child psychology, child welfare and international standards and norms of human rights and the rights of the child, including the present Rules. The personnel should maintain and improve their knowledge and professional capacity by attending courses of in-service training, to be organized at suitable intervals throughout their career.

86. The director of a facility should be adequately qualified for his or her task, with administrative ability and suitable training and experience, and should carry out his or her duties on a full-time basis.

87. In the performance of their duties, personnel of detention facilities should respect and protect the human dignity and fundamental human rights of all juveniles, in particular, as follows:

(a) No member of the detention facility or institutional personnel may inflict, instigate or tolerate any act of torture or any form of harsh, cruel, inhuman or degrading treatment, punishment, correction or discipline under any pretext or circumstance whatsoever;

(b) All personnel should rigorously oppose and combat any act of corruption, reporting it without delay to the competent authorities;

(c) All personnel should respect the present Rules. Personnel who have reason to believe that a serious violation of the present Rules has occurred or is about to occur should report the matter to their superior authorities or organs vested with reviewing or remedial power;

(d) All personnel should ensure the full protection of the physical and mental health of juveniles, including protection from physical, sexual and emotional abuse and exploitation, and should take immediate action to secure medical attention whenever required;

(e) All personnel should respect the right of the juvenile to privacy, and, in particular, should safeguard all confidential matters concerning juveniles or their families learned as a result of their professional capacity;

(f) All personnel should seek to minimize any differences between life inside and outside the detention facility which tend to lessen due respect for the dignity of juveniles as human beings.

ANNEX VII

United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), (1995)

Adopted and proclaimed by General Assembly resolution 45/112 of 14 December 1990

I. Fundamental principles

1. The prevention of juvenile delinquency is an essential part of crime prevention in society. By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non-criminogenic attitudes.

2. The successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents, with respect for and promotion of their personality from early childhood.

3. For the purposes of the interpretation of the present Guidelines, a child-centred orientation should be pursued. Young persons should have an active role and partnership within society and should not be considered as mere objects of socialization or control.

4. In the implementation of the present Guidelines, in accordance with national legal systems, the well-being of young persons from their early childhood should be the focus of any preventive programme.

5. The need for and importance of progressive delinquency prevention policies and the systematic study and the elaboration of measures should be recognized. These should avoid criminalizing and penalizing a child for behaviour that does not cause serious damage to the development of the child or harm to others. Such policies and measures should involve:

   (a) The provision of opportunities, in particular educational opportunities, to meet the varying needs of young persons and to serve as a supportive framework for

safeguarding the personal development of all young persons, particularly those who are demonstrably endangered or at social risk and are in need of special care and protection;

(b) Specialized philosophies and approaches for delinquency prevention, on the basis of laws, processes, institutions, facilities and a service delivery network aimed at reducing the motivation, need and opportunity for, or conditions giving rise to, the commission of infractions;

(c) Official intervention to be pursued primarily in the overall interest of the young person and guided by fairness and equity;

(d) Safeguarding the well-being, development, rights and interests of all young persons;

(e) Consideration that youthful behaviour or conduct that does not conform to overall social norms and values is often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood;

(f) Awareness that, in the predominant opinion of experts, labelling a young person as “deviant”’, “delinquent” or “pre-delinquent” often contributes to the development of a consistent pattern of undesirable behaviour by young persons.

6. Community-based services and programmes should be developed for the prevention of juvenile delinquency, particularly where no agencies have yet been established. Formal agencies of social control should only be utilized as a means of last resort.

II. Scope of the Guidelines

7. The present Guidelines should be interpreted and implemented within the broad framework of the Universal

Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child and the Convention on the Rights of the Child, and in the context of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), as well as other instruments and norms relating to the rights, interests and well-being of all children and young persons.

8. The present Guidelines should also be implemented in the context of the economic, social and cultural conditions prevailing in each Member State.

III. General prevention

9. Comprehensive prevention plans should be instituted at every level of Government and include the following:

(a) In-depth analyses of the problem and inventories of programmes, services, facilities and resources available;

(b) Well-defined responsibilities for the qualified agencies, institutions and personnel involved in preventive efforts;

(c) Mechanisms for the appropriate co-ordination of prevention efforts between governmental and non-governmental agencies;

(d) Policies, programmes and strategies based on prognostic studies to be continuously monitored and carefully evaluated in the course of implementation;

(e) Methods for effectively reducing the opportunity to commit delinquent acts;

(f) Community involvement through a wide range of services and programmes;

(g) Close interdisciplinary co-operation between national, State, provincial and local governments, with the

involvement of the private sector, representative citizens of the community to be served, and labour, child-care, health education, social, law enforcement and judicial agencies in taking concerted action to prevent juvenile delinquency and youth crime;

(h) Youth participation in delinquency prevention policies and processes, including recourse to community resources, youth self-help, and victim compensation and assistance programmes;

(i) Specialized personnel at all levels.

IV. Socialization processes

10. Emphasis should be placed on preventive policies facilitating the successful socialization and integration of all children and young persons, in particular through the family, the community, peer groups, schools, vocational training and the world of work, as well as through voluntary organizations. Due respect should be given to the proper personal development of children and young persons, and they should be accepted as full and equal partners in socialization and integration processes.

A. Family

11. Every society should place a high priority on the needs and well-being of the family and of all its members.

12. Since the family is the central unit responsible for the primary socialization of children, governmental and social efforts to preserve the integrity of the family, including the extended family, should be pursued. The society has a responsibility to assist the family in providing care and protection and in ensuring the physical and mental well-being of children. Adequate arrangements including day-care should be provided.

13. Governments should establish policies that are conducive to the bringing up of children in stable and settled family

environments. Families in need of assistance in the resolution of conditions of instability or conflict should be provided with requisite services.

14. Where a stable and settled family environment is lacking and when community efforts to assist parents in this regard have failed and the extended family cannot fulfil this role, alternative placements, including foster care and adoption, should be considered. Such placements should replicate, to the extent possible, a stable and settled family environment, while, at the same time, establishing a sense of permanency for children, thus avoiding problems associated with “foster drift”.

15. Special attention should be given to children of families affected by problems brought about by rapid and uneven economic, social and cultural change, in particular the children of indigenous, migrant and refugee families. As such changes may disrupt the social capacity of the family to secure the traditional rearing and nurturing of children, often as a result of role and culture conflict, innovative and socially constructive modalities for the socialization of children have to be designed.

16. Measures should be taken and programmes developed to provide families with the opportunity to learn about parental roles and obligations as regards child development and child care, promoting positive parent-child relationships, sensitizing parents to the problems of children and young persons and encouraging their involvement in family and community-based activities.

17. Governments should take measures to promote family cohesion and harmony and to discourage the separation of children from their parents, unless circumstances affecting the welfare and future of the child leave no viable alternative.

18. It is important to emphasize the socialization function of the family and extended family; it is also equally

important to recognize the future role, responsibilities, participation and partnership of young persons in society.

19. In ensuring the right of the child to proper socialization, Governments and other agencies should rely on existing social and legal agencies, but, whenever traditional institutions and customs are no longer effective, they should also provide and allow for innovative measures.

B. Education

20. Governments are under an obligation to make public education accessible to all young persons.

21. Education systems should, in addition to their academic and vocational training activities, devote particular attention to the following:

(a) Teaching of basic values and developing respect for the child's own cultural identity and patterns, for the social values of the country in which the child is living, for civilizations different from the child's own and for human rights and fundamental freedoms;

(b) Promotion and development of the personality, talents and mental and physical abilities of young people to their fullest potential;

(c) Involvement of young persons as active and effective participants in, rather than mere objects of, the educational process;

(d) Undertaking activities that foster a sense of identity with and of belonging to the school and the community;

(e) Encouragement of young persons to understand and respect diverse views and opinions, as well as cultural and other differences;

(f) Provision of information and guidance regarding vocational training, employment opportunities and career development;

(g) Provision of positive emotional support to young persons and the avoidance of psychological maltreatment;

(h) Avoidance of harsh disciplinary measures, particularly corporal punishment.

22. Educational systems should seek to work together with parents, community organizations and agencies concerned with the activities of young persons.

23. Young persons and their families should be informed about the law and their rights and responsibilities under the law, as well as the universal value system, including United Nations instruments.

24. Educational systems should extend particular care and attention to young persons who are at social risk. Specialized prevention programmes and educational materials, curricula, approaches and tools should be developed and fully utilized.

25. Special attention should be given to comprehensive policies and strategies for the prevention of alcohol, drug and other substance abuse by young persons. Teachers and other professionals should be equipped and trained to prevent and deal with these problems. Information on the use and abuse of drugs, including alcohol, should be made available to the student body.

26. Schools should serve as resource and referral centres for the provision of medical, counselling and other services to young persons, particularly those with special needs and suffering from abuse, neglect, victimization and exploitation.

27. Through a variety of educational programmes, teachers and other adults and the student body should be sensitized to the problems, needs and perceptions of young persons, particularly those belonging to underprivileged, disadvantaged, ethnic or other minority and low-income groups.

28. School systems should attempt to meet and promote the highest professional and educational standards with respect to curricula, teaching and learning methods and approaches, and the recruitment and training of qualified teachers. Regular monitoring and assessment of performance by the appropriate professional organizations and authorities should be ensured.

29. School systems should plan, develop and implement extracurricular activities of interest to young persons, in co-operation with community groups.

30. Special assistance should be given to children and young persons who find it difficult to comply with attendance codes, and to "drop-outs".

31. Schools should promote policies and rules that are fair and just; students should be represented in bodies formulating school policy, including policy on discipline, and decision-making.

C. Community

32. Community-based services and programmes which respond to the special needs, problems, interests and concerns of young persons and which offer appropriate counselling and guidance to young persons and their families should be developed, or strengthened where they exist.

33. Communities should provide, or strengthen where they exist, a wide range of community-based support measures for young persons, including community development centres, recreational facilities and services to respond to the special problems of children who are at social risk. In providing these helping measures, respect for individual rights should be ensured.

34. Special facilities should be set up to provide adequate shelter for young persons who are no longer able to live at or who do not have s to live in.

35. A range of services and helping measures should be provided to deal with the difficulties experienced by young persons in the transition to adulthood. Such services should include special programmes for young drug abusers which emphasize care, counselling, assistance and therapy-oriented interventions.

36. Voluntary organizations providing services for young persons should be given financial and other support by Governments and other institutions.

37. Youth organizations should be created or strengthened at the local level and given full participatory status in the management of community affairs. These organizations should encourage youth to organize collective and voluntary projects, particularly projects aimed at helping young persons in need of assistance.

38. Government agencies should take special responsibility and provide necessary services for less or street children; information about local facilities, accommodation, employment and other forms and sources of help should be made readily available to young persons.

39. A wide range of recreational facilities and services of particular interest to young persons should be established and made easily accessible to them.

D. Mass media

40. The mass media should be encouraged to ensure that young persons have access to information and material from a diversity of national and international sources.

41. The mass media should be encouraged to portray the positive contribution of young persons to society.

42. The mass media should be encouraged to disseminate information on the existence of services, facilities and opportunities for young persons in society.

43. The mass media generally, and the television and film media in particular, should be encouraged to minimize the level of pornography, drugs and violence portrayed and to display violence and exploitation disfavourably, as well as to avoid demeaning and degrading presentations, especially of children, women and interpersonal relations, and to promote egalitarian principles and roles.

44. The mass media should be aware of its extensive social role and responsibility, as well as its influence, in communications relating to youthful drug and alcohol abuse. It should use its power for drug abuse prevention by relaying consistent messages through a balanced approach. Effective drug awareness campaigns at all levels should be promoted.

V. Social policy

45. Government agencies should give high priority to plans and programmes for young persons and should provide sufficient funds and other resources for the effective delivery of services, facilities and staff for adequate medical and mental health care, nutrition, housing and other relevant services, including drug and alcohol abuse prevention and treatment, ensuring that such resources reach and actually benefit young persons.

46. The institutionalization of young persons should be a measure of last resort and for the minimum necessary period, and the best interests of the young person should be of paramount importance. Criteria authorizing formal intervention of this type should be strictly defined and limited to the following situations: (a) where the child or young person has suffered harm that has been inflicted by the parents or guardians; (b) where the child or young person has been sexually, physically or emotionally abused by the parents or guardians; (c) where the child or young person has been neglected, abandoned or exploited by the parents or guardians; (d) where the child or young person is threatened by physical or moral

danger due to the behaviour of the parents or guardians; and (e) where a serious physical or psychological danger to the child or young person has manifested itself in his or her own behaviour and neither the parents, the guardians, the juvenile himself or herself nor non-residential community services can meet the danger by means other than institutionalization.

47. Government agencies should provide young persons with the opportunity of continuing in full-time education, funded by the State where parents or guardians are unable to support the young persons, and of receiving work experience.

48. Programmes to prevent delinquency should be planned and developed on the basis of reliable, scientific research findings, and periodically monitored, evaluated and adjusted accordingly.

49. Scientific information should be disseminated to the professional community and to the public at large about the sort of behaviour or situation which indicates or may result in physical and psychological victimization, harm and abuse, as well as exploitation, of young persons.

50. Generally, participation in plans and programmes should be voluntary. Young persons themselves should be involved in their formulation, development and implementation.

51. Government should begin or continue to explore, develop and implement policies, measures and strategies within and outside the criminal justice system to prevent domestic violence against and affecting young persons and to ensure fair treatment to these victims of domestic violence.

VI. Legislation and juvenile justice administration

52. Governments should enact and enforce specific laws and procedures to promote and protect the rights and well-being of all young persons.

53. Legislation preventing the victimization, abuse, exploitation and the use for criminal activities of children and young persons should be enacted and enforced.

54. No child or young person should be subjected to harsh or degrading correction or punishment measures at , in schools or in any other institutions.

55. Legislation and enforcement aimed at restricting and controlling accessibility of weapons of any sort to children and young persons should be pursued.

56. In order to prevent further stigmatization, victimization and criminalization of young persons, legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person.

57. Consideration should be given to the establishment of an office of ombudsman or similar independent organ, which would ensure that the status, rights and interests of young persons are upheld and that proper referral to available services is made. The ombudsman or other organ designated would also supervise the implementation of the Riyadh Guidelines, the Beijing Rules and the Rules for the Protection of Juveniles Deprived of their Liberty. The ombudsman or other organ would, at regular intervals, publish a report on the progress made and on the difficulties encountered in the implementation of the instrument. Child advocacy services should also be established.

58. Law enforcement and other relevant personnel, of both sexes, should be trained to respond to the special needs of young persons and should be familiar with and use, to the maximum extent possible, programmes and referral possibilities for the diversion of young persons from the justice system.

59. Legislation should be enacted and strictly enforced to protect children and young persons from drug abuse and drug traffickers.

VII. Research, policy development and coordination

60. Efforts should be made and appropriate mechanisms established to promote, on both a multidisciplinary and an intradisciplinary basis, interaction and coordination between economic, social, education and health agencies and services, the justice system, youth, community and development agencies and other relevant institutions.

61. The exchange of information, experience and expertise gained through projects, programmes, practices and initiatives relating to youth crime, delinquency prevention and juvenile justice should be intensified at the national, regional and international levels.

62. Regional and international co-operation on matters of youth crime, delinquency prevention and juvenile justice involving practitioners, experts and decision makers should be further developed and strengthened.

63. Technical and scientific cooperation on practical and policy-related matters, particularly in training, pilot and demonstration projects, and on specific issues concerning the prevention of youth crime and juvenile delinquency should be strongly supported by all Governments, the United Nations system and other concerned organizations.

64. Collaboration should be encouraged in undertaking scientific research with respect to effective modalities for youth crime and juvenile delinquency prevention and the findings of such research should be widely disseminated and evaluated.

65. Appropriate United Nations bodies, institutes, agencies and offices should pursue close collaboration and coordination on various questions related to children juvenile justice and youth crime and juvenile delinquency prevention.

66. On the basis of the present Guidelines, the United Nations Secretariat, in cooperation with interested institutions, should play an active role in the conduct of research, scientific collaboration, the formulation of policy options and the review and monitoring of their implementation, and should serve as a source of reliable information on effective modalities for delinquency prevention.

ANNEX VIII

United Nations Minimum Rules for Non-custodial Measures (Tokyo Rules), (1990)

Adopted by General Assembly resolution 45/110 of 14 December 1990

I. General principles

1. Fundamental aims

1.1 The present Standard Minimum Rules provide a set of basic principles to promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment.

1.2 The Rules are intended to promote greater community involvement in the management of criminal justice, specifically in the treatment of offenders, as well as to promote among offenders a sense of responsibility towards society.

1.3 The Rules shall be implemented taking into account the political, economic, social and cultural conditions of each country and the aims and objectives of its criminal justice system.

1.4 When implementing the Rules, Member States shall endeavour to ensure a proper balance between the rights of individual offenders, the rights of victims, and the concern of society for public safety and crime prevention.

1.5 Member States shall develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.

2. The scope of non-custodial measures

2.1 The relevant provisions of the present Rules shall be applied to all persons subject to prosecution, trial or the execution of a sentence, at all stages of the administration of criminal justice. For the purposes of the Rules, these

persons are referred to as “offenders”, irrespective of whether they are suspected, accused or sentenced.

2.2 The Rules shall be applied without any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth or other status.

2.3 In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions. The number and types of non-custodial measures available should be determined in such a way so that consistent sentencing remains possible.

2.4 The development of new non-custodial measures should be encouraged and closely monitored and their use systematically evaluated.

2.5 Consideration shall be given to dealing with offenders in the community avoiding as far as possible resort to formal proceedings or trial by a court, in accordance with legal safeguards and the rule of law.

2.6 Non-custodial measures should be used in accordance with the principle of minimum intervention.

2.7 The use of non-custodial measures should be part of the movement towards depenalization and decriminalization instead of interfering with or delaying efforts in that direction.

3 . Legal safeguards

3.1 The introduction, definition and application of non-custodial measures shall be prescribed by law.

3.2 The selection of a non-custodial measure shall be based on an assessment of established criteria in respect of both

the nature and gravity of the offence and the personality, background of the offender, the purposes of sentencing and the rights of victims.

3.3 Discretion by the judicial or other competent independent authority shall be exercised at all stages of the proceedings by ensuring full accountability and only in accordance with the rule of law.

3.4 Non-custodial measures imposing an obligation on the offender, applied before or instead of formal proceedings or trial , shall require the offender's consent.

3.5 Decisions on the imposition of non-custodial measures shall be subject to review by a judicial or other competent independent authority, upon application by the offender.

3.6 The offender shall be entitled to make a request or complaint to a judicial or other competent independent authority on matters affecting his or her individual rights in the implementation of non-custodial measures.

3.7 Appropriate machinery shall be provided for the recourse and, if possible, redress of any grievance related to non-compliance with internationally recognized human rights.

3.8 Non-custodial measures shall not involve medical or psychological experimentation on, or undue risk of physical or mental injury to, the offender.

3.9 The dignity of the offender subject to non-custodial measures shall be protected at all times.

3.10 In the implementation of non-custodial measures, the offender's rights shall not be restricted further than was authorized by the competent authority that rendered the original decision.

3.11 In the application of non-custodial measures, the offender's right to privacy shall be respected, as shall be the right to privacy of the offender's family.

3.12 The offender's personal records shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the offender's case or to other duly authorized persons.

4 . Saving clause

4.1 Nothing in these Rules shall be interpreted as precluding the application of the Standard Minimum Rules for the Treatment of Prisoners, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment or any other human rights instruments and standards recognized by the international community and relating to the treatment of offenders and the protection of their basic human rights.

II. Pre-trial stage

5. Pre-trial dispositions

5.1 Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. For the purpose of deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system. For minor cases the prosecutor may impose suitable non-custodial measures, as appropriate.

6. Avoidance of pre-trial detention

6.1 Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the

investigation of the alleged offence and for the protection of society and the victim.

6.2 Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule 5.1 and shall be administered humanely and with respect for the inherent dignity of human beings.

6.3 The offender shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed.

III. Trial and sentencing stage

7. Social inquiry reports

7.1 If the possibility of social inquiry reports exists, the judicial authority may avail itself of a report prepared by a competent, authorized official or agency. The report should contain social information on the offender that is relevant to the person's pattern of offending and current offences. It should also contain information and recommendations that are relevant to the sentencing procedure. The report shall be factual, objective and unbiased, with any expression of opinion clearly identified.

8. Sentencing dispositions

8.1 The judicial authority, having at its disposal a range of non-custodial measures, should take into consideration in making its decision the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted whenever appropriate.

8.2 Sentencing authorities may dispose of cases in the following ways:

(a) Verbal sanctions, such as admonition, reprimand and warning;

(b) Conditional discharge;

(c) Status penalties;

(d) Economic sanctions and monetary penalties, such as fines and day-fines;

(e) Confiscation or an expropriation order;

(f) Restitution to the victim or a compensation order;

(g) Suspended or deferred sentence;

(h) Probation and judicial supervision;

(i) A community service order;

(j) Referral to an attendance centre;

(k) House arrest;

(l) Any other mode of non-institutional treatment;

(m) Some combination of the measures listed above.

IV. Post-sentencing stage

9. Post-sentencing dispositions

9.1 The competent authority shall have at its disposal a wide range of post-sentencing alternatives in order to avoid institutionalization and to assist offenders in their early reintegration into society.

9.2 Post-sentencing dispositions may include:

(a) Furlough and half-way houses;

(b) Work or education release;

(c) Various forms of parole;

(d) Remission;

(e) Pardon.

9.3 The decision on post-sentencing dispositions, except in

the case of pardon, shall be subject to review by a judicial or other competent independent authority, upon application of the offender.

9.4 Any form of release from an institution to a non-custodial programme shall be considered at the earliest possible stage.

V. Implementation of non-custodial measures

10. Supervision

10.1 The purpose of supervision is to reduce reoffending and to assist the offender's integration into society in a way which minimizes the likelihood of a return to crime.

10.2 If a non-custodial measure entails supervision, the latter shall be carried out by a competent authority under the specific conditions prescribed by law.

10.3 Within the framework of a given non-custodial measure, the most suitable type of supervision and treatment should be determined for each individual case aimed at assisting the offender to work on his or her offending. Supervision and treatment should be periodically reviewed and adjusted as necessary.

10.4 Offenders should, when needed, be provided with psychological, social and material assistance and with opportunities to strengthen links with the community and facilitate their reintegration into society.

11. Duration

11.1 The duration of a non-custodial measure shall not exceed the period established by the competent authority in accordance with the law.

11.2 Provision may be made for early termination of the measure if the offender has responded favourably to it.

12. Conditions

12.1 If the competent authority shall determine the conditions to be observed by the offender, it should take into account both the needs of society and the needs and rights of the offender and the victim.

12.2 The conditions to be observed shall be practical, precise and as few as possible, and be aimed at reducing the likelihood of an offender relapsing into criminal behaviour and of increasing the offender's chances of social integration, taking into account the needs of the victim.

12.3 At the beginning of the application of a non-custodial measure, the offender shall receive an explanation, orally and in writing, of the conditions governing the application of the measure, including the offender's obligations and rights.

12.4 The conditions may be modified by the competent authority under the established statutory provisions, in accordance with the progress made by the offender.

13. Treatment process

13.1 Within the framework of a given non-custodial measure, in appropriate cases, various schemes, such as case-work, group therapy, residential programmes and the specialized treatment of various categories of offenders, should be developed to meet the needs of offenders more effectively.

13.2 Treatment should be conducted by professionals who have suitable training and practical experience.

13.3 When it is decided that treatment is necessary, efforts should be made to understand the offender's background, personality, aptitude, intelligence, values and, especially, the circumstances leading to the commission of the offence.

13.4 The competent authority may involve the community and social support systems in the application of non-custodial measures.

13.5 Case-load assignments shall be maintained as far as practicable at a manageable level to ensure the effective implementation of treatment programmes.

13.6 For each offender, a case record shall be established and maintained by the competent authority.

14. Discipline and breach of conditions

14.1 A breach of the conditions to be observed by the offender may result in a modification or revocation of the non-custodial measure.

14.2 The modification or revocation of the non-custodial measure shall be made by the competent authority; this shall be done only after a careful examination of the facts adduced by both the supervising officer and the offender.

14.3 The failure of a non-custodial measure should not automatically lead to the imposition of a custodial measure.

14.4 In the event of a modification or revocation of the non-custodial measure, the competent authority shall attempt to establish a suitable alternative non-custodial measure. A sentence of imprisonment may be imposed only in the absence of other suitable alternatives.

14.5 The power to arrest and detain the offender under supervision in cases where there is a breach of the conditions shall be prescribed by law.

14.6 Upon modification or revocation of the non-custodial measure, the offender shall have the right to appeal to a judicial or other competent independent authority.

VI. Staff

15. Recruitment

15.1 There shall be no discrimination in the recruitment of staff on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth or other status. The policy regarding staff recruitment should take into consideration national policies of affirmative action and reflect the diversity of the offenders to be supervised.

15.2 Persons appointed to apply non-custodial measures should be personally suitable and, whenever possible, have appropriate professional training and practical experience. Such qualifications shall be clearly specified.

15.3 To secure and retain qualified professional staff, appropriate service status, adequate salary and benefits commensurate with the nature of the work should be ensured and ample opportunities should be provided for professional growth and career development.

16. Staff training

16.1 The objective of training shall be to make clear to staff their responsibilities with regard to rehabilitating the offender, ensuring the offender's rights and protecting society. Training should also give staff an understanding of the need to cooperate in and coordinate activities with the agencies concerned.

16.2 Before entering duty, staff shall be given training that includes instruction on the nature of non-custodial measures, the purposes of supervision and the various modalities of the application of non-custodial measures.

16.3 After entering duty, staff shall maintain and improve their knowledge and professional capacity by attending in-service training and refresher courses. Adequate facilities shall be made available for that purpose.

VII. Volunteers and other community resources

17. Public participation

17.1 Public participation should be encouraged as it is a major resource and one of the most important factors in improving ties between offenders undergoing non-custodial measures and the family and community. It should complement the efforts of the criminal justice administration.

17.2 Public participation should be regarded as an opportunity for members of the community to contribute to the protection of their society.

18. Public understanding and cooperation

18.1 Government agencies, the private sector and the general public should be encouraged to support voluntary organizations that promote noncustodial measures.

18.2 Conferences, seminars, symposia and other activities should be regularly organized to stimulate awareness of the need for public participation in the application of non-custodial measures.

18.3 All forms of the mass media should be utilized to help to create a constructive public attitude, leading to activities conducive to a broader application of non-custodial treatment and the social integration of offenders.

18.4 Every effort should be made to inform the public of the importance of its role in the implementation of non-custodial measures.

19. Volunteers

19.1 Volunteers shall be carefully screened and recruited on the basis of their aptitude for and interest in the work involved. They shall be properly trained for the specific responsibilities to be discharged by them and shall have

access to support and counselling from, and the opportunity to consult with, the competent authority.

19.2 Volunteers should encourage offenders and their families to develop meaningful ties with the community and a broader sphere of contact by providing counselling and other appropriate forms of assistance according to their capacity and the offenders' needs.

19.3 Volunteers shall be insured against accident, injury and public liability when carrying out their duties. They shall be reimbursed for authorized expenditures incurred in the course of their work. Public recognition should be extended to them for the services they render for the well-being of the community.

VIII. Research, planning, policy formulation and evalution

20. Research and planning

20.1 As an essential aspect of the planning process, efforts should be made to involve both public and private bodies in the organization and promotion of research on the non-custodial treatment of offenders.

20.2 Research on the problems that confront clients, practitioners, the community and policy-makers should be carried out on a regular basis.

20.3 Research and information mechanisms should be built into the criminal justice system for the collection and analysis of data and statistics on the implementation of non-custodial treatment for offenders.

21. Policy formulation and programme development

21.1 Programmes for non-custodial measures should be systematically planned and implemented as an integral part of the criminal justice system within the national development process.

21.2 Regular evaluations should be carried out with a view to implementing non-custodial measures more effectively.

21.3 Periodic reviews should be concluded to assess the objectives, functioning and effectiveness of non-custodial measures.

22. Linkages with relevant agencies and activities

22.1 Suitable mechanisms should be evolved at various levels to facilitate the establishment of linkages between services responsible for non-custodial measures, other branches of the criminal justice system, social development and welfare agencies, both governmental and non-governmental, in such fields as health, housing, education and labour, and the mass media.

23. International cooperation

23.1 Efforts shall be made to promote scientific cooperation between countries in the field of non-institutional treatment. Research, training, technical assistance and the exchange of information among Member States on non-custodial measures should be strengthened, through the United Nations institutes for the prevention of crime and the treatment of offenders, in close collaboration with the Crime Prevention and Criminal Justice Branch of the Centre for Social Development and Humanitarian Affairs of the United Nations Secretariat.

23.2 Comparative studies and the harmonization of legislative provisions should be furthered to expand the range of non-institutional options and facilitate their application across national frontiers, in accordance with the Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released.

ANNEX IX

Guidelines on Justice Matters involving Child Victims and Witnesses of Crime (2005)

The Economic and Social Council,

Recalling General Assembly resolution 40/34 of 29

November 1985, by which the Assembly adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,

Recalling also the provisions of the Convention on the Rights of the Child, adopted by the General Assembly in its resolution 44/25 of 20 November 1989, in particular articles 3 and 39 thereof, as well as the provisions of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted by the Assembly in its resolution 54/263 of 25 May 2000, in particular article 8 thereof,

Bearing in mind the relevant provisions of the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century, annexed to General Assembly resolution 55/59 of 4 December 2000, as well as the plans of action for the implementation of the Vienna Declaration, annexed to Assembly resolution 56/261 of 31 January 2002, in particular the plans of action on witnesses and victims of crime and juvenile justice,

Bearing in mind also the document entitled “A World Fit for Children”, adopted by the General Assembly in its resolution S-27/2 of 10 May 2002, Recalling its resolution 1996/16 of 23 July 1996, in which it requested the Secretary-General to continue to promote the use and application of United Nations standards and norms in crime prevention and criminal justice, Mindful of the serious physical, psychological and emotional consequences of various forms of crime for the victims, especially child victims, Recognizing that the participation of child victims and witnesses of crime in the criminal justice process is essential in order to effectively prosecute various forms of crime, including in cases of sexual exploitation of children, trafficking in children and other forms of transnational organized crime where children are often the only witnesses,

Mindful of the public interest in a fair trial based on reliable evidence and also of the susceptibility of child witnesses and victims to suggestion or coercion,

Mindful also of the fact that child victims and witnesses of crime require special protection, assistance and support appropriate to their age, level of maturity and individual special needs in order to prevent additional hardship caused to them as a result of their participation in the criminal justice process,

Emphasizing that United Nations standards and norms in crime prevention and criminal justice contribute to the body of 2 declarations, treaties and other instruments spearheading criminal justice reform in Member States aimed at dealing effectively and humanely with any form of crime and its prevention worldwide,

Noting with appreciation the efforts of the International Bureau for Children's Rights in drawing up guidelines on justice for child victims and witnesses of crime, drafted together with a steering/drafting committee of renowned international experts in the area of child rights, criminal law and victimology,

1. Requests the Secretary-General to convene an intergovernmental expert group, with representation based on the regional composition of the Commission on Crime Prevention and Criminal Justice and open to any Member State wishing to participate as an observer, subject to the availability of extrabudgetary resources, in order to develop guidelines on justice in matters involving child victims and witnesses of crime;

2. Requests the intergovernmental expert group, within the context of its meeting, to take into consideration any relevant material, including the guidelines on justice for child victims and witnesses of crime drawn up by the International Bureau for Children's Rights, annexed to the present resolution;

3. Invites the Eleventh United Nations Congress on Crime

Prevention and Criminal Justice, under the substantive item entitled “Making standards work: fifty years of standard-setting in crime prevention and criminal justice”, during the Workshop on Enhancing Criminal Justice Reform, including Restorative Justice, and during the ancillary meetings of non-governmental and professional organizations, to consider and discuss the issue of guidelines on justice for child victims and witnesses of crime, and invites the intergovernmental expert group to take into account the results of those discussions in carrying out its work;

4. Requests the Secretary-General to submit to the Commission on Crime Prevention and Criminal Justice at its fifteenth session for its consideration and action a report on the results of the meeting of the intergovernmental expert group.

Annex

Guidelines on justice for child victims and witnesses of crime drawn up by the International Bureau of Children's Rights

I. Objectives and preamble

A. Objectives

1. The present guidelines on justice for child victims and witnesses of crime set forth good practice based on the consensus of contemporary knowledge and relevant international and regional norms, standards and principles.

2. The guidelines provide a practical framework to achieve the following objectives:

   (a) To guide professionals and, where appropriate, volunteers working with child victims and witnesses of crime in 3 their day-to-day practice in the adult and juvenile justice process at the national, regional and international levels, consistent with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;1

   (b) To assist in the review of national and domestic laws, procedures and practices so that these ensure full respect for the rights of child victims and witnesses of crime and fully implement the Convention on the Rights of the Child;2

   (c) To assist Governments, international organizations, public agencies, non-governmental and community based organizations and other interested parties in designing and implementing legislation, policy, programmes and practices that address key issues related to child victims and witnesses of crime;

(d) To assist and support those caring for children in dealing sensitively with child victims and witnesses of crime.

3. Each jurisdiction will need to implement the present guidelines consistent with its legal, social, economic, cultural and geographical conditions. However, the jurisdiction should constantly endeavour to overcome practical difficulties in their application, as the guidelines are, in their entirety, a set of minimum acceptable principles and standards.

4. In implementing the guidelines, each jurisdiction must ensure that adequate training, selection and procedures are put in place to meet the special needs of child victims and witnesses of crime, where the nature of the victimization affects categories of children differently, such as sexual assault of girl children.

5. The guidelines cover a field in which knowledge and practice are growing and improving. They are neither intended to be exhaustive nor to preclude further development, provided it is in harmony with their underlying objectives and principles.

6. The guidelines should also be applied to processes in informal and customary systems of justice such as restorative justice and in non-criminal fields of law including, but not limited to, custody, divorce, adoption, child protection, mental health, citizenship, immigration and refugee law.

B. Considerations

7. The guidelines were developed:

(a) Cognizant that millions of children throughout the world suffer harm as a result of crime and abuse of power and that the rights of those children have not been adequately recognized and that they may suffer additional hardship when assisting in the justice process;

(b) Reaffirming that every effort must be made to prevent victimization of children, particularly through implementation of the Guidelines for the Prevention of Crime; 3

1 General Assembly resolution 40/34, annex.

2 General Assembly resolution 44/25, annex.

3 Economic and Social Council resolution 2002/13, annex.4

(c) Recalling that the Convention on the Rights of the Child sets forth requirements and principles to secure effective recognition of the rights of children and that the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power sets forth principles to provide victims with the right to information, participation, protection, reparation and assistance; d) Stressing that all States parties to international and regional instruments have a duty to fulfil their obligations, including the implementation of the Convention on the Rights of the Child and its Protocols;

(e) Recalling international and regional initiatives that implement the principles of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including the Handbook on Justice for Victims and the Guide for Policy Makers on the Declaration of Basic Principles, both issued by the United Nations Office for Drug Control and Crime Prevention in 1999;

(f) Recognizing that children are vulnerable and require special protection appropriate to their age, level of maturity andindividual special needs;

(g) Considering that improved responses to child victims and witnesses of crime can make children and their families more willing to disclose instances of victimization and more supportive of the justice process;

(h) Recalling that justice for child victims and witnesses of crime must be assured while safeguarding the rights of accused and convicted offenders, including those that focus on children in conflict with the law, such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules);4

(i) Bearing in mind the variety of legal systems and traditions, and noting that crime is increasingly transnational in nature and that there is a need to ensure that child victims and witnesses of crime receive equivalent protection in all countries.

C. Principles

8. In order to ensure justice for child victims and witnesses of crime, professionals and others responsible for the well-being of those children must respect the following cross-cutting principles as stated in other international instruments and in particular the Convention on the Rights of the Child,5 as reflected in the work of the Committee on the Rights of the Child:

(a) Dignity. Every child is a unique and valuable human being and as such his or her individual dignity, special needs, interests and privacy should be respected and protected;

(b) Non-discrimination. Every child has the right to be treated fairly and equally, regardless of his or her or the parent or legal guardian's race, ethnicity, colour, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth or other status;

4 General Assembly resolution 40/33, annex.

5 General Assembly resolution 44/25, annex.

(c) Best interests of the child. Every child has the right to have his or her best interests given primary consideration. This includes the right to protection and to a chance for harmonious development:

(i) Protection. Every child has the right to life and survival and to be shielded from any form of hardship, abuse or neglect, including physical, psychological, mental and emotional abuse and neglect;

(ii) Harmonious development. Every child has the right to a chance for harmonious development and to a standard of living adequate for physical, mental, spiritual, moral and social growth. In the case of a child who has been traumatized, every step should be taken to enable the child to enjoy healthy development;

(d) Right to participation. Every child has the right to express his or her views, opinions and beliefs freely in all matters, in his or her own words, and to contribute especially to the decisions affecting his or her life, including those taken in any judicial processes, and to have those views taken into consideration.

D. Definitions

9. Throughout the present guidelines, the following definitions apply:

(a) “Child victims and witnesses” denotes children and adolescents, under the age of 18, who are victims of crime or witnesses to crime regardless of their role in the offence or in the prosecution of the alleged offender or groups of offenders;

(b) “Professionals” refers to persons who, within the context of their work, are in contact with child victims and witnesses of crime and for whom the present guidelines are applicable. This includes, but is not limited to, the following: child and victim advocates and support persons; child protection service practitioners; child

welfare agency staff; prosecutors and defence lawyers; diplomatic and consular staff; domestic violence programme staff; judges; law enforcement officials; medical and mental health professionals; and social workers;

(c) "Justice process" encompasses detection of the crime, making of the complaint, investigation, prosecution and trial and post-trial procedures, regardless of whether the case is handled in a national, international or regional criminal justice system for adults or juveniles, or in a customary or informal system of justice;

(d) "Child-sensitive" denotes an approach that takes into account the child's individual needs and wishes.

II. Guidelines on justice for child victims and witnesses of crime

A. The right to be treated with dignity and compassion

10. Child victims and witnesses should be treated in a caring and sensitive manner throughout the justice process, taking into account their personal situation and immediate needs, age, gender, disability and level of maturity and fully respecting their physical, mental and moral integrity.

11. Every child should be treated as an individual with his or her individual needs, wishes and feelings. Professionals should not treat any child as a typical child of a given age or as a typical victim or witness of a specific crime.

12. Interference in the child's private life should be limited to the minimum needed at the same time as high standards of evidence collection are maintained in order to ensure fair and equitable outcomes of the justice process.

13. In order to avoid further hardship to the child, interviews, examinations and other forms of investigation should be conducted by trained professionals who proceed in a sensitive, respectful and thorough manner.

14. All interactions described in the present guidelines should be conducted in a child-sensitive and empathetic manner in a suitable environment that accommodates the special needs of the child. They should also take place in a language that the child uses and understands.

B. The right to be protected from discrimination

15. Child victims and witnesses should have access to a justice process that protects them from discrimination based on the child, parent or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth or other status.

16. The justice process and support services available to child victims and witnesses and their families should be sensitive to the child's age, wishes, understanding, gender, sexual orientation, ethnic, cultural, religious, linguistic and social background, caste, socio-economic condition and immigration or refugee status, as well as to the special needs of the child, including health, abilities and capacities. Professionals should be trained and educated about such differences.

17. In many cases, special services and protection will need to be instituted to take account of the different nature of specific offences against children, such as sexual assault involving girl children.

18. Age should not be a barrier to a child's right to participate fully in the justice process. Every child has the right to be treated as a capable witness and his or her testimony should be presumed valid and credible at trial unless proven otherwise and as long as his or her age and maturity allow the giving of intelligible7testimony, with or without communication aids and other assistance.

C. The right to be informed

19. Child victims and witnesses, their families and their legal representatives, from their first contact with the justice process and throughout that process, have the right to be promptly informed of:

(a) The availability of health, psychological, social and other relevant services as well as the means of accessing such services along with legal or other advice or representation, compensation and emergency financial support, where applicable;

(b) The procedures for the adult and juvenile criminal justice process, including the role of child victims and witnesses, the importance, timing and manner of testimony, and ways in which "questioning" will be conducted during the investigation and trial;

(c) The progress and disposition of the specific case, including the apprehension, arrest and custodial status of the accused and any pending changes to that status, the prosecutorial decision and relevant post-trial developments and the outcome of the case;

(d) The existing support mechanisms for the child when making a complaint and participating in the investigation and court proceedings;

(e) The specific places and times of hearings and other relevant events;

(f) The availability of protective measures;

(g) The existing opportunities to obtain reparation from the offender or from the State through the justice process, through alternative civil proceedings or through other processes;

(h) The existing mechanisms for review of decisions affecting child victims and witnesses;

(i) The relevant rights for child victims and witnesses pursuant to the Convention on the Rights of the Child and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

D. The right to express views and concerns and to be heard

20. Professionals should make every effort to enable child victims and witnesses to express their views and concerns related to their involvement in the justice process.

21. Professionals should:

(a) Ensure that child victims and witnesses are consulted on the matters set forth in paragraph 19 above;

(b) Ensure that child victims and witnesses are enabled to express freely and in their own manner their views and concerns 8 regarding their involvement in the justice process, their concerns regarding safety in relation to the accused, the manner in which they prefer to provide testimony and their feelings about the conclusions of the process.

22. Professionals should give due regard to the child's views and concerns and, if they are unable to accommodate them, should explain the reasons to the child.

E. The right to effective assistance

23. Child victims and witnesses and, where appropriate, family members should have access to assistance provided by professionals who have received relevant training as set out in paragraphs 41-43 below. This includes assistance and support services such as financial, legal, counselling, health and social services, physical and psychological recovery services, and other services necessary for the child's reintegration. All such assistance should address the child's needs and enable them to participate effectively at all stages of the justice process.

24. In assisting child victims and witnesses, professionals should make every effort to coordinate support so that the child is not subjected to excessive interventions.

25. Child victims and witnesses should receive assistance from support persons, such as child victim/witness specialists, commencing at the initial report and continuing until such services are no longer required.

26. Professionals should develop and implement measures to make it easier for children to give evidence and to improve communication and understanding at the pre-trial and trial stages.

    These measures may include:

    (a) Child victim and witness specialists to address the child's special needs;

    (b) Support persons, including specialists and appropriate family members to accompany the child during testimony;

    (c) Guardians ad litem to protect the child's legal interests.

F. The right to privacy

27. Child victims and witnesses should have their privacy protected as a matter of primary importance.

28. Any information relating to a child's involvement in the justice process should be protected. This can be achieved through maintaining confidentiality and restricting disclosure of information that may lead to identification of a child who is a victim or witness in the justice process.

29. Where appropriate, measures should be taken to exclude the public and the media from the courtroom during the child's testimony.

G. The right to be protected from hardship during the justice process 9

30. Professionals should take measures to prevent hardship during the detection, investigation and prosecution process in order to ensure that the best interests and dignity of child victims and witnesses are respected.

31. Professionals should approach child victims and witnesses with sensitivity, so that they:

(a) Provide support for child victims and witnesses, including accompanying the child throughout his or her involvement in the justice process, when it is in his or her best interests;

(b) Provide certainty about the process, including providing child victims and witnesses with clear expectations as to what to expect in the process, with as much certainty as possible. The child's participation in hearings and trials should be planned ahead of time and every effort should be made to ensure continuity in the relationships between children and the professionals in contact with them throughout the process;

(c) Ensure speedy trials, unless delays are in the child's best interest. Investigation of crimes involving child victims and witnesses should also be expedited and there should be procedures, laws or court rules that provide for cases involving child victims and witnesses to be expedited;

(d) Use child-sensitive procedures, including interview rooms designed for children, interdisciplinary services for child victims integrated under one roof, modified court environments that take child witnesses into consideration, recesses during a child's testimony, hearings scheduled at times of day appropriate to the age and maturity of the child, an on-call system to ensure the child goes to court only when necessary and other appropriate measures to facilitate the child's testimony.

32. Professionals should also implement measures:

(a) To limit the number of interviews. Special procedures for collection of evidence from child victims and witnesses should be implemented in order to reduce the number of interviews, statements, hearings and, specifically, unnecessary contact with the justice process, such as through use of pre-recorded videos;

(b) To avoid unnecessary contacts with the alleged perpetrator, his or her defence team and other persons not directly related to the justice process. Professionals should ensure that child victims and witnesses are protected, if compatible with the legal system and with due respect for the rights of the defence, from being cross-examined by the alleged perpetrator. Wherever possible, and as necessary, child victims and witnesses should be interviewed, and examined in court, out of sight of the alleged perpetrator, and separate courthouse waiting rooms and private interview areas should be provided;

(c) To use testimonial aids to facilitate the child's testimony. Judges should give serious consideration to permitting the use of testimonial aids to facilitate the child's testimony and to reduce potential for intimidation of the child, as well as exercise supervision and take appropriate measures to ensure that child victims and witnesses are questioned in a child-sensitive manner. 10

H. The right to safety

33. Where the safety of a child victim or witness may be at risk, appropriate measures should be taken to require the reporting of those safety risks to appropriate authorities and to protect the child from such risk before, during and after the justice process.

34. Child-focused facility staff, professionals and other individuals who come into contact with children should be required to notify appropriate authorities if they

suspect that a child victim or witness has been harmed, is being harmed or is likely to be harmed.

35. Professionals should be trained in recognizing and preventing intimidation, threats and harm to child victims and witnesses. Where child victims and witnesses may be the subject of intimidation, threats or harm, appropriate conditions should be put in place to ensure the safety of the child. Such safeguards could include:

(a) Avoiding direct contact between child victims and witnesses and the alleged perpetrators at any point in the justice process;

(b) Using court-ordered restraining orders supported by a registry system;

(c) Ordering pre-trial detention of the accused and setting special "no contact" bail conditions;

(d) Placing the accused under house arrest;

(e) Wherever possible, giving child victims and witnesses protection by the police or other relevant agencies and safeguarding their whereabouts from disclosure.

I. The right to reparation

36. Child victims and witnesses should, wherever possible, receive reparation in order to achieve full redress, reintegration and recovery. Procedures for obtaining and enforcing reparation should be readily accessible and child-sensitive.

37. Provided the proceedings are child-sensitive and respect the present guidelines, combined criminal and reparations proceedings should be encouraged, together with informal and community justice procedures such as restorative justice.

38. Reparation may include restitution from the offender ordered in the criminal court, aid from victim

compensation programmes administered by the State and damages ordered to be paid in civil proceedings. Where possible, costs of social and educational reintegration, medical treatment, mental health care and legal services should be addressed. Procedures should be instituted to ensure automatic enforcement of reparation orders and payment of reparation before fines.

J. The right to special preventive measures

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39. In addition to preventive measures that should be in place for all children, special strategies are required for child victims and witnesses who are particularly vulnerable to repeat victimization or offending.

40. Professionals should develop and implement comprehensive and specially tailored strategies and interventions in cases where there are risks that child victims may be victimized further. These strategies and interventions should take into account the nature of the victimization, including victimization related to abuse in the home, sexual exploitation, abuse in institutional settings and trafficking. The strategies may include those based on government, neighbourhood and citizen initiatives.

III. Implementation

A. Professionals should be trained and educated in the present guidelines in order to deal effectively and sensitively with child victims and witnesses

41. Adequate training, education and information should be made available to front-line professionals, criminal and juvenile justice officials, justice system practitioners and other professionals working with child victims and witnesses with a view to improving and sustaining specialized methods, approaches and attitudes.

42. Professionals should be selected and trained to meet the needs of child victims and witnesses, including in specialized units and services.

43. This training should include:

(a) Relevant human rights norms, standards and principles, including the rights of the child;

(b) Principles and ethical duties of their office;

(c) Signs and symptoms that point to evidence of crimes against children;

(d) Crisis assessment skills and techniques, especially for making referrals, with an emphasis placed on the need for confidentiality;

(e) Impact, consequences and trauma of crimes against children;

(f) Special measures and techniques to assist child victims and witnesses in the justice process;

(g) Cross-cultural and age-related linguistic, religious, social and gender issues;

(h) Appropriate adult-child communication skills;

(i) Interviewing and assessment techniques that minimize any trauma to the child while maximizing the quality of information received from the child;

(j) Skills to deal with child victims and witnesses in a sympathetic, understanding, constructive and reassuring manner; 12

(k) Methods to protect and present evidence and to question child witnesses;

(l) Roles of, and methods used by, professionals working with child victims and witnesses.

B. Professionals should cooperate in the implementation of the present guidelines so that child victims and witnesses are dealt with efficiently and effectively

44. Professionals should make every effort to adopt an interdisciplinary approach in aiding children by familiarizing themselves with the wide array of available services, such as victim support, advocacy, economic assistance, counselling, health, legal and social services. This approach may include protocols for the different stages of the justice process to encourage cooperation among entities that provide services to child victims and witnesses, as well as other forms of multidisciplinary work that includes police, prosecutor, medical, social services and psychological personnel working in the same location.

45. International cooperation should be enhanced between States and all sectors of society, both at the national and international levels, including mutual assistance for the purpose of facilitating collection and exchange of information and the detection, investigation and prosecution of transnational crimes involving child victims and witnesses.

C. The implementation of the guidelines should be monitored

46. Professionals should utilize the present guidelines as a basis for developing laws and written policies, standards and protocols aimed at assisting child victims and witnesses involved in the justice process.

47. Professionals should periodically review and evaluate their role, together with other agencies in the justice process, in ensuring the protection of the rights of the child and the effective implementation of the present guidelines.

ANNEX X

Guidelines for the Alternative Care of Children (2009)

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HUMAN RIGHTS COUNCIL

Eleventh session

Agenda item 3

PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL,

POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS,

INCLUDING THE RIGHT TO DEVELOPMENT

Angola, Argentina, Austria*, Belarus*, Bolivia (Plurinational State of), Brazil,

Chad*, Chile, Colombia*, Costa Rica*, Dominican Republic*, Ecuador*, Egypt,

Guatemala*, Honduras*, Italy, Lebanon*, Mexico, Monaco*, Morocco*,

Netherlands, New Zealand*, Nicaragua, Palestine*, Panama*, Peru*, Philippines,

Portugal*, Russian Federation, Slovakia, Somalia*, Switzerland, Ukraine,

Uruguay: draft resolution

11/…Guidelines for the Alternative Care of Children

The Human Rights Council,

Reaffirming the Universal Declaration of Human Rights and the Convention on the Rights of the Child, and celebrating the twentieth anniversary of the Convention in 2009,

Reaffirming also all previous resolutions on the rights of the child of the Council, the Commission on Human Rights and the General Assembly, the most recent being Council resolutions 7/29 of 28 March 2008, 9/13 of 24 September 2008 and 10/8 of 26 March 2009 and Assembly resolution 63/241 of 23 December 2008,

* Non-member State of the Human Rights Council.

Considering that the Guidelines for the Alternative Care of Children, the text of which is annexed to the present resolution, set out desirable orientations for policy and practice with the intention of enhancing the implementation of the Convention on the Rights of the Child, and of relevant provisions of other international instruments regarding the protection and well-being of children deprived of parental care or who are at risk of being so,

1. *Welcomes* the accomplishment of the Guidelines for the Alternative Care of Children;

2. *Decides* to submit the Guidelines to the General Assembly for adoption on the twentieth anniversary of the Convention on the Rights of the Child.

Annex

GUIDELINES FOR THE ALTERNATIVE CARE OF CHILDREN

I. PURPOSE

1. The present Guidelines are intended to enhance the implementation of the Convention on the Rights of the Child and of relevant provisions of other international instruments regarding theprotection and well-being of children who are deprived of parental care or who are at risk of being so.

2. Against the background of these international instruments and taking account of the developing body of knowledge and experience in this sphere, the Guidelines set out desirable orientations for policy and practice. They are designed for wide dissemination among all sectors directly or indirectly concerned with issues relating to alternative care, and seek in particular to:

   (a) Support efforts to keep children in, or return them to, the care of their family or, failing this, to find another appropriate and permanent solution, including adoption and *kafala* of Islamic law;

   (b) Ensure that, while such permanent solutions are being sought, or in cases where they are not possible or are not in the best interests of the child, the most suitable forms of alternative care are identified and provided, under conditions that promote the child's full and harmonious development;

   (c) Assist and encourage governments to better implement their responsibilities and obligations in these respects, bearing in mind the economic, social and cultural conditions prevailing in each State; and

   (d) Guide policies, decisions and activities of all oncerned

with social protection and child welfare in both the public and private sectors, including civil society.

II. GENERAL PRINCIPLES AND PERSPECTIVES

A. The child and the family

3. The family being the fundamental group of society and the natural environment for the growth, well-being and protection of children, efforts should primarily be directed to enabling the child to remain in or return to the care of his/her parents, or when appropriate, other close family members. The State should ensure that families have access to forms of support in the care-giving role.

4. Every child and young person should live in a supportive, protective and caring environment that promotes his/her full potential. Children with inadequate or no parental care are at special risk of being denied such a nurturing environment.

5. Where the child's own family is unable, even with appropriate support, to provide adequate care for the child, or abandons or relinquishes the child, the State is responsible for protecting the rights of the child and ensuring appropriate alternative care, with or through competent local authorities and duly authorized civil society organizations. It is the role of the State, through its competent authorities, to ensure the supervision of the safety, well-being and development of any child placed in alternative care and the regular review of the appropriateness of the care arrangement provided.

6. All decisions, initiatives and approaches falling within the scope of the present Guidelines should be made on a case-by-case basis, with a view notably to ensuring the child's safety and security, and must be grounded in the best interests and rights of the child concerned, in conformity with the principle of non-discrimination and taking due account of the gender perspective. They should

respect fully the child's right to be consulted and to have his/her views duly taken into account in accordance with his/her evolving capacities, and on the basis of his/her access to all necessary information. Every effort should be made to enable such consultation and information provision to be carried out in the child's preferred language.

6. bis In applying the present Guidelines, determination of the best interests of the child shall be designed to identify courses of action for children deprived of parental care, or at risk of being so, that are best suited to satisfying their needs and rights, taking into account the full and personal development of their rights in their family, social and cultural environment and their status as subjects of rights, both at the time of the determination and in the longer term. The determination process should take account of, inter alia, the right of the child to be heard and to have his/her views taken into account in accordance with his/her age and maturity.

7. States should develop and implement comprehensive child welfare and protection policies within the framework of their overall social and human development policy, with attention to the improvement of existing alternative care provision, reflecting the principles contained in the present Guidelines.

8. As part of efforts to prevent separation of children from their parents, States should seek to ensure appropriate and culturally sensitive measures:

   (a) To support family care-giving environments whose capacities are limited by factors such as disabilities; drug and alcohol misuse; discrimination against families with indigenous or minority backgrounds; and those living in armed conflict regions or under foreign occupation;

   (b) To provide appropriate care and protection for vulnerable children, such as child victims of abuse and

exploitation; abandoned children; children living on the street; children born out of wedlock; unaccompanied and separated children; internally displaced and refugee children; children of migrant workers; children of asylum-seekers; or children living with or affected by HIV/AIDS and other serious illnesses.

9. Special efforts should be made to tackle discrimination on the basis of any status of the child or parents, including poverty, ethnicity, religion, sex, mental and physical disability, HIV/AIDS status or other serious illnesses, whether physical or mental, birth out of wedlock, and socio-economic stigma, and all other statuses and circumstances that can give rise to relinquishment, abandonment and/or removal of a child.

B. Alternative care

10. All decisions concerning alternative care should take full account of the desirability, in principle, of maintaining the child as close as possible to his/her habitual place of residence, in order to facilitate contact and potential reintegration with his/her family and to minimize disruption of his/her educational, cultural and social life.

11. Decisions regarding children in alternative care, including those in informal care, should have due regard for the importance of ensuring children a stable home and of meeting their basic need for safe and continuous attachment to their caregivers, with permanency generally being a key goal.

12. Children must be treated with dignity and respect at all times and must benefit from effective protection from abuse, neglect and all forms of exploitation, whether on the part of care providers, peers or third parties, in whatever care setting they may find themselves.

13. Removal of a child from the care of the family should be seen as a measure of last resort and should be, whenever

possible, temporary and for the shortest possible duration. Removal decisions should be regularly reviewed and the child's return to parental care, once the original causes of removal have been resolved or have disappeared, should be in the child's best interests,in keeping with the assessment foreseen in paragraph 48 below.

14. Financial and material poverty, or conditions directly and uniquely imputable to such poverty, should never be the only justification for the removal of a child from parental care, for receiving a child into alternative care, or for preventing his/her reintegration, but should be seen as a signal for the need to provide appropriate support to the family.

15. Attention must be paid to promoting and safeguarding all other rights of special pertinence to the situation of children without parental care, including, but not limited to, access toeducation, health and other basic services, the right to identity, freedom of religion or belief, language and protection of property and inheritance rights.

16. Siblings with existing bonds should in principle not be separated by placements in alternative care unless there is a clear risk of abuse or other justification in the best interests of the child. In any case, every effort should be made to enable siblings to maintain contact witheach other, unless this is against their wishes or interests.

17. Recognizing that, in most countries, the majority of children without parental care are looked after informally by relatives or others, States should seek to devise appropriate means, consistent with the present Guidelines, to ensure their welfare and protection while in such informal care arrangements, with due respect for cultural, economic, gender and religious differences and practices that do not conflict with the rights and best interests of the child.

18. No child should be without the support and protection of a legal guardian or other recognized responsible adult or competent public body at any time.

19. The provision of alternative care should never be undertaken with a prime purpose of furthering the political, religious or economic goals of the providers.

20. Use of residential care should be limited to cases where such a setting is specifically appropriate, necessary and constructive for the individual child concerned and in his/her best interests.

21. In accordance with the predominant opinion of experts, alternative care for young children, especially those under the age of 3 years, should be provided in family-based settings.Exceptions to this principle may be warranted in order to prevent the separation of siblings and in cases where the placement is of an emergency nature or is for a predetermined and very limited duration, with planned family reintegration or other appropriate long-term care solution as its outcome.

22. While recognizing that residential care facilities and family-based care complement each other in meeting the needs of children, where large residential care facilities (institutions) remain, alternatives should be developed in the context of an overall deinstitutionalization strategy, with precise goals and objectives, which will allow for their progressive elimination. To this end, States should establish care standards to ensure the quality and conditions that are conducive to the child's development, such as individualized and small-group care, and should evaluate existing facilities against these standards. Decisions regarding the establishment of, or permission to establish, new residential care facilities, whether public or private, should take full account of this deinstitutionalization objective and strategy.

Measures to promote application

23. States should, to the maximum extent of their available resources and, where appropriate, in the framework of development cooperation, allocate human and financial resources to ensure the optimal and progressive implementation of the present Guidelines throughout their respective territories in a timely manner. States should facilitate active cooperation among all relevant authorities and the mainstreaming of child and family welfare issues within all ministries directly or indirectly concerned.

24. States are responsible for determining any need for, and requesting, international cooperation in implementing the present Guidelines. Such requests should be given due consideration and should receive a favourable response wherever possible and appropriate. The enhanced implementation of the present Guidelines should figure in development cooperation programmes. When providing assistance to a State, foreign entities should abstain from any initiative inconsistent with the Guidelines.

25. Nothing in the present Guidelines should be interpreted as encouraging or condoning lower standards than those that may exist in given States, including in their legislation. Similarly, competent authorities, professional organizations and others are encouraged to develop national or professionally-specific guidelines that build upon the letter and spirit of the present Guidelines.

III. SCOPE OF THE GUIDELINES

26. The present Guidelines apply to the appropriate use and conditions of alternative formal care for all persons under the age of 18 years, unless under the law applicable to the child majority is attained earlier. Only where indicated do the Guidelines also apply to informal care settings, having due regard for both the important role played by the extended family and community and the obligations of States for all children not in the care of their parents or

legal and customary caregivers, as set out in the Convention on the Rights of the Child.

27. Principles in the present Guidelines are also applicable, as appropriate, to young persons already in alternative care and who need continuing care or support for a transitional period after reaching the age of majority under applicable law.

28. For the purposes of the present Guidelines, and subject notably to the exceptions listed in paragraph 29 below, the following definitions shall apply:

(a) Children without parental care: all children not in the overnight care of at least one of their parents, for whatever reason and under whatever circumstances. Children without parental care who are outside their country of habitual residence or victims of emergency situations may be designated as:

(i) “Unaccompanied” if they are not cared for by another relative or an adult who by law or custom is responsible for doing so; or

(ii) “Separated” if they are separated from a previous legal or customary primary caregiver, but who may nevertheless be accompanied by another relative.

(b) Alternative care may take the form of:

(i) Informal care: any private arrangement provided in a family environment, whereby the child is looked after on an ongoing or indefinite basis by relatives or friends (informal kinship care) or by others in their individual capacity, at the initiative of the child, his/her parents or other person without this arrangement having been ordered by an administrative or judicial authority or a duly accredited body;

(ii) Formal care: all care provided in a family environment which has been ordered by a competent

administrative body or judicial authority, and all care provided in a residential environment, including in private facilities, whether or not as a result of administrative or judicial measures.

(c) With respect to the environment where it is provided, alternative care may be:

(i) Kinship care: family-based care within the child's extended family or with close friends of the family known to the child, whether formal or informal in nature;

(ii) Foster care: situations where children are placed by a competent authority for the purpose of alternative care in the domestic environment of a family other than the children's own family, that has been selected, qualified, approved and supervised for providing such care;

(iii) Other forms of family-based or family-like care placements;

(iv) Residential care: care provided in any non-family-based group setting, such as places of safety for emergency care, transit centres in emergency situations, and all other short and long-term residential care facilities including group homes;

(v) Supervised independent living arrangements for children.

(d) With respect to those responsible for alternative care:

(i) Agencies are the public or private bodies and services that organize alternative care for children;

(ii) Facilities are the individual public or private establishments that provide residential care for children.

29. The scope of alternative care as foreseen in the present Guidelines does not extend, however, to:

(a) Persons under the age of 18 years who are deprived of their liberty by decision of a judicial or administrative

authority as a result of being alleged as, accused of or recognized as having infringed the law, and whose situation is covered by the United Nations Standard Minimum Rules for the Administration of Juvenile Justice and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty;

(b) Care by adoptive parents from the moment the child concerned is effectively placed in their custody pursuant to a final adoption order, as of which moment, for the purposes of the present Guidelines, the child is considered to be in parental care. The Guidelines are, however, applicable to pre-adoption or probationary placement of a child with the prospective adoptive parents, as far as they are compatible with requirements governing such placements as stipulated in other relevant international instruments;

(c) Informal arrangements whereby a child voluntarily stays with relatives or friends for recreational purposes and reasons not connected with the parents' general inability or unwillingness to provide adequate care.

30. Competent authorities and others concerned are also encouraged to make use of the present Guidelines, as applicable, at boarding schools, hospitals, centres for children with mental and physical disabilities or other special needs, camps, the workplace and other places which may be responsible for the care of children.

IV. PREVENTING THE NEED FOR ALTERNATIVE CARE

A. Promoting parental care

31. States should pursue policies that ensure support for families in meeting their responsibilities towards the child and promote the right of the child to have a relationship with both parents. These policies should address the root causes of child abandonment, relinquishment and

separation of the child from his/her family by ensuring, inter alia, the right to birth registration, access to adequate housing and to basic health, education and social welfare services, as well as by promoting measures to combat poverty, discrimination, marginalization, stigmatization, violence, child maltreatment and sexual abuse, and substance abuse.

32. States should develop and implement consistent and mutually reinforcing family-oriented policies designed to promote and strengthen parents' ability to care for their children.

33. States should implement effective measures to prevent child abandonment, relinquishment and separation of the child from his/her family. Social policies and programmes should, inter alia, empower families with attitudes, skills, capacities and tools to enable them to provide adequately for the protection, care and development of their children. The complementary capacities of the State and civil society, including non-governmental and community-based organizations, religious leaders and the media should be engaged to this end. These social protection measures should include:

(a) Family strengthening services, such as parenting courses and sessions, the promotion of positive parent-child relationships, conflict resolution skills, opportunities for employment, income-generation and, where required, social assistance;

(b) Supportive social services, such as day care, mediation and conciliation services, substance abuse treatment, financial assistance, and services for parents and children with disabilities. Such services, preferably of an integrated and non-intrusive nature, should be directly accessible at community level and should actively involve the participation of families as partners, combining their resources with those of the community and the carer;

(c) Youth policies aiming at empowering youth to face positively the challenges of everyday life, including when they decide to leave the parental home, and preparing future parents to make informed decisions regarding their sexual and reproductive health and to fulfil their responsibilities in this respect.

34. Various complementary methods and techniques should be used for family support, varying throughout the process of support, such as home visits, group meetings with other families, case conferences and securing commitments by the family concerned. They should be directed towards both facilitating intrafamilial relationships and promoting the family's integration within its community.

35. Special attention should be paid, in accordance with local laws, to the provision and promotion of support and care services for single and adolescent parents and their children, whether or not born out of wedlock. States should ensure that adolescent parents retain all rights inherent to their status both as parents and as children, including access to all appropriate services for their own development, allowances to which parents are entitled, and their inheritance rights. Measures should be adopted to ensure the protection of pregnant adolescents and to guarantee that they do not interrupt their studies. Efforts should also be made to reduce stigma attached to single and adolescent parenthood.

36. Support and services should be available to siblings who have lost their parents or caregivers and choose to remain together in their household, to the extent that the eldest sibling is both willing and deemed capable of acting as the household head. States should ensure, including through the appointment of a legal guardian, a recognized responsible adult or, where appropriate, a public body legally mandated to act as guardian, as stipulated in paragraph 18 above, that such households benefit from

mandatory protection from all forms of exploitation and abuse, and supervision and support on the part of the local community and its competent services, such as social workers, with particular concern for the children's health, housing, education and inheritance rights. Special attention should be given to ensuring the head of such a household retains all rights inherent to his/her child status, including access to education and leisure, in addition to his/her rights as a household head.

37. States should ensure opportunities for day care, including all-day schooling, and respite care which would enable parents better to cope with their overall responsibilities towards the family, including additional responsibilities inherent in caring for children with special needs.

Preventing family separation

38. Proper criteria based on sound professional principles should be developed and consistently applied for assessing the child's and family's situation, including the family's actual and potential capacity to care for the child, in cases where the competent authority or agency has reasonable grounds to believe that the well-being of the child is at risk.

39. Decisions regarding removal or reintegration should be based on this assessment and made by suitably qualified and trained professionals, on behalf of or authorized by a competent authority, in full consultation with all concerned and bearing in mind the need to plan for the child's future.

40. States are encouraged to adopt measures for the integral protection and guarantee of rights during pregnancy, birth and the breastfeeding period, in order to ensure conditions of dignity and equality for the adequate development of the pregnancy and care of the child. Therefore, support programmes should be provided to future mothers and fathers, particularly adolescent parents, who have

difficulties in exercising their parental responsibilities. Such programmes should aim at empowering mothers and fathers to exercise their parental responsibilities in conditions of dignity, and at avoiding their being induced to surrender their child because of their vulnerability.

41. When a child is relinquished or abandoned, States should ensure that this may take place in conditions of confidentiality and safety for the child, respecting his/her right to access information on his/her origins where appropriate and possible under the law of the State.

42. States should formulate clear policies to address situations where a child has been abandoned anonymously, which indicate whether and how family tracing should be undertaken and reunification or placement within the extended family pursued. Policies should also allow for timely decision-making on the child's eligibility for permanent family placement and for arranging such placements expeditiously.

43. When a public or private agency or facility is approached by a parent or legal guardian wishing to relinquish a child permanently, the State should ensure that the family receives counselling and social support to encourage and enable them to continue to care for the child. If this fails, a social work or other appropriate professional assessment should be undertaken to determine whether there are other family members who wish to take permanent responsibility for the child, and whether such arrangements would be in the child's best interests. Where such arrangements are not possible or in the child's best interests, efforts should be made to find a permanent family placement within a reasonable period.

44. When a public or private agency or facility is approached by a parent or caregiver wishing to place a child in care for a short or indefinite period, the State should ensure the availability of counselling and social support to encourage and enable them to continue to care for the child. A child

should be admitted to alternative care only when such efforts have been exhausted and acceptable and justified reasons for entry into care exist.

45. Specific training should be provided to teachers and others working with children, in order to help them to identify situations of abuse, neglect, exploitation or risk of abandonment and to refer such situations to competent bodies.

46. Any decision to remove a child against the will of his/her parents must be made by competent authorities, in accordance with applicable law and procedures and subject to judicial review, the parents being assured the right of appeal and access to appropriate legal representation.

47. When the child's sole or main carer may be the subject of deprivation of liberty as a result of preventive detention or sentencing decisions, non-custodial remand measures and sentences should be taken in appropriate cases wherever possible, the best interests of the child being given due consideration. States should take into account the best interests of the child when deciding whether to remove children born in prison and children living in prison with a parent. The removal of such children should be treated in the same way as other instances where separation is considered. Best efforts should be made to ensure that children remaining in custody with their parent benefit from adequate care and protection, while guaranteeing their own status as free individuals and access to activities in the community.

B. Promoting family reintegration

48. In order to prepare and support the child and the family for his/her possible return to the family, his/her situation should be assessed by a duly designated individual or team with access to multidisciplinary advice, in consultation with the different actors involved (the child,

the family, the alternative caregiver), so as to decide whether the reintegration of the child in the family is possible and in the best interests of the child, which steps this would involve and under whose supervision.

49. The aims of the reintegration and the family's and alternative caregiver's principal tasks in this respect should be set out in writing and agreed on by all concerned.

50. Regular and appropriate contact between the child and his/her family specifically for the purpose of reintegration should be developed, supported and monitored by the competent body.

51. Once decided, reintegration of the child in his/her family should be designed as a gradual and supervised process, accompanied by follow-up and support measures that take account of the child's age, needs and evolving capacities, as well as the cause of the separation.

V. FRAMEWORK OF CARE PROVISION

52. In order to meet the specific psychoemotional, social and other needs of each child without parental care, States should take all necessary measures to ensure that the legislative, policy and financial conditions exist to provide for adequate alternative care options, with priority to family and community-based solutions.

53. States should ensure the availability of a range of alternative care options, consistent with the general principles of the present Guidelines, for emergency, short-term and long-term care.

54. States should ensure that all entities and individuals engaged in the provision of alternative care for children receive due authorization to do so from a competent authority and be subject to the latter's regular monitoring and review in keeping with the present Guidelines. To this end, these authorities should develop appropriate criteria

for assessing the professional and ethical fitness of care providers and for their accreditation, monitoring and supervision.

55. With regard to informal care arrangements for the child, whether within the extended family, with friends or with other parties, States should, where appropriate, encourage suchcarers to notify the competent authorities accordingly so that they and the child may receive any necessary financial and other support that would promote the child's welfare and protection.

Where possible and appropriate, States should encourage and enable informal caregivers, with the consent of the child and parents concerned, to formalize the care arrangement after a suitable lapse of time, to the extent that the arrangement has proved to be in the child's best interests todate and is expected to continue in the foreseeable future.

VI. DETERMINATION OF THE MOST APPROPRIATE FORM OF CARE

56. Decision-making on alternative care in the best interests of the child should take place through a judicial, administrative or other adequate and recognized procedure, with legal safeguards, including, where appropriate, legal representation on behalf of children in any legal proceedings. It should be based on rigorous assessment, planning and review, through established structures and mechanisms, and carried out on a case-by-case basis, by suitably qualified professionals in a multidisciplinary team, wherever possible. It should involve full consultation at all stages with the child, according to his/her evolving capacities, and with his/her parents or legal guardians. To this end, all concerned should be provided with the necessary information on which to base their opinion. States should make every effort to provide adequate resources and channels for the training and recognition of the professionals responsible

for determining the best form of care so as to facilitate compliance with these provisions.

57. Assessment should be carried out expeditiously, thoroughly and carefully. It should take into account the child's immediate safety and well-being, as well as his/her longer term care and development, and should cover the child's personal and developmental characteristics, ethnic, cultural, linguistic and religious background, family and social environment, medical history and any special needs.

58. The resulting initial and review reports should be used as essential tools for planning decisions from the time of their acceptance by the competent authorities onwards, with a view to, inter alia, avoiding undue disruption and contradictory decisions.

59. Frequent changes in care setting are detrimental to the child's development and ability to form attachments, and should be avoided. Short-term placements should aim at enabling an appropriate permanent solution to be arranged. Permanency for the child should be secured without undue delay through reintegration in his/her nuclear or extended family or, if this is not possible, in an alternative stable family setting or, where paragraph 20 above applies, in stable and appropriate residential care.

60. Planning for care provision and permanency should be carried out from the earliest possible time, ideally before the child enters care, taking into account the immediate and longer term advantages and disadvantages of each option considered, and should comprise short- and long-term propositions.

61. Planning for care provision and permanency should be based on, notably, the nature and quality of the child's attachment to his/her family; the family's capacity to safeguard the child's well-being and harmonious development; the child's need or desire to feel part of a

family; the desirability of the child remaining within his/her community and country; his/her cultural, linguistic and religious background; and relationships with siblings, with a view to avoiding their separation.

62. The plan should clearly state, inter alia, the goals of the placement and the measures to achieve them.

63. The child and his/her parents or legal guardians should be fully informed about the alternative care options available, the implications of each option and their rights and obligations in the matter.

64. The preparation, enforcement and evaluation of a protective measure for a child should be carried out, to the greatest extent possible, with the participation of his/her parents or legal guardians and potential foster carers and caregivers, with respect to his/her particular needs, convictions and special wishes. At the request of the child, parents or legal guardians, other important persons in the child's life may also be consulted in any decision-making process, at the discretion of the competent authority.

65. States should ensure that any child who has been placed in alternative care by a properly constituted court, tribunal or administrative or other competent body, as well as his/her parents or others with parental responsibility, are given the opportunity to make representations on the placement decision before a court, are informed of their rights to make such representations and are assisted in doing so.

66. States should ensure the right of any child who has been placed in temporary care to regular and thorough review - preferably at least every three months - of the appropriateness of his/her care and treatment, taking into account notably his/her personal development and any changing needs, developments in his/her family environment, and the adequacy and necessity of the

current placement in these lights. The review should be carried out by duly qualified and authorized persons, and fully involve the child and all relevant persons in the child's life.

67. The child should be prepared for all changes of care settings resulting from the planning and review processes.

VII. PROVISION OF ALTERNATIVE CARE

A. Policies

68. It is a responsibility of the State or appropriate level of government to ensure the development and implementation of coordinated policies regarding formal and informal care for all children who are without parental care. Such policies should be based on sound information and statistical data. They should define a process for determining who has responsibility for a child, taking into account the role of the child's parents or principal caregivers in his/her protection, care and development. Presumptive responsibility, unless shown to be otherwise, is with the child's parents or principal caregivers.

69. All State entities involved in the referral of, and assistance to, children without parental care, in cooperation with civil society, should adopt policies and procedures which favour information-sharing and networking between agencies and individuals in order to ensure effective care, aftercare and protection for these children. The location and/or design of the agency responsible for the oversight of alternative care should be established so as to maximize its accessibility to those who require the services provided.

70. Special attention should be paid to the quality of alternative care provision, both in residential and family-based care, in particular with regard to the professional skills, selection, training and supervision of carers. Their

role and functions should be clearly defined and clarified with respect to those of the child's parents or legal guardians.

71. In each country, the competent authorities should draw up a document setting out the rights of children in alternative care in keeping with the present Guidelines. Children in alternative care should be enabled to understand fully the rules, regulations and objectives of the care setting and their rights and obligations therein.

72. All alternative care provision should be based on a written statement of the provider's aims and objectives in providing the service and the nature of their responsibilities to the child that reflects the standards set by the Convention on the Rights of the Child, the present Guidelines and applicable law. All providers should be appropriately qualified or approved in accordance with legal requirements to provide alternative care services.

73. A regulatory framework should be established to ensure a standard process for the referral or admission of a child to an alternative care setting.

74. Cultural and religious practices regarding provision of alternative care, including those related to gender perspectives, should be respected and promoted to the extent that they can be shown to be consistent with the children's rights and best interests. The process of considering whether such practices should be promoted should be carried out in a broadly participatory way, involving the cultural and religious leaders concerned, professionals and those caring for children without parental care, parents and other relevant stakeholders, as well as the children themselves.

1. Informal care

75. With a view to ensuring that appropriate conditions of care are met in informal care provided by individuals or

families, States should recognize the role played by this type of care and take adequate measures to support its optimal provision on the basis of an assessment of which particular settings may require special assistance or oversight.

76. Competent authorities should, where appropriate, encourage informal carers to notify the care arrangement and should seek to ensure their access to all available services and benefits likely to assist them in discharging their duty to care for and protect the child.

77. The State should recognize the de facto responsibility of informal carers for the child.

78. States should devise special and appropriate measures designed to protect children in informal care from abuse, neglect, child labour and all other forms of exploitation, with particular attention to informal care provided by non-relatives, by relatives previously unknown to the child or far from the child's habitual place of residence.

2. General conditions applying to all forms of formal alternative care arrangements

79. The transfer of a child into alternative care should be carried out with the utmost sensitivity and in a child-friendly manner, in particular involving specially trained and, in principle, non-uniformed personnel.

80. When a child is placed in alternative care, contact with his/her family, as well as with other persons close to him or her, such as friends, neighbours and previous carers, should be encouraged and facilitated, in keeping with the child's protection and best interests. The child should have access to information on the situation of his/her family members in the absence of contact with them.

81. States should pay special attention to ensuring that children in alternative care because of parental

imprisonment or prolonged hospitalization have the opportunity to maintain contact with their parents and receive any necessary counselling and support in that regard.

82. Carers should ensure that children receive adequate amounts of wholesome and nutritious food in accordance with local dietary habits and relevant dietary standards, as well as with the child's religious beliefs. Appropriate nutritional supplementation should also be provided when necessary.

83. Carers should promote the health of the children for whom they are responsible and make arrangements to ensure that medical care, counselling and support are made available as required.

84. Children should have access to formal, non-formal and vocational education in accordance with their rights, to the maximum extent possible in educational facilities in the local community.

85. Carers should ensure that the right of every child, including children with disabilities, living with or affected by HIV/AIDS or having any other special needs, to develop through play and leisure activities is respected and that opportunities for such activities are created within and outside the care setting. Contacts with the children and others in the local community should be encouraged and facilitated.

86. The specific safety, health, nutritional, developmental and other needs of babies and young children, including those with special needs, should be catered for in all care settings, including ensuring their ongoing attachment to a specific carer.

87. Children should be allowed to satisfy the needs of their religious and spiritual life, including by receiving visits from a qualified representative of their religion, and to freely decide to participate or not in religious services,

religious education or counselling. The child's own religious background should be respected, and no child should be encouraged or persuaded to change his/her religion or belief during a care placement.

88. All adults responsible for children should respect and promote the right to privacy, including appropriate facilities for hygiene and sanitary needs, respecting gender differences and interaction, and adequate, secure and accessible storage space for personal possessions.

89. Carers should understand the importance of their role in developing positive, safe and nurturing relationships with children, and be able to do so.

90. Accommodation in all alternative care settings should meet the requirements of health and safety.

91. States must ensure through their competent authorities that accommodation provided to children in alternative care, and their supervision in such placements, enable them to be effectively protected against abuse. Particular attention needs to be paid to the age, maturity and degree of vulnerability of each child in determining his/her living arrangements. Measures aimed at protecting children in care should be in conformity with the law and not involve unreasonable constraints on their liberty and conduct in comparison with children of similar age in their community.

92. All alternative care settings should provide adequate protection to children from abduction, trafficking, sale and all other forms of exploitation. Any consequent constraints on their liberty and conduct should be no more than are strictly necessary to ensure their effective protection from such acts.

93. All carers should promote and encourage children and young people to develop and exercise informed choices, taking account of acceptable risks and the child's age, and according to his/her evolving capacities.

94. States, agencies and facilities, schools and other community services should take appropriate measures to ensure that children in alternative care are not stigmatized during or after their placement. This should include efforts to minimize the identification of the child as being looked after in an alternative care setting.

95. All disciplinary measures and behaviour management constituting torture, cruel, inhuman or degrading treatment, including closed or solitary confinement or any other forms of physical or psychological violence that are likely to compromise the physical or mental health of the child, must be strictly prohibited in conformity with international human rights law. States must take all necessary measures to prevent such practices and ensure that they are punishable by law. Restriction of contact with members of the child's family and other persons of special importance to the child should never be used as a sanction.

96. Use of force and restraints of whatever nature should not be authorized unless strictly necessary for safeguarding the child's or others' physical or psychological integrity, in conformity with the law and in a reasonable and proportionate manner and with respect for the fundamental rights of the child. Restraint by means of drugs and medication should be based on therapeutic needs and should never be employed without evaluation and prescription by a specialist.

97. Children in care should be offered access to a person of trust in whom they may confide in total confidentiality. This person should be designated by the competent authority with the agreement of the child concerned. The child should be informed that legal or ethical standards may require breaching confidentiality under certain circumstances.

98. Children in care should have access to a known, effective and impartial mechanism whereby they can notify

complaints or concerns regarding their treatment or conditions of placement. Such mechanisms should include initial consultation, feedback, implementation and further consultation. Young people with previous care experience should be involved in this process, due weight being given to their opinions. This process should be conducted by competent persons trained to work with children and young people.

99. To promote the child's sense of self-identity, a life story book comprising appropriate information, pictures, personal objects and mementoes regarding each step of the child's life should be maintained with the child's participation and made available to the child throughout his/her life.

B. Legal responsibility for the child

100. In situations where the child's parents are absent or are incapable of making day-to-day decisions in the best interests of the child, and the child's placement in alternative care has been ordered or authorized by a competent administrative body or judicial authority, a designated individual or competent entity should be vested with the legal right and responsibility to make such decisions in the place of parents, in full consultation with the child. States should ensure that a mechanism is in place for designating such an individual or entity.

101. Such legal responsibility should be attributed by the competent authorities and be supervised directly by them or through formally accredited entities, including non-governmental organizations. Accountability for the actions of the individual or entity concerned should lie with the designating body.

102. Persons exercising such legal responsibility should be reputable individuals with relevant knowledge of children's issues, an ability to work directly with children, and an understanding of any special and cultural needs of

the children to be entrusted to them. They should receive appropriate training and professional support in this regard. They should be in a position to make independent and impartial decisions that are in the best interests of the children concerned and that promote and safeguard each child's welfare.

103. The role and specific responsibilities of the designated person or entity should include:

(a) Ensuring that the rights of the child are protected and that, in particular, the child has appropriate care, accommodation, health-care provision, developmental opportunities, psychosocial support, education and language support;

(b) Ensuring that the child has access to legal and other representation where necessary, consulting with the child so that the child's views are taken into account by decision-making authorities, and advising and keeping the child informed of his/her rights;

(c) Contributing to the identification of a stable solution in the child's best interests;

(d) Providing a link between the child and various organizations that may provide services to the child;

(e) Assisting the child in family tracing;

(f) Ensuring that, if repatriation or family reunification is carried out, it is done in the best interests of the child;

(g) Helping the child to keep in touch with his/her family, when appropriate.

1. Agencies and facilities responsible for formal care

104. Legislation should stipulate that all agencies and facilities must be registered and authorized to operate by social welfare services or another competent authority, and that failure to comply with such legislation constitutes an

offence punishable by law. Authorization should be granted and regularly reviewed by the competent authorities on the basis of standard criteria covering, at a minimum, the agency's or facility's objectives, functioning, staff recruitment and qualifications, conditions of care and financial resources and management.

105. All agencies and facilities should have written policy and practice statements consistent with the present Guidelines, setting out clearly their aims, policies, methods and the standards applied for the recruitment, monitoring, supervision and evaluation of qualified and suitable carers to ensure that those aims are met.

106. All agencies and facilities should develop a staff code of conduct, consistent with the present Guidelines, that defines the role of each professional and of the carers in particular and includes clear reporting procedures on allegations of misconduct by any team member.

107. The forms of financing care provision should never be such as to encourage a child's unnecessary placement or prolonged stay in care arrangements organized or provided by an agency or facility.

108. Comprehensive and up-to-date records should be maintained regarding the administration of alternative care services, including detailed files on all children in their care, staff employed and financial transactions.

109. The records on children in care should be complete, up to date, confidential and secure, and include information on their admission and departure and the form, content and details of the care placement of each child, together with any appropriate identity documents and other personal information. Information on the child's family should be included in the child's file as well as in the reports based on regular evaluations. This record should follow the child throughout the alternative care period and be

consulted by duly authorized professionals responsible for his/her current care.

110. The above-mentioned records could be made available to the child, as well as to the parents or guardians, within the limits of the child's right to privacy and confidentiality, as appropriate. Appropriate counselling should be provided before, during and after consultation of the record.

111. All alternative care services should have a clear policy on maintaining the confidentiality of information pertaining to each child, which all carers are aware of and adhere to.

112. As a matter of good practice, all agencies and facilities should systematically ensure that, prior to employment, carers and other staff in direct contact with children undergo an appropriate and comprehensive assessment of their suitability to work with children.

113. Conditions of work, including remuneration, for carers employed by agencies and facilities should be such as to maximize motivation, job satisfaction and continuity, and hence their disposition to fulfil their role in the most appropriate and effective manner.

114. Training should be provided to all carers on the rights of children without parental care and on the specific vulnerability of children, in particularly difficult situations, such as emergency placements or placements outside their area of habitual residence. Cultural, social, gender and religious sensitization should also be assured. States should also provide adequate resources and channels for the recognition of these professionals in order to favour the implementation of these provisions.

115. Training in dealing appropriately with challenging behaviour, including conflict resolution techniques and means to prevent acts of harm or self-harm, should be provided to all care staff employed by agencies and facilities.

116. Agencies and facilities should ensure that, wherever appropriate, carers are prepared torespond to children with special needs, notably those living with HIV/AIDS or other chronic physical or mental illnesses, and children with physical or mental disabilities.

2. Foster care

117. The competent authority or agency should devise a system, and should train concerned staff accordingly, to assess and match the needs of the child with the abilities and resources of potential foster carers and to prepare all concerned for the placement.

118. A pool of accredited foster carers should be identified in each locality, who can provide children with care and protection while maintaining ties to family, community and cultural group.

119. Special preparation, support and counselling services for foster carers should be developed and made available to carers at regular intervals, before, during and after the placement.

120. Carers should have, within fostering agencies and other systems involved with children without parental care, the opportunity to make their voice heard and to influence policy.

121. Encouragement should be given to the establishment of associations of foster carers that can provide important mutual support and contribute to practice and policy development.

C. Residential care

122. Facilities providing residential care should be small and organized around the rights and needs of the child, in a setting as close as possible to a family or small group situation. Their objective should generally be to provide temporary care and to contribute actively to the child's

family reintegration or, if this is not possible, to secure his/her stable care in an alternative family setting, including through adoption or *kafala* of Islamic law, where appropriate.

123. Measures should be taken so that, where necessary and appropriate, a child solely in need of protection and alternative care may be accommodated separately from children who are subject to the criminal justice system.

124. The competent national or local authority should establish rigorous screening procedures to ensure that only appropriate admissions to such facilities are made.

125. States should ensure that there are sufficient carers in residential care settings to allow individualized attention and to give the child, where appropriate, the opportunity to bond with a specific carer. Carers should also be deployed within the care setting in such a way as to implement effectively its aims and objectives and ensure child protection.

126. Laws, policies and regulations should prohibit the recruitment and solicitation of children for placement in residential care by agencies, facilities or individuals.

D. Inspection and monitoring

127. Agencies, facilities and professionals involved in care provision should be accountable to a specific public authority, which should ensure, inter alia, frequent inspections comprising both scheduled and unannounced visits, involving discussion with and observation of the staff and the children.

128. To the extent possible and appropriate, inspection functions should include a component of training and capacity-building for care providers.

129. States should be encouraged to ensure that an independent monitoring mechanism is in place, with due consideration

for the Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights (Paris Principles). The monitoring mechanism should be easily accessible to children, parents and those responsible for children without parental care. The functions of the monitoring mechanism should include:

(a) Consulting in conditions of privacy with children in all forms of alternative care, visiting the care settings in which they live and undertaking investigations into any alleged situation of violation of children's rights in those settings, on complaint or on its own initiative;

(b) Recommending relevant policies to appropriate authorities with the aim of improving the treatment of children deprived of parental care and ensuring that it is in keeping with the preponderance of research findings on child protection, health, development and care;

(c) Submitting proposals and observations concerning draft legislation;

(d) Contributing independently to the reporting process under the Convention on the Rights of the Child, including to periodic State party reports to the Committee on the Rights of the Child with regard to the implementation of the present Guidelines.

E. Support for aftercare

130. Agencies and facilities should have a clear policy and carry out agreed procedures relating to the planned and unplanned conclusion of their work with children to ensure appropriate aftercare and/or follow-up. Throughout the period of care, they should systematically aim at preparing the child to assume self-reliance and to integrate fully in the community, notably through the acquisition of social and life skills, which are fostered by participation in the life of the local community.

131. The process of transition from care to aftercare should take into consideration the child's gender, age, maturity and particular circumstances and include counselling and support, notably to avoid exploitation. Children leaving care should be encouraged to take part in the planning of aftercare life. Children with special needs, such as disabilities, should benefit from an appropriate support system, ensuring, inter alia, avoidance of unnecessary institutionalization. Both the public and private sectors should be encouraged, including through incentives, to employ children from different care services, particularly children with special needs.

132. Special efforts should be made to allocate to each child, whenever possible, a specialized person who can facilitate his/her independence when leaving care.

133. Aftercare should be prepared as early as possible in the placement and, in any case, well before the child leaves the care setting.

134. Ongoing educational and vocational training opportunities should be imparted as part of life skill education to young people leaving care in order to help them to become financially independent and generate their own income.

135. Access to social, legal and health services, together with appropriate financial support, should also be provided to young people leaving care and during aftercare.

VIII. CARE PROVISION FOR CHILDREN OUTSIDE THEIR COUNTRY OF HABITUAL RESIDENCE

A. Placement of a child for care abroad

136. The present Guidelines should apply to all public and private entities and all persons involved in arrangements for a child to be sent for care to a country other than his/her country of habitual residence, whether for medical treatment, temporary hosting, respite care or any other reason.

137. States concerned should ensure that a designated body has responsibility for determining specific standards to be met regarding, in particular, the criteria for selecting carers in the host country and the quality of care and follow-up, as well as for supervising and monitoring the operation of such schemes.

138. To ensure appropriate international cooperation and child protection in such situations, States are encouraged to ratify or accede to the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children.

B. Provision of care for a child already abroad

139. The present Guidelines, as well as other relevant international provisions, should apply to all public and private entities and all persons involved in arrangements for a child needing care while in a country other than his/her country of habitual residence, for whatever reason.

140. Unaccompanied or separated children already abroad should in principle enjoy the same level of protection and care as national children in the country concerned.

141. In determining appropriate care provision, the diversity and disparity of unaccompanied or separated children (such as ethnic and migratory background or cultural and religious diversity) should be taken into consideration on a case-by-case basis.

142. Unaccompanied or separated children, including those who arrive irregularly in a country, should not be, in principle, deprived of their liberty solely for having breached any law governing access to and stay within the territory.

143. Child victims of trafficking should neither be detained in police custody nor subjected to penalties for their involvement under compulsion in unlawful activities.

144. As soon as an unaccompanied child is identified, States are strongly encouraged to appoint a guardian or, where necessary, representation by an organization responsible for his/her care and well-being to accompany the child throughout the status determination and decision-making process.

145. As soon as an unaccompanied or separated child is taken into care, all reasonable efforts should be made to trace his/her family and re-establish family ties, when this is in the best interests of the child and would not endanger those involved.

146. In order to assist in planning the future of an unaccompanied or separated child in a manner that best protects his/her rights, relevant State and social service authorities should make all reasonable efforts to procure documentation and information in order to conduct an assessment of the child's risk and social and family conditions in his/her country of habitual residence.

147. Unaccompanied or separated children must not be returned to their country of habitual residence:

(a) If, following the risk and security assessment, there are reasons to believe that the child's safety and security are in danger;

(b) Unless, prior to the return, a suitable caregiver, such as a parent, other relative, other adult caretaker, a Government agency or an authorized agency or facility in the country of origin, has agreed and is able to take responsibility for the child and provide him/her with appropriate care and protection;

(c) If, for other reasons, it is not in their best interests, according to the assessment of the competent authorities.

148. With the above aims in mind, cooperation among States, regions, local authorities and civil society associations should be promoted, strengthened and enhanced.

149. The effective involvement of consular services or, failing that, legal representatives of the country of origin should be foreseen, when this is in the best interests of the child and would not endanger the child or his/her family.

150. Those responsible for the welfare of an unaccompanied or separated child should facilitate regular communication between the child and his/her family, except where this is against the child's wishes or is demonstrably not in his/her best interests.

151. Placement with a view to adoption or *kafala* of Islamic law should not be considered a suitable initial option for an unaccompanied or separated child. States are encouraged to consider this option only after efforts to determine the location of his/her parents, extended family or habitual carers have been exhausted.

IX. CARE IN EMERGENCY SITUATIONS

A. Application of the Guidelines

152. The present Guidelines should continue to apply in situations of emergency arising from natural and man-made disasters, including international and non-international armed conflicts, as well as foreign occupation. Individuals and organizations wishing to work on behalf of children without parental care in emergency situations are strongly encouraged to operate in accordance with the Guidelines.

153. In such circumstances, the State or de facto authorities in the region concerned, the international community and all local, national, foreign and international agencies providing or intending to provide child-focused services should pay special attention:

(a) To ensure that all entities and persons involved in responding to unaccompanied or separated children are sufficiently experienced, trained, resourceful and equipped to do so in an appropriate manner;

(b) To develop, as necessary, temporary and long-term family-based care;

(c) To use residential care only as a temporary measure until family-based care can be developed;

(d) To prohibit the establishment of new residential facilities structured to provide simultaneous care to large groups of children on a permanent or long-term basis;

(e) To prevent the cross-border displacement of children, except under the circumstances described in paragraph 159 below;

(f) To make cooperation with family tracing and reintegration efforts mandatory.

Preventing separation

154. Organizations and authorities should make every effort to prevent the separation of children from their parents or primary caregivers, unless the best interests of the child so require, and ensure that their actions do not inadvertently encourage family separation by providingservices and benefits to children alone rather than to families.

155. Separations initiated by the child's parents or other primary caregivers should be prevented by:

(a) Ensuring that all households have access to basic food and medical supplies and other services, including education;

(b) Limiting the development of residential care options and restricting their use to those situations where it is absolutely necessary.

B. Care arrangements

156. Communities should be supported to play an active role in monitoring and responding to care and protection issues facing children in their local context.

157. Care within a child's own community, including fostering, should be encouraged, as it provides continuity in socialization and development.

158. As unaccompanied or separated children may be at heightened risk of abuse and exploitation, monitoring and specific support to carers should be foreseen to ensure their protection.

159. Children in emergency situations should not be moved to a country other than that of their habitual residence for alternative care except temporarily for compelling health, medical or safety reasons. In that case, this should be as close as possible to their home, they should be accompanied by a parent or caregiver known to the child, and a clear return plan should be established.

160. Should family reintegration prove impossible within an appropriate period or be deemed contrary to the child's best interests, stable and definitive solutions, such as *kafala* of Islamic law or adoption, should be envisaged; failing this, other long-term options should be considered, such as foster care or appropriate residential care, including group homes and other supervised living arrangements.

C. Tracing and family reintegration

161. Identifying, registering and documenting unaccompanied or separated children are priorities in any emergency and should be carried out as quickly as possible.

162. Registration activities should be conducted by or under the direct supervision of State authorities and explicitly mandated entities with responsibility for and experience in this task.

163. The confidential nature of the information collected should be respected and systems put in place for safe forwarding and storage of information. Information

should only be shared among duly mandated agencies for the purpose of tracing, family reintegration and care.

164. All those engaged in tracing family members or primary legal or customary caregivers should operate within a coordinated system, using standardized forms and mutually compatible procedures, wherever possible. They should ensure that the child and others concerned would not be endangered by their actions.

165. The validity of relationships and the confirmation of the willingness of the child and family members to be reunited must be verified for every child. No action should be taken that may hinder eventual family reintegration, such as adoption, change of name, or movement to places far from the family's likely location, until all tracing efforts have been exhausted.

166. Appropriate records of any placement of a child should be made and kept in a safe and secure manner so that reunification can be facilitated in the future.

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